Glass

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Interior Elements, Inc.--Reconsideration

File: B-238117.2

Date: August 17, 1990

Joseph G. Billings, Esq., Baskin Flaherty Elliott & Mannino, P.C., for the protester.
Linda C. Glass Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration which essentially restates arguments previously considered, and does not establish any error of law or provide information not previously considered is denied.

DECISION

Interior Elements, Inc. requests reconsideration of our decision, Interior Elements, Inc., B-238117, Mar. 29, 1990, 90-1 CPD ¶ 341. In that decision, we denied Interior's protest of the General Services Administration's (GSA's) determination to use f.o.b. destination delivery terms for multiple-award Federal Supply Schedule (FSS) contracts for conference room tables. We denied the protest because Interior failed to show that the contracting officer's decision to require f.o.b. destination delivery for conference tables was unreasonable or inconsistent with applicable regulations.

We deny the request for reconsideration.

The RFP, issued on November 3, 1989, provided that multiple awards would be made to those offerors whose offers, conforming to the solicitation, were most advantageous to the government. Offerors were required to submit prices on an f.o.b. destination basis and were cautioned that award would be made on that basis only. (This was a change from the previous year's solicitation, under which an offeror had the option of offering on either an f.o.b. origin or f.o.b. destination basis.) Prices offered were to cover delivery

to destinations located within the 48 contiguous states and the District of Columbia.

Of the 51 offers received in response to the solicitation, 40 were on an f.o.b. destination basis. Interior submitted five offers, all of which offered f.o.b. destination, at least on an alternative basis.

In its original protest, Interior contended that the solicitation requirement that offers be submitted exclusively on an f.o.b. destination basis was unduly restrictive of competition, inconsistent with applicable regulations and violated GSA policy.

In our decision, we found that the contracting officer reasonably decided to use an f.o.b. destination delivery requirement. The agency stated that the contracting officer decided to eliminate the option of f.o.b. origin delivery terms under the solicitation because experience showed that f.o.b. origin contracts did not work well, and numerous problems arose in determining the overall lowest in price, in freight claims and in administration. The agency reported that under f.o.b. origin contracts, ordering agencies had to bear certain responsibilities, such as obtaining delivery terms from carriers and processing freight claims, which required the expenditure of resources by the ordering agencies, some of which did not have the personnel or expertise to adjudicate freight claims. The agency further stated that the average order under this solicitation was between two and five units, making any possible savings on delivery unlikely. In short, the agency maintained that the administrative burden and cost of evaluating offers on f.o.b. origin terms far outweighed any savings that may be realized on any individual order. As explained more fully in that decision, we found the agency's explanation for its decision to require offers exclusively on an f.o.b. destination basis to be reasonable and consistent with the purpose of the FSS schedule, which is to simplify the purchase of commonly used items.

Interior also argued that the requirement for f.o.b. destination terms only did not comply with GSA's published policy of conforming its multiple award schedule procurement practices with commercial practices and making those practices fair to all parties. See 47 Fed. Reg. 50,242 (1982). Interior argued that the commercial practice of the furniture industry is to provide a variety of delivery terms. We reviewed GSA's policy and determined that there was no violation in this case. GSA's policy, as reflected in the policy statement, is to employ commercial practice to the extent practical taking into consideration cost

effectiveness and fairness to all parties. We held that while violation of this policy alone would not affect the legal validity of the agency's decision, in this case GSA specifically determined that with respect to the purchase of conference room tables, it was neither cost effective nor reasonable for agencies with inexperienced personnel to receive and evaluate offers on an f.o.b. origin basis. We found that the policy statement itself did not contain any specific requirement with respect to delivery terms; therefore we concluded that GSA did not violate its program policy. Since we found no modification of published policy, we similarly rejected the protester's argument that the f.o.b. destination requirement modified published GSA policy and thus required GSA's publication of a notice of proposed regulation in the Federal Register.

Lastly, we rejected Interior's argument that the requirement violated Federal Acquisition Regulation (FAR) § 47.304, "Determination of Delivery Terms." Interior contended that the FAR directs the contracting officer to use f.o.b. origin where, as here, the destinations are unknown and freight charges cannot be calculated for individual shipments. We found no violation of the FAR provision because the FAR gives the contracting officer broad discretion to determine appropriate delivery terms to be included in a solicitation. Specifically, the FAR provides that where "evaluation of f.o.b. origin offers is anticipated to result in increased administrative lead time or administrative cost that would outweigh the potential advantages of an f.o.b. origin determination," f.o.b. destination would normally be more advantageous to the government. FAR § 47.304-1(g)(5). We determined that the contracting officer's finding that the problems of increased administrative lead time and cost under f.o.b. origin contracts outweighed the benefits that might have been realized under such contracts and that the f.o.b. destination requirement best met the government needs, was reasonable and not an abuse of discretion.

In its request for reconsideration, Interior alleges that we erred in not finding that: (1) the f.o.b. destination requirement was unnecessary to satisfy the needs of the government and was unduly restrictive of competition; (2) GSA violated its policy statement and effectively modified it without publication of the change; and (3) the contracting officer's decision violated the FAR.

Under our Bid Protest Regulations, a party requesting reconsideration must show that our prior decision contains errors of fact or law or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. 21.12(a) (1990). Repetition of

arguments made during the original protest does not meet this standard. See Sechan Elecs., Inc.--Request for Recon., B-233943.2, July 19, 1989, 89-2 CPD ¶ 59; R.E. Scherrer, Inc.--Request for Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274.

RESTRICTIVENESS OF REQUIREMENT

Interior's primary basis for requesting reconsideration is the contention that we erred in not finding the f.o.b. destination requirement unnecessary to satisfy the needs of the government and unduly restrictive of competition. In this regard, the protester is arguing, as it did in its original protest, that administrative burden alone does not justify limiting competition. As stated in our prior decision, the agency's experience showed that f.o.b. origin procurements did not work well. The contracting officer stated that numerous problems arose in determining overall lowest in price, in freight claims and in administration. Also, ordering agencies must bear additional responsibility and expend resources, and some agencies do not have the personnel or expertise to adjudicate freight claims. We found reasonable GSA's concern about administrative burden, particularly since the average order under this FSS contract is anticipated to be only for two to five tables, and concluded that GSA's approach was permissible. While the protester continues to disagree, its position concerning administrative burden is one we considered before reaching our initial decision and thus provides no basis for reconsideration.

Interior also argues that we ignored the fact that other multiple award schedule procurements entail the same administrative burden as the solicitation at issue, yet f.o.b. origin offers are acceptable. As we stated in our prior decision, each procurement stands alone and we examine the contracting officer's decision in each instance. Whether or not other multiple award schedule procurements with the same administrative burdens are issued on an f.o.b. origin basis is not relevant to our determination that for this particular solicitation the contracting officer's decision to require offers on an f.o.b. destination basis only was reasonable.

POLICY VIOLATION

Interior's second basis for requesting reconsideration is the contention that the contracting officer violated and effectively modified GSA's policy statement. The protester concludes that the contracting officer's decision does not distinguish other multiple award schedule procurements where

GSA policy allows for f.o.b. origin terms in accordance with commercial practice and is arbitrary and capricious in light of multiple award schedule procurements having similar administrative burdens.

Interior is merely repeating arguments it made as to whether the contracting officer violated or modified GSA policy when he decided the appropriate freight terms for the solicitation. We fully considered the policy issue in our prior decision and found that GSA's policy to employ commercial practice to the extent practical was consistent with the contracting officer's determination here that f.o.b. origin would be impractical and costly. Therefore, the protester's contention that the contracting officer violated GSA policy is without merit. As stated in our prior decision, the f.o.b. destination requirement did not modify published GSA policy; thus, GSA was not required to publish a notice of proposed regulation in the Federal Register. We remain unpersuaded by the protester's argument to the contrary.

REGULATORY VIOLATION

Finally, Interior restates its original protest argument that the contracting officer's decision violated the FAR and was an abuse of discretion. The protester argues that our Office placed the burden of proof upon the protester to establish the unreasonableness of the contracting officer's f.o.b. destination requirement. The protester alleges that GSA never established the prima facie case necessary to rebut the restrictive solicitation requirement because it did not provide any evidence of administrative burden beyond that usually associated with multiple award schedule procurements.

In our decision, we reviewed the contracting officer's justification for the f.o.b. destination requirement and found the justification reasonable. We specifically found that the contracting officer's decision did not violate the FAR nor was his decision an abuse of discretion. As previously stated, the contracting officer, on the basis of the FAR, determined that problems of increased administrative lead time and cost under f.o.b. origin contracts outweighed the benefits that might have been realized under such contracts and that f.o.b. destination best met the government's needs. Interior has not proffered any new information showing that our prior decision in this regard was founded upon legal or factual errors; instead, Interior simply expresses disagreement with our prior decision.

Again, this is not a basis for reconsidering our initial decision. See Carrier Joint Venture--Request for Recon., B-233702.2, June 22, 1989, 89-1 CPD ¶ 594.

The request for reconsideration is denied.

for Ronald Berger
James F. Hinchman
General Counsel