



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Cedar Valley Corp.--Reconsideration

**File:** B-256556.2

**Date:** December 12, 1994

Albert B. Krachman, Esq., Bracewell & Patterson, for the protester.

Adam Vodraska, Esq., Guy R. Pietrovito, Esq., and James Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Request for reconsideration of decision denying protest is denied where the protester does not show that the decision contained any errors of fact or law or present information not previously considered that warrants reversal or modification.

### DECISION

Cedar Valley Corporation requests reconsideration of our decision in Cedar Valley Corp., B-256556, July 5, 1994, 94-2 CPD ¶ 7, in which we denied its protest of the U.S. Army Corps of Engineers' award of a contract to Kiewit Western Company under invitation for bids (IFB) No. DACA45-94-B-0003 for runway replacement and lighting at Offutt Air Force Base, Nebraska.

We deny the request for reconsideration.

The IFB provided for the evaluation of bids under the Corps's "evaluated total cost method" (ETCM), in which factors representing the potential for delays and changes in the course of the contract performance, as well as projected costs to the government involved in closing and moving the air base operations, were added to the bidders' prices. Along with a single lump-sum bid price, the IFB required each bidder to state the shortest practicable performance period it would take to complete the entire contract. The IFB did not state a required or estimated performance period, but bidders were informed of the dates the contractor would have access to the runway. The evaluated cost total for each bid submitted was computed according to the IFB formula based upon the bid price, the bidder's proposed performance period, and the IFB's stated cost

evaluation factors. Award was made to the bidder whose evaluated cost total was the lowest but the amount of the contract was fixed at the price bid.

Although Cedar Valley's bid price was lower than Kiewit's, the Corps made award to Kiewit because it offered the lowest evaluated total cost based on a proposed performance period 100 days shorter than that bid by Cedar Valley. Cedar Valley protested that Kiewit's proposed performance period was not practicable as required by the IFB; that award to Kiewit at a bid price higher than Cedar Valley's constituted expediting in violation of the Military Construction Codification Act, 10 U.S.C. § 2858 (1988); and that Kiewit failed to provide a bid bond extension.

From our review of the record, including the parties' extensive argument and testimony from a hearing conducted in this matter, we found that the Corps reasonably determined that Kiewit had proposed a practicable performance period and that award to Kiewit would result in the lowest total cost to the government. We also found reasonable the Corps's position that the statutory prohibition against expediting is inapplicable to performance periods proposed under the ETCM. Finally, we found that the bid bond on its face bound bidders' sureties for up to an additional 60 days if bids were extended and there was thus no need for Kiewit to obtain a separate extension of its bid bond.

Cedar Valley contends that we erred as a matter of law by failing to address its protest argument that the Corps did not perform a meaningful cost estimate as required by Federal Acquisition Regulation (FAR) § 36.203. This regulation provides that for all proposed construction contracts, an independent government estimate shall be prepared in as much detail as though the government were competing for award. FAR § 36.203(a). Cedar Valley argued that the Corps could not determine the practicability of Kiewit's proposed performance schedule without reference to a proper government cost estimate.

Our Bid Protest Regulations require a party requesting reconsideration to show that our prior decision contains 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) (1994). Here, Cedar Valley has failed to demonstrate errors of law or fact that warrant reversal of our prior decision. While it is true we did not specifically mention Cedar Valley's argument concerning the Corps's use of its cost estimate, this argument was considered in reaching our decision and, as explained below, the fact that the Corps did not reference its estimate in determining the practicability of Kiewit's

proposed performance period provided no basis to find the Corps's determination unreasonable.

In accordance with FAR § 36.203, the Corps prepared a cost estimate for its proposed construction contract. In its comments on the agency's report, the protester noted that "the Corps' effort was so detailed that its estimate matched with [Cedar Valley's] 270 day estimate" and that the Corps's "estimate is backed by substantial computer analysis, breaking down functions to man hour requirements." Our own review of the record showed that the government estimate was prepared in sufficient detail to meet the requirements of FAR § 36.203.

The protester complained that the Corps failed to use this estimate in evaluating Kiewit's proposed performance time. The Corps's hearing testimony explained that the government cost estimator for this project was not in a position to take bidders' resources into account when preparing the government estimate and that the estimate was formulated based on what an average contractor could be expected to accomplish; the resources available to each bidder for this project would vary, depending on a bidder's schedule, expertise, or equipment. Under the ETCM, the resources available to a bidder, as well as other factors such as a bidder's innovative contract approach, are key to accomplishing the project in the shortest practicable time or determining whether a proposed performance period was practicable. We found that the Corps reasonably determined that Kiewit, considering Kiewit's approach to performing the contract, had the necessary resources and financial capability to perform within its proposed performance period and that the proposed performance period was feasible. We also pointed out that even if Kiewit did not perform within the period promised, contractual liquidated damages would protect the government from incurring additional costs. Thus, the Corps's failure to reference the cost estimate in determining the practicability of Kiewit's performance period was essentially irrelevant in these circumstances as the agency's evaluation of the Kiewit bid was otherwise supportable.

In this regard, we find no requirement in the FAR or elsewhere that the government estimate be the determining factor in assessing the practicability of a bidder's

proposed performance time in a construction contract. Re  
Paulsen Constr. Co., B-231393, Sept. 13, 1988, 88-2 CPD  
¶ 230, recon. denied, B-231393.2, Jan. 24, 1989, 89-1 CPD  
¶ 63 (performance period proposed by bidder compared to that  
of government estimate).

The request for reconsideration is denied.

*Robert P. Murphy*  
for Robert P. Murphy  
General Counsel