



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Southern Technologies, Inc.--Reconsideration and Costs

File: B-278030.3

Date: April 29, 1998

James V. Etscorn, Esq., Baker & Hostetler LLP, for the protester.

Lis B. Young, Esq., Naval Facilities Engineering Command, for the agency.

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DIGEST

1. Request for reconsideration is denied where requester fails to demonstrate errors of law or fact in prior decision.
2. Where agency overrode statutory stay of performance on the basis of urgent and compelling circumstances, General Accounting Office is not precluded from considering practicability of a recompetition in considering whether corrective action proposed by agency is appropriate.
3. General Accounting Office will not recommend that protester recover the costs of filing and pursuing its protest where the agency offered to take corrective action promptly, *i.e.*, by the due date for the agency report.

DECISION

Southern Technologies, Inc. requests reconsideration of our decision, Southern Techs., Inc., B-278030, B-278030.2, Dec. 19, 1997, 97-2 CPD ¶ 167, in which we found that the payment of the protester's proposal preparation costs was appropriate corrective action for the agency's admittedly improper actions in conducting the procurement under request for proposals (RFP) No. N62477-97-R-0041, for power plant improvements at the Goddard Power Plant in Indian Head, Maryland.¹

Southern argues that we mischaracterized its protest and failed to address some of the arguments it raised. Southern also asks that we recommend that the agency reimburse Southern for its protest costs.

We deny the request for reconsideration and the request for costs.

¹The purpose of the improvements is to bring the plant, which is a major emitter of nitrogen oxides (NOx), into compliance with emission standards set by the state of Maryland. Work to be performed includes the installation of low NOx coal/oil fired burners on each of the plant's three boilers.

BACKGROUND

In its original protest, Southern complained that its proposal had been determined technically unacceptable and excluded from the competitive range because the burners that it offered to install in the plant's boilers employed overfire air (OFA) technology. The protester argued that OFA technology was consistent with the solicitation's requirements and that its proposal therefore should not have been excluded from further consideration. The Navy responded that OFA was not an acceptable technology, but conceded that the RFP's specifications, as written, could have misled offerors in this regard. The agency maintained, however, that including the protester in the competitive range, as Southern had requested, would not be appropriate corrective action because Southern would have to rewrite its proposal using a different technical approach to make the proposal susceptible of award. The Navy instead proposed to reimburse the protester for its proposal preparation costs, and asked us to dismiss the protest on the ground that it was taking appropriate corrective action.

We declined to dismiss on the basis of the agency's request since, as we informed the parties, we did not think that the Navy had demonstrated that payment of proposal preparation costs was the appropriate corrective action for the impropriety. We explained that although, as a general rule, a proposal should not be included in the competitive range if it would have to be substantially rewritten to become technically acceptable, that rule did not govern where the agency conceded that the specifications were misleading and required revision--and the reasons for the proposal's exclusion related directly to the misleading provisions that were to be rewritten. In such circumstances, we noted, unless precluded by the urgency of the requirement, the agency should amend the solicitation to reflect its needs accurately, and then reopen the competition and allow offerors to submit new or revised proposals on the basis of the revised requirements.

The Navy responded with a supplemental submission arguing that the urgency of the requirement did indeed preclude a reopening of the competition. Southern took issue with the agency's representation, arguing that reopening the competition for all or part of the solicitation was both feasible and appropriate. The protester further argued that if the long lead-time status of the burners precluded recompeting the work relating to their installation, award for the work on the burners should remain in place with the awardee, Frank Lill and Son, and the remaining work recompeted in a competition from which Lill would be excluded.

We found that the Navy had demonstrated that a recompetition of the RFP would be impracticable since delay in the award would mean that the plant would not have a boiler with a low NOx burner available for operation during the peak ozone months of 1998, in violation of the terms of the plant's operating permit. We also determined that carving out a portion of the work for Lill and recompeting the rest in a competition from which Lill would be excluded, as the protester had proposed,

would be inconsistent with the statutory mandate for full and open competition. See 10 U.S.C. § 2305(a)(1)(A) (1994). We therefore concluded that there was no meaningful remedial action that the agency could take and that payment of the protester's proposal preparation costs was the only appropriate corrective action available. Having concluded that the agency was taking appropriate corrective action, we dismissed as academic Southern's underlying protest objecting to the exclusion of its proposal from the competitive range.

TIMELINESS

As a preliminary matter, the Navy argues that we should dismiss Southern's request for reconsideration, which was filed on December 31, 1997, as untimely because it was filed more than 10 days after the decision was issued.

Our Bid Protest Regulations require that a request for reconsideration be filed not later than 10 days after the basis for reconsideration is, or should have been, known. 4 C.F.R. § 21.14(b) (1997). Thus, contrary to the agency's position, the critical date for timeliness purposes is the date that the protester received our decision, not the date the decision was issued. Accordingly, for the December 31 reconsideration request to be timely, Southern must have received our decision (dated December 19) no earlier than December 21 (a Sunday). The protester's counsel states that he did not receive a copy of the decision until after December 20, a claim that we find fully credible given that we have no record of having furnished a copy other than by mail.² Since the request for reconsideration was filed within 10 days after the protester received a copy of our decision, it is timely.

ANALYSIS

Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must either show that our prior decision contains 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); Lovelace Scientific Resources, Inc.--Recon., B-256315.2, Nov. 25, 1994, 94-2 CPD ¶ 209 at 1. As explained below, Southern's request for reconsideration does not meet this standard.

Southern argues first that we incorrectly characterized its protest as an objection to the corrective action proposed by the agency when it was in fact a complaint about

²A copy of the decision was posted on the Internet, but not until December 22; the protester's counsel states that the protester retrieved it from the Internet on December 24. Even if the protester had seen the decision there on the date it was first posted, it would have had until January 2, 1998 to file its request for reconsideration.

the agency's actions in conducting the underlying procurement. According to the protester, it "never embraced nor rejected the agency's remedial proposal but declined acquiescence because it recognized that it [Southern] was in no position to determine the appropriateness of the agency's motion without a determination by the Comptroller General of the merits of Southern's protest." Request for reconsideration at 1.

We understood that the protester's underlying complaint was that the agency had acted improperly in conducting the procurement. The agency conceded this point in its initial submission, however, and requested that we dismiss the protest on the ground that it was prepared to take corrective action by paying the protester its proposal preparation costs. Since, as we noted in the decision, we will dismiss a protest as academic where the agency takes appropriate corrective action, the issue that remained before us was the appropriateness of the corrective action proposed. Accordingly, this is the issue on which our decision properly focused.

Next, Southern argues that we ought not to have considered the practicability of recompeting the solicitation in considering whether the proposed corrective action was appropriate. In support of its argument, the protester cites section 21.8(c) of our Bid Protest Regulations, 4 C.F.R. § 21.8(c), which provides as follows:

If the head of the procuring activity determines that performance of the contract notwithstanding a pending protest is in the government's best interest, GAO shall make its recommendation(s) under paragraph (a) of this section without regard to any cost or disruption from terminating, recompeting, or reawarding the contract.

The section cited by the protester addresses situations in which the agency has overridden the statutory stay of performance on the ground that performance is in the government's best interests. See 31 U.S.C.A. §§ 3553(d)(3)(C)(i)(I), 3554(b)(2) (West Supp. 1997). The section does not apply where, as here, the agency determines to proceed with performance on the ground of urgency, pursuant to 31 U.S.C.A. § 3553(d)(3)(C)(i)(II). We are not precluded from considering the cost or disruption that a recompetition would engender in fashioning a recommendation for corrective action where the agency has overridden a stay of performance on the grounds of urgency. See Astrophysics Research Corp., 66 Comp. Gen. 211, 214 (1987), 87-1 CPD ¶ 65 at 4. Similarly here, there was no bar on our considering the practicability of a recompetition in deciding whether the corrective action proposed by the agency was appropriate.

The protester further argues that we erred in accepting the agency's argument that only if the award to Lill was left in place would the plant have a boiler with a low NOx burner available for operation in time for the peak ozone months of 1998, as required by the plant's operating permit. Southern contends that even if the award to Lill is left in place, the plant will not have a low NOx burner by the beginning of

the summer because the contract gives Lill 360 days from the date of award, i.e., until late September 1998, to complete installation of the first burner.

We discussed this matter with the parties via conference call at the time of the initial protest. In response to a question from our Office regarding Lill's timeline for completing work of the first boiler, the agency stated that although the contract gives Lill 360 days to complete the work, Lill had represented to it that it would accelerate its work schedule and complete installation of the first burner by June. The agency further stated that it had no reason to think that Lill would not meet this schedule. We likewise have no reason to question the agency's acceptance of this representation. Accordingly, we do not think that we erred in considering whether the work could be completed by another contractor by the beginning of the summer in determining the feasibility of a recompetition.

Southern also argues that we erred in declining to consider its argument that the plant could reduce emissions to an acceptable level for the 1998 season without installing any new NOx burners by reducing its reliance upon coal as a fuel. We declined to consider this argument on the ground that it was not within the scope of our authority to question the agency's pollution abatement strategy. The protester contends that its argument addressed the urgency of the agency's requirement for a low NOx burner, and not the agency's pollution abatement strategy.

Notwithstanding Southern's characterization of its argument, we believe it clearly focuses on the agency's strategic approach to abating pollution to meet June 1998 requirements, and not just on how truly urgent the agency's need is for the items in question. Indeed, the logical extension of the argument is that the agency does not need low NOx burners at all because it can continue to attain the lower levels of pollution required by its operating permit by continuing to rely more heavily on oil and less heavily on coal for fuel. In sum, the protester's argument clearly did address the agency's pollution abatement strategy and, as such, is not a matter for our consideration.

Southern argues next that we erred in concluding that it had abandoned its argument regarding the rejection of Lill's proposal as front-loaded. The protester maintains that it addressed the argument in both its letter of November 11 and in its response to the agency report on November 25, and that it therefore cannot be said to have abandoned the issue.

First, the agency report responding to Southern's supplemental protest, which addressed the issue of front-loading in Lill's offer, was not filed until November 19; thus, any discussion of the issue in Southern's letter of November 11 was clearly not a response to the agency report. Moreover, although Southern did make reference to front-loading in its letter of November 25, it was not in the context of arguing that Lill's offer should have been rejected on that basis; instead, it was in

the context of arguing that recompetition of the work encompassed in option No. 2 of the RFP would not be a meaningful remedy because Lill would have an insurmountable advantage over other offerors due to the front-loaded manner in which it had structured its pricing. Nowhere in its November 25 response to the agency report did the protester attempt to rebut the agency's argument that an offer that is mathematically unbalanced due to the pricing of the base and option items need not be rejected where the agency reasonably expects to exercise the options. MCI Constructors, Inc., B-274347, B-274347.2, Dec. 3, 1996, 96-2 CPD ¶ 210 at 5. Thus, we think that we properly viewed the protester as having abandoned the argument.

PROTEST COSTS

The protester requests that we recommend that it recover its protest costs.

Under section 21.8(e) of our Bid Protest Regulations, we may recommend that a protester be reimbursed the costs of filing and pursuing a protest where the contracting agency decides to take corrective action in response to the protest. 4 C.F.R. § 21.8(e). We will make such a recommendation, however, only where, based on the circumstances of the case, the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Oklahoma Indian Corp.--Claim for Costs, 70 Comp. Gen. 558, 559 (1991), 91-1 CPD ¶ 558 at 2. A protester is not entitled to costs where, under the facts and circumstances of a given case, the agency has taken reasonably prompt corrective action. DuraMed Enters., Inc.--Request for Costs, B-271793.2, Oct. 4, 1996, 96-2 CPD ¶ 135 at 2.

In general, if an agency takes corrective action in response to a protest by the due date of its protest report, we consider such action to be prompt and will not recommend reimbursement of protest costs. HSQ Tech.--Request for Costs, B-276050.2, June 25, 1997, 97-1 CPD ¶ 228 at 2. Such was the case here: the agency first offered to take corrective action on the report due date. Because the agency offered to take corrective action rather than filing an agency report, the protester was not put to the time and expense of filing comments in response to such a report. Thus, the purpose of section 21.8(e)--to encourage agencies to take

corrective action in response to meritorious protests before protesters have expended additional unnecessary time and resources pursuing their claims--was served here.³ DuraMed Enters., Inc.--Request for Costs, *supra*, at 2.

The request for reconsideration and the request for costs are denied.

Comptroller General
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³To the extent that the protester incurred additional expenses in challenging the corrective action offered by the agency, these costs are not reimbursable since they are not costs incurred in persuading the agency of the merits of the protest, *i.e.*, in pursuing the protest. KPMG Peat Marwick--Entitlement to Costs, B-251902.2, June 8, 1993, 93-1 CPD ¶ 443 at 3.