



Comptroller General
of the United States
Washington, D.C. 20548

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Decision

Matter of: Department of the Air Force--Reconsideration

File: B-242650.4

Date: October 28, 1991

Stan Hinton, Esq., Doke & Riley, for the protesters, Gulf Gas Utilities Co. and Krystal Gas Marketing Company.
Gregory Kellam Scott for the protester, Commercial Energies, Inc.

Gregory H. Petkoff, Esq., Department of the Air Force, for the agency.

David Hasfurther, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration is denied where agency submits for the first time in its reconsideration information which was available to the agency at the time of the initial protest, but was not submitted. In any event, information does not warrant reversal of initial decision.

DECISION

The Department of the Air Force requests that we reconsider our decision in Gulf Gas Utilities Co., et al., B-242650 et al., May 20, 1991, 70 Comp. Gen. ___, 91-1 CPD ¶ 482. In that decision we found that the determination by Randolph Air Force Base to conduct a sole-source procurement (request for proposals No. F41689-91-R-0005) of its natural gas requirements with Valero Transmission Company, L.P. (Valero) was unreasonable because the evidence presented did not establish that only one known source could meet the government's needs.

We found that the agency in making its sole-source determination had not considered the capabilities of competing firms that had expressed an interest in the procurement; had failed to consider the willingness of City Public Service (CPS) and Oasis, two local transmission companies with gas line access to the San Antonio bases, to enter into trans-

portation agreements with competing firms to permit the delivery of gas to the agency's three San Antonio bases; and had failed to consider the possibility that a competitor could construct pipelines with the necessary metering to the four non-San Antonio installations or lease facilities from Valero. We recommended, accordingly, that the procurement be conducted competitively unless a market survey shows that only Valero can meet the agency's needs. A sole-source contract was awarded to Valero notwithstanding the protest and prior to the issuance of our decision sustaining the protests.

We deny the request for reconsideration because the information provided by the Air Force could have been furnished at the time the original protests were considered and, in any event, the information does not warrant reversal of the decision.

The agency requests reconsideration because, it states, our decision was based on the Air Force's "incomplete explanation" of how the natural gas market operates, in general, and how the regulatory and operational framework affect natural gas service to Department of Defense installations in Texas, in particular. The agency now states that a market survey was conducted by its utility expert, although not specifically for this procurement, and that this survey consisted of the expert's 4-year involvement in the natural gas procurements for the installations in question as well as conversations held with the three protesters, the Texas Railroad Commission, CPS, and Valero. This survey was reported to us, for the first time, in the form of an affidavit in the reconsideration request. It is the expert's opinion that, based on the nature of the natural gas market and the Texas regulatory and operational framework, the agency's requirements could be satisfied only by a contractor that could demonstrate access to both firm supplies and firm transportation on the delivering transmission pipelines. The Air Force states that the survey and the agency's unsuccessful attempt to conduct a competitive acquisition in 1988 supports the determination that only Valero was capable of supplying the agency's requirements.

We have carefully reviewed the extensive affidavit provided by the utility expert retained by the Air Force. This utility expert states, in regard to the San Antonio bases, that a competitor would not be able to perform because Valero would not permit a competitor to use its transmission lines to deliver the competitor's gas to the CPS system (and thus also to the agency's San Antonio installations) and because the owners of the Oasis pipeline--the only other

pipeline connecting to CPS's system--do not permit the transportation of natural gas owned by a third party on their pipeline. He also states that, even if an agreement could be reached to use the Oasis pipeline, an agreement would also have to be reached with CPS governing transmission of the gas over the CPS transmission system. If such an agreement could be reached with CPS, it would take 8-14 months (based on conversations with CPS) to negotiate, would probably not result in terms acceptable to the agency, would not include the essential backup service required, and would not guarantee uninterrupted service (which also would be unavailable from Oasis). The utility expert's survey also concluded that Valero would not transport a competitor's gas on Valero's transmission lines to the non-San Antonio installations and that construction of alternate pipelines would require 9-16 months after contract award, and the construction costs would make the competitors uncompetitive with Valero.

In response to the agency's reconsideration request, the protesters argue that the information presented in the Air Force reconsideration could and should have been submitted during the initial protest proceeding and that we therefore should not consider this information now. In any event, the protesters state unequivocally that the agency's utility expert never spoke with them regarding this procurement and their abilities to meet the agency's needs for this procurement. Gulf Gas Utilities (GGU) agrees that company officials did speak with the expert during a meeting with another party regarding a private project but that the conversation had nothing to do with this procurement. GGU also states that CPS has advised GGU that neither the agency nor the utility expert has ever contacted it regarding what form any agreement with a competitor of Valero might take. GGU argues the agency is simply speculating that it does not believe any agreement will be to its liking. GGU sees no reason why, except for the transportation rates, it should not be able to obtain an agreement with CPS that is the same as the agreement CPS has with Valero. GGU has also submitted evidence indicating that it could obtain firm gas and states that this would also include firm transportation for the gas over the Oasis pipeline. Further, GGU states that the amount of time and the cost required to construct alternate pipelines for the non-San Antonio installations are considerably less than the figures given by the utility expert because they do not require constructing complete lines, but, rather, connections to other pipelines.

Finally, GGU takes issue with the Air Force's reliance on its experience in the 1988 procurement to support its view that there is no expectation of competition. GGU argues

that the records of that procurement suggest that the Air Force was predisposed towards Valero. GGU specifically asserts that the Air Force showed considerable flexibility in negotiating the contract terms and conditions with Valero, agreeing to many changes to the original solicitation to obtain an acceptable offer. GGU also states that the agency did not exhibit this same flexibility in negotiating with CPS. The protesters thus contend that the agency's request for reconsideration should be denied since the agency in support of its request has submitted nothing but unsubstantiated facts, apparent hearsay, an undocumented survey, and other misleading information.


Under our Bid Protest Regulations, a request for reconsideration must contain a detailed statement of the factual and legal grounds upon which a reversal or modification of the initial decision is warranted as well as specify any errors of law made or information not previously considered by this Office in rendering its prior decisions. 4 C.F.R. § 21.12(a). Information not previously considered means information that was not available when the initial protest was filed. Norfolk Dredging Co.--Recon., B-236259.2, Oct. 31, 1989, 89-2 CPD ¶ 405. Failure to make all arguments or submit all information available during the course of the initial protest undermines the goals of our bid protest forum--to produce fair and equitable decisions based on consideration of both parties' arguments on a fully developed record--and cannot justify reconsideration of our prior decision. The Department of the Army--Recon., B-237742.2, June 11, 1990, 90-1 CPD ¶ 546. We agree with the protesters that the information provided by the Air Force could have been furnished at the time the original protests were considered.

Moreover, the evidence remains insufficient to establish that a proper market survey was conducted to establish the reasonableness of the sole-source procurement with Valero. The evidence in many ways is consistent with the evidence presented by the agency in response to the original protests. It consists largely of general conclusions without substantiating data and, in many cases, the evidence appears to be assertions and legal conclusions reported by the sole-source awardee. The agency states through submissions of its utility expert that individual experts and consultants are hired for their special "expertise and knowledge" and that "there is no requirement that the basis

of the knowledge of or opinion expressed by the consultants be documented." That may be acceptable for the internal purposes of the agency, but we cannot agree that it is sufficient to justify the sole-source here. Cf. MGM Land Co.; Tony Western, B-241169, B-241169.2, Jan. 17, 1991, 91-1 CPS ¶ 50. For example, the original position of the agency was that CPS would be unwilling to enter into an agreement with any supplier other than Valero. The agency's position now is that CPS may be willing, but the agency believes that whatever agreement results will be unacceptable. The agency does not present any evidence that it has discussed the matter with CPS in the context of this procurement, and, thus, no specifics are offered to establish the agency's assertion as true. A proposed agreement that CPS may have put forward in 1988 is not necessarily the same as one that CPS might be willing to enter into today. In fact, the original record suggested that CPS was willing to enter into transportation agreements and to consider proposals received from suppliers to the Air Force. This apparently led to the initial effort to compete the current requirement, which was canceled prior to issuance of a solicitation. Also, the agency noted as a concern regarding the 1988 procurement that CPS's industrial service was interruptable, but it fails to explain why this is not also a concern with the current CPS-Valero transportation agreement, and if it is not so then why a competitor of Valero cannot also obtain an agreement the same as Valero's. Further, in responding to the original protests, the agency failed to mention the existence of the Oasis pipeline. Now, while admitting its existence, the agency maintains that the owners of Oasis will not provide firm transportation for the transport of gas owned by a third party. This may be true. However, the protesters suggest that for certain other gas suppliers, the owners of Oasis will apparently permit use of the Oasis line. As regards the non-San Antonio installations, the agency has again offered no supporting data for its conclusions, which conflict with those offered by the protesters.

In short, even if we consider timely the Air Force's submission of information regarding its "market survey," we think it falls short of justifying the sole-source to Valero. We think our original decision was correct--that, absent a market survey which permits interested parties an opportunity to address the Air Force's precise needs, the agency has not established the reasonableness of the sole-source award.

The request for reconsideration is denied. The protesters are entitled to their costs incurred in this proceeding. Techniarts Eng'g; Department of the Navy--Recon.,
B-238520.3; B-238520.4, June 27, 1991, 91-1 CPD ¶ 608.


James F. Hinchman
General Counsel

¹The agency requests that Commercial Energies, Inc. not be awarded the cost of pursuing its protest, including attorneys' fees, because its protest dealt with the manner in which the solicitation was written rather than the question of the reasonableness of the sole-source determination. Among other things, however, Commercial did protest the failure of the requirement to be competed on an unrestricted basis.