The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Global Diesel Systems, Inc.--Request for Reconsideration

File: B-229508.3

Date: July 14, 1988

DIGEST

Request for reconsideration is denied where protester fails to show any basis that would warrant reversal or modification of the prior decision.

DECISION

Global Diesel Systems, Inc., requests reconsideration of our decision, Global Diesel Systems, Inc., B-299508.2, May 31, 1988, 88-1 CPD ¶ 509, dismissing in part and denying in part its protest of the contract award to Fluid Mechanics, Inc., to provide fuel injection nozzles pursuant to request for proposals (RFP) No. DLA700-87-R-2067, issued by the Defense Construction Supply Center (DCSC), Defense Logistics Agency.

We deny the request for reconsideration.

The RFP solicited the lowest priced acceptable offer to provide fuel injection nozzles from a list of three approved sources but allowed offers of alternate parts if it could be established that they were equal to the approved parts. Global's alternate part offer was rejected because prior approval of Global's part had been rescinded as it was based on a commercial cross-reference list in connection with another solicitation, and the approval had not been authorized by the Engineer Support Activity (ESA). (DCSC decided in 1984 or 1985 that all alternate offers for this requirement had to be forwarded to the ESA for approval). Global filed a protest with our Office based upon this rejection but withdrew the protest after it reached an agreement with DCSC that if Global was the lowest offeror after receipt of best and final offers (BAFOs), award would be delayed pending a technical evaluation by the ESA of its part. However, Fluid Mechanics subsequently offered the lowest unit price of $28.50, while Global offered a unit price of $29 and, accordingly, award was made to Fluid Mechanics.

In its second protest, Global alleged that DCSC unduly delayed the technical evaluation of its alternate part, that the agency made award to an offeror based upon the use of a part not listed as an approved source in the solicitation, and that the agency failed to conduct discussions. With regard to discussions, Global argued that discussions would have revealed that, despite the RFP's "duty-free entry" clause, its offer included such duty costs which, once subtracted, would make Global's offer low. Subsequent to Global's protest, the agency determined that the previous approval of Fluid Mechanics' part had been incorrectly granted because it had not been submitted for ESA testing. Accordingly, the agency agreed to evaluate both Fluid Mechanics' and Global's part, withheld performance pending such evaluation, and, if Fluid Mechanics' part was determined to be technically unacceptable, agreed to terminate Fluid Mechanics' contract and make award to Global, provided its part was determined to be technically acceptable.

We found Global's allegations regarding the technical evaluation of its part and the agency's failure to list an approved source to be academic because the agency, after the filing of the protest, had taken measures to evaluate Global's part and because the awardee's unlisted part is manufactured exclusively for Fluid Mechanics by a West German firm (L'Orange), and, therefore, Global would not have been able to offer this part in any event. In this regard, we will not consider issues of protest where the agency has altered its actions so that no useful purpose would be served by our decision. See Abbott Laboratories, et al., B-223952, et al., Aug. 25, 1986, 86-2 CPD ¶ 222. We, therefore, dismissed this protest ground.

We also found Global's argument concerning lack of discussions to be without merit as the "duty-free entry" clause contained in the solicitation expressly and unambiguously stated that no amount of duty will be included in the contract price of qualifying country-end products. As Global's offered part was from a qualifying country, the Netherlands, no duty should have been included in the price and no offeror should have been reasonably misled. We did not find Global's argument concerning the agency's past practices to be persuasive.1/ We found the fact that the agency may or may not have improperly applied the "duty-free entry" clause in other procurements to be irrelevant and did

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1/ Global argued that in four of the five most recent DCSC contracts obtained by Global with this clause, the government obtained a duty-free certificate on only one occasion and only at Global's request.

not justify repetition of the error. See Military Waste Management, Inc., B-228862, Oct. 30, 1987, 87-2 CPD ¶ 424. Accordingly, we denied this protest ground.

In its request for reconsideration, Global argues that its protest is not academic because, in unduly delaying the technical evaluation, the agency has failed to comply with the Defense Procurement Reform Act of 1984 (Act), 10 U.S.C. § 2319 (Supp. IV 1986). The Act generally provides procedures for establishing qualification requirements by contracting agencies for contract awards, such as a qualified products list, qualified manufacturers list, or qualified bidders list, and also requires agencies to promptly provide opportunities for offerors to meet standards for qualification, such as testing. The protester complains that, under our decision, the agency "suffers no adverse consequences from its conduct" in the lengthy evaluation of Global's part. Global also argues that the agency's failure to list L'Orange as an approved source provided Fluid Mechanics with "a most favorite offeror" status and, further, that our characterization of the L'Orange part as made exclusively for Fluid was in error. Finally, Global reasserts its position that discussions should have been held in order to clarify whether its price reflected an amount for import duty.

Notwithstanding Global's continued complaint that the agency has taken an inordinate amount of time to evaluate its part, the agency has agreed, in response to the protest, to evaluate both Global's and Fluid Mechanics' part, and performance under the awarded contract has been suspended until the evaluations are completed. Global has not been precluded from becoming qualified or denied the opportunity to compete for this contract. Rather, the agency, in our view, has taken all reasonable steps to meet the protester's concern for a technical evaluation and subsequent approval of its alternate part as an approved source. In short, Global here is potentially in line for award, and the firm has not been unreasonably excluded from the competition. Under these circumstances, we are not persuaded that our earlier finding of this matter as academic was in error.

With respect to Global's contention that our reference to the L'Orange part as made exclusively for Fluid Mechanics was in error, we have received confirmation from L'Orange that Fluid Mechanics has exclusive rights to the part. Any other firm must receive permission from Fluid Mechanics to quote a price for the L'Orange part. Thus, we again find that Global was not prejudiced by the agency's failure to list L'Orange as an approved source since Global would not have been able to offer the part in any event.

Finally, Global again asserts that discussions should have been conducted because of the agency's "long and consistent history of [improperly implementing] the duty-free entry provisions." It remains Global's position that the agency consistently failed to furnish duty-free certificates and accepts offers with duty charges included, but later subtracts such fees to reflect a "duty-free" price. We again simply note that the RFP here expressly and unambiguously stated that prices must be duty-free and also required the agency to furnish the successful offeror with duty-free certificates. If the agency fails to do so in accordance with its contractual obligations, the protester should pursue its remedies under the standard disputes clause if it receives the contract. However, we still think that the fact that the agency may or may not have improperly implemented the "duty-free entry" clause in other procurements is irrelevant and does not justify repetition of the error. See Military Waste Management, Inc., B-228862, supra.

We therefore are not persuaded that we erred in our prior decision in concluding that Global was not prejudiced in any way by the agency's conduct in this procurement. Global has failed to present any new evidence to the contrary.

The request for reconsideration is denied.

James F. Hinchman
General Counsel