



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Veda, Incorporated--Reconsideration

File: B-278516.3, B-278516.4

Date: July 8, 1998

Jerald S. Howe, Jr., Esq., Patrick O'Donnell, Esq., and John J. Duffy, Esq., Steptoe & Johnson, for the protester.

Jacob B. Pompan, Esq., Pompan, Murray, Ruffner & Werfel, for Resource Consultants, Inc., an intervenor.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Request for reconsideration is denied, where the protester fails to show that the General Accounting Office erred in finding as a matter of fact that the contracting agency essentially had performed a cost/technical tradeoff, even though the agency asserted that no cost/technical tradeoff had been performed.

2. Awardee's recruitment of incumbent personnel after General Accounting Office decision denying allegations of awardee's bait-and-switch practices provides no basis for reconsideration of the decision.

DECISION

Veda, Incorporated requests reconsideration of our decision in Veda, Inc., B-278516.2, Mar. 19, 1998, 98-1 CPD ¶ 112, in which we denied Veda's protest of the award of a contract to Resource Consultants, Inc. (RCI) under request for proposals (RFP) No. N00244-97-R-5030, issued by the Fleet and Industrial Supply Center, Department of the Navy, for support services at the North Island Naval Aviation Depot (NADEP), San Diego, California. Veda challenges our findings that the Navy "essentially" performed a cost/technical tradeoff analysis in selecting RCI's offer for award, that the Navy erred in failing to credit RCI for that firm's proposed overhead cost cap in the agency's cost realism analysis, and that there was no evidence of RCI practicing a bait-and-switch in its offer of personnel.

We deny the request for reconsideration.

The RFP provided for the award of a cost reimbursable contract on a cost/technical tradeoff basis for support services for a base period with 4 option years. Evaluation factors and subfactors were stated, and offerors informed that the technical evaluation factors combined were significantly more important than cost. Offerors

were also informed that cost realism would be evaluated. The RFP estimated an annual level-of-effort of 186,450 staff-hours, identifying labor categories and estimated staff-hours per category. Some of the labor categories were identified as key personnel labor categories. Under the personnel qualifications factor (the second most important technical evaluation factor), each of the offeror's proposed key personnel were to be evaluated for relevant experience and qualifications.

Proposals were received from Veda and RCI, and evaluated as being essentially technically equal. In the agency's cost realism evaluation, RCI's probable costs of performance were determined to be approximately \$2.2 million lower than Veda's probable costs of performance. Although RCI offered a contractual cap on its proposed overhead, which the agency calculated would further reduce RCI's evaluated probable costs by \$1.7 million, the agency did not account for this contractual cap in its cost realism analysis because, in its view, RCI had not provided sufficient information to demonstrate that it could absorb this amount over the life of the contract.

The contracting officer, who served as the source selection official, accepted the evaluators' conclusion that Veda's and RCI's proposals were essentially technically equal. However, prior to making his source selection, the contracting officer requested that an analysis of the cost impact of making award to RCI be performed to assess "how much would it cost RCI to get up to speed." The contracting officer's representative on the prior contract performed this analysis and concluded that additional effort would be necessary to bring RCI "up to speed." He identified for the contracting officer an estimate of the minimum numbers of hours of government effort and associated cost, and estimated a number of hours of contractor effort and associated cost for this additional effort. This assessment reflected the contracting officer's representative's judgment as to the cost impact associated with the technical approach weaknesses evaluated in RCI's technical proposal.

In making his source selection decision, the contracting officer relied upon the final evaluation report (and its conclusion that the proposals were essentially technically equal), his discussions with the evaluators and the contract negotiator, the cost evaluation (which found that RCI's proposed evaluated cost was approximately \$2.2 million lower than Veda's), and the contracting officer's representative's calculation of a \$1.5 million cost impact of making award to RCI. Based upon this information, the contracting officer determined that RCI's proposal represented the best value to the government. Award was made to RCI. Although the agency chose not to credit RCI for its offered overhead rate cap in the agency's cost realism evaluation, the Navy accepted RCI's cost cap offer and included the cap in the contract awarded to RCI.

We found from our review of the protest record, including hearing testimony, that the Navy's evaluation of the proposals was reasonable and consistent with the stated evaluation criteria. This evaluation found, as we described in our prior decision, that Veda's and RCI's proposals were extremely close in technical merit and that Veda's documented strengths and RCI's weaknesses under the technical evaluation factors were not significant. See Veda, Inc., supra, at 10-12. We also found that, although the contracting officer stated that he had concluded that Veda's and RCI's technical proposals were technically equivalent, and had selected RCI based upon that firm's much lower evaluated cost, the contracting officer had "essentially performed a cost/technical tradeoff" in selecting RCI's proposal for award. That is, the contracting officer recognized that the two firms' proposals were close in technical merit, considered the difference in the firms' evaluated costs, and also considered the costs associated with RCI's evaluated technical weaknesses, noting that these costs did not come close to offsetting RCI's cost advantage. Id. at 12-13. We also found that the agency erred in not crediting RCI for its proposed overhead expenses cap in the agency's analysis; if that cap were properly considered in the agency's cost evaluation, RCI's evaluated cost advantage would have been significantly greater than that considered. Id. at 14.

In addition, we found that RCI had not engaged in bait-and-switch practices by misrepresenting its intent to use the personnel proposed for this contract, as alleged by Veda. Although Veda had stated in its protest that RCI had approached a number of incumbent personnel about performing under this contract, we noted that it was not unusual in government contracts for proposed personnel to change employers and/or jobs after the submission of proposals. Id. at 16-17.

In requesting reconsideration, Veda first complains that we erred in finding that the contracting officer performed a cost/technical tradeoff analysis. Veda argues that this finding is inconsistent with the contracting officer's testimony and the agency's position that it did not perform a cost/technical tradeoff analysis, but selected RCI's proposal as the lower-cost, technically equivalent offer.

We recognized in our prior decision that the agency and contracting officer believed that a cost/technical tradeoff had not been conducted. See id. at 8, 13. Thus, the crux of Veda's arguments on reconsideration is that we erred in finding as a matter of fact that the contracting officer essentially performed a cost/technical tradeoff in selecting RCI's proposal for award because the contracting officer and agency denied conducting a cost/technical tradeoff. We do not agree with Veda's belief that the agency's or any other party's characterization of facts in the record constrains our ability as a forum to make findings of fact consistent with the record. As we have often noted, we consider the entire record before us in reviewing a protest to ascertain whether the protested matter complies with procurement statutes and regulations. See, e.g., Southwest Marine, Inc.; American Sys. Eng'g Corp., B-265865.3, B-265865.4, Jan. 23, 1996, 96-1 CPD ¶ 56 at 10.

The record in this case belied the agency's characterization of its source selection as being based upon a finding of technical equivalence and low evaluated cost. Rather, as described in detail in our prior decision, the contracting officer weighed the technical evaluation board's technical findings, which evidenced that the proposals were close in technical merit although Veda's proposal was higher rated than RCI's, against the expected costs to the government, including the cost associated with RCI's evaluated weaknesses; this essentially constituted a cost/technical tradeoff, despite the agency's denial that it had performed such a tradeoff. Veda, Inc., supra, at 12-13. While Veda clearly disagrees with this finding of fact, it does not demonstrate that it was in error.

Veda has also not demonstrated that we erred in finding that this cost/technical tradeoff was reasonable. While Veda again complains that the Navy's analysis of the cost impact of making award to RCI was only an estimate and these costs may actually be higher than that estimated by the Navy, this does demonstrate that this estimate was unreasonable for the purposes for which it was used in the cost/technical tradeoff. Rather, Veda merely disagrees with the Navy's estimate, and has provided no evidence or arguments that demonstrate that the Navy's estimate of the additional costs associated with RCI's technical weaknesses was in error.

Veda also requests reconsideration of our finding that the Navy erred in failing to credit RCI in the agency's cost realism analysis for that firm's proposed overhead cost cap. Veda again complains that acceptance of RCI's cost cap would pose serious technical risk that the Navy did not evaluate. Repetition of arguments made during the original protest or mere disagreement with our decision does not constitute a valid basis for reconsideration. R.E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274 at 2. Here, Veda has not presented any new facts, evidence, or arguments not already considered in our decision.

In any event, as previously explained, an agency may not ignore an offeror's unequivocal offer of a cost cap in the agency's cost realism evaluation. See Veda, Inc., supra, at 14-15. Thus, the Navy could not ignore RCI's unequivocal offer of an overhead cost cap (which became effective and binding when accepted by the agency and incorporated into RCI's contract) in computing the probable costs of RCI's performance. Rather, the agency was permitted under the RFP to consider whether there was any performance risk arising from the cost cap. This risk was evaluated by the Navy, which found that any risk arising from RCI's offered overhead cap was minimal.

Veda finally argues that RCI has recently recruited three Veda employees, who were proposed by Veda as key personnel, and that this "new evidence" now demonstrates that RCI engaged in bait-and-switch practices. Veda also complains that RCI is using in its recruitment of Veda employees a table of key employees from Veda's

technical proposal; Veda argues that this also evidences RCI's bait-and-switch practices.¹

We do not agree that RCI's recruitment of three Veda employees provides any basis for reversal or modification of our decision. As we have often recognized, the substitution of employees after award is neither prohibited nor unusual. See Meridian Management Corp., Inc.; NAA Servs. Corp., B-254797, B-254797.2, Jan. 21, 1994, 94-1 CPD ¶ 167 at 9. Here, RCI's recruitment of Veda employees would at most result in the substitution of only 3 of the 45 key personnel originally proposed more than 13 months ago. We do not find that this substitution demonstrates that we erred in finding no evidence of bait-and-switch. See EBA Eng'g, Inc., B-275818, Mar. 31, 1997, 97-1 CPD ¶ 127 at 7-8. Rather, it is consistent with our recognition in the prior decision that RCI's efforts to interview incumbent personnel reflected a prudent business practice to ensure that the contractor had at all times the personnel necessary to perform its contract. See Veda, Inc., supra, at 17; cf. Planning Research Corp. v. United States, 971 F.2d 736 (Fed. Cir. 1992), aff'g, Electronic Data Systems Federal Corp., 89-2 BCA ¶ 21,655 (extensive substitution of incumbent personnel for proposed committed personnel immediately after contract award, contrary to explicit proposal promises not to hire incumbent personnel, was sufficient circumstantial evidence to support the decision of the General Services Board of Contract Appeals that the awardee had engaged in bait-and-switch practices). We also do not find that RCI's possession of a list of Veda's proposed key personnel demonstrates that at the time RCI submitted its proposal RCI intended to practice a bait-and-switch.

The request for reconsideration is denied.

Comptroller General
of the United States

¹Veda also argues that RCI's possession of this allegedly confidential, proprietary information may evidence a violation of the Office of Federal Procurement Policy Act, 41 U.S.C.A. § 423 (West Supp. 1998), which our Office should investigate. That Act provides that no person shall file a protest alleging a violation of the Act, unless the alleged violation was first reported to the agency responsible for the procurement. 41 U.S.C.A. § 423(g); see also 4 C.F.R. § 21.5(d) (1998). The Navy has informed us that it is investigating Veda's allegation of RCI's procurement integrity violation. Because our consideration of this issue pending the Navy's investigation would be premature, this allegation is dismissed. While we will consider Veda's complaint that RCI's possession of this information may evidence a violation of the protective order issued in connection with Veda's protest, this allegation does not present any basis for reconsideration.