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Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Digital Systems Group, Inc.--Reconsideration

File: B-256422.2; B-256521.2

Date: October 28, 1994

Robert G. Fryling, Esq., and Eric H. Vance, Esq., Blank, Rome, Comisky & McCauley, for the protester.
Nilza F. Velazquez, Esq., Department of Transportation, and Seth Binstock, Esq., General Services Administration, for the agencies.
Paul E. Jordan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration is denied where protester neither shows that prior decision denying its protests contained errors of fact or law, nor presents information not previously considered that warrants reversal or modification of our decision.

DECISION

Digital Systems Group, Inc. (DSG), a small business concern, requests reconsideration of our decision Digital Sys. Group, Inc., B-256422; B-256521, June 3, 1994, 94-1 CPD ¶ 344, in which we denied its protests against the issuing agencies' failure to consider setting aside letters of interest (LOI) issued by the United States Coast Guard (solicitation No. DTCG40-94-R-10004), and the Overseas Private Investment Corporation (OPIC) (solicitation No. OPIC-94-R-1001), for computer software and support services to be ordered under the Financial Management Software Systems mandatory Multiple Award Schedule (FMSS Schedule).

We deny the request for reconsideration.

Prior to issuing the latest FMSS Schedule amendment on an unrestricted basis, the General Services Administration (GSA) considered whether to set aside the FMSS Schedule for small businesses. GSA concluded that it was not feasible to do so, and the Small Business Administration concurred. In its protests, DSG contended that the decision whether to set aside should be made by the user agency when issuing an LOI and not by GSA. DSG argued in part that since a user agency

was free to include its own requirements for the computer software and support services, it was free to restrict the acquisition to exclusive small business participation.

In our decision denying the protests, we concluded that the question of whether to set aside an acquisition was for GSA's determination. We noted that section H.12 (erroneously designated as "H.21" in our prior decision), when read in conjunction with applicable provisions of the Federal Information Resources Management Regulation, actually precluded setting aside an acquisition at the user agency level. In this regard, we observed that section H.12 was intended not only to require that all schedule contractors be apprised of agency requirements, but that all contractors also be allowed to submit proposals for meeting the agency's requirements. We also found:

> "While section [H.12] specifically provides for user agencies to 'further delineate the standard FMSS functional requirement' and 'specify additional requirements that are not included in the current specifications,' such requirements still are covered by the FMSS Schedule contract terms. Thus, while this provision puts FMSS Schedule contractors on notice that user agencies may have additional technical requirements, nothing in the provision implies that any schedule contractors may be excluded from competition under individual LOIs."

Subsequent to that decision, the Department of Agriculture, a user agency with a pending LOI, denied DSG's agency-level protest of allegedly restrictive LOI provisions. Agriculture explained to DSG that "nothing in either the procedures or contract terms contemplates full participation by all FMSS Schedule contractors in each LOI competition." Agriculture's position ostensibly was based on advice from GSA.

In its request for reconsideration, DSG argues that it now appears that GSA has taken inconsistent positions on the subject of a user agency's ability to exclude FMSS Schedule contractors under an LOI. In DSG's view, GSA's position before our Office had been that all companies had to have an opportunity to submit a proposal, which is inconsistent with the Agriculture/GSA statement that "full participation" in each competition was not contemplated. DSG argues that if GSA's new position is to be accepted, our prior decision is incorrect, and DSG is entitled to reconsideration to resolve the matter. We find no inconsistency in GSA's positions.

Our decision dealt with the narrow issue of whether user agencies could exclude FMSS Schedule contractors on the basis of size status. We concluded that user agencies could not so exclude contractors because GSA had determined that a set-aside was not warranted, and the FMSS schedule contract did not otherwise provide for agencies to set aside their LOIs. The above-quoted language from our decision regarding exclusion was directed at set-asides alone. It did not mean that we believed that contractors could not be "excluded" as the result of a user agency's specification of requirements which an offeror could not meet. As we noted in the same passage, section H.12 specifically provides for agencies to "specify additional requirements."[1]

In this regard, we view the two types of restrictions as different in kind. A small business set-aside is designed to assist small businesses in obtaining government contracts and excludes large businesses from the competition. A restriction based on the agency's requirements is designed to assure that the agency's minimum needs are satisfied and adversely affects only those contractors unable to meet those requirements. There is nothing in the FMSS Schedule contract that requires agencies to tailor their requirements to ensure that all Schedule contractors will be able to meet the requirements. A Schedule contractor unable to meet all the requirements specified by a user agency can attempt to meet them through product improvement/development or subcontracting/teaming with a more experienced concern. Conversely, a large business cannot meet a small business size restriction and thus is automatically excluded by such a restriction. As we stated in our prior decision, "all FMSS Schedule contractors are to be provided an opportunity to compete for the agency's requirements." However, being entitled to the opportunity to compete does not mean that an offeror must automatically be successful in meeting the agency's requirements.

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

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[1]Although we referred to "technical" requirements in the quoted passage, in its comments on the reconsideration request, GSA correctly notes that section H.12 does not specify that an agency's additional requirements are restricted to "technical" requirements. Our Office is currently considering three bid protests by DSG which concern the extent to which additional requirements can be properly included in an LOI by a user agency.

reversal or modification of our decision. 4 C.F.R. § 21.12(a) (1994). Since there is no inconsistency in the positions taken by GSA, and thus no information which we failed to previously consider, we have no basis to reconsider our prior decision.

The request for reconsideration is denied.

Robert P. Murphy
Acting General Counsel