



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Department of Commerce--Reconsideration

File: B-277260.4

Date: July 31, 1998

Minh N. Vu, Esq., Latham & Watkins, for the protester.

Mark Langstein, Esq., and Amy L. Freeman, Esq., Department of Commerce, for the agency.

Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration of prior decision sustaining a protest of a contract award for software development is denied where the procuring agency's request fails to show that the prior decision contains any errors of fact or law or to present information not previously considered, and presents evidence that could have been, but was not, presented during the prior protest; however, recommendation in the prior decision that the agency take certain corrective action, which could ultimately result in the termination of the awarded contract, is modified because the agency has established, as verified through a site visit by the General Accounting Office, that such a significant portion of the contract work has been completed that it would be impracticable to disturb the award.

DECISION

The National Oceanic and Atmospheric Administration (NOAA), Department of Commerce requests reconsideration of, and/or modification of the recommendation made in, our decision, Techno-Sciences, Inc., B-277260.2, Mar. 25, 1998, 98-1 CPD ¶ 128, sustaining Techno-Sciences's protest of a market survey undertaken by NOAA to implement corrective action recommended in our decision in Techno-Sciences, Inc., B-277260, Sept. 22, 1997, 97-2 CPD ¶ 115.

We deny the request for reconsideration, but modify the recommendation.

In Techno-Sciences, Inc., B-277260, supra, we sustained Techno-Sciences's protest of the award of a contract to Research and Professional Services, Inc. (RPS), negotiated through the Small Business Administration section 8(a) set-aside program under request for proposals (RFP) No. 50-DDNE-7-90034, for software development, testing and maintenance to support the United States Mission Control Center (USMCC). The protest was sustained because the agency did not reasonably determine, in accordance with applicable regulations, that the RPS award was at a

fair market price, particularly given Techno-Sciences's apparently acceptable offer to perform the services at a much lower price. We recommended that the agency review its fair market price estimate, specifically considering Techno-Sciences's commercial software enhanced to meet NOAA's requirements, and if it was determined that the RPS contract costs exceeded a fair market price, that RPS's contract be terminated and the requirements fulfilled under an unrestricted procurement. We also recommended that Techno-Sciences be reimbursed its costs of filing and pursuing the protest.

In Techno-Sciences, Inc., B-277260.2, supra, we found that the market survey conducted by NOAA to implement the recommendation in our initial decision was not a reasonable method of determining whether the RPS award was at a fair market price because the survey included material requirements that were not included in the RPS contract. We again recommended that NOAA review its fair market price estimate, considering Techno-Sciences's commercial software enhanced to meet NOAA's requirements, after fairly describing to Techno-Sciences the material requirements included in RPS's contract. If it was determined that RPS's contract exceeded a fair market price, we recommended that RPS's contract be terminated and the requirements fulfilled under an unrestricted procurement. NOAA requests reconsideration of this latter decision.

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) (1998). Repetition of arguments made during consideration of the original protest or mere disagreement with our decision does not provide a basis for reconsideration. PRC, Inc.--Recon., B-274698.4, July 10, 1997, 97-2 CPD ¶ 10 at 1. Nor will we consider arguments that could have been made, 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' arguments on a fully developed record. Dyna-Air Eng'g Corp.--Recon., B-271587.2, Aug. 30, 1996, 96-2 CPD ¶ 93 at 1-2. As explained below, we find that NOAA has not established a basis for reconsideration of the prior decision.

For example, NOAA contends that Techno-Sciences, Inc., B-277260.2, supra, erroneously concluded that the market survey required producers of commercial USMCC software to meet requirements materially different from those being met under RPS's contract. Specifically, NOAA asserts that the requirements of the market survey were not materially different because the additional requirements (local user terminal (LUT) pass scheduling and search and rescue (SAR) mapping requirements, and LUT communications check) not being coded under the RPS contract allegedly constitute less than 2 percent of the contract cost. It also argues that the inference that our Office drew from its failure to produce the contracting officer's technical representative that there may have been additional requirements

was unjustified, since it has now confirmed that only the three foregoing requirements were not being coded by RPS.

NOAA's arguments merely either repeat arguments that the agency previously made during the course of the protest, constitute its disagreement with the decision, or reflect arguments that it could have made during course of the protest.

For example, the issue of whether the coding of the LUT pass scheduling and SAR mapping coding requirements were being performed under the RPS contract was a specific subject of the protest and the hearing on the protest. However, neither at the hearing nor in its post-hearing comments did NOAA contend that these were not material requirements and, as indicated in our prior decision, the record evidenced that these were material requirements. *Id.* at 9. Moreover, as discussed in our prior decision, the agency did not produce, as requested, the official with the most knowledge in this matter at the hearing (who was the person who apparently had knowledge as to these requirements' materiality). *Id.* at 7, 9. Since NOAA waited until its request for reconsideration to assert or advance evidence that these requirements were not material, they provide no basis to reconsider our prior decision.

While NOAA objects to the inference drawn in our prior decision that there may be other requirements in the market survey that were not being coded under the RPS contract, we made this inference because the witness produced for the hearing by the agency admitted that this might be the case, Hearing Transcript (Tr.) at 100, 109-10, and NOAA failed to produce the requested witness with the most knowledge of this matter. While NOAA may disagree with the inference drawn by the decision, it was consistent with the record that had been developed as of the time of our decision and our Bid Protest Regulations, 4 C.F.R. § 21.7(f), which state:

If a witness whose attendance has been requested by GAO fails to attend the hearing or fails to answer a relevant question, GAO may draw an inference unfavorable to the party for whom the witness would have testified.

NOAA also claims that it properly solicited products in the market survey that met the total requirements of the system, not merely those that were being coded under the RPS contract, because these requirements represented NOAA's actual needs, regardless of who coded the software. This contention reflects NOAA's misunderstanding of the purpose of the recommendation in our prior decision that NOAA develop a fair market price estimate, considering Techno-Sciences's offer to supply assertedly similar software, so as to ascertain whether the RPS contract was at a fair market price--not to conduct a survey to determine whether to purchase commercial USMCC software to meet all of NOAA's USMCC software requirements. Thus, we noted in the decision which is the subject of this reconsideration that NOAA's market survey, although unobjectionable in general, was not necessary,

since NOAA could simply have obtained a price from Techno-Sciences to provide software similar to that being coded under RPS's contract.

As noted, in conducting this market survey, Techno-Sciences was required to price material requirements that were not being coded by RPS, such that the survey did not represent a reasonable basis for ascertaining whether the RPS contract price was fair or reasonable. While NOAA again asserts that Techno-Sciences should have known that the LUT pass scheduling and SAR mapping requirements would not be coded by RPS and that Techno-Sciences was not prejudiced by the market survey's request that it respond to these requirements, these assertions amount to mere disagreement with our prior decision and provide no basis for reconsideration.¹

NOAA finally asserts that it would be impracticable to implement the recommendation made in Techno-Sciences, Inc., B-277260.2, supra, because the coding of the software under the RPS contract is almost complete and operational. In this regard, given the timing of the protest, NOAA was not required to stay performance pending our decisions. Given that NOAA's witness at the hearing on the prior protest testified that the specifications that constituted the basis for the RPS coding work were incomplete, Tr. at 125, our Office conducted a site visit of the USMCC to determine the level of progress made in the RPS software development effort.² This visit confirmed that a significant portion of the fourth generation USMCC software has already been coded by RPS and that the completed software is currently performing key aspects of the USMCC's core functions. Under the circumstances, we agree that it would be impracticable to disturb the procurement at this time and accordingly modify our recommendation. However, Techno-Sciences is still entitled to recover its reasonable costs of filing and pursuing the protests, including reasonable attorneys' fees, as well as its costs of responding to the agency's request for reconsideration. See Department of State--Recon., B-243974.4, May 18, 1992, 92-1 CPD ¶ 447 at 8-9.

¹NOAA also asserts that our decision did not address the agency's argument regarding whether prices proposed by commercial manufacturers were required to meet a commercial requirement similar to that reflected in the Federal Acquisition Regulation (FAR) § 2.101, governing commercial items. This is not true. We fully considered NOAA's arguments and found them to be without merit. See Techno-Sciences, Inc., B-277260.2, supra, at 6-7.

²The protester's counsel also attended the site visit.

The request for reconsideration is denied, except to the extent that the recommendation is modified as discussed herein.

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