15-859

DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-190983 DATE: January 12, 1981

MATTER OF: KET, Inc.--Request for Reconsideration

DIGEST:

1. Request for reconsideration of decision holding that contracting officer's decision to consider defective proposal in competitive range was not unreasonable is denied where requester has merely repeated arguments made in original protest.

2. Prior decision not to recommend corrective action where contracting agency relaxed mandatory requirement for successful offeror without providing protester opportunity to submit offer on relaxed basis is affirmed, since there was about $8 million difference between two offers and it is not apparent that protester was competitively prejudiced by procurement deficiency.

3. Prior decision holding that agency had tried to comply with Federal policy of attempting to secure maximum practical competition in negotiated procurements is affirmed where requester has presented no information which was not previously considered.

4. Prior decision that protest alleging that contracting agency exceeded terms of "Delegation of Procurement Authority" was untimely is affirmed. Issue is untimely, since it was known to protester upon receipt of agency report, but was not filed until more than 10 working days later. Grounds for protest raised after initial timely protest must independently satisfy timeliness requirements.

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5. Request for conference on request for reconsideration of decision is denied, since Bid Protest Procedures do not explicitly provide for conference on reconsideration, protester had conference on merits of original protest, and matter can be resolved without conference.

KET, Inc., requests reconsideration of our decision denying its protest against the Internal Revenue Service's (IRS) award of a contract to Sperry-Univac for installation of data communications processing systems at the IRS National Office Computer Facility and at each of the IRS regional service centers pursuant to request for proposals (RFP) No. 77-28. KET, Inc., B-190983, December 21, 1979, 79-2 CPD 429.

KET argues that our decision on its protest contained five errors of fact or law which merit reversal or modification of that decision. Specifically, KET contends that:

"(1) GAO erroneously concluded that the IRS had a reasonable basis for including the Sperry-Univac initial and revised proposal in the competitive range;

"(2) GAO applied an improper standard in deciding not to recommend remedial relief based on the IRS improper procurement actions;

"(3) the GAO determination finding that this procurement was based on adequate competition failed to consider the entire record developed in this protest;

"(4) the GAO decision dismissing the KET comment regarding the IRS Delegation of Procurement Authority was based on an improper characterization of the KET argument; and

"(5) the GAO determination regarding the propriety of recommending remedial relief failed to consider the alternate forms of remedial relief requested by KET."

COMPETITIVE RANGE DETERMINATION (Issue 1)

KET reasserts the argument made in its original protest that both the initial and revised Sperry-Univac proposals were substantially deficient and technically unacceptable because, among other things, they did not meet the RFP mandatory requirements regarding detection and automatic recovery from power failure and minimum acceptable message processing capability. KET concludes that the contracting officer's decision to include Sperry-Univac in the competitive range was without a reasonable basis since there was no possibility that the Sperry-Univac proposal could be made to conform to the mandatory requirements of the RFP. In our December 21, 1979, decision we stated that there was nothing in the record to show that the contracting officer's decision to include Sperry-Univac's proposal in the competitive range was unreasonable, especially since one of the fundamental purposes of negotiated procurements is to determine whether deficient proposals are reasonably subject to being made acceptable through discussions. KET contends that our holding on this issue was erroneous and states that "this GAO conclusion is based on a failure to compare the initial and revised Sperry proposals against the RFP requirements."

KET's argument on this point is merely a repetition of arguments previously made by KET and carefully considered by our Office. In our December 21, 1979, decision, we held that, although the original and revised Sperry-Univac proposals may have been deficient in some areas, there was no evidence to justify finding unreasonable the IRS evaluators' belief that Sperry-Univac could modify its proposal further during discussions and thereby make it conform to all mandatory RFP requirements. Moreover, we must point out that, contrary to KET's belief, our holding on this issue was made after GAO technical personnel had reviewed both the initial and revised Sperry-Univac proposals and compared them

to the RFP requirements. Since KET has provided no information on this issue which was not previously considered nor shown any errors of fact or law in our previous decision, we do not believe that reversal or modification of our prior holding on this point is warranted. See 4 C.F.R. § 20.9(a) (1980).

GAO'S FAILURE TO RECOMMEND REMEDIAL RELIEF (Issues 2 and 5)

Issues 2 and 5 in KET's request for reconsideration are so closely related that we will deal with them together. Essentially, KET takes issue with our failure to recommend any form of corrective action in the December 21, 1979, decision.

In our prior decision, we found that, although the RFP's mandatory requirements had indicated that the computer system proposed must provide for automatic recovery in the event of power failure, the award was made to Sperry-Univac even though it had offered a system which was merely rapid but not automatic. We agreed with KET that the Sperry-Univac revisions made during discussions had not cured this deficiency in its initial proposal. We concluded that what the IRS was really looking for was a fast, rather than automatic, system. We held that award to Sperry-Univac based on a proposed system requiring operator intervention was improper in view of the express requirement of the RFP for an automatic system. We further indicated that, once IRS contracting officials determined that something less than an automatic recovery system would serve IRS's needs, the contracting officer should have issued an amendment incorporating the relaxed requirement into the RFP. In spite of the above findings, we decided not to recommend any form of corrective action because: (1) the Sperry-Univac system appeared to be adequate to serve the IRS's actual needs and (2) it did not appear from the record that KET would have been able to lower its price sufficiently to be price competitive with Sperry-Univac even if it had been informed of the relaxation of the mandatory requirement relating to recovery from power failure.

In view of our finding that the IRS relaxed a mandatory requirement without amending the RFP and giving KET notification of the new requirement, KET

believes we are bound to recommend some form of corrective action. In support of this position, KET has cited a number of court cases, one grant case issued by the Environmental Protection Agency, and several decisions previously issued by this Office. Moreover, KET has supplemented its request for reconsideration with an affidavit from its president which states that KET would have offered a less sophisticated, less costly system if it had been told of the actual needs of the IRS.

Generally, the cases cited by KET support the proposition that, where a procuring agency has improperly relaxed its requirements to reflect its actual minimum needs without communicating the new requirements to all offerors by amending the solicitation, the proper remedial action is to resolicit using the corrected specifications or, at least, to reopen negotiations based on the relaxed specifications with those firms which had made offers under the original solicitation. In addition, several of these cases support KET's argument that the only way to determine if an offeror could have lowered its price had an amendment stating the new specifications been issued is to allow that offeror to make an offer based upon the new specifications during the reopened negotiations or under the resolicitation.

Our December 21, 1979, decision on KET's protest was not in any way meant as a disavowal of these principles. However, every protest necessitates an independent review and, before determining if corrective action is appropriate in a particular case, we must make a determination whether it is in the Government's best interest. In determining the Government's best interest, many factors are considered by our Office, such as the seriousness of the procurement deficiency, the degree of prejudice to other offerors or the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the Government, the urgency of the procurement, and the impact on the user agency's mission. See Honeywell Information Systems, Inc., 56 Comp. Gen. 505 (1977), 77-1 CPD 256.

Our review of all the circumstances relating to the present procurement led us to a determination

that no corrective action should be recommended in spite of the improper acitons of the IRS. We determined that it was extremely unlikely that KET had been competitively prejudiced by not knowing of the relaxation of the IRS's requirements. We believed that, in the unique circumstances of this procurement, where the KET proposal was evaluated at approximately $15 million and the Sperry-Univac proposal was evaluated at approximately $7 million, there was virtually no possibility that KET would have been able to be competitive with Sperry-Univac even if KET had known that the automatic recovery feature was not mandatory. We noted in the prior decision that KET had not argued that it would have offered something else had it known the actual needs of the IRS. KET has now supplied a statement from its president that it would have offered a lower priced system had it known the new requirements. We note that, even now, KET does not argue that it could have modified its proposal and thereby lowered its price sufficiently to have won the competition with Sperry-Univac.

We also point out that, while we do recommend corrective action in appropriate cases, in determining whether a particular protest is appropriate for such recommendation we have, in the past, looked at whether the procurement deficiency resulted in competitive prejudice to the protester. If the price differential has been so great that we believed, as in the present protest, that it was reasonably clear that the protester would not have been in line for award even if the procurement had not been defective, we have not recommended remedial relief. Where it cannot be said that the protesting party was unfairly deprived of a contract, we will not generally disturb an ongoing procurement and a contractual relationship between the contracting agency and another party which did not contribute to or may not have been aware of the agency's improper actions. See, for example, Data 100 Corporation - Reconsideration, B-185864, October 21, 1976, 76-2 CPD 354. See, also, Parkson Corporation, B-187101, February 11, 1977, 77-1 CPD 103. In essence then, we believe that prejudice is an essential part of a protest and it is incumbent upon a protester to show how it was prejudiced if corrective action is requested. See Honeywell Information Systems, Inc., B-191212, July 14, 1978, 78-2 CPD 39.

In view of the above, we do not believe that reversal or modification of our December 21, 1979, decision is warranted on this point.

ADEQUACY OF COMPETITION (Issue 3)

In our earlier decision on this protest, we had held that, even though only two proposals were actually received in response to this IRS solicitation, we believed the IRS had tried to comply with the Federal policy of attempting to secure maximum practical competition in negotiated procurements. KET argues that we erred in making this determination. Essentially, KET argues that our determination should have taken into account that offerors were not treated equally in view of our finding that IRS had relaxed a mandatory requirement without issuing an amendment.

KET has provided no information which was not previously considered by our Office on this point. Moreover, we do not believe that our determination that the IRS had attempted to secure maximum practical competition has been shown to be legally in error. KET's argument that the competition was unfair was, in effect, sustained in our earlier decision even though we did not believe corrective action should be recommended. Accordingly, we do not believe this argument merits a reversal or modification of our prior decision.

DELEGATION OF PROCUREMENT AUTHORITY (Issue 4)

KET had protested that the IRS had exceeded the terms of the "Delegation of Procurement Authority" issued to the IRS by the General Services Administration. We held that since KET knew this basis of protest upon receipt of a copy of the "Delegation of Procurement Authority" with the IRS report on July 6, 1978, but had not filed this issue of protest until July 24, 1978, this issue was untimely filed under section 20.2(b)(2) of our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(2) (1980), which requires filing within 10 days after the basis for protest is known. KET now argues that this issue was timely because: (1) it was submitted with KET's comments on the agency report which were timely filed,

since KET had requested and been granted an extension to file its comments by the GAO attorney and (2) this was not a new issue but merely a response to the IRS report which stated that the IRS award to Sperry-Univac was in accordance with all applicable procurement regulations.

Where, as here, a protester initially files a timely protest and later raises a new and independent ground of protest, the later-raised ground of protest must independently satisfy the timeliness rules of our Bid Protest Procedures. See James G. Biddle Company, B-196394, February 13, 1980, 80-1 CPD 129. Since KET knew this basis for protest upon receipt of the IRS report, KET had to file this issue within 10 working days of its receipt of that report. When KET's request for an extension of its time to comment was granted, that did not serve as an extension of KET's time for filing new issues. Cf. Holmes and Narver Inc., B-196832, February 14, 1980, 80-1 CPD 134, wherein we held that the GAO attorney might have misled the protester when he requested parties not to comment on the agency report until after the conference. Moreover, even though KET tries to characterize this issue as having been raised by the IRS in its report, we do not agree. The IRS was merely defending its position on the issues initially raised by KET when it stated that it had abided by all procurement regulations. The burden was clearly on KET to raise this new and independent ground for protest in a timely fashion. Thus, this argument does not give us any reason to modify or reverse our prior decision.

CONFERENCE REQUEST

We note that, in its request for reconsideration, KET requested a conference. Our Bid Protest Procedures do not explicitly provide for a conference in these circumstances. 4 C.F.R. § 20.9 (1980). We believe a request for a conference should be granted only where the reconsideration request cannot be resolved without a conference. Serve-Air, Inc.--Reconsideration, 58 Comp. Gen. 362 (1979), 79-1 CPD 212. In the present case, KET had a conference on the merits of its protest before our prior decision was issued. In our judgment, another conference would serve no useful purpose.

CONCLUSION

Our prior decision in this protest is affirmed.

Milton J. Socolar

For the Comptroller General
of the United States