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

91-1 CPD 613

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# Decision

**Matter of:** Aircraft Porous Media, Inc.--Reconsideration

**File:** B-241665.4

**Date:** June 28, 1991

Paul Mishkin, Esq., Mishkin, O'Neil & McAllister, for the protester.
Paul Shnitzer, Esq., and Robert P. Davis, Esq., Crowell & Moring, for Guild Associates, Inc., 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**

1. Prior decision denying protest of agency's determination that proposals were technically equal and of agency's decision to award cost reimbursement contract based on lowest proposed cost is affirmed where protester fails to show that prior decision was based on a misinterpretation of applicable law or misunderstanding of the record.

2. Request for award of portion of attorneys' fees incurred to refute agency arguments that were subsequently contradicted by agency's own witness is denied where agency's award decision ultimately was found to be consistent with statutory and regulatory requirements, since award of such costs is contingent upon a finding that the agency violated such requirements.

**DECISION**

Aircraft Porous Media, Inc. (APM) requests reconsideration of our decision, Aircraft Porous Media, Inc., B-241665.2; B-241665.3, Apr. 8, 1991, 91-1 CPD ¶ 356, in which we denied APM's protest challenging the award of a contract to Guild Associates, Inc., pursuant to request for proposals (RFP) No. DAAA15-90-R-1043, issued by the Department of the Army for the design, fabrication, and testing of four air filtration devices for nuclear, biological, and chemical contaminants based upon Pressure Swing Adsorption (PSA) technology. APM

argues that our prior decision misapplied the legal standards relating to the evaluation of proposals, and erroneously interpreted the factual record in that case. In addition, APM contends it should be reimbursed portions of its attorneys' fees incurred to refute agency arguments that were subsequently discredited and abandoned.

We affirm our prior decision.

The four air purification devices sought by the RFP were destined for two separate uses: two were to be used to validate a mathematical model for describing the operation of such devices using PSA technology;1/ the other two were to be integrated with an auxiliary powered environmental control system (APECS) being procured under a contract awarded by the Army's Belvoir Research, Development and Engineering Center (BRDEC).

After completion of two rounds of technical discussions, the two offerors in the competitive range--APM and Guild--were determined to be technically equal. The Army then held cost negotiations and requested submission of best and final offers (BAFO). A few days prior to the due date for receipt of BAFOs, APM was asked to supply its air filtration device to a subcontractor for the BRDEC effort--the source of the APECS units used in this procurement. Because of the overlap between the two efforts if APM were involved in this as well as the BRDEC procurement, APM's BAFO reduced its proposed engineering hours from 11,830 to 10,000.

In its review of APM's BAFO, the Army recognized the advantage of having APM provide the PSA air filtration device for both efforts. As a result of this perceived advantage of selecting APM, the evaluation committee stated, "[a]ll other factors being equal, merit rating and cost, the Committee recommends award to APM. . . ." Based on the cost realism review of APM's BAFO, however, the Army refused to accept the full amount of the engineering hour reduction proposed by APM, and instead returned to APM's proposed cost approximately two-thirds of the engineering hour reduction. With this adjustment, APM's BAFO cost was higher than the cost proposed by Guild. Since the Army had determined that the proposals were technically equal, and that no reevaluation of the technical merit of the proposals was needed as a result of the BAFO submissions, the Army selected Guild for award based upon Guild's lower proposed cost.

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1/ Hence, the industry name for the instant procurement: the PSA Math Model Validation Contract.

Our prior decision upheld the Army's cost realism review of APM's proposal on the basis that APM was ultimately responsible for inadequately explaining the cost reductions in its BAFO. We also concluded that the Army need not reevaluate the proposals based on the BAFO submissions because we did not believe such a reevaluation would affect the agency's finding that the proposals were technically equal. APM had received the maximum score possible in every area, except personnel and facilities; as a result, APM received a merit rating of 95 out of 100, while Guild's rating was 98. Even if APM received every remaining point available, the point spread between APM and Guild would be even closer than it was when the Army determined that the proposals were technically equal.2/ Therefore, we concluded that reevaluating the technical proposals based on the BAFO submissions would not change the Army's determination of technical equality, or its decision to award to the proposal with the lowest proposed cost.

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) (1991); Gracon Corp.--Recon., B-236603.2, May 24, 1990, 90-1 CPD ¶ 496. As explained below, APM has not made the required showing here.

APM first argues that our decision either ignored or misread the law applicable to evaluating proposals by failing to direct the Army to rescore the technical proposals based on the information provided in APM's BAFO--i.e., that APM would supply the PSA air filtration device for the BRDEC effort. According to APM, since the Army recognized the advantage of APM's role in the BRDEC effort, it could not refuse to adjust the scoring of the technical proposals simply because APM had already received a nearly perfect score. Specifically, APM argues that this result is inconsistent with our prior decisions in Jack Faucett Assocs., B-233224, Feb. 3, 1989, 89-1 CPD ¶ 115, aff'd, B-233224.2, June 12, 1989, 89-1 CPD ¶ 551; Consolidated Food Mgmt. Co., B-217254, June 12, 1985, 85-1 CPD ¶ 673; and Group Technologies Corp., B-240736, Dec. 19, 1990, 90-2 CPD ¶ 502.

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2/ Guild made no changes in its BAFO response, thus there was no reason its score would change.

Of the decisions APM cites, only Jack Faucett Assocs. involves circumstances similar to those in the procurement here.3/ We sustained Faucett's protest of the award of a cost reimbursement contract where the agency found proposals technically equal and then made award to the lowest cost offeror. We found that the agency had failed to apply the evaluation criteria properly, and should have rescored the proposals after submission of BAFOs, both of which could have affected the agency's decision that the offers were technically equal. In its BAFO, Faucett increased the number of hours for certain key employees by approximately 10 percent, and the evaluation scheme listed "staffing plan" as the most important criterion. In addition, the agency had identified, during discussions, the low number of proposed hours for principal investigators--the key employees at issue--as a weakness in the proposal. In our view, the agency could not then reasonably refuse to rescore the proposal when the BAFO submission increased the proposed hours in response to the discussions, and it was clear that the rescoring could affect the agency's finding that the proposals were technically equal.

Unlike in Jack Faucett Assocs., the engineering hour reduction claimed by APM was not specifically related to any single evaluation criterion or, for that matter, even identified with any specific effort within the technical proposal;4/ rather,

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3/ In Consolidated Food Mgmt. Co., involving a protest filed prior to proposal submission, we stated that agencies (or in this case, a federal grantee) may, in appropriate circumstances, evaluate responsibility-related factors, such as contractor experience, on a comparative basis. In Group Technologies Corp., we sustained a challenge to an agency's cost realism evaluation and directed the agency to reevaluate the offers received "in a comparative manner" and in accordance with the terms of the solicitation. APM's assertion that the references to comparative evaluations in these two cases requires reversal of our prior decision here is so clearly at odds with the facts in this protest and in those cases that they do not warrant detailed discussion.

4/ Given APM's failure to specify where the reduction in engineering hours would occur within its technical proposal, any rescoring of APM's BAFO on this point actually may have reduced APM's score, not increased it.

APM simply informed the Army by letter that it was removing 1,830 engineering hours from its proposal due to the "synergy" between the BRDEC contract and the procurement at issue, with no supplementary information to explain the reduction. Further, while the increase of principal investigator hours in Jack Faucett Assocs. strengthened that proposal--making it less likely that the agency, upon reevaluation, would continue to view the proposals as technically equal--the record does not show that either APM's reduction in engineering hours or its selection as a supplier to a subcontractor on the BRDEC effort significantly improved the proposal. In fact, APM has yet to suggest how its role as a supplier to a subcontractor on the related BRDEC effort translates to a higher score on any of the objective evaluation criteria established in the RFP.

Finally, APM has never challenged the conclusion of the evaluators that the advantage provided by APM's role as a supplier to a subcontractor was very slight, but has instead argued that the recognition of this slight advantage by the evaluators required reevaluation of the BAFO submissions. In our view, the evaluators' recognition of the slight advantage to the government resulting from APM's role on the BRDEC contract--accorded tiebreaker status only if all other considerations, including cost, proved equal--supports the Army's decision not to rescore APM's BAFO submission on the grounds that the technical equality of the two offerors would not change.

APM next argues that our prior decision was based on an erroneous reading of the record--i.e., a factual error. Specifically, APM argues that our prior decision upheld the Army's cost realism analysis because APM did not adequately alert the Army to an earlier integration effort involving APM's PSA air filtration device and an APECS unit. According to APM, since the Army was aware of the earlier effort, the basis for our decision is factually incorrect.

APM's BAFO letter stated that ". . . the synergism between the two contracts (APECS and PSA Math Model Validation), will allow us to significantly reduce the engineering hours that would have been required if, we were to have been selected for only the PSA Math Model Validation Program." Our decision first concluded that this limited explanation did not communicate to the Army evaluators what APM now claims it wanted the evaluators to consider: that the claimed synergy between the APECS and PSA Math Model Validation Contracts also includes APM's endeavors on a third effort, related to the

APECS effort mentioned in APM's BAFO letter. The second part of our conclusion was that APM could not reasonably assume that the agency would consider this prior effort, about which there is no hint in APM's BAFO explanation, and be sufficiently familiar with that effort to accept APM's engineering hour reduction without question.

Despite APM's assertion that we overlooked the Army's knowledge of the related integration effort, our prior decision expressly acknowledges that the Army's technical witness was aware of that effort. The decision also acknowledges that this individual was present in a November 1989 briefing when the number of engineering hours required for integrating a PSA air filtration device with an APECS system on that related effort was mentioned. Nonetheless, an offeror cannot reasonably assume that such an individual will serve on the evaluation panel or will remember (and then put to use during a cost realism review) a figure as specific as the number of engineering hours required for part of an effort in which the agency has an interest, but not a contract.5/ In short, we do not accept APM's argument that the Army's cost realism analysis was unreasonable because, in APM's view, the Army knew enough about APM's involvement in a prior integration effort to know that APM's engineering hour reduction was reliable. As we stated in our prior decision, offerors must bear the risk of including inadequately explained cost reductions in their BAFOs. See The EC Corp., B-238505, May 30, 1990, 90-1 CPD ¶ 509.

Finally, APM argues that it should be awarded attorneys' fees incurred refuting agency submissions later shown to be untrue. During the course of the initial protest, the Army originally stated that it based its decision not to accept APM's engineering hour reduction on a comparison with a similar contract. After an exchange of extensive submissions on this issue, the Army's technical witness explained during questioning in a fact-finding hearing that the claimed comparison did not occur, and that there was no such contract to consider. At no time prior to the witness's disavowal of the agency's pleadings did Army counsel correct the record, although the witness explained that he brought the error to the attention of agency counsel well in advance of the hearing, and prior to at least one intervening agency

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5/ APM's related integration effort was not undertaken as part of any government contract. Rather, the effort was part of an independent research initiative with another company, FMC.

pleading. Nonetheless, our authority to allow the recovery of such costs is predicated upon a determination by our Office that the agency violated statute or regulation in the conduct of the procurement. 31 U.S.C. § 3554(c)(1) (1988); see State Mach. Prods., Inc.--Recon., B-240630.2, Nov. 19, 1990, 90-2 CPD ¶ 406. Here, the Army's award decision was ultimately found to be consistent with the requirements of law and regulation, and accordingly, APM may not recover the cost of pursuing this protest.

Our prior decision is affirmed.

James F. Hinchman
General Counsel