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McArthur

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

Decision

Matter of: Earle Palmer Brown Companies, Inc.--
Second Reconsideration

File: B-243544.4

Date: August 6, 1992

Gary F. Jonas for the protester.
C. Douglas McArthur, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Party seeking reversal or modification of prior decision must convincingly show that decision contains either error of fact or law or information not previously considered that warrants its reversal or modification, and General Accounting Office will not reconsider a prior decision based upon arguments and information that could and should have been presented during the initial consideration of the protest.

DECISION

Earle Palmer Brown Companies, Inc. (EPB) has filed a second request for reconsideration of our prior decision in Earle Palmer Brown Cos., Inc., 70 Comp. Gen. 667 (1991), 91-2 CPD ¶ 134, in which we denied its protest of the award of a contract under request for proposals (RFP) No. M00027-90-R-0010, issued by the United States Marine Corps for recruit advertising services. The protester initially argued that the agency, as part of its cost realism analysis, unreasonably adjusted upward its proposed cost and that this adjustment wrongly deprived EPB of award.

We deny the request for reconsideration.

On June 25, 1990, the agency issued the solicitation for a cost-plus-fixed-fee contract for the creation and production of advertising to encourage recruitment in the Marine Corps.

The solicitation reserved to the agency the right to adjust offerors' proposed prices for cost realism and provided for a cost/technical trade-off using Greatest Value Scoring (GVS).[1]

Although the incumbent, J. Walter Thompson U.S.A., Inc. (JWT), submitted the technically superior proposal, the protester's proposed price was so low that the initial calculation of total GVS scores indicated that the protester had the overall advantage. The protester's cost proposal raised several concerns, however, which resulted in an upward adjustment for realism to the protester's proposed cost, based on the contracting officer's determination that the protester would have to pay higher salaries than proposed to attract key personnel identified as district representatives with the qualifications proposed in its best and final offer (BAFO). The upward adjustment of the protester's cost resulted in a slight increase in the incumbent's cost score, giving JWT a higher total GVS score. The source selection authority (SSA) selected the incumbent for award, and EPB protested to our Office.

In its original protest, EPB argued that the cost realism adjustment made to its proposal was unreasonable because it failed to take into account the differences between the proposals and circumstances of the two offerors. The protester contended that the agency should not, in any event, have adjusted its proposed cost for district representative salaries without first raising the matter in discussions. The protester also argued that the two proposals were substantially equal in technical merit and the incumbent's proposal contained no technical advantage meriting the payment of the additional cost involved.

We found that the agency was reasonably concerned about the protester's ability to perform in accordance with its proposed cost, based on its low district representative salaries. We found that the agency reasonably determined that the protester was likely to incur costs higher than it proposed and acted properly in adjusting the protester's proposed cost upward, to reflect the probable cost of performance employing district representatives with the qualifications proposed in EPB's BAFO. We found the amount of the adjustment reasonable.

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[1]Under GVS, the agency assigned point values to technical and cost factors and derived a total combined point score for the purpose of determining which proposal was most advantageous to the government.

The record showed that in requesting BAFOs, the agency modified the solicitation to base the cost evaluation on a specified number of hours, where the solicitation had previously allowed each offeror to propose its own estimated number of labor hours. This modification resulted in a significant reduction in the number of hours upon which the protester had based its initial proposal and which had been a significant factor in lowering EPB's costs below those of the awardee. We found that the low salaries in the protester's initial proposal appeared to have been consistent with an approach using less qualified personnel working a greater number of hours. We therefore found that the agency was not required to have discussed the realism of the protester's initial proposed salaries because the realism issue first became apparent only when the protester submitted a BAFO that proposed highly qualified personnel working a fewer number of hours at the same, or slightly lower, salaries.

Our review of the evaluation documents established that the SSA had a reasonable basis for determining that the incumbent's proposal was superior in technical merit and worth the additional cost. The SSA found that the Thompson proposal had received higher ratings in the most critical categories--creative, systems, facilities and staffing, and the ability to develop and execute a media campaign directed at the target audience, while the protester ranked third in technical quality. The SSA determined that the awardee's higher technical score represented a real technical advantage for the agency and that award to JWT would be consistent with the criteria listed in the solicitation. We found that the record supported this selection decision as consistent with the factors that the solicitation had established for award.

On August 21, 1991, the protester filed a request for our Office to reconsider our decision, arguing that the agency was obligated to discuss any inconsistency between the proposed qualifications and the proposed salaries for district representatives before adjusting the protester's price upward. The protester argued specifically that we were in error in our prior decision in finding that in its BAFO, EPB had proposed enhanced qualifications for the district representatives, arguing that its BAFO revisions served only to "amplify" its initial proposal. In support of its claim that it could have responded to a request for additional information, the protester, which in its proposal and its protest had made no more than a broad, general assertion that it currently employed personnel who could meet the qualifications for district representative, offered the names of specific personnel in its employ.

In denying the request for reconsideration, we found that regardless of the protester's attempt to characterize its BAFO as an amplification of the initially proposed district representative qualifications, the record clearly showed that the protester offered enhanced qualifications with its BAFO. The protester had never argued otherwise. Where the initial proposal did not offer to provide candidates with experience in advertising or marketing, the BAFO proposed candidates with 3 years of advertising experience to qualify for the position. The evaluation board raised the protester's technical score based on the BAFO response. The protester's offer of specific names, to support its prior general assertions that employees currently working for EPB at the low salaries proposed for district representatives, met the proposed qualifications for those positions, constituted new information that we declined to consider in the context of a request for reconsideration. We therefore declined to reconsider our original decision, that the problem with district representative salaries first became apparent in the BAFO when the discrepancy between proposed salaries and proposed qualifications became apparent. Earle Palmer Brown Cos., Inc.--Recon., B-243544.3, Mar. 2, 1992, 92-1 CPD ¶ 246.

In its August 21 request, the protester also contended that the decision of the SSA was erroneously based on the presumption that 70 percent, or $1.8 million, of the $2.5 million difference in prices proposed by the protester and the awardee was attributable to the higher skill level of the awardee's personnel. The protester argued that $1 million of the differential, attributable to secretarial labor (EPB's personnel do their own typing), should not have been considered as conferring any benefit to the agency, and that only $800,000, or one-third of the difference in proposed price, was attributable to the higher skill level of the awardee's personnel. The protester argued that our Office was wrong in stating that by conceding that at least $800,000 was attributable to the higher skill levels of the JWT personnel, EPB had in effect conceded that a substantial portion of the cost difference was in fact attributable to the higher skill level.

We found that the protester's arguments regarding the award decision were no more than a disagreement with our conclusion that a substantial portion of the difference in price was attributable to the higher skill level of the JWT personnel. We declined to reconsider our conclusion that the award decision was reasonable and consistent with the solicitation criteria for award, based on the protester's mere disagreement with our prior conclusion. Earle Palmer Brown Cos., Inc.--Recon., supra.

In our decision on the initial reconsideration request, we also declined to consider arguments newly raised by the protester related to the make-up of the evaluation panel, the failure to consider EPB's American ownership (JWT is British-owned) in the evaluation, and the agency's approval of a new advertising campaign ("Chess Board") while the procurement was still ongoing, as untimely. 4 C.F.R. § 21.2(a)(2),(3) (1992). Regarding Chess Board, we found that the protester had been well aware of this issue for several months, requesting discovery of documents related to Chess Board during the initial protest. The protester had several opportunities to pursue its arguments in this regard, including a line of questioning introduced by our Office at the hearing, but had withheld any discussion of the issue until it submitted its final comments, 2 months after it first became aware of the issue. Earle Palmer Brown Cos., Inc.--Recon., supra.

To obtain reversal or modification of a decision, the protesting party must convincingly show that our prior decision contains either error of fact or law or information not previously considered that warrants its reversal or modification. 4 C.F.R. § 21.12(a); Gracon Corp.--Recon., B-236603.2, May 24, 1990, 90-1 CPD ¶ 496. We will not reconsider a prior decision based upon arguments and information that could and should have been presented during our initial consideration of the protest. Newport News Shipbuilding and Dry Dock Co.--Recon., B-221888.2, Oct. 15, 1986, 86-2 CPD ¶ 428.

In again requesting reconsideration, the protester now argues that contrary to our finding in the original decision and the reconsideration, it did not decrease the hours for district representatives proposed in its BAFO and did not propose higher qualified personnel. While acknowledging that it did reduce the total number of hours proposed in its BAFO, the protester asserts that our Office failed to take note of the fact that district representative hours did not change; the protester repeats its argument that the BAFO was not a revision but a mere amplification of the qualifications needed to become a district representative. The protester disagrees with our conclusion that the identification of specific employees constituted new information, and argues that it could have supplied the names if asked. The protester also argues that if it had not had personnel at the appropriate salary level to serve as district representatives, the Defense Contract Audit Agency (DCAA) audit of the initial proposal would have discovered that fact.

We see no basis for altering our finding that the protester offered enhanced qualifications for the district representatives with its BAFO, while also reducing wages.

The protester does not deny that it originally proposed more hours in its initial proposal than in its BAFO or that it lowered the salaries for district representatives in its BAFO. Despite the protester's assertions that its proposal referenced current employees of EPB that could serve as district representatives, in the context of a reconsideration request, naming those employees essentially constituted new information of a kind that we do not consider on reconsideration. As stated in our original decision, the district representative positions were unique and EPB did not employ personnel in a similar position with similar responsibilities, so there was no way for DCAA, which only verifies the rates that an offeror actually pays, to discover any discrepancy between the protester's initial cost and technical proposals.

The protester's second point of contention concerns the difference between the costs proposed by EPB and those proposed by JWT and whether that difference was mainly attributable to higher overhead and fees or to higher quality personnel. The protester argues that our Office accepted its contention that only $800,000 of the $2.5 million was attributable to the higher skill level of JWT personnel. The protester quotes the SSA as stating that award to JWT would be hard to justify if the greater portion of the difference in price were attributable to overhead and fee, and contends that the difference was exactly that, and concludes that the record therefore establishes that the SSA would have made a different award decision had he realized what the extra cost actually represented.

We do not agree with the protester's argument that the difference in cost attributable to the higher skill levels of JWT personnel was only $800,000 out of $2.5 million. The protester itself recognized that the actual amount of direct labor involved in the $2.5 million was $1.8 million but argued that $1 million of direct secretarial labor does not translate into a higher skill level and is therefore similar to overhead, in that the extra cost does not benefit the agency. We did not accept this argument, and we note that if we had, we would also have to consider whether all of the hours proposed by EPB, which apparently included secretarial labor in the hours proposed in professional categories, similarly benefitted the agency. We concluded in our original decision, that regardless of the merit of EPB's arguments regarding the significance of the cost difference, the protester has conceded that at a minimum, the higher skill levels represent a third of the cost difference and that $800,000 is a substantial amount both in absolute and relative terms.

Further, the solicitation essentially provided for award to the offeror who received the highest GVS; our review of an award decision concerns whether the decision was reasonable in view of the solicitation's expressed evaluation scheme. Hager, Sharp & Abramson, Inc., B-201368, May 8, 1981, 81-1 CPD ¶ 365. While a selection official may reasonably judge that the cost of a technically superior proposal is so high that selection of a lower priced, technically inferior proposal is justified, notwithstanding an evaluation scheme placing primary importance on technical considerations, such a selection would deviate from the established criteria and would have to be supported by "an extremely strong justification." EPSCO, Inc., B-183816, Nov. 21, 1975, 75-2 CPD ¶ 338. The agency attempted no such justification in this case, and based on the record before our Office, we cannot substitute our own judgment for that of the SSA to find that one exists.

Finally, although the protester acknowledges that it queried the agency about Chess Board during its debriefing, the protester argues that it was uncertain until the hearing before our Office whether Chess Board was approved in time to be shared by other offerors. In this regard, the protester argues that it has been hampered in its efforts to gain access to information confirming its suspicions and therefore has been as yet unable to develop a logical argument to demonstrate the unfairness of the agency's handling of the Chess Board issue. The protester charges that it is incumbent upon our Office to conduct its own independent investigation of the issue.

A protester is obligated to diligently pursue its grounds of protest, and where as here the protester has failed to utilize the document disclosure provisions of our Bid Protest Regulations, 4 C.F.R. § 21.3(f), and has chosen other routes of obtaining the information that it deems necessary to support its allegations, it has not met that obligation. Adrian Supply Co.--Recon., B-242819 et al., Apr. 9, 1992, 92-1 CPD 356. Our Office does not conduct independent investigations as part of our bid protest functions; our decisions are based on our review of the written record which consists of the submissions of the parties. TSI Microelectronics Corp.--Recon., B-243889.2, Nov. 4, 1991, 91-2 CPD ¶ 423. We see no basis for changing our prior finding that the protester had sufficient notice of issues regarding Chess Board within a week of filing its initial protest and that it could have pursued the matter and requested relevant documentation at that time. We see

no basis for reconsidering our prior determination that the protester failed to raise the issue before our Office in a timely manner.

We deny the request for reconsideration.

James F. Hinchman
General Counsel