



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Dominion Aviation, Inc.--Reconsideration

File: B-275419.4

Date: February 24, 1998

John R. Thompson, for Dominion Aviation, Inc., the protester.
Maj. Michael J. O'Farrell, Department of the Army, for the agency.
David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest grounds first raised by pro se protester in request for reconsideration and based on detailed information concerning awardee's proposal and its evaluation as revealed in GAO decision are untimely where information was available at least 2 months earlier under a protective order issued by GAO.

DECISION

Dominion Aviation, Inc. requests that we reconsider our decision, Doss Aviation, Inc.; Dominion Aviation, Inc., B-275419 et al., Feb. 20, 1997, 97-1 CPD ¶ 117, in which we denied its protest against the Department of the Army's award of a contract to UNC Aviation Services, under request for proposals No. DABT01-96-R-0001, for rotary wing (helicopter) flight training services at Fort Rucker.

We deny the request.

As noted in our decision, the Army determined that Dominion's proposal offered moderate performance risk as a result of inadequate staffing with respect to instructor pilots, a limited ability to absorb within its proposed contract price the likely cost increases it would encounter in performing the contract, and a marginal past performance record. In contrast, the agency determined that UNC had submitted a technically superior proposal which was based on adequate staffing with experienced personnel and offered advantages in a number of areas, including quality control and management, and that UNC had an excellent performance record as the incumbent contractor, demonstrating its ability to successfully and safely perform the required work at its stated fixed price, such that UNC's proposal overall offered the agency a significantly higher likelihood of the successful performance of vital, safety-related services. Given the evaluated superiority of UNC's proposal under the most important evaluation factor (technical), its excellent performance record as the incumbent contractor, the greater realism of its

proposed cost/price, the fact that price was the least important of four evaluation factors, and the fact that UNC's price was only 5.1 percent higher than Dominion's price, we found no basis to question the agency's position that UNC's proposal offered the best value under the stated evaluation criteria.

In its request for reconsideration, Dominion challenges the Army's evaluation that its proposal offered moderate performance risk. As an initial matter, Dominion notes that the solicitation provided for the government to "conduct a performance risk assessment based on the offeror's present and past performance as it relates to the probability of successfully accomplishing the proposed effort." According to the protester, since this provision did not provide for consideration of anything other than past performance, it was improper for the agency to consider Dominion's evaluated inadequate staffing in the determination of performance risk.

Dominion's position ignores the fact that Dominion's overall moderate risk rating was based on both a proposal risk assessment, which found that Dominion's inadequate staffing and limited ability to absorb within its proposed contract price likely cost increases warranted a moderate performance risk assessment, and a separate past performance risk assessment, which found that Dominion's performance history warranted a moderate risk assessment. Specifically, the source selection evaluation board (SSEB) reported that on the only prior contract on which the agency had received reports with respect to the performance of Dominion itself (rather than its employees), which was one of only two government contracts on which Dominion, a newly formed company, was performing, Dominion had encountered significant performance problems; although contracting officials were advised by the assigned Defense Contract Management Center that Dominion's performance on this contract had improved such that it was now marginal, but satisfactory, the SSEB concluded that this level of past performance itself created a moderate risk. Further, even where a solicitation includes as part of the evaluation the consideration of risk based on an offeror's past and present performance, and does not otherwise enumerate risk as an evaluation factor, the agency is not precluded from also considering any risk arising from the offeror's approach; as we have previously recognized, consideration of the risk involved with respect to an offeror's proposal and approach is inherent in the evaluation of technical proposals. Communications Int'l Inc., B-246076, Feb. 18, 1992, 92-1 CPD ¶ 194 at 6.

Dominion also questions the determination that its performance history was marginal, but this challenge does not provide a basis for reconsidering the matter since it was untimely raised during the protest. The record indicates that Dominion was first advised during negotiations that its performance on the contract for which the agency was able to obtain a reference was unsatisfactory/marginal, leading to a high risk evaluation/no award recommendation, and was later advised (in the post-award debriefing on November 7, 1996) that improved, "marginal, but satisfactory" performance on that contract had resulted in an upgrade in its past performance rating to "medium risk." Dominion did not challenge its performance history

evaluation until it filed its comments on the agency report on December 30, which was more than 10 days after the debriefing and therefore untimely. 4 C.F.R. § 21.2(a)(2) (1997).

In addition, Dominion reiterates its argument that, had the agency accepted its proposed reduction in the setback rates--that is, the percentage of student pilots held back for additional training--relative to the historical setback rates for the past 12 months (which were set forth in the solicitation), the evaluated five-instructor pilot deficit relative to the independent government estimate of staffing would have been reduced to a one-instructor deficit. As we noted in our decision, however, Dominion offered no detailed explanation in its proposal as to how it would accomplish a reduction in the historical setback. The mere fact that, as pointed out by Dominion, its vice president had previously reduced setback rates when managing flight training for another contractor at Fort Rucker from 1986 to 1988, provides no basis to question the agency's position that Dominion's essentially unsupported claim that it would be able to reduce the current historical rates would not justify evaluating its staffing based on this hope.

Dominion also challenges the assignment of strengths to UNC's proposal. In this regard, as we noted in our decision, the SSEB awarded UNC's proposal evaluation credit based on such strengths as having a favorable safety record while the incumbent contractor at Fort Rucker and offering quality assurance instructor training at no cost to the government. Dominion questions the assignment of a strength to UNC for its safety record on the basis that the safety record was the result of the cumulative effort of the existing, in-place work force; according to the protestor, "[s]aid safety record was started under the umbrella of another contractor and has carried over into UNC's performance period." Dominion questions the assignment of evaluation credit to UNC for the proposed no-cost quality assurance instructor training on the basis that it too proposed a similar approach.

Dominion's challenge to the evaluation of UNC's proposal is untimely. Our Bid Protest Regulations contain strict rules for the timely submission of protests and additional protest grounds. Under these rules, a protest ground based on other than alleged improprieties in a solicitation generally must be filed not later than 10 calendar days after the protestor knew, or should have known, of the basis for protest, whichever is earlier. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2). Further, a protestor may not passively await the receipt of information providing a basis for protest; rather, the protestor has an affirmative obligation to diligently pursue information which may form a basis for protest. See Automated Medical Prods. Corp., B-275835, Feb. 3, 1997, 97-1 CPD ¶ 52 at 2. These timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Air Inc.-Recon., B-238220.2, Jan. 29, 1990, 90-1 CPD ¶ 129 at 2.

A protective order was issued by our Office in this matter to protect proposal and detailed evaluation information that might afford a competitive advantage in the event our decision led to a reopening of negotiations or a recompetition. Dominion did not retain counsel and, as a result, did not avail itself of the opportunity under our Regulations to obtain during the pendency of its protest access to all relevant information concerning UNC's proposal and its evaluation. 4 C.F.R. § 21.4(c). Now, 2 months after the relevant information was made available in the protected agency report, Dominion has raised arguments concerning UNC's evaluation, apparently based on information first learned from the publicly available copy of our decision (which reflected the redaction of protected material from the decision as issued to parties admitted to the protective order). However, having made the business decision not to retain counsel and obtain access to information under the protective order, Dominion cannot at this late date raise protest grounds based on the information it essentially opted not to receive earlier. Considering these grounds to be timely raised would be inconsistent with our goal of resolving protests expeditiously, without unduly disrupting or delaying the agency's procurement process. See Automated Medical Prods. Corp., *supra*, at 3-4 (protest based on information received approximately 4 months after award pursuant to Freedom of Information Act request is untimely because protester did not diligently pursue basis of protest where same information could have been obtained earlier had it requested post-award debriefing); Adrian Supply Co.--Recon., B-242819.4, B-242819.5, Oct. 9, 1991, 91-2 ¶ 321 at 2-4 (protest based on information received pursuant to Freedom of Information Act request is untimely because protester did not diligently pursue basis of protest where same information could have been obtained 2 months earlier under document request provisions of Bid Protest Regulations).

In any case, we find Dominion's arguments unpersuasive. Although the work force inherited by UNC may have contributed to the positive safety record achieved by that contractor at Fort Rucker, we find nothing unreasonable in the agency's concluding that UNC itself also deserved credit for effectively managing that work force so as to assure a positive safety record. Certainly, in our view, the agency could consider the demonstrated effective management record of the incumbent contractor to be a relative strength when compared to the record of a company without similar corporate experience managing flight training. As for the assignment of evaluation credit to UNC for the proposed no-cost quality assurance instructor training, the record indicates that the Army in fact evaluated Dominion's proposal of no-cost quality assurance instructor training as an advantage, but concluded, notwithstanding this advantage, that UNC's proposal overall was superior.

The request for reconsideration is denied.

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