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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Department of the Navy--Request for Modification of Remedy

File: B-401102.3

Date: August 6, 2009

David Turner, Esq., Department of the Navy, Navy Supply Systems Command, for Rosemary Livingston--Agency Tender Official, the protester.

Hilary S. Cairnie, Esq., Vorys, Sater, Seymour & Pease LLP, for Fidelity Technologies Corp., an intervenor.

Sean McBride, Esq., Department of the Navy, Naval Facilities Engineering Command, for the agency.

Cherie J. Owen, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of this decision.

DIGEST

Request for reconsideration is denied where the request is based on information that was available to, but not proffered by, the requester during consideration of the initial protest.

DECISION

The Naval Facilities Engineering Command requests that our Office modify the recommendation in our decision Rosemary Livingston--Agency Tender Official, B-401102.2, July 6, 2009, 2009 CPD ¶ __, in which we sustained the agency tender official's (ATO) protest, concluding that there was inadequate documentation to support a finding that the ATO's fourth revised tender was unacceptable and further discussions were necessary. In issuing our recommendation, we stated that ordinarily we would have recommended that the agency re-evaluate proposals, document those conclusions, and then take appropriate action based on those conclusions. However, because the implementation of such a recommendation is barred by § 8023 of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, we recommended that the agency terminate the contract award. The Navy contends that we should have left to the agency's discretion whether corrective action is unlawful under the circumstances of this case.

We deny the request.

Our decision in Rosemary Livingston–Agency Tender Official, *supra*, addressed the agency’s actions in conducting a public-private competition under Office of Management and Budget (OMB) Circular A-76 (the Circular). In its initial protest filing, dated March 26, 2009, the protester requested that GAO recommend that the contract be cancelled or terminated because the agency was prohibited by law from using appropriated funds toward a cost study that had exceeded the 30-month limitation. Protest at 51. Despite the ATO’s clear identification of this issue, the Navy’s April 27 agency report (AR) responding to the protest did not address possible remedies. Therefore, near the end of our consideration of the initial protest, we specifically asked the parties to address possible remedies if we were to sustain the protest. Fax from GAO to the Parties, June 3, 2009, at 2. Our request also advised that the parties could comment on the issue of possible remedies even if they elected not to comment further on the merits of the protest. Id.

In response to our request, the protester submitted a letter arguing:

[T]he available remedies are limited as the statutorily-imposed 30-month time limit for this A-76 study expired on 6 December 2008. As such, appropriated funds can not be used to fund any extension of the study. This statutory limitation would appear to preclude any reevaluation of new proposal submissions or even a price comparison As such, it would appear that the Agency’s only viable option would be to cancel the award to FTC and cancel the A-76 study.

Letter from the Protester, June 8, 2009, at 5-6.

The agency’s response to our request was comprised of a 7-page letter which, among other things, included only a cursory discussion of the impact of the appropriations limitation on any available remedy. On this issue, the Navy’s reply to the protester’s suggestion that the contract and the competition must be terminated was that the argument was “nonsensical.” Letter from the Department of the Navy, June 8, 2009, at 6. Instead of addressing the appropriations limitation, the Navy argued that the appropriate remedy, should the protest be sustained, would be to require the agency to re-evaluate proposals and reach a new performance decision. Id.

On this record, when we sustained the protest, we noted that § 8023 of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009 states, “None of the funds appropriated by this Act shall be available to perform any cost study pursuant to the provisions of OMB Circular A-76 if the study being performed exceeds a period of . . . 30 months after initiation of such study” Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, div. C, title VIII, 122 Stat. 3619, 3626 (Sept. 30, 2008).

Given that it was undisputed that the 30-month deadline had expired shortly after the performance decision, we noted that a recommendation by our Office to rectify the

inconsistency in the evaluation record would result in the Navy expending funds to continue to perform the study at issue. However, we also acknowledged that it would be improper to leave in place an award for which we could not find adequate support in the record. Therefore, our Office recommended that the Navy terminate the contract award to Fidelity Technology Corporation and terminate the competition.

In its request that we modify the recommendation in our prior decision, the Navy contends that we should amend our recommendation to allow it to determine whether agency appropriations are available to carry out a reevaluation of proposals. The Navy suggests that the statutory restriction may not bar corrective action in connection with the cost study here. In support of its position, the Navy submits, for the first time, three Department of Defense (DOD) memoranda addressing the method for calculating the end date of a cost study.¹

Under our Bid Protest Regulations, a request for reconsideration must contain a detailed statement of the factual and legal grounds upon which reversal or modifications of the initial decision is deemed warranted, specifying any errors of law made or information not previously considered by our Office. 4 C.F.R. § 21.14(a) (2009). In order to provide a basis for reconsideration, additional information not previously considered must have been unavailable to the requesting party when the initial protest was being considered. Allstate Van & Storage, Inc., B-270744.2, Aug. 20, 1996, 96-2 CPD ¶ 72 at 2. Failure to make all arguments or submit all information available during the course of the initial protest undermines the goals of our bid protest forum—to produce fair and equitable decisions based on consideration of all parties’ arguments on a fully developed record—and cannot justify reconsideration of our prior decision. The Department of the Army-Recon., B-237742.2, June 11, 1990, 90-1 CPD ¶ 546.

The DOD memoranda now submitted by the Navy clearly were available during our consideration of the original protest. During our consideration of the protest, the protester twice raised the argument that the competition could not be reopened

¹ The first two memoranda, dated May 9, 2006, and September 2007, state that a performance decision, which identifies the end and outcome of the public-private competition process, occurs prior to the resolution of any type of dispute, such as a protest. DOD Competitive Sourcing Program Memorandum, May 9, 2006 at 2; DOD Competitive Sourcing Program Guidance Memorandum, Sept. 2007, at 1. The third memorandum, prepared in response to a protest involving a similar issue, advised that the cost study had ended on the date the agency certified its initial performance decision. Memorandum to the Assistant Secretary of the Navy, from the Office of the Under Secretary of Defense, Mar. 25, 2009, at 1-2. Accordingly, the memorandum advised that the agency could amend the solicitation and make a new award decision in response to a protest, notwithstanding the fact that over 37 months had elapsed since the original start date. Id.

because it had exceeded the 30-month limitation. Moreover, we specifically asked the parties to address the issue of possible remedies in the event the protest was sustained. Despite this invitation, the agency did not raise the arguments it now proffers, and did not submit the DOD memoranda upon which it now relies. Whatever the reason for the Navy's failure to mention the DOD memoranda during the protest, it cannot now proffer this information and the associated arguments for the first time on reconsideration. Since the agency was clearly on notice about this issue from the ATO's very first protest filing, it could have introduced this information at any point during the initial protest, but did not. We will not consider it now.²

The request for reconsideration is denied.

Daniel I. Gordon
Acting General Counsel

² With regard to the agency's assertion that GAO's "Procurement Law Group should not foreclose agency discretion with respect to use of agency appropriations . . . ," particularly because "the Procurement Law Group's jurisdiction is limited to violations of procurement law . . . vice appropriations law," Navy Request for Modification of Remedy, July 16, 2009, at 2, we note only that our decision reflects our Office's views regarding both the procurement law and appropriations law aspects of this matter.