Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: PRC, Inc.--Reconsideration

File: B-274698.4

Date: July 10, 1997

L. James D'Agostino, Esq., Timothy B. Harris, Esq., and William B. Fisher, Esq., Wickwire Gavin, for the protester.
Stuart Young, Esq., for DynCorp (a partner in TESCO, a joint venture), the intervenor.
Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

A request for reconsideration which alleges that a prior decision denying a protest against a source selection decision was based on errors of fact and law, and that the General Accounting Office did not consider relevant information, is denied where the allegations are not supported by the protest record, and any issues not addressed in the prior decision would not provide a basis for reversing or modifying that decision.

DECISION

PRC, Inc. requests reconsideration of our decision, PRC, Inc., B-274698.2; B-274698.3, Jan. 23, 1997, 97-1 CPD ¶ 115, denying its protests of an award to TESCO, a joint venture, under request for proposals (RFP) No. DATM01-95-R-0019, issued by the U.S. Army Materiel Command, Operational Test and Evaluation Command (OPTEC) Contracting Activity, for test support services required by the Test and Evaluation Command, Fort Hood, Texas.

We deny the request for reconsideration.

In order to obtain reconsideration under our Bid Protest Regulations, the requesting party must show that our prior decision may contain 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) (1997); Defense Logistics Agency; Moheat Envtl. Servs..--Recon., B-270538.5; B-270538.6, Nov. 20, 1996, 96-2 CPD ¶ 194 at 1. Repetition of arguments made during consideration of the original protest or mere disagreement with our decision does not provide a basis for reconsideration. R.E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274 at 2. As

discussed below, PRC has shown no errors of law or fact that warrant reconsideration of our prior decision.

PRC first contends that our decision incorrectly found that TESCO's initiation of the development under its incumbent contract of an automated information management system for the control of government furnished property (GFP), which TESCO then proposed in response to this RFP, did not constitute an unfair competitive advantage. PRC alleges that our finding was based on erroneous determinations that the development of the information management system was a "requirement" of the incumbent contract, and that a showing of bad faith or an intent to harm the incumbent's competitors was required to establish an unfair competitive advantage. PRC asserts that we "should reconsider the evidence in light of whether TESCO was unintentionally given a competitive advantage."

PRC's request regarding an unintentional competitive advantage misses the point, since, as discussed in our prior decision, the record showed that the competitive advantage which TESCO may have received from performing as the incumbent contractor was not an unfair competitive advantage. A competitive advantage of an incumbent contractor, which was gained by virtue of that contractor's performing the incumbent contract, is not an unfair or improper competitive advantage, and an agency is not required to attempt to equalize competition to compensate for that advantage unless there is evidence of preferential treatment or other improper action. Versar, Inc., B-254464.3, Feb. 16, 1994, 94-1 CPD ¶ 230 at 12; Information Ventures, Inc., B-240925.2, Jan. 15, 1991, 91-1 CPD ¶ 39 at 3; Wismer and Becker Contracting Engineers and Synthetic Fuel Corp. of Am., A Joint Venture, B-191756, Mar. 6, 1979, 79-1 CPD ¶ 148 at 14.

We stated in our decision that there was no evidence in the record to show that the development of an information management system "was outside the scope of the incumbent contract."[1] The work authorization orders (WAO), issued annually at the start of each fiscal year of the contract, included requirements for record keeping and report preparation, as well as requirements for seeking and incorporating efficiencies to improve the quality and production of services. The protester does not argue that these WAOs were outside the scope of the contract. Although not stated in our decision, the terms of the WAO issued at the start of the final year (fiscal year 1996) of TESCO's incumbent contract specifically required the contractor to "[d]evelop and implement an information management system" for the control of GFP. Since automated information management systems are intended to improve the efficiency of record keeping and report preparation, the development of

[1]We did not, as alleged by the protester, conclude that this work was a "requirement" of the prior contract.

an information management system was within the scope of the incumbent contract.[2]

Where contract requirements are repetitive or otherwise prepare the incumbent contractor to compete for future solicitations, the performance of the incumbent contract will obviously give the incumbent contractor a competitive advantage over other competitors for the succeeding contract; however, this competitive advantage is not in itself preferential treatment or otherwise an unfair competitive advantage. See B.B Saxon Co., Inc., 57 Comp. Gen. 501, 512-513 (1978), 78-1 CPD ¶ 410 at 19-20 (incumbent contractor's possession of required equipment by virtue of performing the incumbent contract was not evidence of unfair competitive advantage); Crux Computer Corp., B-234143, May 3, 1989, 89-1 CPD ¶ 422 at 5 (development of a system under prior agency contract is not evidence of preferential treatment in subsequent competition for the system); H. J. Hansen Co., B-181543, Mar. 28, 1975, 75-1 CPD ¶ 187 at 7-8 (contract for preliminary study which in effect financed the contractor's competitive advantage was not evidence of unfair advantage for succeeding sole source contract). Here, there is no evidence that TESCO obtained an unfair competitive advantage by its funded initiation of an information management system for the control of GFP under the incumbent contract or that the last WAO under that contract was issued due to improper motives.

PRC next contends that our decision incorrectly found that the higher-level source selection officials had a reasonable basis for reducing the evaluated risk of certain aspects of TESCO's proposal from those determined by the lower-level evaluators. PRC alleges that nothing in the record rebuts these judgments of the lower-level evaluators, that the record does not establish which official actually made the reductions and his rationale for doing so, and the record does not establish that the SSA was aware of the initially evaluated risks and their reduction. We disagree.

The agency's explanation for the reduction of risk stated in response to the protest was that source selection officials in the source selection evaluation board (SSEB) and the source selection advisory council (SSAC) had judged from their own qualified knowledge that the risks associated with the development of TESCO's proposed information management system and the proposed staffing plan were not as significant as the lower-level evaluators had determined. The hearing testimony from several of these officials explained their knowledge and indicated that, in their judgment, the risks were "minor" or "minimal." Hearing Transcript (Tr.) at 268-272, 278-281 (risk associated with development of the information management system);

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[2]Contrary to the protester's allegations, the last WAO issued under the prior contract requiring the information management system or "common data base" was issued before the issuance of this RFP, which contains a proposed WAO substantially similar to that last WAO.

355-364 (risk associated with staffing plan).[3] Although the source selection report did not explain the basis for the risk reductions, the protest record, including hearing testimony and TESCO's proposal, supported the reasonableness of those reductions.[4] Since source selection officials are not bound by the judgment of evaluators and may impose their own evaluation judgment where, as here, that judgment is rational and consistent with the evaluation criteria, we determined that the reduction of evaluated risk in TESCO's proposal was proper.[5] See Loral Aeronutronic, B-259857.2; B-259858.2, July 5, 1995, 95-2 ¶ 213 at 7-9.

PRC has not shown that our determination in this regard was based on factual or legal error. PRC's allegations that the record does not clearly establish the specific individual who actually changed the risk ratings in the source selection report, or whether the SSA was aware of these reductions in risk ratings, do not alter the prevailing facts here: the report to the SSA stated reasonable risk ratings and the SSA relied upon this report in making his source selection decision. In any event, PRC did not establish that the SSA (who was a witness at the hearing) was unaware of the evaluated risk reductions, or that he disagreed with the judgments of his subordinate source selection officials. Since, as indicated, source selection officials may properly revise evaluation judgments and PRC did not show the revised risk ratings upon which the SSA relied to be unreasonable, PRC's allegations that we erred in upholding the SSA's resulting selection decision are unfounded. Id.

PRC also contends that we made an error of law by not applying the standard of review for source selection decisions stated in Dewberry & Davis, B-247116, May 5, 1992, 92-1 CPD ¶ 421. We disagree. As indicated in Dewberry & Davis, we review a

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[3]As stated in our prior decision, our Office will consider, in addition to the contemporaneous record, all information provided to us for consideration during the protest, including the parties' arguments and explanations, and testimony elicited at a hearing. The agency's contemporaneous record of the evaluation process was inadequate, and we convened a hearing to supplement that record.

[4]As PRC alleges, the source selection officials did not review TESCO's proposal. However, their judgment was based on their personal knowledge of the aspects of the proposal as described by the evaluators. The evaluators' bases for their risk evaluations, except for the initial risk ratings, as well as other aspects of the proposals were accurately stated in the source selection report. Thus, relevant aspects of TESCO's proposal were readily available to the source selection officials without referring directly to the proposal.

[5]Contrary to PRC's contention, we did not substitute our judgment for that of the evaluators, but reviewed the reasonableness of the higher-level source selection officials' determinations.

source selection decision for reasonableness and consistency with the stated evaluation scheme. Id. at 5.

We did not cite Dewberry & Davis in our prior decision because the facts surrounding the source selection there were not similar to the facts surrounding the protested selection of TESCO. Although cost was the least important factor under a best value evaluation scheme in both Dewberry & Davis and the present case, the similarities between the two cases end there. In this case, the evaluated difference between PRC's and TESCO's technical proposals was small, although the cost difference was not, and the SSA's determination that there did not exist additional value in PRC's proposal to account for its $1.5 million dollar additional cost was reasonably supported by the record. In Dewberry & Davis, the technical difference between the protester's nearly perfect technical rating and the awardee's barely acceptable rating was extreme, but was not considered in the source selection decision; thus, the record showed that the agency essentially conducted its source selection on a low cost, technically acceptable basis, which was contrary to the stated evaluation scheme. Id. at 5-7.

A more analogous decision, cited in our prior decision, is Calspan Corp., B-255268, Feb. 22, 1994, 94-1 CPD ¶ 136, which involved facts quite similar to the selection of TESCO's proposal over PRC's. Specifically, cost was the least important factor in the stated evaluation scheme; the evaluated technical and cost differences were similar to those present here; and the record evidenced that the lower-level evaluators may have unduly emphasized an aspect of one proposal resulting in a noticeable evaluated difference, but there was little or no significant difference between the proposals that would provide additional value for the acceptance of the higher cost proposal. Id. at 8-10.

PRC nevertheless argues that we erred in finding that it had not identified any significant technical or management differences not considered in the source selection or evaluation that would justify the cost premium associated in making award to PRC. Despite having access under a protective order to TESCO's complete proposal, PRC did not show the existence of any significant difference between what each proposal offered. Instead, PRC essentially alleged that TESCO's ratings should have been lower than evaluated based on statements made by agency personnel. Our decision explained that the ratings given to TESCO were reasonably based on the rating scale stated in the source selection plan; they need not have been lower under that rating scale, despite isolated remarks from some agency personnel to the contrary.

To the extent PRC alleges that we failed to consider its allegations that certain aspects of TESCO's or PRC's proposals were not evaluated, PRC does not identify any real and significant differences in the two proposals. For example, PRC alleges that TESCO's proposed Mobile Army Instrumentation Suite (MAIS) staffing was

deficient; however, as stated in our decision, since TESCO's proposed MAIS staffing was at least equal to PRC's, there is no basis to find that PRC's proposal offered any advantage over TESCO's. Also, while our prior decision did not mention PRC's allegation that it was not given credit for offering a fully developed GFP tracking application, the record does not show that this aspect of the proposals was a basis upon which to differentiate between them, given that the record suggested that PRC's system was similar to TESCO's system.

In sum, PRC did not show that its proposal offered any additional value over TESCO's proposal to warrant paying the additional $1.5 million. Thus, we correctly found that the SSA's selection of TESCO's proposal at a lower price under the stated evaluation scheme was reasonable. See id. at 10.

Lastly, PRC contends that we erred in not finding that an appearance of impropriety arose from TESCO's employment of the former OPTEC commanding officer. PRC alleges that a protester should not be required to show that such a former government employee had access to competitively useful information in order to prove that an appearance of impropriety existed, as this would be inconsistent with the decision in NKF Eng'g, Inc. v. United States, 805 F.2d 372 (Fed. Cir. 1986). We disagree.

Our decision was based on the principle of law that a contracting agency may disqualify an offeror from a competition where an appearance of a conflict of interest exists, even if no actual impropriety can be shown, so long as the determination is based on facts and not mere innuendo or suspicion. This is entirely consistent with NKF Eng'g, Inc. v. United States, which requires that the facts of the case support a finding of an appearance of impropriety. Id. at 376-377. The record contained no hard evidence that the former OPTEC commanding officer had access to information from which the offeror employing him could have gained an unfair competitive advantage. We therefore determined that the record did not establish the existence of an appearance of impropriety. Our decision acknowledged that the employment of this person so soon after his retirement might raise some suspicion of impropriety, but PRC did not establish anything beyond suspicion or innuendo.

PRC alleges that our analysis of the record failed to consider misrepresentations in the former commanding officer's affidavits, and reports on the status of OPTEC procurements which he received. We did not fail to consider these portions of the record. The former commanding officer was a witness at the hearing on the protests because his representations in successive affidavits were amended to explain conflicting documents as they were entered into the record. He testified that the contracting function was not within his command; that his exposure to procurement-related documents was rare; and that he still could not recall reviewing certain documents in the record, but acknowledged that his signature or

initials on these documents indicated that he had indeed reviewed them. Our decision found his testimony credible on these points, and then analyzed the documents to which he had access, and found that the information contained in them was not competitively useful and thus was not evidence of an appearance of impropriety. PRC has not identified any errors in our analysis of these documents.

To the extent PRC alleges that we did not consider in our analysis the periodic procurement status reports to which the commanding officer had access, we note that our decision did not specifically discuss these status reports because PRC's comments on the hearing merely mentioned their existence without attempting to show that they established an appearance of impropriety. PRC's examination of the witness showed that these status reports were supposed to show whether procurements were staying on schedule. Tr. at 517-520. Of course, as incumbent contractor, TESCO properly would be aware of the status of its contract, and thus the information in the status reports would not be competitively useful. The commanding officer's access to these status reports is not evidence of an appearance of impropriety.

The request for reconsideration is denied.

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