



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Oakcreek Funding Corporation--Reconsideration
File: B-248204.3
Date: November 10, 1992

Cyrus E. Phillips, IV, Esq., Keck, Mahin & Cate, for the requester.
Garry R. Boehlert, Esq., Watt, Tieder, Killian & Hoffar, for HFS, Inc., an interested party.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration of a decision sustaining a protest that the contracting agency improperly conducted post best and final offer discussions with the awardee is denied where the awardee merely repeats arguments made during the original protest but fails to point out any errors of fact or law or information not previously considered in the original decision.

DECISION

Oakcreek Funding Corporation requests reconsideration of our decision in HFS, Inc., B-248204.2, Sept. 18, 1992, 92-2 CPD ¶ , which sustained the protest of HFS, Inc. (HFSI) against the award of a contract to Oakcreek under request for proposals (RFP) No. F33600-92-R-0057, issued by the Department of the Air Force, Wright-Patterson Air Force Base (AFB), Ohio, for computer hardware maintenance and system analyst support.

We deny the request for reconsideration.

The RFP called for preventive, remedial, and on-call computer hardware maintenance for the "Computational Resources for Engineering and Simulation Training and Educational" (CREATE) computer system and system analyst support, including installation and support of software for the "World Wide Military Command and Control System," "Weapon System Management Information System," and CREATE

computer systems at Wright-Patterson AFB.¹ Oakcreek received the award as the low-priced, technically acceptable offeror.

Our decision held that Oakcreek was improperly awarded the contract because the Air Force improperly provided Oakcreek with the opportunity to make its best and final offer (BAFO) acceptable by permitting it to submit revised B-tables (the list of equipment to be maintained under the contract) that had been omitted from Oakcreek's BAFO, which constituted discussions, without providing HFSI the opportunity to submit a revised proposal. We also found that, based upon evidence presented at a hearing conducted under our Bid Protest Regulations, 4 C.F.R. § 21.5 (1992), Oakcreek could not meet the RFP's material requirement to obtain access to certain HFSI proprietary software.

Oakcreek, which participated in the original decision, requests reconsideration of our prior decision for a variety of reasons. In doing so, Oakcreek, in essence, repeats the arguments made both by Oakcreek and the Air Force during the original protest. Under our Bid Protest Regulations, to obtain reconsideration the requesting party must show that our prior decision may contain 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). The repetition of arguments made during our consideration of the original protest and mere disagreement with our decision do not meet this standard. R.E. Scherrer, Inc.--Recon., B-231101, Sept. 21, 1988, 88-2 CPD ¶ 274.

Oakcreek contends that the Air Force's post-BAFO communications, which provided it the opportunity to submit the solicitation's revised "B-tables" inadvertently omitted from its BAFO, did not constitute discussions as held by our prior decision. Oakcreek argues that its failure to submit the B-tables was a minor informality.

As found in our prior decision, the revised B-tables were material in two respects. First, the tables identified the CREATE equipment that the contractor obligated itself to maintain under the contract. The Air Force admitted that if there are any changes to the individual equipment items reflected on the B-tables, a modification to the contract is required to formalize these changes, and that the B-tables are necessary to make such pricing adjustments. Second, as recognized by both the Air Force and Oakcreek, the B-tables

¹All of the computer systems utilize an array of computer equipment manufactured by Honeywell, Inc, which operate with HFSI proprietary software, including source codes.

are necessary to calculate maintenance credits where system components are not properly maintained in a particular month. We found that Oakcreek's failure to include the revised B-tables in its BAFO rendered its BAFO unacceptable.

Oakcreek's arguments that the late submission of the revised B-tables was a minor informality is basically a reiteration of previously asserted and considered arguments. For example, Oakcreek contends that because it submitted properly completed B-tables with its initial proposal and the total monthly maintenance price did not change, we were wrong in concluding that the omitted revised B-tables created doubt as to Oakcreek's legal obligation to maintain the different equipment contained in the revised B-tables. While Oakcreek raises several points allegedly demonstrating that the B-tables did not change in substance from those initially completed by Oakcreek, it admits that the revised B-tables did reflect some changes in equipment quantities, serial numbers, and model numbers from the original B-tables. Oakcreek failed to make these arguments, which could have been made during the course of the initial protest, and it is not entitled to wait until an unfavorable decision before making arguments available during the course of the initial protest. To consider such arguments would undermine the goals of our bid protest forum--to produce fair and equitable decisions based on consideration of both parties' arguments on a fully developed record--and cannot justify reconsideration of our prior decision. Department of the Army--Recon., B-237742.2, June 11, 1990, 90-1 CPD ¶ 546.

Next, Oakcreek asserts that our decision wrongly determined that Oakcreek could not meet the requirement to obtain HFSI proprietary software based upon the testimony of an HFSI official that HFSI's corporate policy is not to allow competitors such as Oakcreek access to certain HFSI proprietary software, specifically source codes.² Oakcreek asserts that other evidence in the record shows that this policy was not HFSI policy at all. This Oakcreek reconsideration request is based upon a misstatement of the record.

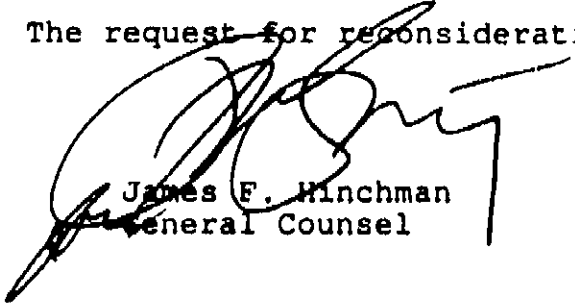
Specifically, Oakcreek asserts that the testimony regarding HFSI's policy was not credible, since HFSI representatives testified of granting access to other companies. While this is true, the HFSI officer testified that access to source codes was granted only in situations involving the test and evaluation of HFSI software (work for which HFSI is ineligible to compete as the manufacturer of the software)

²The source code is the language of the original programmer of a program module, which contains the instructions to be executed by the computer.

or where HFSI had hired firms to do subcontract work for HFSI. Hearing Transcript (Tr.) at 191, 207-208. The HFSI officer testified further that all denials of access involved requests for access to HFSI proprietary software by direct competitors for the same business and that Oakcreek was considered to be a direct competitor in this case. Tr. at 192, 208. There is no evidence in the record that suggests that HFSI has deviated from the policy of not allowing source code access to firms that are competing for the same business for which HFSI is competing where the HFSI source codes could be used.³ Tr. at 191-192. Therefore Oakcreek has presented no evidence that any factual error was made in our prior decision regarding HFSI's source code access policy or Oakcreek's ability to obtain access.

Finally, Oakcreek claims that its ability to obtain access to HFSI's proprietary data should not have been considered because this allegedly involves a matter of copyright infringement, which is within the United States Claims Court's exclusive jurisdiction. Our decision did not address any potential dispute between HFSI and Oakcreek, but only considered the question of whether Oakcreek met the solicitation requirements that it have access to certain HFSI software, a matter clearly within our Office's protest review function. The question of whether HFSI has a cause of action against Oakcreek for copyright infringement is nowhere addressed in our decision.

The request for reconsideration is denied.



James F. Hinchman
General Counsel

³The testimony referenced by Oakcreek concerns no situations where access to source codes was granted to competitors. See all Tr. 206, where, on cross-examination an HFSI official made clear HFSI's very restrictive policy on the release of source codes, as opposed its sale of other HFSI proprietary software.