



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

DOCUMENT FOR PUBLIC RELEASE

A protected decision was issued on the date below and was subject to a GAO Protective Order. This version has been redacted or approved by the parties involved for public release.

Matter of: Ann Riley & Associates, Ltd.--Reconsideration

File: B-271741.3

Date: March 10, 1997

Ronald K. Henry, Esq., and Mark A. Riordan, Esq., Kaye, Scholer, Fierman, Hays & Handler, LLP, for the protester.

Matthew S. Perlman, Esq., and Tenley A. Carp, Esq., Arent Fox Kintner Plotkin & Kahn, for Bayley Reporting, Inc., an intervenor.

George C. Brown, Esq., Ilene F. Citrin, Esq., and Valerie G. Preiss, Esq., Securities and Exchange Commission, for the agency.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester has not made requisite showing of "bait and switch" by awardee where there is no evidence in the record that (1) the awardee represented in its proposal that it would rely on certain specified personnel in performing the services; (2) the agency relied on this representation in evaluating the proposal; and (3) it was foreseeable that the individuals named in the proposal would not be able to perform the contract work.

2. Agency was not required to hold discussions regarding every weakness identified in the protester's proposal.

DECISION

Ann Riley & Associates, Ltd. requests reconsideration of our decision, Ann Riley & Assocs., Ltd., B-271741.2, Aug. 7, 1996, 97-1 CPD ¶ ____, in which we denied its protest of the award of a contract to Bayley Reporting, Inc. under request for proposals (RFP) No. SECHQ1-94-R-0008, issued by the Securities and Exchange Commission (SEC) for court reporting and transcription services. Ann Riley argues that our prior decision failed to address whether Bayley had engaged in "bait and switch" tactics in its proposal, and failed to properly consider Ann Riley's claim that discussions were misleading.

We deny the request for reconsideration.

Our decision reviewed Bayley's size, capacity, and rapid growth, as well as its proposal, with an eye towards whether the agency could reasonably conclude that Bayley would be able to comply with the statutorily-mandated limitations on subcontracting clause--*i.e.*, the requirement that at least 50 percent of the cost of personnel incurred be for Bayley employees. Our decision concluded that the agency reasonably found both that Bayley's proposal evidenced its intent to comply with the requirement and that Bayley would be able to perform as proposed. In so doing, our decision answered the main thrust of Ann Riley's argument that "Bayley could not, would not, and did not intend to comply" with the limitations on subcontracting clause.

As its first basis for reconsideration, Ann Riley argues that our prior decision failed to resolve whether Bayley's performance of the contract following award constituted proof of an impermissible "bait and switch" tactic. While we considered this issue as part of our earlier decision, the decision does not specifically address the issue; hence, we do so here.¹ See Minigraph, Inc.--Recon., B-237873.3, Dec. 10, 1990, 90-2 CPD ¶ 492.

The SEC correctly points out that the term "bait and switch" generally refers to an offeror's misrepresentation in its proposal of the personnel that it expects to use during contract performance. Planning Research Corp. v. United States, 971 F.2d 736 (Fed. Cir. 1992) (personnel misrepresentation); CBIS Fed. Inc., 71 Comp. Gen. 319 (1992), 92-1 CPD ¶ 308 (misrepresentation of personnel availability); Informatics, Inc., 57 Comp. Gen. 217 (1978), 78-1 CPD ¶ 53 (awardee misrepresented its survey of the availability of incumbent's personnel); KPMG Peat Marwick, LLP, B-259479.2, May 9, 1995, 95-2 CPD ¶ 13 (awardee replaced 13 of 18 key personnel immediately after award); ManTech Advanced Sys. Int'l, Inc., B-255719.2, May 11, 1994, 94-1 CPD ¶ 326 (awardee misrepresented availability of incumbent's personnel); ManTech Field Eng'g Corp., B-245886.4, Mar. 27, 1992, 92-1 CPD ¶ 309, recon. denied, B-245886.5, Aug. 7, 1992, 92-2 CPD ¶ 89 (misrepresentation of personnel availability). Where such a misrepresentation materially influences an agency's evaluation of an offeror's proposal, it undermines the integrity of the competitive procurement system and generally provides a basis for proposal rejection or termination of a contract award based upon the proposal. ManTech Advanced Sys. Int'l, Inc., *supra*.

To demonstrate a "bait and switch," a protester must show not only that personnel other than those proposed are performing the services--*i.e.*, the "switch"--but also that: (1) the awardee represented in its proposal that it would rely on certain

¹For the record, we note that Ann Riley's assertion that a "bait and switch" occurred was but one minor element of its principal contention that the agency evaluation was unreasonable.

specified personnel in performing the services; (2) the agency relied on this representation in evaluating the proposal; and (3) it was foreseeable that the individuals named in the proposal would not be available to perform the contract work. Combat Sys. Dev. Assocs. Joint Venture, B-259920.6, Nov. 28, 1995, 95-2 CPD ¶ 244; Free State Reporting, Inc., B-259650, Apr. 14, 1995, 95-1 CPD ¶ 199. Each of these three elements must be present to establish the "bait" portion of a "bait and switch" claim. Free State Reporting, Inc., *supra*.

Ann Riley's claim lacks all three elements required to show that Bayley "baited" the SEC in this procurement. First, there is no showing that Bayley misrepresented the personnel it would use during performance; switched any of its key personnel; or indicated that any specific task would be performed by a person who is now not performing that task. Second, the evaluation factors in this case do not include criteria designed to assess specific subcontractors that might be switched at some later date; nor do they include an assessment of whether the offeror itself, as opposed to a subcontractor, will perform some specific task. Thus, there is no place in the evaluation scheme where the agency gave evaluative credit for one method of performance versus another.

Further, there is no evidence of the third element of a "bait" claim--that the "switch" must be foreseeable. Our prior decision expressly considered whether the agency reasonably concluded that Bayley would be able to perform the contract without violating the limitations on subcontracting. In considering the propriety of the SEC's conclusions we found that the agency was not misled by the proposal; recognized the embryonic nature of Bayley; adequately considered Bayley's lack of current capacity; and reasonably accepted Bayley's promises to expand to meet the SEC's reporting requirements. Given our conclusion that the agency's decision was reasonable--a conclusion which Ann Riley does not challenge--we see no basis for concluding at this juncture that it was foreseeable that Bayley would violate the subcontracting limitation after award such that we should conclude that Bayley improperly "baited" the agency.²

²We note that Ann Riley has submitted an analysis of Bayley's performance since contract award in an attempt to establish the alleged "switch." Ann Riley claims in the analysis that a review of Bayley's performance presented by Bayley during the course of the earlier protest was flawed, and when corrected for errors and faulty assumptions shows that "Bayley's in-house labor costs were, at best, only 48.5 percent of the amount expended for personnel under the contract." Whether Bayley complied with the subcontracting limitation at some point after award ultimately raises a matter of contract administration that we will not review where the record does not otherwise support a claim that the awardee misled the agency. See Diversified Computer Consultants, B-230313; B-230313.2, July 5, 1988, 88-2 CPD ¶ 5. No such showing has been made here.

The second basis of Ann Riley's request for reconsideration is that our Office did not fully consider its contention that the agency failed to hold meaningful discussions with the company. In this regard, Ann Riley points out that Bayley prevailed in this competition with only a 1.5 point margin, and cites several examples where Ann Riley's score might have improved by 1.5 points or more with an opportunity to discuss its shortcomings.³

Our prior decision considered, and indicated that it considered, the discussions that were held here and the evaluation materials listing each shortfall noted by the evaluators. Our decision explained that there is no requirement that an agency advise an offeror of a minor weakness that is not considered significant, even where the weakness subsequently becomes a determinative factor when two closely-ranked proposals are compared. Volmar Constr., Inc., B-270364; B-270364.2, Mar. 4, 1996, 96-1 CPD ¶ 139. Applying this principle to the record before us, we concluded that the evaluators' comments reflected minor concerns that need not have been pointed out during discussions.

In essence, Ann Riley's complaint in this area is that the point differential between its technically superior initial proposal, and the technically weaker proposal of Bayley, was narrowed through more comprehensive discussions with Bayley than with Ann Riley, such that in the final analysis, Bayley's lower price--converted to a point score via a scheme set forth in the solicitation--was able to offset Ann Riley's higher technical score. Ann Riley correctly notes that during this process a variety of relative weaknesses that caused its proposal to receive a less than perfect score were not pointed out to the company. Our conclusion, then and now, however, is that the principal concerns about Ann Riley's proposal were brought to the protester's attention, and the various other concerns, both individually and in total, did not prevent the protester from having a reasonable chance for award; the agency's failure to point out those other concerns thus did not deprive Ann Riley of meaningful discussions.

The request for reconsideration is denied.

Comptroller General
of the United States

³As explained in our prior decision, although Bayley's proposal received a lower technical score than Ann Riley's proposal--48 points versus 52 (out of 60 possible points)--Bayley's lower price resulted in more points for Bayley under the cost factor. Thus, the overall scores were 88.6 for Bayley and 87.1 for Ann Riley.