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Van Schaik

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

100#1910

Decision

Matter of: Moon Engineering Co., Inc.--Reconsideration

File: B-251698.6

Date: October 19, 1993

Terence Murphy, Esq., and James H. Shoemaker, Esq., Kaufman & Canoles, for Moon Engineering Co., Inc., the interested party.
John Van Schaik, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration of prior decision is denied where request contains no facts or legal grounds warranting reversal but merely restates arguments raised earlier and disagrees with the original decision.

DECISION

Moon Engineering Co., Inc. requests reconsideration of our decision The Jonathan Corp.; Metro Mach. Corp., B-251698.3; B-251698.4, May 17, 1993, 93-2 CPD ¶ ___, in which we sustained protests against the award of a contract to Moon under request for proposals (RFP) No. N00024-93-R-8500, issued by the Department of the Navy for maintenance of three Navy ships. Moon argues that our prior decision erred in concluding that the Navy was required to conduct discussions and wrongly concluded that the protesters were prejudiced as a result of the Navy's cost evaluation or the failure to hold discussions.

We deny the request for reconsideration.

The solicitation contemplated award of a cost-plus-award-fee contract to provide all materials, services and facilities necessary to perform phased maintenance on three ships, with award to be made to the offeror whose proposal was most advantageous to the government, considering cost and other factors. Offerors were instructed to base their cost proposals on a notional work package of 100 items constituting a standardized list of repairs and alterations, including drydock work. The solicitation also directed offerors to provide detail in their cost proposals on the number of direct labor hours and the cost of materials needed to perform each of these 100 work items.

In evaluating cost proposals, the Navy calculated a labor hour and material cost estimate for each offeror using that offeror's proposed costs for each of the 100 work items in the notional package. In doing so, the Navy adjusted proposed costs with a computer program which accepted an offeror's labor hour and material cost estimates within a predetermined percentage range of the government's estimate, but rejected any such estimate falling outside the range.[1] Where an offeror's estimate for labor or material on one of the 100 items fell outside the range, the Navy approximately "split the difference" between the government's estimate and the offeror's proposed costs.[2] This number was used to calculate an evaluated labor hour or material cost estimate for that item. The Navy then totaled all of the adjusted labor hour and material cost estimates for the 100 work items in the notional work package, together with other costs and adjustments, to calculate an overall evaluated cost to the government for each offeror. After deciding that all offerors were technically equal and that discussions were not necessary, the Navy awarded the contract to Moon as the offeror with the lowest evaluated cost.

Our prior decision sustained the protest on two grounds. First, we concluded that the method used by the Navy to analyze the realism of proposed labor hour and material costs was mechanical and did not satisfy the requirement for an independent analysis of each offeror's proposed costs. Second, we concluded that the Navy unreasonably failed to hold discussions with offerors concerning their cost

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[1]The amount of the predetermined percentage range used by the Navy will not be disclosed herein, since the Navy has explained that the range may play a role in the reevaluation and has requested that the specific figure not be disclosed.

[2]Our description of the Navy's action as approximately splitting the difference between the government estimate and offerors' proposed costs is based on the Navy description of its approach, set forth below:

> "One half of the difference between the [g]overnment estimate and the offeror's proposed cost [will be] added to (or subtracted from) the offeror's estimate after first reducing or increasing the [g]overnment estimate by [the predetermined percentage] in the direction of the difference (reduce the difference) in order to establish projected cost and adjustment dollars."

proposals. Accordingly, we recommended that the Navy reevaluate the cost proposals in order to reasonably determine the extent to which each offeror's proposed costs represent what the contract should cost for that offeror to perform. In addition, we recommended that the agency conduct discussions with the offerors concerning their cost proposals, and request best and final offers (BAFO) from all offerors in the competitive range.

In its reconsideration request, Moon essentially raises two arguments. First, it argues that we improperly substituted our judgment for that of the contracting officer concerning the need to conduct discussions. Second, it argues that neither of the protesters were prejudiced by the Navy's cost realism review, or by its failure to conduct discussions.

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) (1993). Repetition of arguments made during the original protest or mere disagreement with our decision does not meet this standard. R.E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274. Although the discussion below addresses Moon's contentions in some detail, we ultimately conclude that Moon's reconsideration request simply repeats arguments made during the original protest, and disagrees with our decision.

Requirement to Conduct Discussions

Our prior decision sustained the protests on the grounds that it was unreasonable for the Navy to fail to hold discussions concerning the cost proposals given the nature, magnitude, and method of the adjustments made to each offeror's costs. We also concluded that discussions should have been held because of the disparity between the cost estimates of the government and the offerors, and the contents of the unused discussion questions prepared by the Navy. In deciding that discussions should have been held, we noted that although contracting officers have discretion about whether or not to hold discussions, that discretion is not unfettered. Rather, the decision to hold discussions must be reasonably based on the particular circumstances of the procurement.

Moon's request for reconsideration repeats the argument, which it and the Navy made in response to the protests, that a contracting officer has discretion not to conduct discussions, yet Moon provides no authority for the proposition that the contracting officer's discretion in this area is unlimited and not reviewable by this Office. Thus, Moon's

arguments in this regard provide no basis for reconsideration.

Moon also argues that the two factors cited in our decision do not support our conclusion that discussions were required--i.e., the decision's conclusion that discussions were warranted by the disparity between the estimates of the government and the offerors, and by the content of the unused discussion questions prepared by the Navy. According to Moon, where a solicitation states an agency's intention to award without discussions, a wide disparity between the proposed costs of offerors and government estimates, per se, does not require that an agency must hold discussions. Moon argues that, in earlier cases, our Office relied on the disparity between government and contractor estimates as a factor only in situations where solicitations stated that the agency intended to conduct discussions. See Kinton, Inc., 67 Comp. Gen. 226 (1988), 88-1 CPD ¶ 112; Teledyne Lewisburg; Oklahoma Aerotronics, Inc., B-183704, Oct. 10, 1975, 75-2 CPD ¶ 228.

As we concluded in our original decision, even where an RFP states that an agency does not intend to conduct discussions, a contracting officer should consider, among other factors, whether a large disparity between the proposed costs of the offerors and the government estimate makes discussions necessary. Moon's disagreement with this conclusion provides no basis for reconsideration.[3]

Moon also argues that the preparation of discussion questions does not support our conclusion that discussions should have been held. According to Moon, the fact that our review established that many of the questions prepared by the Navy might have generated answers which could significantly change the nature and extent of the cost adjustments made by the Navy--and therefore, the outcome of the procurement--is not a valid basis for finding that

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[3]In this regard, Moon also suggests that a recent change to the requirement to hold discussions enacted for procurements covered by Title 10 of the United States Code somehow precludes our Office from concluding that it was unreasonable for the agency to fail to hold discussions here. We find nothing in the language or legislative history of this recent change--which deleted a requirement that award based on initial proposals must be made to the lowest-priced offeror, 10 U.S.C. § 2305(b)(4) as amended by the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 802(d)(3)(A), 104 Stat. 1485, 1589 (1990)--to establish that an agency need not conduct discussions even though it otherwise has no reasonable basis for awarding a contract.

discussions were required. In Moon's view, any question, in theory, could produce an answer which could change the outcome of an evaluation.

As our original decision explained in detail, the Navy's failure to conduct an independent review of each offeror's proposed costs gave it no reasonable basis to decide which offeror would perform the contract at the lowest cost to the government. Without such independent review, the cost evaluation performed by the Navy provided little or no useful information concerning whether an offeror would be able to perform the notional work items using its proposed labor hours or material costs. Instead, the Navy mechanically adjusted proposed costs that were above or below the government's estimate without regard to the offeror's unique approach, capabilities, or experience. Under these circumstances, we concluded that if the Navy had used its discussion questions--addressing numerous contractor cost estimates which were ultimately adjusted by large amounts--the agency would have had a better understanding of what it would cost each offeror to perform the contract, and would have had a reasonable basis to determine which offeror proposed the lowest cost. Moon's disagreement with that conclusion provides no basis for reconsideration of our decision.

Prejudice

Moon's second contention is that the protesters were not prejudiced by the Navy's cost evaluation, or by the Navy's failure to conduct discussions. According to Moon, our prior decision should be reversed because there was no factual determination of prejudice and because we improperly concluded that a reasonable possibility of prejudice is sufficient to sustain a protest. For example, Moon argues that before sustaining the protest, our prior decision should have concluded that the relative cost positions of Metro or Jonathan would improve under a new evaluation. In addition, Moon argues that the protesters were not prejudiced, because in a reevaluation, Moon's evaluated cost could decrease--thus improving its competitive position compared to the other offerors.

Preliminarily, we note that Moon's reconsideration request does not challenge our conclusions that the Navy's mechanical method of analyzing proposed costs led to anomalous results in the evaluation of both the protesters and the awardee, or that the Navy's approach lacked any rational justification for the adjusted cost estimates actually used for each offeror. Nor does Moon challenge our conclusion that the Navy failed to perform an independent analysis of each offeror's cost proposal based upon its particular approach, personnel and other circumstances. Rather, Moon

argues that our decision erred by failing to sufficiently describe how each of the protesters was prejudiced.

As explained in our original decision, the Navy's mechanical use of the "split the difference" formula for all contractor estimates which were outside of the predetermined range led to anomalous results in the cost evaluation. For example, this method was used on numerous "0" labor hour and "0" material cost estimates, ignoring the possibility--in fact, the likelihood--that labor hours or material costs for those work items were accounted for elsewhere in the proposal, such as in overhead. We also noted that the Navy's cost analyst applied the "split the difference" formula to all contractor estimates outside of the predetermined percentage range.

Splitting the difference between an offeror's proposed labor hours or cost and a government estimate does not provide a justification for the resulting labor hour or cost estimate. There is no rational basis to conclude that such an estimate in any way reflects a reasoned assessment of the costs a contractor is likely to incur in performing a particular work item. Given the lack of a rational basis for substituting government estimates for contractor estimates--especially where those estimates were the result of a mechanical blending of the two--we concluded that the agency's cost evaluation did not rise to the level of an independent analysis of each offeror's proposal.

Where an agency clearly violates procurement requirements, we will resolve any doubts concerning the prejudicial effect of the agency's action in favor of the protester, and that a reasonable possibility of prejudice is a sufficient basis for sustaining a protest. In this case, since the Navy's cost evaluation did not satisfy the requirement for an independent analysis of each offeror's cost proposal, see FAR § 15.605(d); United Int'l Eng'g, Inc.; Morrison Knudsen-Dynamics Research; PRC Inc.; Science Applications Int'l Corp., 71 Comp. Gen. 177 (1992), 92-1 CPD ¶ 122, we concluded that there was a reasonable possibility of prejudice to both protesters.

Contrary to Moon's contentions, when there is no basis upon which to speculate about the results of a proper cost realism analysis, or to discern the impact of such an analysis on each firm's chance for award, there is no requirement that a protester show it would receive award in a reevaluation, or show that the awardee would not.[4] The

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[4]See generally Trijicon, Inc., 71 Comp. Gen. 41 (1991), 91-2 CPD ¶ 375, where an agency's evaluation abandoned the stated
(continued...)

purpose of the government's evaluation of proposed costs is to determine what it would cost each offeror to perform. Speculation concerning the results of such an analysis is no substitute for the required analysis. We concluded in our original decision that, in the absence of the required review of proposed costs, there was a reasonable possibility of prejudice to the protesters and nothing in Moon's request for reconsideration has demonstrated any error in that conclusion.[5]

Moon also repeats its argument that the protesters were not prejudiced because the relative position of Moon, Jonathan and Metro did not change as a result of the agency's actions. Moon also claims that our Office improperly concluded that only the two protesters would benefit from discussions, or from a reasonable cost evaluation. According to Moon, since all offerors were subject to the same mechanical cost analysis, and since no offeror received discussions, the protesters were no more prejudiced than Moon.

Moon's arguments again ignore the requirements of FAR 15.605(d). Agencies are charged with evaluating an offeror's proposed costs for the very reason that such costs are not dispositive: regardless of the costs proposed, the award of a cost reimbursement contract binds the government to pay the contractor all actual, allowable, and properly allocable costs. FAR § 15.605(d). Our prior decision simply declined to speculate--as Moon and the Navy argued that we should--that all of the offerors would benefit equally from discussions, resulting in no change in the

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[4](...continued)
RFP evaluation scheme seeking technical merit, and instead awarded all technically acceptable proposals with a perfect score, no information was available in the evaluation materials to support a conclusion that one proposal was more advantageous to the government than any other proposal, or that an offeror was not prejudiced by the agency's evaluation.

[5]Likewise, Moon's contention that Jonathan was not prejudiced because of Jonathan's relative standing compared to other offerors even before the Navy performed its cost evaluation again requires us to speculate about the results of a rational evaluation of each offeror's cost proposals. Given that all proposals were found to be technically equal and that award was made to the low cost offeror, we disagreed with the contention that neither of the protesters would have had a chance for award had the agency conducted a rational evaluation of proposed labor hours and material costs.

relative standing of the protesters. Moon's repetition of these arguments, and its disagreement with our conclusion, provides no basis for reconsideration.[6]

Finally, Moon argues that we should not have recommended that the Navy conduct discussions and request BAFOs after reevaluating the proposals. According to Moon, after the Navy reevaluates the propcsals pursuant to our recommendation, it is possible "that discussions will not be necessary consistent with the provision in the RFP that the Navy intends to award on initial proposals."

Our original decision was based on the assumption that the Navy would reevaluate the proposals previously submitted and that, based on those proposals, discussions would be necessary to assure a reasonable cost evaluation. However, in response to our recommendation, the Navy amended the RFP to change the evaluation scheme and requested BAFOs. Under the circumstances, our original recommendation should not be

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[6]We note that Moon's argument that we erroneously concluded that there was no written record of the cost analyst's judgment as to the sufficiency of the support of the offerors labor hour and material cost estimates mischaracterizes our decision. According to Moon, the record "include[s] the contemporaneous written record of the cost analyst's judgments." Our decision explained that, in spite of the Navy's assertion that the cost analyst applied the "split the difference" formula to all contractor estimates outside of the predetermined percentage range on which she determined that the "[o]fferor's estimate is well supported with an equal probability of [g]overnment or [o]fferor being correct," there was no written record of the cost analyst's judgments on this issue. In other words, although the Navy insisted that its cost analyst only split the difference upon concluding that the contractor cost estimate was as likely to be correct as the government estimate, there was no record of these claimed individualized judgments. The cost analyst confirmed this fact at the hearing on this protest. Hearing Transcript at 36 through 39.

understood by the Navy to mandate that discussions be held unless discussions are required in order to reasonably determine which offeror would perform at the lowest overall cost to the government.

The request for reconsideration is denied.

James F. Hinchman
General Counsel