



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Cosmodyne, Inc.--Reconsideration

File: B-271838.2

Date: May 23, 1997

Paul Shnitzer, Esq., Crowell & Moring, and Robert A. Brunette, Esq., for the protester.

Ronald S. Perlman, Esq., Porter, Wright, Morris & Arthur, for Pacific Consolidated Industries, an intervenor.

Timothy Lasko, Esq., Department of the Navy, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Request for reconsideration is denied where protester fails to demonstrate that decision erred in finding that awardee's liquid oxygen/nitrogen generator complied with solicitation requirement for prior deployment of the unit and that modifications to awardee's previously deployed unit were minor.
2. Protester's argument that awardee's liquid oxygen/nitrogen generator will not be able to continue operating after a chemical warfare agent attack due to co-adsorption of carbon dioxide is without merit where protester itself concedes that co-adsorption will not occur if the unit contains [DELETED] for chemical warfare agent capture, which the awardee's system does.
3. Erroneous identification of type of ship on which filter on awardee's liquid oxygen/nitrogen generator has previously been deployed does not provide basis for reversal or modification of decision since record otherwise establishes effectiveness of the filter for its intended purpose.

DECISION

Cosmodyne, Inc. requests reconsideration of our decision, Cosmodyne, Inc., B-271838, July 30, 1996, 96-2 CPD ¶ 78, in which we denied its protest of the selection of Pacific Consolidated Industries (PCI) for award under request for proposals (RFP) No. 68335-95-R-0003, a small business set-aside for liquid oxygen/nitrogen generators capable of operating in an environment contaminated

with nuclear, biological and chemical (NBC) warfare agents. Cosmodyne contends that our decision contains a number of errors.

We deny the request for reconsideration.

Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must show either that our prior decision contains errors of fact or law, or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.14(a) (1996). Neither repetition of arguments made during our consideration of the original protest nor mere disagreement with our decision meets this standard. Dictaphone Corp.--Recon., B-244691.3, Jan. 5, 1993, 93-1 CPD ¶ 2. Nor will we consider arguments that could have been, but were not, raised during our initial consideration of the protest since to do so would undermine the goal of our bid protest forum--to produce fair and equitable decisions based on consideration of the parties' argument on a fully developed record. Ford Contracting Co.--Recon., B-248007.3; B-248007.4, Feb. 2, 1993, 93-1 CPD ¶ 90.

Cosmodyne argues first that we erred in concluding that PCI had complied with the solicitation requirement that the generator offered previously have been deployed. The protester contends that PCI does not meet this requirement because it has not previously deployed a 2-ton generator with NBC protection.

We addressed this argument in our decision, noting that the RFP required that "the unit without the minor modifications necessary to meet the requirements of the solicitation" (emphasis added) to have been deployed previously, and not that the precise unit have previously been deployed. We found that to meet the requirements of the solicitation here, PCI had made only two minor modifications to a unit that it had previously deployed to [DELETED]. One of those modifications was the substitution of [DELETED], a change undertaken to assure compliance with the RFP requirement for NBC protection. In other words, even assuming that the generator deployed by the [DELETED] was not NBC-protected--a point which, as discussed in our decision, both PCI and the Navy dispute¹--PCI still complied with the requirement for prior deployment because the substitution of [DELETED] resulted in only minor modification of the unit. Thus, the record does not establish that we erred in finding that PCI had satisfied the prior deployment requirement.

The protester also argues that we incorrectly relied upon PCI's representation that the only modifications that it had made to its previously deployed unit to comply with the requirements of the solicitation here were the previously discussed

¹As noted in our prior decision, PCI's plant also includes a [DELETED], which, according to both PCI and the Navy, functions as a second protective system against chemical warfare agent contamination.

substitution of [DELETED]. Cosmodyne insists that it is clear from the evaluation record that at least one additional modification was required: substitution of a higher flow capacity air compressor.² Along the same lines, the protester argues that we incorrectly determined that substitution of [DELETED] assembly for a standard HEPA filter would require only minor modification of the unit. The protester maintains that at least [DELETED] would be required to cover the air compressor's air flow,³ and that substitution of [DELETED] for the standard filter would require significant redesign of the unit.⁴

With regard to the first of these two arguments, it was--and continues to be--our understanding based on the record here that a higher flow capacity air compressor was not required, as the agency's technical expert had originally thought, because the air compressor used in PCI's 1.85-ton/day unit had excess capacity and was in fact adequately sized to process 2.0 tons/day. Moreover, even if the substitution of a higher capacity air compressor had been required, such a substitution still would have been a minor modification, according to the Navy expert. The protester's second argument does not provide a basis for reconsideration of our decision since it could have been, but was not, raised by Cosmodyne during the course of its initial protest. Id. In any event, the protester itself concedes that it is possible to "[DELETED]" in housings designed for [DELETED], which means that redesign of

²In this regard, Cosmodyne points to the statement of the Navy's technical expert that:

"Modifications would be required to upgrade the [DELETED] unit to meet the Navy's requirements of two tons per day at 99.5%. A higher flow air compressor would be required. . . ."

³According to the protester, PCI's air compressor would need to have an air flow of 720 cubic feet per minute (CFM) and each [DELETED] is capable of filtering only 100 CFM.

⁴The protester also argues that we erroneously ignored the testimony of its technical expert that substantial modification of PCI's previously deployed units would be required to meet the requirements of the solicitation here. We did not ignore the testimony of Cosmodyne's technical expert--we simply concluded that it was not entitled to great weight given that it was premised on the incorrect assumption that PCI would need to upscale its 1.5 ton/day unit by 33 percent to meet the 2-ton/day requirement in this solicitation.

the unit to incorporate a series of [DELETED] would not be required. We therefore remain unpersuaded that other than minor modifications to PCI's previously deployed unit would be required to meet the requirements of the solicitation here.

Cosmodyne argues next that we should not have dismissed as untimely its argument that in the event of a chemical warfare agent attack, PCI's plant would not be able to continue operating for 10 days without stoppages for thawing, as required by the RFP.⁵ We dismissed this argument because it was not raised in the agency-level protest that Cosmodyne pursued prior to coming to our Office. The protester contends that it was appropriate for it not to have raised the argument until it filed its comments on the agency report to our Office because it was not aware until it received the agency report that PCI had relied on tests of less than 10-days duration to establish the effectiveness of PCI's [DELETED] in defeating chemical warfare agents. According to Cosmodyne, it offered the above argument to demonstrate the insufficiency of PCI's test results.

Assuming, for the sake of argument, that Cosmodyne's argument regarding co-adsorption was a timely response to the position taken by the agency in its report--that PCI had adequately demonstrated the effectiveness of its [DELETED] in protecting against chemical warfare agent contamination--we find the argument to be without merit because it is premised on the incorrect assumption that PCI's generator did not contain [DELETED] and that the [DELETED] was therefore the only protective system against chemical warfare agents. In this regard, Cosmodyne's expert stated (in an affidavit submitted in connection with the original protest) that Cosmodyne itself had avoided the problem of co-adsorption in its system "by simply incorporating [DELETED] designed solely for CW agents capture." (Affidavit of James D. Yearout, dated June 11, 1996, at ¶ 8.) The direct implication of this statement is that co-adsorption will not be a problem if a generator incorporates [DELETED] for chemical warfare agent capture--which PCI's unit did.

Cosmodyne further argues that in our decision we relied upon an incorrect agency representation that [DELETED] were currently in use aboard Navy aircraft carriers. The protester insists that [DELETED] are not used aboard aircraft carriers.

⁵According to the protester, PCI's plant will not be able to continue operating after a chemical warfare agent attack since its [DELETED], which serves to remove carbon dioxide as well as chemical warfare agents from the feed air, could become ineffective at removing the carbon dioxide in the presence of chemical agents, which could allow some carbon dioxide to pass into the cold box portion of the unit, where it would freeze on the heat exchange surfaces, disrupting the production of oxygen and nitrogen.

The agency concedes that its statement regarding the use of [DELETED] aboard aircraft carriers was in error. According to the agency, the reference instead should have been to air capable ships, on which [DELETED] are used as part of a total protective system. The error had no significance, however, since the record still establishes--and indeed the protester has never disputed--that the [DELETED] is an Army/Navy approved chemical warfare filter effective against the chemical agents involved here. Thus, the error does not provide a basis for reversal or modification of our decision.

Next, Cosmodyne takes issue with our statement (made in response to its argument that PCI's unit fails to meet the RFP's requirement for a minimum field mean time between failures (MTBF) of 520 hours) that it did not furnish information as to how long PCI's generators had been operating prior to their failures. The protester insists that it did furnish this information with regard to two of PCI's units (deployed in Operation Desert Shield/Desert Storm), and that it also presented evidence establishing that there had been no period of successful performance for two other units (sold to the Turkish Ministry of Defense) because they did not pass acceptance testing.

In asserting that it did furnish information as to how long two of PCI's units had been operating prior to their failures (an assertion which, as discussed below, the record fails to support), the protester effectively concedes that it did not furnish such information for the vast majority of the approximately 40 previously deployed GAMMA-design PCI plants. Moreover, regarding the two units for which PCI did provide hours of operation, the information presented is inconclusive since it establishes only the number of hours that the units operated in particular military operations (*i.e.*, Desert Shield and Desert Storm) prior to their failures. Since we had no way of knowing how long the plants had been operating prior to being deployed in Desert Shield/Desert Storm, it is impossible to tell how long they had operated prior to failure.⁶ With regard to the plants that were not accepted by the Turkish Ministry of Defense, it is unclear from the record how the matter was ultimately resolved (*i.e.*, whether or not they were ultimately returned to PCI as noncompliant).

Finally, the protester argues that fairness dictates that we not accept PCI's "general assurances" regarding the scope of the modifications required to increase the generator's capacity to 2.0 tons/day and regarding its compliance with the solicitation's MTBF requirements since, in an earlier protest, we were unwilling to

⁶The record also establishes that the failure of the Desert Shield unit was the result of problems external to the unit (*i.e.*, fluctuations in power from the Saudi generating plant and the Army's emergency generators).

accept Cosmodyne's general assurances of compliance with the RFP's NBC requirements.⁷

In the earlier decision to which Cosmodyne refers, Pacific Consolidated Indus., B-260650.2, Oct. 25, 1995, 95-2 CPD ¶ 247, aff'd, Cosmodyne, Inc.--Recon., B-260650.3, Mar. 18, 1996, 96-1 CPD ¶ 201, we sustained PCI's protest against the selection of Cosmodyne for award under the same RFP at issue here⁸ on the ground that the evaluation record (which contained no discussion of the NBC requirement or Cosmodyne's proposed approach for complying with it) did not support the evaluators' conclusion that the Cosmodyne proposal demonstrated compliance with the requirement for NBC protection. The nature of the record here is different. As discussed in our earlier decision, PCI offered more than "general assurances" that it would comply with the MBTF requirement--it offered evidence that its currently fielded units were meeting it, and that it had taken steps to correct a problem that had resulted in failure of some of the older units. With regard to the scope of the modifications needed to convert its 1.85-ton/day generator to a 2.0-ton/day one, we did not simply rely on PCI's assurances that only minor modifications would be required; we also relied on the consistent conclusion of the agency's technical expert. Thus, we see no inconsistency between our treatment of PCI's protest and our treatment of Cosmodyne's.

The request for reconsideration is denied.

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⁷The protester also argues that we should not have accepted the Navy's unsupported assertion that the [DELETED] are used aboard aircraft carriers. As previously discussed, the Navy has conceded that its reference to the aircraft carriers was in error; however, it is apparent from the record that the error had no significance.

⁸To remedy the defect, we recommended that the agency reopen discussions and request an additional round of best and final offers (BAFO). The Navy did so, and, after receiving responses from both offerors, determined both proposals to be technically acceptable; since PCI's BAFO price was lower than Cosmodyne's, it was selected for award.