Van Schaik

Comptroller General
of the United States

Washington, D.C. 20548

1053239

Decision

Matter of: Dash Engineering, Inc.; Engineered Fabrics Corporation--Reconsideration

File: B-246304.12; B-246304.13

Date: September 27, 1993

Thomas G. Farrell, for Dash Engineering, Inc.; and Douglas K. Olson, Esq., Kilcullen, Wilson and Kilcullen, for Engineered Fabrics Corporation, the protesters.
John Van Schaik, Esq., and Daniel I. Gordon, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Prior decision is affirmed where requests for reconsideration contain no statement of facts or legal grounds warranting reversal but merely restate protest arguments and disagree with the original decision.

DECISION

Dash Engineering, Inc. and Engineered Fabrics Corporation (EFC) request reconsideration of our decision in Dash Eng'g, Inc.; Engineered Fabrics Corp., B-246304.8; B-246304.9, May 4, 1993, 93-1 CPD ¶ 363. In that decision, we dismissed in part and denied in part EFC's and Dash's protests of the Department of the Air Force's waiver of a statutory prohibition on the expenditure of appropriated funds for certain foreign goods in a contract awarded to Sekur S.p.A.-Pirelli Group (Sekur-Pirelli) under request for proposals (RFP) No. F09603-92-R-30819, for helicopter fuel cells.

We affirm our decision.

As explained in our initial decision, the RFP contemplated the award of a contract for engineering services and supplies necessary to design, develop and test crash-resistant, self-sealing main fuel tank assemblies. The RFP incorporated Defense Federal Acquisition Regulation Supplement (DFARS) § 252.225-7009,[1] which implements the Berry Amendment and generally restricts the Department of

[1]The current version of this clause is located at DFARS § 252.225-7012.

058449/150252

Defense's (DOD) expenditure of funds for certain articles and items, including synthetic fabric and coated synthetic fabric, to domestically produced products.[2]

The Air Force awarded the contract in May 1991 to Sekur-Pirelli, which proposed fuel cells manufactured in Italy; Dash was the only firm to submit a proposal for domestically manufactured fuel cells. Subsequently, in response to inquiries from members of Congress, this Office issued a decision concerning application of the Berry Amendment to the acquisition of fuel cells. Department of Def. Purchase of Fuel Cells, B-246304.2 et al., July 31, 1992. We concluded that the fuel cells to be provided under the Sekur-Pirelli contract were subject to the Berry Amendment restriction.

On December 14, 1992, the Deputy Assistant Secretary of the Air Force (Acquisition) signed a "Determination for Waiver of Restrictions on Acquisition of Fuel Cells Applicable to MH-53J Helicopter." The waiver determination, issued pursuant to the terms of the applicable DFARS clause, stated that the fuel cells "cannot be acquired when needed in sufficient quality and sufficient quantity grown or produced in the United States or its possessions at U.S. market prices." The specific grounds for the waiver, discussed at length in our initial decision, related primarily to safety considerations. Both protesters challenged various aspects of the Berry Amendment waiver and the award to Sekur-Pirelli.

We dismissed EFC's protest since EFC had not submitted a proposal under the solicitation, but was instead a subcontractor to another offeror, and therefore was not an interested party. Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (1988), only an "interested party" may protest a federal procurement. See also 4 C.F.R. § 21.0(a) (1993). As we explained in our original decision, a prospective subcontractor does not have the requisite interest to be an interested party because it is not a prospective or actual offeror.

In its reconsideration request, EFC argues that we incorrectly concluded that it was not an interested party to protest. While conceding that it was only a potential subcontractor to Dash prior to the waiver of the Berry Amendment restriction and therefore not an interested party

---

[2]The current version of the Berry Amendment is in section 9005 of the DOD Appropriations Act, 1993, Pub. L. No. 102-396, § 9005, 106 Stat. 1876, 1900 (1992).

at that time, EFC alleges that it would have submitted a proposal for domestically manufactured fuel cells under a solicitation revised to waive that restriction.

Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must show that our prior decision may contain either errors of fact or law or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.12(a). Repetition of arguments made during the original protest or mere disagreement with our decision does not meet this standard. R.E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274. For the most part, EFC's request for reconsideration merely repeats the argument, raised during the initial protest, regarding the impact of the Berry Amendment waiver on EFC's behavior. The repetition of this argument does not constitute a basis for reconsideration.[3]

Turning to Dash's request for reconsideration, our initial decision denied Dash's challenge to the propriety of the Berry Amendment waiver. We found that the waiver was reasonable since the record supported the Air Force's position that it needed to acquire the fuel cells promptly in order to minimize the dangers to flight crews and passengers from crashes that may occur during the high risk missions for which the helicopters are used, and that foreign manufactured fuel cells were available significantly earlier than domestically manufactured ones.

In its request for reconsideration, Dash argues that the standard of review adopted in our decision was not appropriate for assessing the lawfulness of a Berry Amendment waiver. Relying on a congressional conference report indicating that DOD should "exercise extreme caution in granting waivers" of the Berry Amendment restriction, see H.R. Rep. No. 102-328, 102nd Cong., 1st Sess. 90 (1991),

---

[3]The only difference in EFC's argument appears to be that, while during the initial protest EFC argued that it would modify its proposed subcontract with Dash in light of the Berry Amendment waiver, it now contends that it would have submitted its own proposal because of that waiver. EFC fails to offer any rationale for the argument that it would have submitted its own proposal for domestically produced fuel cells once it knew that the Air Force would consider foreign manufactured fuel cells, even though the company declined to submit a proposal for domestic items when it believed that only such items were eligible for award. This argument, which is both unsupported and implausible, fails to indicate that our dismissal of EFC's initial protest was improper.

Dash argues that our Office improperly acquiesced in a waiver which could not satisfy this "extreme caution" standard.

Although our decision did not specifically mention the language which Dash quotes from the conference report, we considered all of Dash's arguments in support of its position that the waiver was improper, including this argument, which Dash had raised in its protest submissions. The repetition of that argument here does not provide a basis for reconsideration. In any event, the chronology of this procurement--where the Air Force did not issue the waiver until 7 months after our Office found that the procurement was subject to the Berry Amendment--suggests that the agency issued the waiver only after careful consideration. In addition, since we are aware of no other Berry Amendment waivers by the Air Force, we see no evidence that the Air Force has failed to exercise caution in granting waivers.

Several other grounds of Dash's reconsideration request merely repeat arguments raised and considered in the initial protest. For example, Dash reasserts the contention, discussed in our decision, that the Air Force erred in finding that there was an urgent need for the fuel cells and that Dash was unable to supply the items as early as could Sekur-Pirelli. Accordingly, those grounds do not provide a basis for reconsideration.

Our decision also discussed the fact, raised again in the reconsideration request, that the urgency was increased due to the Air Force's initial erroneous finding that the Berry Amendment did not apply to the fuel cells and due to the agency's delay in issuing a waiver once our Office determined that the Berry Amendment did apply. Dash argues that the Air Force caused the urgency and therefore should not be allowed to rely on it as a basis for the waiver.[4] As

---

[4]While Dash relies on our decision in Service Contractors, B-243236, July 12, 1991, 91-2 CPD ¶ 49, that reliance is misplaced. In that decision, we held that an agency could not properly cite urgency as a basis for limiting competition for a contract for lawn maintenance services where the urgency was the result of the agency's lack of advance planning. In Service Contractors, the agency's action was based on the provision in the Competition in Contracting Act of 1984, 41 U.S.C. § 253(c)(2), which permits limits on full and open competition where there is an urgent need for the requirement. The statutory provision, however, excludes from this urgency exception situations in which the urgency is caused by the contracting activity's lack of advance planning. 41 U.S.C. § 253(f)(5)(A). The Berry Amendment
(continued...)

explained in our opinion, we concluded that, because the waiver was based primarily on safety considerations, concerns about the Air Force's actions preceding issuance of the waiver do not provide grounds for finding the waiver improper. Dash's reconsideration request in this regard merely repeats arguments already raised and considered during the protest.

Similarly addressed in the initial protest was Dash's allegation that the contracting officer created the urgent need for the fuel cells artificially and in bad faith by withholding the request for a waiver until it might be too late to obtain the use of domestically produced fuel cells. Dash's request for reconsideration also repeats the argument from the initial protest that the Air Force provided Sekur-Pirelli special assistance not offered to Dash and that Air Force officials acted in bad faith by refusing to consider a sole-source contract with Dash or Dash's offer of a price reduction or an accelerated delivery schedule.[5] The

---

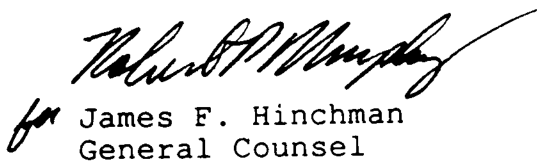
[4](...continued)
waiver provisions have no such exclusion, and more importantly, the Service Contractors protest did not involve safety concerns, while the Air Force waiver in this case relied on, and was justified by, those concerns.

[5]To support its request for reconsideration, Dash cites our decision in Goodyear Tire & Rubber Co., 72 Comp. Gen. 28 (1992), 92-2 CPD ¶ 315, in which we held that the protester had been prejudiced by the agency's waiving a solicitation requirement in order to find the awardee's product acceptable. The protester in that case argued that it would have offered a much lower price if it had known that the agency intended to waive the requirement at issue. Dash contends that we should accept its claim that it would have proposed a lower price and a shorter delivery schedule if it had known that the agency would waive the Berry Amendment. The two cases are readily distinguishable. In Goodyear Tire & Rubber Co., the agency waived a solicitation requirement for one offeror only and thereby treated offerors unequally. The question of prejudice arose because, even where an agency acts improperly, we will not sustain a protest unless the protester was prejudiced by the agency action. See Lithos Restoration Ltd., 71 Comp. Gen. 367 (1992), 92-1 CPD ¶ 379. In the present case, the Air Force was explicitly permitted under the DFARS clause in the solicitation to waive the Berry Amendment restriction, and the waiver issued was proper (for the reasons set forth in detail in our decision) and did not constitute unequal treatment of offerors. Since the agency's action was proper, the question of prejudice does not arise. Moreover, as explained in our
(continued...)

protester's repetition of these allegations in its request for reconsideration does not provide a basis for reconsidering our decision.

Finally, Dash argues in its request for reconsideration, as it did in its protest, that the award to Sekur-Pirelli was improper. Since the contract was awarded to Sekur-Pirelli in May 1991, and Dash protested in December 1992, we concluded that any allegations concerning the award were untimely and would not be considered. In its reconsideration request, Dash has not challenged that conclusion.

The decision is affirmed.



for James F. Hinchman
General Counsel

[5](...continued)
initial opinion, the agency reasonably relied on Dash's proposed prices and schedule as evidence of its capability to supply the fuel cells; Dash has offered no justification for its suggestion that the Air Force was required to provide Dash a further opportunity to lower its prices or shorten its production schedule.