Curcio 7/30/92

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

Decision

Matter of: Daniel F. Young, Inc.--Request for Reconsideration

File: B-246736.4

Date: July 30, 1992

Elias Rosenzweig, Esq., and Francis P. Manfredi, Esq., Brauner, Baron, Rosenzweig & Klein, for Daniel F. Young, Inc., the party requesting reconsideration.
J. Michael Farrell, Esq., and James H. Roberts, III, Esq., Manatt, Phelps, Phillips & Kantor, for Fritz Companies, Inc., an interested party.
Mary G. Curcio, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration is denied where party requesting reconsideration does not demonstrate that decision was based on an error of fact or law.

DECISION

Daniel F. Young, Inc. requests that we reconsider our decision in Fritz Co., Inc., B-246736 et al., May 13, 1992, 92-1 CPD ¶ 443, in which we sustained Fritz's protest that the Agency for International Development (AID) improperly awarded a contract to Young on the basis of initial proposals because the agency unreasonably determined that the proposal submitted by Young was superior to the other acceptable proposals received. We also found that AID improperly held discussions with only the awardee.

We affirm our prior decision.

The request for proposals (RFP) was issued on July 16, 1991, for a contractor to provide freight forwarding and booking services related to food-aid cargoes for which AID is responsible. The RFP contemplated the award of a requirements contract on a no-cost basis to the government. The RFP required the submission of a technical proposal and listed four evaluation factors against which the technical proposals would be evaluated. The RFP also required the submission of a business management proposal which would be evaluated to determine the responsibility and eligibility of the offeror. The proposal also was to include a small

business and small disadvantaged business (SDB) subcontracting plan, if the offeror itself was not a small business or SDB. The solicitation provided that if offers were found to be equal, the participation of disadvantaged enterprises and small business concerns could become the determining factor in the award decision. The RFP stated that the contract would be awarded to the responsible and eligible offeror whose proposal, conforming to the solicitation, was most advantageous to the government, technical and business management factors considered.

Eight offerors responded to the solicitation by the August 30 closing date. After the proposals were evaluated independently by each member of a three member technical evaluation team, the evaluation team met and reached a consensus evaluation for each offeror. Based on the consensus scores, Young was ranked first and Fritz was ranked third. The evaluation team recommended to the negotiator (the contracting officer's representative) that award be made to Young on the basis of initial proposals because the Young proposal was superior technically and none of the other proposals could become competitive with Young without substantial revisions.

The negotiator reviewed the file and disagreed with the technical evaluation team. Specifically, he found that the proposals of Fritz and the second ranked offeror could be improved through discussions. He concluded, however, that at best the proposals could become technically equal to the Young proposal, which received a near perfect score. He also found that Young submitted a small business and SDB subcontracting plan that was superior to those submitted by Fritz and the second ranked offeror. Accordingly, he recommended that the contracting officer award the contract to Young on the basis of initial proposals because at best the proposals could be ranked technically equal if discussions were held, and in such circumstances the solicitation directed award to the offeror with the best plan for participation by disadvantaged enterprises and small businesses, in this case Young. The contracting officer concurred and awarded the contract to Young on the basis of initial proposals. Fritz protested to our Office.

We sustained Fritz's protest because we determined that the agency could not reasonably conclude that Young submitted a superior small and disadvantaged enterprise subcontracting plan. In this regard, as initially submitted, Young's subcontracting plan offered a range of participation by a small business or SDB and the low end of the range was less than the percentage proposed by the second ranked offeror and equal to the percentage offered by Fritz. We held that the contracting officer could not reasonably conclude that the possibility that Young's subcontractor might earn a

percentage of the commissions equal to the top of the range made its proposal superior since Young in fact committed only to the low end of the range. We thus concluded that AID could not make award to Young on the basis of initial proposals on the ground that, even if the top three offers were otherwise equal, Young would be in line for award based on the superiority of its proposed subcontracting plan.

We further noted that Young did eventually revise its proposed subcontracting plan to provide for a fixed percentage of participation by its proposed SDB subcontractor, and the revision did make Young's subcontracting plan superior to that of the other two offerors. We found, however, that by allowing Young to make a material revision in its initial proposal, AID engaged in discussions with the firm. Since once an agency holds discussions with one offeror, it must do so with all offerors in the competitive range, and since it was clear that Fritz and the second ranked offeror would have been included in the competitive range if AID had established one, we concluded that AID could not properly make the award to Young on the basis of its revised proposal, without holding discussions with Fritz and the second ranked offeror and giving them the opportunity to revise their proposals.

Under our Bid Protest Regulations, to prevail on 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) (1992). Young has not met that standard.

In its request for reconsideration, Young first argues that our Office should not have considered Fritz's protest because Fritz was not an interested party to file the protest. Under our Bid Protest Regulations, an interested party for purposes of filing a protest is an actual or prospective bidder or offeror with a direct economic interest in the award of a contract. 4 C.F.R. § 21.0(a). We have generally interpreted this to include any entity that would be in line for award if its protest were upheld. See Discount Mach. & Equip. Inc., B-240426.6, Jan. 23, 1991, 91-1 CPD ¶ 66. Young argues that if as a result of discussions, Fritz and the second ranked offeror became technically equal to Young, the award would have gone to the second ranked offeror rather than to Fritz because the second ranked offeror proposed a subcontracting plan that was superior to the plan offered by Fritz. Young therefore reasons that since even if Fritz's protest were upheld Fritz would not be in line for award, Fritz was not an interested party to pursue the protest.

We disagree. Fritz clearly was an interested party to protest AID's decision to award the contract to Young on the basis of initial proposals. Specifically, if, as in fact happened, we sustained Fritz's protest, the appropriate remedy, and the one we recommended, was for AID to establish a competitive range and hold discussions with all offerors in the competitive range. Since the record makes clear that Fritz would be included in the competitive range, Fritz would have an opportunity to revise its proposal and become competitive for the award. Accordingly, Fritz had a sufficient economic interest to maintain its protest. See Mobile Telesystems, Inc., B-245146, Dec. 18, 1991, 91-2 CPD ¶ 560.

Young next argues that AID was not required to hold discussions with Fritz because the deficiencies in Fritz's proposal could not have been remedied through discussions. Specifically, Young asserts that the major deficiency in Fritz's proposal was a lack of experience in both Fritz and its proposed subcontractor and that this defect could not have been remedied through discussions. To support its position, Young notes that in evaluating Fritz's proposal, the committee found that Fritz had no experience in handling agricultural commodities and this was a very critical performance area. Young further asserts that the evaluation committee did not consider that Fritz's proposed disadvantaged business subcontractor had little experience in performing freight forwarding services via ship and in fact, according to Young, was not qualified to perform the services. Young argues that in any case, if Fritz did become technically equal to Young through discussions, Fritz would not receive the award because Young changed its subcontracting plan to offer a percentage of disadvantaged business participation that was clearly superior to that offered by Fritz and Young would therefore be the proper awardee under the tie breaker provision of the solicitation.

In essence, Young is requesting that, at this time, the General Accounting Office reevaluate Fritz's proposal and determine what offerors should be included in the competitive range. Our Office will not reconsider a decision based on arguments that could have been, but were not, made during the initial proceedings. See Rantec Microwave & Elecs., Inc.--Recon., B-241151.2, Feb. 28, 1991, 91-1 CPD ¶ 227. Young fully participated in the initial protest proceedings, both seeking and obtaining admission under the protective order that was issued and filing its response to the protest. If Young believed that Fritz could not have improved its proposal through discussions, Young should have made that argument during the initial protest so that AID would have had the opportunity to respond to Young's specific arguments concerning AID's evaluation of Young's

proposal. Since Young failed to do so we will not consider the allegation now.[1]

Similarly, to the extent that Young now argues that AID was excused from holding discussions under Federal Acquisition Regulation (FAR) § 15.610(a)(1) because an AID regulation, 22 C.F.R. § 201.65(h), set the prices for the brokerage services, this argument could have been made during the initial protest, and will not be considered now.[2]

Young next asserts that AID was not required to establish a competitive range or hold discussions with Fritz and the second ranked offeror because neither had a reasonable chance of being selected for award. A contracting agency is required to establish a competitive range and hold discussions with those offerors that have a reasonable chance of receiving the award. FAR § 15.609(a). As discussed in our initial decision, the technical evaluation team initially recommended that the contract be awarded to Young on the basis of initial proposals. The negotiator, who was also the contracting officer's representative, disagreed. Specifically, he stated that:

> "(d)espite the fact that major revisions would be required, the question to be answered is whether (the second ranked offeror) and Fritz could reasonably be expected to improve, through negotiations, to the point where their proposals could be selected for award of the contract. The Negotiator is unwilling to concede that the (second ranked offeror) and Fritz could not become

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[1]In our initial decision we did specifically address whether Fritz could become competitive with Young through discussions. In doing so we relied on the negotiator's finding that Fritz and the second ranked offeror could become competitive with Young. To the extent Young now disagrees with this conclusion, we note that the purpose of holding discussions and requesting BAFOs is to provide offerors with the opportunity to correct and improve their proposals. Thus, even if Young's assertions concerning Fritz's proposal are true, it does not follow that the proposal could not be improved. For example, if AID held discussions with Fritz, Fritz could have changed its subcontractor or, as Young did after discussions, the percentage of disadvantaged business participation it proposed.

[2]In any case, 22 C.F.R. § 201.65(h) establishes the conditions under which AID will pay brokerage commissions in connection with ocean freight services. The regulation, however, does not establish the price for these services.

> competitive with DFY [Young] on a technical basis."

The negotiator concluded, however, that the award should be made to Young on the basis of initial proposals because Young submitted a superior subcontracting plan. The contracting officer concurred with this conclusion.

Young argues that the negotiator's statement--that he would not concede that the second ranked offeror and Fritz could not become competitive with Young--is not the same as stating that Fritz had a reasonable chance of receiving the award. Young also points to the contracting officer's, letter informing Fritz that it was not selected for award, which stated that it was unlikely that Fritz could improve its proposal to the point where it had a reasonable chance of being selected for award because of the substantial lead enjoyed by the successful offeror.

Young's argument does not provide a basis for us to reverse our decision. First, the negotiator's specific statement--that he refused to concede that Fritz could not become competitive with Young as the result of discussions--combined with his decision to award to Young on the basis of Young's superior subcontracting plan supports our conclusion: if it were not for Young's superior subcontracting plan the negotiator would have held discussions with Fritz because he believed Fritz might become competitive with Young. Further, to the extent the contracting officer later stated in his letter to Fritz that it was unlikely Fritz could improve its proposal to the extent where it had a reasonable chance of being selected for award, this conclusion is not otherwise documented in the record as the reason that Fritz was not placed in the competitive range, and, notably, the contracting officer relied on the negotiator's memorandum in awarding the contract to Young on the basis of initial proposals. At no time during the protest did AID argue that the award decision was based on AID's belief that Fritz did not have a reasonable chance of receiving an award if discussions were held.

Young asserts that our decision improperly treated the alleged discussions concerning the extent of small and SDB subcontracting as an element to be discussed with offerors within the competitive range rather than as an element of offeror responsibility, which could be negotiated after bid opening.

In our decision we recognized, in response to AID's assertion in its report, that under FAR § 19.702(a), an otherwise successful offeror may negotiate the terms of its subcontracting plan with the agency after award because the issue concerns the offeror's responsibility, and that such negotiations do not rise to the level of discussions. We also stated, however, that it was not reasonable to interpret this provision to apply where, as here, an offeror's status as the successful offeror is the result of revisions to its subcontracting plan. While Young has reiterated the argument made by the agency during the initial protest and indicated its disagreement with our position, Young has not demonstrated that our conclusion was factually or legally incorrect.

Finally, Young argues that the agency did not hold discussions with Young concerning its subcontracting plan; rather, argues Young, AID merely requested Young to clarify its proposal concerning the subcontracting plan. To support this position, Young argues that all the information contained in Young's initial proposal made it clear that a named subcontractor would perform all chartering work under the contract. Young notes that its proposal also specifically stated that under the current contract it was performing for AID, up to 33 percent of total commissions were earned by its disadvantaged subcontractor. Young reasons that it was thus clear from the beginning that its subcontractor would receive 33 percent of the commissions, and, in any case, more than the percentage of the revenues to be earned by Fritz's proposed subcontractor. Young's argument, however, misses the point of our decision.

Discussions are defined as any oral or written communication between the government and an offeror, other than communications conducted for the purpose of minor clarification, whether or not initiated by the government, that: (a) involves information essential for determining the acceptability of a proposal; or (b) provides the offeror an opportunity to revise or modify its proposal. FAR § 15.601.

Here, while the information Young relies on was in its proposal and in fact the contracting officer found that under its prior contract Young's proposed subcontractor received 33 percent of the total commissions Young earned, in the initial proposal Young submitted in response to the instant solicitation, Young was only committed to participation by its subcontractor equal to the low end of a stated range. In changing its proposal to provide that its proposed subcontractor would receive a fixed percentage of the commissions equal to the top of the range it proposed,

Young materially changed its commitment under the contract. Accordingly, this change was not a minor clarification but instead the result of discussions. Once AID held discussions with Young, AID was required to hold them with all offerors in the competitive range. If in fact Young initially intended to provide that its proposed subcontractor would receive the top of the range proposed, Young should have unambiguously stated so.

The prior decision is affirmed.

Milton J. Socolar

Acting Comptroller General
of the United States