



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: General Services Administration--Reconsideration

File: B-237268.3; B-237271.3; B-237272.3; B-237274.3

Date: November 7, 1990

Karl Dix, Jr., Esq., and E. Alan Arnold, Esq., Smith, Currie & Hancock, for Griffin Services, Inc., the protester.
Robert C. MacKichan, Jr., Esq., and S. Lane Tucker, Esq., General Services Administration, for the agency.
Paul E. Jordan, Esq., Paul Lieberman, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. General Accounting Office will not consider new arguments raised by agency in request for reconsideration where those arguments are derived from information available during initial consideration of protest but not submitted, since parties that withhold or fail to submit all relevant evidence, information, or analyses for our initial consideration do so at their own peril.
2. Request for reconsideration is denied where procuring agency fails to establish any factual or legal errors in decision sustaining protest.

DECISION

The General Services Administration (GSA) requests reconsideration of our decision in Griffin Servs., Inc., B-237268.2 et al., June 14, 1990, 90-1 CPD ¶ 558, in which we sustained Griffin's protest that GSA had canceled four solicitations without a reasonable basis.

The reconsideration request is denied.

Griffin had been the sole offeror under four solicitations, request for proposal (RFP) Nos. GS-07P-89-JWC-0101, -0102, -0103, and -0104, issued by GSA for operation and maintenance services at numerous buildings in the Denver Federal Center (DFC). Griffin challenged GSA's cancellation of the RFPs and its decision to perform the services in-house, contending that the agency's actual motivation was to avoid awarding Griffin a contract. Because of Griffin's allegation that the agency's

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action was but a pretext, we examined GSA's justification for its decisions and found that it failed to provide a reasonable basis for the cancellation. We recommended that GSA reinstate the canceled solicitations, obtain Griffin's proposals which it had returned, and proceed with the evaluation. We also awarded Griffin the costs of filing and pursuing the protests.

GSA first takes issue with our determination to review its decision to cancel the RFPs. While we review agency decisions to cancel solicitations to determine whether those decisions are reasonably based (see G.K.S. Inc., 68 Comp. Gen. 589 (1989), 89-2 CPD ¶ 117), we generally do not review them when the work in question is to be performed in-house, since such decisions are a matter of executive branch policy (see RAI, Inc., B-231889, July 13, 1988, 88-2 CPD ¶ 48). Nonetheless, as we stated in our initial decision, where a protester argues that the agency rationale is a pretext, we will examine the reasonableness of the agency's justification. Judith White, B-233853.2, June 9, 1989, 89-1 CPD ¶ 544; H. David Feltoon, B-232418, Jan. 5, 1989, 89-1 CPD ¶ 10.

GSA interprets the White and Feltoon decisions to mean that only where pretext or bad faith is both alleged and proved, should we sustain a protest challenging a determination to cancel. We find GSA's interpretation too narrow. While the allegations of bad faith prompted our review, that review is not restricted to whether bad faith was present.

In White and Feltoon the protesters alleged that the agencies' decisions to cancel solicitations and to perform services in-house were unreasonable and constituted pretexts to avoid awarding contracts to the protesters. In reviewing the agencies' justifications, although we found no evidence of bad faith, we proceeded to determine whether the justifications in question were reasonably based, which we concluded was the case in both instances. Here, while we did not find that GSA's decision to cancel was a pretext, we did find it was not reasonably based. Our decision to review the reasonableness of GSA's cancellation determination was legally appropriate in these circumstances, and it constituted the same scope of review as that conducted in White and Feltoon.

GSA also argues that our conclusion that GSA's actions lacked a reasonable basis was "factually incorrect." GSA's argument is based on information provided in the original agency report and on information included in affidavits submitted with its reconsideration request. GSA explains that it failed to submit all the information in its report responding to Griffin's protests because it did not anticipate the remedy fashioned in our decision, since Griffin had requested award of all four contracts, relief which was unavailable under the RFPs' terms restricting any offeror to a single award. The

agency concentrated its report on information which supported the decision not to award Griffin four contracts. Acknowledging that this information was inadequate, GSA now attempts to explain why award of one contract to Griffin, with the balance to be performed in-house, would be inefficient and uneconomical.

GSA reasonably should have anticipated the relief we recommended. The RFPs restricted the number of awards to one per offeror and GSA itself argued that Griffin was not an interested party as to three of the RFPs. Thus, GSA should not have been surprised by a decision which recommended by way of relief that one contract be awarded to Griffin. Further, regardless of GSA's reasons for doing so, parties that withhold or fail to submit all relevant evidence, information or analyses for our initial consideration do so at their own risk. The Department of the Army--Recon., B-237742.2, June 11, 1990, 90-1 CPD ¶ 546. GSA should have produced these affidavits during the initial protest; their production at this point will not result in a reconsideration of our decision. Id.^{1/}

Since GSA has presented no argument or information establishing that our prior decision is legally or factually erroneous,

^{1/} We note that GSA's newly submitted information would not have warranted a different result. In addition to restating its original explanation and expanding upon the need for an in-house "core capability," the affidavits state generally that use of a contractor for one building series, while using government employees for the other three series of buildings, would result in an unnecessary duplication of costs. It is evident that the duplicative costs cited--e.g., separate supervision of each workforce, contract administration and inspection costs for the contract services, and maintenance of separate pools of labor and duplicative parts inventories--are the same that would have been present to some extent if contracts had been awarded to four separate contractors as originally planned by GSA. Moreover, GSA makes only general assertions. We have not been presented with any statement or analysis of the specific staff and work required under the four solicitations that would show the relative efficiency and cost of retaining all or some of the work in-house. Similarly, GSA states that a failure to keep all of the contract work in-house would jeopardize its ability to effectively deal with potential contract failure or other emergency situations that may arise within a six state area. Without support, this bare assertion does not provide the reasonable basis necessary for us to sustain the agency's action.

the request for reconsideration is denied. See 4 C.F.R.
§ 21.12(a) (1990). In addition, Griffin is entitled to its
costs incurred during this request for reconsideration.



James F. Hinchman
General Counsel