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Van Schaik

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

Decision

Matter of: National Credit Union Administration; Schreiner, Legge & Company--Reconsideration

File: B-244680.2; B-244680.3

Date: April 1, 1992

Daniel S. Koch, Esq., Kurz, Koch, Doland & Dembling, for the protester.
Benny R. Henson, National Credit Union Administration, for the agency.
John W. Van Schaik, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGESTS

1. Contracting agency provides no basis for reconsidering prior decision since repetition of arguments made during consideration of the original protest and mere disagreement with General Accounting Office decision do not meet the standard for reconsideration requests.

2. Since there is no evidence in the record to indicate that the awardee prepared or assisted in preparation of the solicitation's statement of work, there was no basis to exclude the firm from competition due to an organizational conflict of interest.

DECISION

The National Credit Union Administration (NCUA) and Schreiner, Legge & Company request that we reconsider our decision, Schreiner, Legge & Co., B-244680, Nov. 6, 1991, 91-2 CPD ¶ 432, in which we sustained Schreiner's protest against the award of several contracts by NCUA under request for proposals (RFP) No. NCUA-91-R-0002, for audit services. NCUA argues that we did not fully consider its argument that it is exempt from the Federal Acquisition Regulation (FAR) while Schreiner requests that we decide protest allegations which we declined to consider in our initial decision.

We affirm our prior decision.

BACKGROUND

NCUA awarded five contracts under the solicitation to the offerors that received the top five technical scores based on the evaluation of initial proposals. We sustained Schreiner's protest because we found upon examination of the record that the agency made award based on initial proposals to other than the lowest overall cost offerors. Since we sustained the protest on this basis, we found it unnecessary to address other contentions raised by the protester. We also concluded that NCUA had articulated a policy to follow the FAR even though it does not conduct its acquisitions pursuant to the Federal Property and Administrative Services Act, 41 U.S.C. § 251 et seq. (1988), which the FAR implements.

NCUA'S RECONSIDERATION REQUEST

In its reconsideration request, NCUA argues, as it did in response to the protest, that it has procurement authority pursuant to the Federal Credit Union Act, as amended, and under that Act it is exempt from other laws that would restrict its procurement authority. According to NCUA, our decision did not fully consider the intent of that Act which, the agency argues, exempts NCUA from the FAR. According to the agency, the procedures it followed "were within the intent and spirit of NCUA procurement policies and instructions." In addition, NCUA states that it recognizes that its instructions are silent with regard to awards without discussions and it has taken steps to clarify its procurement authority.

NCUA, in essence, repeats arguments it made previously and expresses disagreement with our decision. Under our Bid Protest Regulations, to obtain reconsideration the requesting party must show that our prior decision contains either 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) (1991). NCUA's repetition of arguments made during our consideration of the original protest and its mere disagreement with our decision do not meet this standard. R.E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274. Moreover, although NCUA argues that the Federal Credit Union Act exempts it from the FAR, as we explained in our initial decision, NCUA's policy, as stated in its Instruction No. 1770.7 (Rev), is that it complies with the FAR with certain exceptions which are listed in its instruction. In deciding the protest, we applied only those FAR provisions that, according to the agency's own policy, are applicable to it. We are aware of no provision in NCUA's instruction that exempts it from the FAR provisions relating to awards based on initial proposals to other than the lowest overall cost offerors, and NCUA has

referred to no such provision. See Tolen Info. Servs., B-240979; B-240981, Dec. 21, 1990, 90-2 CPD ¶ 518.

SCHREINER'S RECONSIDERATION REQUEST

In its reconsideration request, Schreiner argues that we should have considered its allegation that NCUA improperly failed to exclude from the competition a firm that has an organizational conflict of interest and an unfair competitive advantage as a result of its performance of a pilot contract. According to Schreiner, NCUA violated FAR § 9.505-2(b)(1) by failing to exclude the pilot contractor, Coopers & Lybrand, from the competition under the protested solicitation. In addition, Schreiner argues that we should have considered its contention that by failing to inform the offerors of the pilot contract, NCUA violated FAR § 15.410(c), which requires contracting agencies to promptly furnish to all offerors any information given to another offeror if the information is necessary in submitting a proposal, or the lack of such information would be prejudicial.

We agree with Schreiner that we should have considered these issues in our original decision. Since we recommended that the remaining requirements be resolicited, it is proper to consider whether Coopers & Lybrand should be excluded from the competition due to an organizational conflict of interest and an unfair competitive advantage. We conclude that NCUA violated neither of the referenced FAR provisions and Coopers & Lybrand was properly permitted to compete under the solicitation.

With respect to the allegation of an organizational conflict of interest, the regulations prohibit contractors that provide "material leading directly, predictably, and without delay" to the statement of work (SOW) from providing the required system or services except in three narrow circumstances, not applicable here. FAR § 9.505-2(b). This restriction is intended to avoid the possibility of bias where a contractor would be in a position to favor its own capabilities. Coopers & Lybrand, 66 Comp. Gen. 216 (1987), 87-1 CPD ¶ 100.

Schreiner argues that on its earlier contract Coopers & Lybrand provided material leading directly to the SOW contained in this solicitation. As evidence of this, Schreiner refers to Coopers & Lybrand's proposal for the earlier contract which stated: "Our first task on this project will be to jointly develop an audit program to be used when reviewing the servicer." As additional evidence that Coopers & Lybrand prepared the SOW, Schreiner refers to an NCUA memorandum which states with respect to the earlier Coopers & Lybrand contract: "This is a test review that will be used

to define the scope of review of future reviews of other credit union information systems servicers." According to Schreiner, these references establish that on the earlier contract Coopers & Lybrand provided information that lead to the SOW contained in the current solicitation, and therefore Schreiner urges the firm should have been excluded from the competition.

We do not agree. Coopers & Lybrand was not awarded the earlier contract to prepare or assist in preparing the SOW for the current audit services solicitation. In the proposal upon which its earlier contract was based, Coopers & Lybrand proposed to assess whether a particular provider of data processing services was delivering accurate, timely and meaningful information. Coopers & Lybrand proposed to conduct a review of the provider's operations, including an assessment of the adequacy of controls in place to protect the integrity of its computer system and of the provider's disaster recovery plan. Among other tasks, Coopers & Lybrand also proposed to design and execute tests of the provider's controls over the interest and dividend calculation process, review its operating budget and recent financial information released to the public and review the provider's standard contract for credit union clients. In addition, the report prepared by Coopers & Lybrand under the earlier contract establishes that, as it proposed, the firm reviewed a single data processing service provider. That report provides no evidence that Coopers & Lybrand prepared or assisted in preparing the SOW or that it provided any material as the result of its performance which appeared in the SOW. It merely assessed the performance of a particular data processing service provider.

The SOW in the current solicitation provided little detail as to how contractors are to perform and simply stated that the contractor is to review, among other matters, the provider's organization and management, strategic planning, data center controls, backup and recovery methods and testing, customer contracts, selected interest and dividend computations and delinquency calculations. This SOW is extremely general and, in our view, includes matters that would be logical elements of any plan to audit a data services provider. We have no reason to believe that anything was included in the SOW as a result of Coopers & Lybrand's earlier contract and, under the circumstances, we conclude that NCUA was not required to exclude Coopers & Lybrand from the competition due to an organizational conflict of interest.

We also conclude that Coopers & Lybrand did not have an unfair competitive advantage based on its performance of the earlier contract. There is no requirement that an agency equalize competition with respect to the advantages that an

incumbent contractor may have, as long as those advantages do not result from unfair action by the government. ADT Facilities Mgmt. Inc., B-236122.2, Dec. 12, 1989, 89-2 CPD ¶ 541. Although Coopers & Lybrand may have had a better understanding of NCUA's requirements due to its performance of the earlier contract, we have no basis to conclude that those advantages were the result of any improper action on the part of NCUA.

Finally, we disagree with the allegation that NCUA violated FAR § 15.410(c) by failing to inform the offerors of the pilot contract. That provision requires contracting agencies to promptly furnish to all prospective offerors any information given to another offeror if the information is necessary to submit a proposal or the lack of such information would be prejudicial. As we explained above, the earlier contract concerned only a review of a single data processing service provider and it included only matters which would logically be included in any review of this kind. Under the circumstances, we do not see how Schreiner, or any other offeror, was prejudiced by not having an opportunity to see the report prepared by Coopers & Lybrand under the contract or the contract itself.

Our prior decision is affirmed.

Milton J. Socolar

Acting Comptroller General
of the United States

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[1]To the extent that Schreiner argues that the earlier contract was improperly awarded to Coopers & Lybrand, this contention is untimely. Under our Bid Protest Regulations, a protest must be filed within 10 working days of when the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1991). Where a protester supplements a timely protest with a new and independent ground, the later raised allegation must independently satisfy the timeliness requirements. Holmes & Narver, Inc., B-239469.2; B-239469.3, Sept. 14, 1990, 90-2 CPD ¶ 210. Schreiner became aware on June 24, 1991, that the earlier contract had been awarded to Coopers & Lybrand. Nonetheless, Schreiner did not raise this issue until more than 10 days later when it filed its comments on the agency report on August 21. Consequently, this issue is untimely and will not be considered.