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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Department of State--Reconsideration

File: B-243974.4

Date: May 18, 1992

Susan F. Heck, Esq., McKenna & Cuneo, for the protester, Ruth Yudenfriend Morrel, Esq., for DynCorp, an interested party.

Dennis J. Gallagher, Esq., and Kathleen D. Martin, Esq., Department of State, for the agency.

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DIGEST

1. Prior decision sustaining a protest is affirmed where the procuring agency's request for reconsideration is based on the agency's assertion that the protest was sustained on an issue that the General Accounting Office raised sua sponte and that the agency did not have an opportunity to respond, but the protest was sustained on an issue specifically raised by the protester, and to which the agency had not responded.

2. The General Accounting Office affirms prior decision, which sustained a protest on the basis of the agency's failure to properly evaluate offerors' costs for required spare/repair parts, where the agency argues that the protester was not prejudiced by the agency's admitted procurement improprieties since the offerors' costs for the parts should be normalized, because the offerors' proposed costs for these parts were not normalized and the record indicates that the protester's cost advantage would be far greater than that considered by the source selection authority, even if these costs were normalized.

DECISION

The Department of State (DOS) requests reconsideration of our decision in MSI, a Div. of the Bionetics Corp., B-243974 et al., Sept. 17, 1991, 91-2 CPD ¶ 254, in which we sustained MSI's protests of the agency's award of a cost reimbursement contract to DynCorp under request for proposals (RFP) No. 0000-930102(CS) for operational and maintenance support for the agency's Bureau of International Narcotics Matters (INM) air wing mission to combat narcotics growing

and trafficking. DOS argues that we erred (1) in sustaining MSI's protest on an issue, which we raised sua sponte and to which the agency did not have an opportunity to respond, and (2) in finding that MSI was prejudiced by the agency's unequal discussions and cost realism analysis. The agency also requests that we modify our prior decision's recommendation that discussions be reopened.

We affirm our prior decision, sustaining MSI's protests, but modify our recommendation and award MSI its costs of defending the reconsideration request and its costs of proposal preparation.

The RFP contemplated the award of a cost-plus-fixed-fee contract for a base year¹ and 4 option years for operational and maintenance services to support the INM air wing in South America, Central America, and Asia.² The RFP provided detailed information concerning the number and types of aircraft; the anticipated flying hours, crew factors and missions per aircraft per country; and a monthly deployment schedule per country. Offerors were required to provide their estimated costs, supported by detailed cost data, for the base and option years.

During discussions, the agency amended the RFP to request technical and cost proposals for an additional 49 rotary aircraft. Offerors were required to provide their estimated costs--supported by detailed cost documentation--for the base year to support each additional aircraft up to a stated maximum for each of four designated countries and to provide escalation rates to be applied to the base year costs to calculate the option years costs.

The RFP provided that award would be made to the responsible offeror, whose proposal, conforming to the RFP requirements, was evaluated as most advantageous to the government, price and other factors considered. Offerors were informed that the government would evaluate offers for award purposes by adding the total cost for all options to the total cost for the basic requirement.

¹The base year period of performance was June 1, 1991, to May 31, 1992.

²The basic contract covered more than 50 fixed-wing and rotary aircraft that are used for narcotics eradication and interdiction. The Anti-Drug Abuse Act of 1986 requires that the government retain title to all aircraft used in international narcotics control. 22 U.S.C. § 2291c. Thus, the air wing aircraft will be provided as government-furnished property to the INM aviation support services program contractor.

After best and final offers (BAFO) and final evaluations were submitted, the source selection authority (SSA) selected DynCorp's highest-rated, \$16 million higher-cost proposal for award over MSI's lower-rated proposal.

Our prior decision found that the agency failed, in its cost realism determination, to consider DynCorp's likely considerable probable costs for required spare/repair parts for the optional aircraft in the option years. This problem was compounded by the agency's failure to conduct equal discussions; the agency informed only DynCorp that spare/repair parts would be furnished for the base year for the optional aircraft, at government expense, with the result that MSI proposed costs in excess of \$1 million for the parts in the base year while DynCorp proposed \$0 for the base year.³ Inasmuch as the option year costs for the parts for the optional aircraft were to be calculated by application of an escalation factor, this meant that DynCorp's proposed costs for its option years were \$0 while MSI's costs were much more. Since DynCorp proposed \$0 for these parts, the overall cost differential between DynCorp and MSI would be significantly larger if DynCorp had proposed costs for these spare/repair parts.

We concluded that since the SSA was not informed of DynCorp's failure to price spare/repair parts for the optional aircraft in the option years or of the unequal discussions, there was not a reasonable basis for the SSA's selection decision and underlying cost/technical tradeoff. That is to say, the SSA's cost/technical tradeoff and selection decision could have been different if the SSA had been aware that MSI's cost advantage appeared to be substantially greater than \$16 million.

We recommended that the agency reopen negotiations with the three offerors in the competitive range, informing them of the agency's requirements, and request revised proposals. If, as a result of the revised proposals and a proper cost evaluation, an offeror other than DynCorp was found to be entitled to award, DynCorp's contract should be terminated for the convenience of the government and award made to that firm, if otherwise eligible.

The agency, while conceding "that there was a failure to provide equivalent information to all offerors, and that this led to proposals being submitted on an inconsistent

³Portions of the protest record are subject to a General Accounting Office protective order to which counsel for MSI and DynCorp were admitted. Our decision here (as was our decision on the prior protest) is based upon protected, confidential information and thus is necessarily general.

basis," argues on reconsideration that we improperly sustained MSI's protest because we, sua sponte, raised the issues on which the protest was sustained and the agency did not have an opportunity to respond. The agency contends that by not identifying this issue as a significant one for the agency, we "effectively misled (DOS) as to what the significant issues in the protest were." In this regard, DOS complains that the issue upon which the protest was sustained was not considered in the hearing that was conducted in the protest.

DOS is incorrect in its assertion that we sustained MSI's protest on an issue that we raised sua sponte. MSI specifically protested the agency's cost realism analysis. In its third protest--based upon documents first released in the agency's report--MSI argued that:

"[I]n evaluating DynCorp's option for additional aircraft (DOS) noted that DynCorp failed to propose the requisite additional spare/repair parts to support the aircraft. . . . In addition, (DOS) noted that DynCorp did not price the additional personnel needed to support the processing and deployment of all optional aircraft through the main base."

Thus, the failure of the agency to evaluate DynCorp's failure to price spare/repair parts for the option years for the additional aircraft was specifically raised by the protester, and the agency had an opportunity to address MSI's arguments in its report on the third protest. Not only did DOS fail to explain or justify its evaluations in this area, but it now concedes its unequal treatment of the offerors.

DOS is concerned that we did not specifically identify for the agency that the cost realism analysis issue was considered "significant," or include the issue as one subject to testimony at the hearing. Parties to a protest, including procuring agencies, who fail to submit all relevant evidence to our Office in the expectation that we will draw conclusions beneficial to them, do so at their own risk; it is not our function to prepare parties' defenses to allegations raised in the record. Interstate Com. Comm'n--Recon., B-237249.2, Apr. 16, 1990, 90-1 CPD ¶ 391. Also, the fact that hearing testimony was not taken on a particular issue is not dispositive of whether the issue is "significant." Hearings are conducted to resolve factual disputes and/or clarify legal issues in the protest. 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.5). Here, a hearing was conducted to assist in resolving certain disputes in the record concerning other aspects of the agency's cost realism analysis and cost/

technical tradeoff. That we did not specifically consider in the hearing that the agency conducted unequal discussions and improperly evaluated DynCorp's cost for the spare/repair parts--facts which the agency now admits to be true--does not make these procurement improprieties insignificant. Rather, the protest was decided on the entire record, including the hearing transcript and evidence.⁴

DOS argues that the provision of the optional additional aircraft was too uncertain to support the evaluation of costs for the option years. Therefore, DOS contends we should not have considered DynCorp's and MSI's costs for the spare/repair parts for these aircraft for the option years. The requirement that offerors price the additional 49 aircraft for the base year, with escalation rates for each option year, was added by a solicitation amendment that specifically provided that "the [g]overnment will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement." DOS evaluated proposed costs for the 49 aircraft for the base year, but did not evaluate costs associated with these 49 aircraft for the option years. While DOS apparently now believes that these costs should not be evaluated because the provision of these additional aircraft is uncertain, the quoted solicitation language specifically required such an evaluation. Thus, DOS was required to consider DynCorp's and MSI's costs for the spare/repair parts for these aircraft for the option years. If DOS does not consider it feasible to evaluate these option prices, it should amend the RFP to so provide.

DOS also contends that we erred in finding that MSI was prejudiced by the agency's unequal discussions and failure to consider DynCorp's probable costs for the spare/repair parts for the additional aircraft in the option years. DOS first argues that MSI's cost advantage would not be greater than its evaluated \$16 million advantage in a proper cost realism determination, as we found in our prior decision. DOS asserts that the costs for these parts would "necessarily be approximately the same for all offerors, since all purchase from the same vendors at standard industry prices and discounts," and that in any event the agency may purchase the parts on its own account and furnish them to the contractor as government-furnished property.

⁴The hearing established that the SSA had not considered the failure of DynCorp to price the required spare/repair parts for the additional aircraft for the option years and that the SSA was not aware of the agency's unequal discussions.

While DOS now contends that the offerors' costs for the spare/repair parts should be normalized,⁵ the agency in its cost realism determination did not normalize these costs or otherwise adjust the offerors' proposed costs, but accepted these costs as proposed. The agency has provided no evidence supporting its assertion that normalization of the offerors' costs for spare/repair parts would minimize any cost impact from its admittedly defective cost realism determination concerning these parts. Indeed, the record indicates that MSI's cost advantage would be far greater than \$16 million, even if the costs for spare/repair parts for the basic contract and optional aircraft were normalized. In this regard, the agency's argument fails to account for the fact that MSI's cost advantage was minimized by MSI's proposal of costs in excess of \$1 million for the option aircraft parts in the base year while DynCorp proposed \$0 for the same parts, and that DynCorp's 5-year costs for these parts is \$0 while MSI costed these parts. Thus, as we found in our prior decision, the SSA's cost/technical tradeoff judgment and selection decision could have been different if the SSA had been aware of MSI's greater cost advantage.⁶

DOS next complains that, in determining that MSI's cost advantage would be greater than \$16 million, we discounted its determination that MSI's proposed costs for insurance and spare/repair parts for the base contract requirement

⁵Normalization is a technique sometimes used within the cost adjustment process of a cost realism analysis in an attempt to arrive at a greater degree of cost realism. It involves measuring offerors against the same cost standard or baseline in circumstances where there are no logical differences in approach or in situations where insufficient information is provided in the proposals, leading to the establishment of a common "should have bid" estimate by the agency. General Research Corp., 70 Comp. Gen. 279 (1991), 91-1 CPD ¶ 183; Dynallectron Corp. et al., 54 Comp. Gen. 562 (1975), 75-1 CPD ¶ 17. The record does not establish that the offerors' proposed costs for the spare/repair parts should be normalized for either the optional aircraft or the basic contract requirement. DOS has provided no evidence to demonstrate that the offerors' costs for these parts should be normalized, and the offerors' logistical approaches and probable costs for inventory and distribution of spare/repair parts could differ significantly.

⁶Nevertheless, since DOS apparently believes these costs should be normalized, it should appropriately consider this matter during its reevaluation of the offerors' proposed costs.

were unrealistically low. We find, as discussed below, that DOS has not demonstrated that we erred in disagreeing with its determination regarding these costs.

With regard to DOS' undocumented statement that MSI's proposed spare/repair part costs for the base contract requirement are unrealistically low, it is true, as noted by DOS, that MSI's proposed costs for the spare/repair parts were substantially less than the government's estimate. DynCorp's proposed costs, although higher than MSI's proposed costs, were also significantly less than the estimate and the proposed spare/repair costs of the third competitive range offeror were far less than MSI's proposed costs. Yet DOS accepted, without adjustment, these lower proposed costs as a part of its cost realism determination, and, as yet, has presented no evidence to support its assertion that MSI's proposed costs were unrealistic or to establish what MSI's probable costs would be. Accordingly, there is no basis in the record to conclude that MSI's cost advantage would be minimized by its proposed costs for the spare/repair parts for the basic contract.

Regarding MSI's proposed costs for insurance, DOS argues that MSI's proposed costs were unrealistic because they were far less than the government's cost estimate for insurance, which was based upon its historical data from the prior contract. But this fact alone does not establish that MSI's proposed costs were unrealistic. Here, too, the record shows that all three competitive range offerors' proposed costs were less than the government's cost estimate for insurance, and the agency "accepted," without adjustment, all three offerors' proposed costs for insurance in its evaluation of BAFO costs. Furthermore, the agency's arguments ignore the fact that a contractor's probable insurance costs would be based upon a variety of factors, including historical loss experience, liability limits, loss control measures, and commissions.

DOS also requests that we modify our recommendation to reopen negotiations with the competitive range offerors, informing them of the agency's requirements, and request revised proposals. The agency contends that our recommendation is "overbroad and indefinite," and requests that we limit the recommended remedy to correcting only the deficiency upon which we sustained the protest--the agency's

⁷We found in our prior decision that the agency had not supported its determination that MSI's proposed costs for spare/repair parts and insurance were understated, "inasmuch as the agency did not determine the probable level of MSI's costs for these areas or otherwise attempt to quantify the extent of the alleged understatement."

unequal discussions and improper evaluation of the MSI's and DynCorp's costs for the spare/repair parts for the additional aircraft. The agency also states that there have been numerous (albeit not fundamental) changes in the INM air wing program that, under our protest recommendation, would require a complete review of the current solicitation requirements. Specifically, DOS appears to argue that it is unlikely that the option for the additional aircraft will be exercised.

As indicated above, the procurement law violation on which this protest was sustained only involved the evaluation of the optional additional aircraft.⁸ Consequently, if DOS determines that there is no reasonable certainty that the options for these additional aircraft will be exercised, notwithstanding the RFP provision stating that it would be evaluated, we recommend that DOS perform a cost/technical tradeoff, without regard to the optional additional aircraft and after performing an appropriate cost analysis. On the other hand, if it is reasonably certain that the additional aircraft option will be exercised, we recommend that DOS assess its current program needs, in view of its representation that they have changed,⁹ amend the RFP accordingly to inform offerors of DOS' actual needs, and request revised proposals.¹⁰ In either event, if DynCorp is not the successful offeror, its contract should be terminated and award made to MSI.

Also, MSI is entitled to recover, as part of its costs of filing and pursuing its protest, its costs, including reasonable attorneys' fees, of responding to the agency's

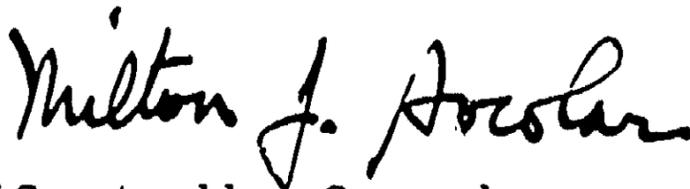
⁸While we did not resolve any of the numerous other issues raised by MSI in its prior protest, it appears that none was sufficient to otherwise justify sustaining the protest.

⁹We fail to see how limiting negotiations and reevaluation of proposals to the question of spare/repair parts for additional aircraft would serve the public's or the agency's interest.

¹⁰DOS also contends that it should not be required to reopen negotiations with the third competitive range offeror, which was not a party to the protest. The agency appears to argue that the third offeror no longer has a reasonable chance for award, given its competitive position after BAFOs. If the agency believes that the third offeror should not remain in the competitive range, our recommendation does not limit the agency's discretion to now determine that the offeror is no longer in the competitive range and reject its proposal.

request for reconsideration. See Pacific Nw. Bell Tel. Co., Mountain Sts. Bell Tel. Co.--Claim for Bid Protest Costs, 67 Comp. Gen. 442 (1988), 88-1 CPD ¶ 527. In addition, because contract performance was not suspended based upon the agency's determination that urgent and compelling circumstances would not permit awaiting our decision and the base year of the contract has almost been completed, MSI has been deprived of its opportunity to fairly be considered for a substantial portion of the RFP work. Therefore, we find MSI is also entitled to recover the reasonable costs of preparing its proposal. See EHE Health Servs., 65 Comp. Gen. 1 (1985), 85-2 CPD ¶ 362; HCA Gov't Servs. et al., B-224434.2 et al., Apr. 24, 1987, 87-1 CPD ¶ 434.

The prior decision is affirmed, except that the recommendation is modified in accordance with this decision. Also, MSI is entitled to recover its costs of responding to the agency's request for reconsideration as well as its costs of proposal preparation.



Acting Comptroller General
of the United States