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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Luhr Brothers, Inc.--Reconsideration

File: B-248423.2

Date: November 9, 1992

S. Leo Arnold, Esq., Ashley, Ashley & Arnold, for the protester.
Daniel C. Sauls, Esq., Steptoe & Johnson, for Great Lakes Dredge & Dock Company, an interested party.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request that the General Accounting Office reconsider portion of earlier decision dismissing as untimely protester's claim that agency held improper discussions with only one bidder is denied where: (1) the record shows that the protester had enough information at the time it filed its initial protest to make this claim; and (2) in any event, our prior decision effectively held that the dialogue between the agency and the low bidder was an appropriate attempt to determine whether the low bidder had the capacity to perform as promised.

DECISION

Luhr Brothers, Inc. requests reconsideration of a portion of our prior decision, Luhr Brothers, Inc., B-248423, Aug. 6, 1992, 92-2 CPD ¶ 88, denying Luhr's protest that the low bid accepted by the Army Corps of Engineers for maintenance dredging of the Ohio and upper Mississippi Rivers was nonresponsive. Luhr does not challenge our decision regarding the responsiveness of the bid (submitted by Great Lakes Dredge & Dock Company), but asks instead that we reconsider our dismissal of a corollary issue--that the agency held improper discussions with Great Lakes--as untimely.

We deny the request for reconsideration.

Luhr's initial protest focused on the Corps's decision to permit Great Lakes to modify information on an equipment schedule appended to the bid schedule. Bidders completed the equipment schedule to identify the specifications of their dredging equipment. Bidders were then required to

compute a production rate based on the capacity of the equipment, and to use that rate to determine the number of hours required to complete the job. After computing the length of the job, bidders were required to bid a price per hour for performing the dredging sought by the solicitation.

Upon receipt of the bids, the Corps concluded that the equipment identified by Great Lakes on its equipment schedule lacked the capacity to dredge at the production rate claimed. After learning of the agency's concerns, Great Lakes agreed to change the configuration of its identified equipment--i.e., the diameter of the dredge's suction pipe--to assure that its equipment dredged at the capacity claimed on the bid schedule.

Since we noted that no term of Great Lakes's bid changed as a result of this change--from bid opening to award, Great Lakes committed to performing the work here at $1,225 per hour, and to do so at a guaranteed production rate of 870 cubic yards per hour--we concluded that the change made to Great Lakes's equipment schedule involved a matter of responsibility, and was properly resolved after bid opening and prior to award. See Haz-Tad, Inc.; Hazeltine Corp.; Tadiran, Ltd., 68 Comp. Gen. 92 (1988), 88-2 CPD ¶ 486.

In our prior decision, we noted that Luhr raised other complaints about the agency's acceptance of Great Lakes's bid in its comments on the agency report, including whether the agency held improper discussions with Great Lakes. We dismissed as untimely Luhr's contention that the agency held improper discussions with Great Lakes because, in our view, Luhr had all the facts it needed to raise this issue at the time it filed its initial protest. In its request for reconsideration, Luhr argues that the record does not support our conclusion that Luhr had the facts it needed to challenge the agency's dialogue with Greac Lakes at the time it filed its initial protest.

To obtain reversal or modification of a decision on reconsideration, the requesting party must convincingly show that our prior decision contains either errors of fact or law, or information not previously considered that warrants its reversal or modification. 4 C.F.R. § 21.12(a) (1992); Gracon Corp.--Recon., B-236603.2, May 24, 1990, 90-1 CPD ¶ 496. For the reasons set forth below, we find that Luhr has not made the required showing here because we continue to believe that Luhr had s. ficient information to raise its challenge when it filed its initial protest.

Luhr states in its request for reconsideration that it did not suspect that discussions may have occurred between the Corps and Great Lakes until Luhr received the agency report prepared in response to its protest. This contention is

inconsistent with Luhr's initial protest filing. Attached to Luhr's initial protest was a March 18, 1992, memorandum from the Corps's Waterways Experimentation Station (WES) to the Corps's Office in Louisville, Kentucky. This memorandum--offered by Luhr with its initial filing as proof that the Great Lakes dredge would not operate at the rate claimed without modification--expressly refers to previous written exchanges between Great Lakes and the Corps.[1]

In addition, Luhr's initial protest included an April 3 letter to the Chief of the Corps's Louisville contracting division from Luhr's Chairman of the Board. In this letter, Luhr state that it noticed that the WES memorandum analyzed Great Lakes's dredge based on structural changes to the dredge. The letter states that Luhr does "not know whether this analysis was based on adjustments proposed by Great Lakes or recommendations to Great Lakes." However, the letter clearly shows that Luhr knew that the Corps and the low bidder were discussing the capacity of the offered dredge, and that the Corps was performing analyses using parameters different from the parameters claimed on the bid equipment sheet. Given this fact, together with the WES memorandum acknowledging exchanges between the agency and Great Lakes, Luhr should have known that the agency and Great Lakes were engaged in a detailed dialogue about the capacity of the dredge--assisted in no small measure by correspondence from Luhr. Since a protest must be filed within 10 days after the basis of protest is known or should have been known, 4 C.F.R. § 21.2(a)(2), this allegation is untimely when first raised in the protester's comments on the agency report. Berkshire Computer Prods., B-246337, Dec. 18, 1991, 91-2 CPD ¶ 564.

We also note that regardless of when Luhr had sufficient knowledge to challenge the exchange between Great Lakes and the Corps, our Office has already decided that this dialogue was about the capacity of the Great Lakes dredge to perform at the production rate offered. Since agencies may only award contracts to responsible offerors, see Federal Acquisition Regulation (FAR) § 9.103, the Corps was required to make this effort to determine whether Great Lakes could

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[1]The Corps's concern about the capacity of the Great Lakes dredge, and the subsequent attempt to ascertain whether the dredge would achieve the production rate claimed, appears to have its origin in a January 27 letter submitted by Luhr challenging Great Lakes's ability to perform as promised. In addition, it is clear that Luhr itself engaged in numerous exchanges with the Corps in an attempt to persuade the agency to reject the Great Lakes bid. These include letters dated March 31 and April 2, questioning any analysis accepting Great Lakes's ability to perform.

perform as required. Where there is a question about whether the bidder's equipment has the capacity claimed--and here that question was raised by Luhr--the use of reports, analyses and supplemental information is not only appropriate, but is expressly anticipated by FAR § 9.105-1.

By concluding in our prior decision that the information provided on the equipment schedule pertained to a bidder's responsibility, not bid responsiveness, we also effectively resolved the issue of whether the Corps engaged in impermissible discussions with only one offeror. In our view, the exchanges Luhr claims were improper discussions were, in fact, appropriate and reasonable attempts to address agency concerns about Great Lakes's ability to perform. Therefore, whether or not Luhr raised a timely challenge to the alleged discussions, Luhr's claim that the agency engaged in impermissible discussions has no merit.

The request for reconsideration is denied.

Ronald Berger

for James F. Hinchman
General Counsel