Moorhouse

The Comptroller General
of the United States

Washington, D.C. 20548

# Decision

Matter of: Roy F. Weston, Inc.--Request for Reconsideration

File: B-221863.3

Date: September 29, 1986

## DIGEST

1. In order to prevail in a request for reconsideration of a prior decision of the General Accounting Office, the requesting party must convincingly show that the decision contains errors of fact or of law which warrant its reversal or modification. The repetition of arguments made during resolution of the original protest or mere disagreement with our decision does not serve to meet that standard.

2. The risk of an auction situation and concerns as to technical leveling or technical transfusion in implementing a General Accounting Office recommendation that corrective action be taken are secondary to the need to remedy a procurement which failed to satisfy the statutory requirement for full and open competition.

## DECISION

Roy F. Weston, Inc. (Weston) requests reconsideration of our decision in NUS Corp. et al., B-221863, et al., June 20, 1986, 86-1 CPD ¶ 574. In that decision, we sustained a protest by NUS Corporation (NUS) against a source selection decision made by the Department of Energy (DOE) under request for proposals (RFP) No. DE-RP01-85-RW00060. The procurement is for technical support services to assist DOE's Office of Civilian Radioactive Waste Management to fulfill its responsibilities under the Nuclear Waste Policy Act of 1982.

We affirm our prior decision.

The particular facts of the case and our legal analysis are set forth in our June 20 decision and need not be repeated at length here. In summary, we agreed with NUS' protest position asserting that DOE had improperly utilized its alternative source selection procedures in selecting only Weston for final contract negotiations. Our decision, in part, reflected our concern that the administrative record in the matter failed to support the cognizant Source Selection Official's (SSO) determination that the higher cost of Weston's offer

was offset by the superior technical merit of the firm's proposal. Rather, we concluded from the record that the competing proposals of Weston and NUS were actually so closely ranked technically that the SSO should have refrained from making his selection decision at that point in the procurement process in the interests of maximizing the competition. Accordingly, we recommended to the Secretary of Energy that discussions be reopened with both Weston and NUS and that best and final offers be obtained on the basis of fully definitized contract documents executed by the firms.[1]/

Weston now requests reconsideration of our June 20 decision on three principal grounds. Weston contends that our decision errs in not recognizing that DOE's alternative source selection procedures give wide discretion to the SSO in determining whether to conduct final contract negotiations with more than one offeror in situations where there are closely ranked competitive proposals. Moreover, Weston argues that our decision reflects an improper substitution of the judgment of this Office for that of the contracting agency without compelling evidence in the record that the agency's actions were unreasonable. Finally, Weston asserts that our recommended corrective action is inappropriate because cost and technical information has been revealed between the parties so that further negotiations will only result in an auction situation and technical leveling or technical transfusion.

At the outset, we note that the established standard for reconsideration is that the requesting party must convincingly show that our prior decision contains either errors of fact or of law which warrant its reversal or modification. See 4 C.F.R. § 21.12(a) (1986); Department of Labor--Reconsideration, B-214564.2, Jan. 3, 1985, 85-1 CPD ¶ 13. Repetition of arguments made during resolution of the original protest or mere disagreement with our decision does not serve to meet that standard. See Affiliated Van Lines, Inc.--Reconsideration, B-220450.2, Jan. 28, 1986, 86-1 CPD ¶ 94. We conclude that Weston's request for reconsideration provides no basis for us to question the correctness of our June 20 decision.

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[1]/ At the same time, we denied a companion protest filed by The Austin Company where the record established that the firm's proposal was markedly inferior to the proposals of its competitors to the extent that it clearly was not entitled to any further negotiations under DOE's alternative procedures.

DISCRETIONARY NATURE OF DOE'S
ALTERNATIVE SOURCE SELECTION PROCEDURES

As noted in our prior decision, DOE's alternative source selection procedures, which limit discussions with offerors during the competition by generally permitting the conduct of final negotiations with only one offeror, are set forth in DOE's Source Evaluation Board (SEB) Handbook and are authorized by DOE's Acquisition Regulation, 48 C.F.R. § 915.613 (1985), for most negotiated prime acquisitions over $5 million. Section 502 of the SEB Handbook, which formed the underlying basis for our June 20 decision, acknowledges that DOE's alternative source selection procedures normally provide for the selection of only one offeror for final contract negotiations. At the same time, however, section 502 also provides that the SSO "may determine" in certain cases that it is in the best interests of the government to select from multiple offers in the form of executed final contract documents, such as when the result of the agency's evaluation of competing proposals is so close as not to provide a meaningful distinction among the offers. Because NUS and Weston were ranked so closely (Weston's technical score was 6 percent higher than NUS' but its proposed cost was also 6 percent higher), and the record failed to disclose a significant discriminator between the proposals apart from Weston's "verified" incumbent performance, we determined that the SSO's selection of only Weston for final contract negotiations was contrary to the intent of section 502.

To the extent section 502 employs the qualifying word "may" with regard to determinations made by the SSO, we agree that the language of the provision, on its face, is discretionary in tone. Nevertheless, we believe that it would be unreasonable to read section 502 as permitting the SSO to terminate discussions early and to select only one offeror for final contract negotiations when confronted with two or more competing offers that have been evaluated as being essentially equal in merit. Otherwise, without obtaining multiple definitized contract documents that would serve to evoke an ultimate discriminator among offers that are so closely ranked, the selection decision would be arbitrary.

Although section 502 may be written in terms that are less than mandatory in nature, we believe that the provision must be given effect in conformity with the overriding statutory requirement that full and open competition be obtained. 41 U.S.C. § 253(a)(1)(A) (Supp. III 1985). In our view, section 502 cannot be read as giving SSO's unlimited discretion to conduct final contract negotiations with only one offeror where the evaluation results do not clearly

support that selection. Therefore, we did not err in deciding that the circumstances of this case imposed an obligation on the SSO under section 502 of the SEB Handbook to conduct final contract negotiations with both Weston and NUS.

MATTERS OF AGENCY JUDGMENT

Weston asserts that our decision reflects an improper substitution of our judgment for DOE's absent compelling evidence in the record that DOE's actions were unreasonable. We point out that this Office, as a general rule, will not conduct de novo evaluations as to the specific technical merits of submitted proposals and to the extent of independently deciding what numerical scores should have been assigned to the various proposals during the conduct of the procurement. See Blurton, Banks & Assoc., Inc., B-206429, Sept. 20, 1982, 82-2 CPD ¶ 238. At the same time, however, we will review the record to determine if the agency's source selection decision was rationally based and consistent with the established evaluation criteria. See System Development Corp., B-219400, Sept. 30, 1985, 85-2 CPD ¶ 356.

Our in camera review of the evaluation documents indicated that Weston's proposal, which had originally been rated slightly lower than NUS', had received a significant scoring increase which apparently was not based entirely upon improvements made in the proposal itself. As noted in our decision, both NUS and Weston had submitted revised proposals which resulted in upgrades in the firms' technical scores, but Weston's scoring increase, in percentage terms, was much greater than NUS'. On the basis of the SEB report and the SSO's selection statement, we ascertained that Weston's score had been upgraded in significant part as the result of the agency's "verification" of the firm's incumbent performance. Although some consideration of Weston's past performance was not necessarily improper, we were concerned as to the ultimate effect this had on the SSO's determination to select only Weston for final contract negotiations because incumbency was extraneous to the evaluation methodology and, therefore, could not be a material factor for selection purposes. Since the record did not show that Weston's proposal to perform the services was clearly superior to NUS' in technical terms, there was no justification for a source selection decision made at that stage in the procurement. Therefore, contrary to Weston's assertion, we did not substitute our judgment for that of the agency's as to the individual merits of the proposals. Rather, we fairly concluded from the evidence that the SSO's decision was premature. We find no legal error in that conclusion.

APPROPRIATENESS OF REMEDY

Weston strenuously urges that our recommendation that the agency reopen negotiations with both Weston and NUS and obtain best and final offers on the basis of fully definitized contract documents is inappropriate in the circumstances because cost and technical information has been revealed between the parties. Accordingly, Weston asserts that a reopening of negotiations will only lead to impermissible technical transfusion or technical leveling and will create a prohibited auction situation. Weston urges that even if we affirm our prior decision, we should modify our recommendation to involve only a very limited reevaluation of the proposals by the SSO without affording either firm the opportunity to submit a revised offer.2/

It is true that Weston and NUS are aware of cost and technical aspects of each other's proposals as the result of information released by the agency during the resolution of the original protest. Moreover, it is also true that neither firm is prevented from modifying its proposal with respect to cost and technical factors in its best and final offer if negotiations are reopened. See Electronic Communications, Inc., 55 Comp. Gen. 636 (1976), 76-1 CPD ¶ 15.

However, we do not believe these considerations preclude the agency from taking the corrective action we have recommended. We note that any cost information revealed has been revealed more to Weston's benefit than to NUS', since the firm knows the degree by which it was not the low offeror. In any event, cost is usually not the determinative factor in selecting the successful offeror for a cost-reimbursement contract such as contemplated here. Furthermore, since this is a procurement for support services primarily involving the experience and expertise of proposed personnel, and not one calling for technical innovation, we see little likelihood that technical leveling or technical transfusion will occur as the result of reopened negotiations.

More importantly, we have held that the risk of an auction is secondary to the preservation of the integrity of the competitive procurement system through the taking of

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2/ Austin has submitted comments on Weston's request for reconsideration to urge that the appropriate remedy should be a cancellation of the RFP and an attendant resolicitation of the requirement. In our view, this would be unacceptable because it would needlessly delay the furnishing of vital services to the agency and would, in effect, provide Austin with a form of relief to which it is not entitled under the facts of the case.

appropriate corrective action. See Honeywell Information Systems, Inc., 56 Comp. Gen. 505 (1977), 77-1 CPD ¶ 256; Price Waterhouse--Reconsideration, B-220049.2, Apr. 7, 1986, 86-1 CPD ¶ 333. In the same vein, we have indicated that concerns as to technical leveling or transfusion do not necessarily overcome the need to remedy a procurement which has failed to satisfy the statutory requirement for full and open competition. See Furuno U.S.A., Inc.--Request for Reconsideration, B-221814.2, June 10, 1986, 86-1 CPD ¶ 540. We point out that we specifically concluded in our prior decision "that the SSO should have acted pursuant to section 502 of the SEB Handbook" and not have made his selection decision at that point in the procurement. Accordingly, the appropriate recommendation in the circumstances was that the agency now apply its own procedures to rectify the procurement impropriety by conducting final contract negotiations with both firms. See 4 C.F.R. § 21.6(a).

DOE has advised us that, except for certain administrative actions, it is awaiting our decision on Weston's request for reconsideration before fully implementing our recommendation. The agency states that, upon affirmation of our prior decision:

> ". . . DOE will amend the solicitation to permit updated proposals from both NUS and Weston, will conduct meaningful discussions with both proposers, and as a part of the request for Best and Final Offers require signed definitized contracts from both NUS and Weston. The Best and Final Offers will be evaluated and the Source Selection Official's decision will be based upon the Best and Final Offers together with signed definitized contracts. It is DOE's belief that these actions will fully implement the GAO recommendation."

We agree that these actions will serve to remedy the procurement defect that was the basis for our June 20 decision. See Furuno U.S.A., Inc.--Request for Reconsideration, B-221814.2, supra.

Our prior decision with its recommendation for corrective action is affirmed.[3]/

for Comptroller General
of the United States

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[3]/ NUS notes that DOE has extended Weston's incumbent contract through September 30, 1986, with options for 3 additional 1-month extensions, in order to provide for continuation of these critical services. NUS is concerned that exercise of the optional extensions will be prejudicial to itself as a viable competitor for the successor contract. However, we cannot fault the agency at this juncture for seeking to avoid any disruption in services essential to its mission.