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

Decision

Matter of: Institute for Systems Analysis--Reconsideration

File: B-244383.7

Date: April 1, 1992

Paul Daniel, Esq., Ober, Kaler, Grimes & Shriver, for the party requesting reconsideration.
Thomas W.A. Barham, Esq., Arent, Fox, Kintner, Plotkin & Kahn, for Management System Designers, Inc. and Harry R. Silver, Esq., Davis, Wright, Tremaine, for Epoch Engineering, Inc., interested parties.
Mary G. Curcio, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration is denied where requesting party bases its reconsideration request on arguments that it could have made during the initial protest or on arguments that were previously considered, and where requesting party does not demonstrate that prior decision was legally or factually incorrect.

DECISION

Institute for Systems Analysis ((ISA) requests reconsideration of our decision, Management Sys. Designers, Inc. et al., B-244383.4 et al., Dec. 6, 1991, 91-2 CPD ¶ 518, in which we sustained the protests of Management System Designers, Inc. ((MSD) and Epoch Engineering, Inc. under request for proposals ((RFP) No. CS-90-029, issued by the United States Customs Service, Department of the Treasury, for technical support services.

We deny the request.

BACKGROUND

The RFP was issued on August 1, 1990, and anticipated the award of an indefinite delivery/indefinite quantity contract. The RFP was comprised of seven task areas under which Customs could place orders and provided an estimate of the total number of hours per year the contractor could expect to perform in each task area, and a list of the labor

categories that would be required for performance of each task area. The RFP also contained a list of technical evaluation factors. Offerors were required to submit a technical proposal, and to propose an hourly rate and a total annual cost for each labor category.

Customs received 10 proposals in response to the solicitation and, after the initial evaluation, placed 4, including those submitted by ISA, MSD, and Epoch, in the competitive range. Each of the competitive range offerors was requested to attend discussion sessions. Immediately prior to the discussion sessions, Customs learned that it would have funding only for task A in the base year. The negotiation minutes showed that ISA was advised during discussions that funding was available only for task A while the other offerors were generally advised that at that time funding for certain tasks (other than tasks A and B) was unknown.

When the agency received best and final offers (BAFO), it initially scored and evaluated them with respect to task A in light of the fact that funding was available for only task A. However, after the agency's legal department informed the evaluators that this was improper because the solicitation did not provide for the evaluation of task A only, the evaluators rescored the BAFOs for all seven tasks. In doing so, they relied on their notes from the discussion sessions and did not hold further discussions or request revised proposals. In evaluating the cost proposals, the agency, in an attempt to realistically assess the true costs of awarding the contract to any particular offeror, considered that only task A would be funded in the base year. The agency also determined that its true requirements for task A were for 24,000 hours for the base year, not 14,000 hours as stated in the solicitation. When the technical and cost scores were combined, ISA was ranked first and was awarded the contract. Subsequently, MSD, Epoch, and a third offeror submitted protests to our Office. ISA now requests reconsideration of our decisions sustaining the MSD and Epoch protests.

DISCUSSION

Under our Bid Protest Regulations, to obtain reconsideration the requesting party must either 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) (1991). We will not reconsider a decision based upon arguments that could and should have been raised while the protest was pending since the goal of our bid protest forum--to produce fair and equitable decisions based on consideration of all

parties' arguments on a fully developed record--otherwise would be undermined. Raytheon Co.; Dept. of the Navy--Recon., B-242484.2; B-242484.3, Aug. 6, 1991, 91-2 CPD ¶ 131. Thus, parties that withhold or fail to submit all relevant evidence, information, or analyses for our initial consideration do so at their own risk. Id.

The MSD Protest

In its protest, MSD argued that the agency's decision to award the contract to ISA under the solicitation as issued was improper because the solicitation did not reflect the agency's true minimum needs. Specifically, MSD argued that the solicitation anticipated the award of seven task areas, while the agency knew that it had funding for task A only. In addition, the RFP advised offerors that they could expect to provide 14,000 hours of support for task A in the base year when, in fact, the agency's real needs were for 24,000 hours of task A support.

We sustained MSD's protest because the agency failed to follow the requirement that where there is a significant change in the government's requirements after an RFP is issued, the government must issue an amendment to notify offerors of the changed requirements and afford them the opportunity to respond to them. See Federal Acquisition Regulation (FAR) § 15.606(a); Universal Techs., Inc., B-241157, Jan. 18, 1991, 91-1 CPD ¶ 63. We further found that Customs's failure to comply with the regulation may have been prejudicial to offerors and affected the results of the competition, since offerors might have revised their technical and cost proposals if they had been aware of the substantial change in requirements. For example, offerors knowing that only task A would be funded might have assigned different personnel, not needed for the other tasks, to task A, with the result that technical point scores might have been different. We expressly rejected the agency's argument that it was not required to issue an amendment because the RFP contemplated the award of an indefinite quantity/indefinite delivery contract which allows for flexibility in establishing needs. Finally, we expressed our concern that offerors were not treated equally because, during discussions, ISA was specifically told that funding was available for task A only, while the other offerors were only generally told that funding for certain tasks might be unavailable.

In its request for reconsideration, ISA argues that our decision is based on incorrect, speculative, and unsupported findings of fact. Specifically, ISA argues that the negotiation minutes do not support our finding that ISA was advised that funding was available for task A only while the other offerors were only generally advised that funding for

certain tasks was unavailable. In this regard, ISA points to the minutes of negotiation with all offerors which, according to ISA, shows that all offerors, including ISA, were advised that funding for certain tasks was unavailable.

ISA's assertion is simply erroneous. Our conclusion was based on a written list of negotiation questions for each offeror dated January 31. The list for ISA raised the specific question, "[s]ince we only expect to be able to fund task A this year and most of your company is currently working on [task A] at a much higher rate, what is the impact of this reduced funding? What assurances can you offer that you would remain a viable company for the duration of the contract?" Thus, there was clear evidence in the record that ISA was told that only task A would be funded in the base year. As noted by ISA, the negotiation minutes showed that the other offerors were only generally told that funding for certain tasks was unavailable.

ISA also complains that there is no basis in the record for our conclusion that offerors might have revised their proposals if they knew of the changed requirements by, for example, offering different personnel for task A. In addition, ISA argues that Customs's failure to amend the solicitation to reflect the changes in requirements was harmless error because the contract to be awarded was an indefinite quantity contract and the awardee under the contract would not be guaranteed any orders under any particular tasks. ISA further argues that the information given to all offerors concerning the fact that funding for certain tasks was uncertain was tantamount to an amendment to the RFP.

These arguments provide no basis for us to reconsider our decision. First, ISA has not demonstrated that our conclusion that offerors were prejudiced because they might have changed their proposals to their advantage if they had known of the change in requirements was factually or legally wrong. The agency increased the hours of task A support by 10,000 and also eliminated 6 of 7 tasks to be performed. In our view, these significant changes in requirements clearly support the conclusion that if offerors knew of the changed requirements they might have revised their proposals. See Comprehensive Health Servs., Inc.--Recon., B-236266.5, Apr. 10, 1990, 90-1 CPD ¶ 376. Second, as stated above, we expressly rejected in our prior decision the argument that the agency was not obligated to amend the solicitation because the contract contemplated was an indefinite quantity contract. We will not reconsider a decision based on the repetition of arguments made during the original protest. See Comprehensive Health Servs., Inc.--Recon., supra. Third, insofar as ISA argues that the notice to offerors during discussions that funding for certain tasks was

unavailable acted as an amendment to the solicitation, we specifically found that all offerors were not provided with the same information. Accordingly, ISA has not provided a basis for us to reconsider the MSD decision.

The Epoch Protest

We sustained Epoch's protest because we found that Epoch's proposal was substantially downgraded for failing to bring its task A project director to the discussion sessions when the firm was never told to do so. In reaching our conclusion that Epoch was never told to bring its project director to the discussion sessions, we relied on two affidavits that were submitted by the Epoch vice president who spoke with the Customs contract negotiator concerning the discussion session in which he stated that he was not asked to bring the project director to the discussion sessions. We also considered that Customs did not dispute the vice president's assertions that Epoch was not told to bring the project director to the discussion sessions or provide any other information on the subject.

In its request for reconsideration, ISA argues that we erred in finding that Epoch was substantially downgraded for failure to bring the task A project director to the discussions and that Epoch was not told to bring the task A project director to the discussion sessions. In this regard, ISA argues that contemporaneous documentation shows that Epoch was asked to bring its project director to the discussion sessions and that our Office improperly credited the affidavits of Epoch personnel in concluding that Epoch was not told to bring its project director to the discussion sessions. In any case, argues ISA, there is nothing in the record to establish that Epoch's proposal was substantially downgraded for failing to bring the project director to the discussion sessions. Rather, according to ISA, the record demonstrates that Epoch's proposal was downgraded because the evaluators were not satisfied with the experience of Epoch's project director.

ISA's arguments do not provide a basis for us to reconsider our decision. In its protest, Epoch specifically complained that its proposal was substantially downgraded because it failed to bring its task A project director to the discussion sessions when it was never told to do so. Epoch also supplied the affidavits from its vice president in which the vice president stated that he was not told to bring the project director to the discussion sessions. ISA was thus aware of Epoch's allegations. Also, since ISA's counsel was admitted under the protective order that we issued in conjunction with the protest, ISA was privy to the evaluation documents on which it now relies to argue that Epoch's proposal was not substantially downgraded for failing to

bring its project director to the discussion sessions. Accordingly, ISA was required to raise these arguments during the initial protest. Since ISA failed to do so, we will not now address them as a basis for reconsideration. See Interstate Com. Comm'n--Recon., B-237249.2, Apr. 16, 1990, 90-1 CPD ¶ 391.

In any case, the document that ISA relies on to show that Epoch was requested to bring its task A project director to the discussion sessions is not a contemporaneous document, that is, it was not generated at the time the agency allegedly requested Epoch to bring the project director to the discussion sessions. Further, the evaluation documents we reviewed clearly showed that Epoch was substantially downgraded for failing to bring the project director to the discussion sessions. Thus, for example, during the initial evaluation of BAFOs, it was noted on the technical chairman's summary evaluation that Epoch did not bring the task A project director to the discussion sessions because he was busy on something else and that Epoch's proposal was downgraded for this reason. Similarly, the source selection memorandum stated:

> "One of the primary objectives of the negotiations was accomplished by interviewing each of the offeror's management team and . . . project director (excluding Epoch, who elected not to bring their proposed C3I project director) in order to substantiate or 'fill-in the blanks' of their resumes."

Thus, there was ample evidence in the record to conclude both that Epoch was not told to bring its project director to the discussions and that Epoch was substantially penalized for failing to do so.

Remedy

In sustaining MSD's protest, we recommended that Customs reopen the competition, issue an amendment reflecting its changed requirements, permit the four competitive range offerors to submit revised proposals, and, if Customs determined that an offeror other than ISA was entitled to award, terminate the ISA contract and award a contract consistent with its new determination. We did not recommend additional corrective action in the Epoch protest because Epoch was being given the opportunity to participate in the procurement for the new requirements under our MSD recommendation.

ISA argues that this recommendation is unfair because in the notice of award the other offerors were advised of ISA's pricing and ISA has not been given access to the other

offerors' pricing. This argument does not persuade us to revise our recommendation for corrective action. The other offerors were only given access to ISA's lump sum price for all seven task areas, based on the agency's needs as they were defined in the initial solicitation. The agency is now redefining those needs and will issue a revised solicitation. In our view, the exposure of ISA's lump sum price based on Customs's erroneously stated needs has not exposed ISA to substantial harm in a competition under a revised solicitation with a new statement of Customs's needs.[1]

The request for reconsideration is denied.

Ronald Berger
for James F. Hinchman
General Counsel

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[1]ISA also argues that the recommendation is unfair because one of the other competitive range offerors was given access to its own evaluation documents and thus has a road map with which to improve its old proposal, an advantage which is not enjoyed by ISA or the other offerors. In response to this argument, we have advised the agency to release to each offeror its own evaluation documents and the agency states it will comply with our request. Accordingly, this argument does not provide a basis for us to revise our recommendation.