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**Comptroller General
of the United States**United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Small Business Administration—Reconsideration**File:** B-298364.8**Date:** April 17, 2007

DECISION

The Small Business Administration (SBA) asks that we reconsider our decision in TYBRIN Corp., B-298364.6, B-298364.7, Mar. 13, 2007, 2007 CPD ¶ ____, in which we sustained TYBRIN's protest of the award of a contract to The CENTECH GROUP under request for proposals (RFP) No. FA9300-04-R-0040, issued by the Department of the Air Force, for advisory and assistance services to support the Aerospace Research, Development, Test and Evaluation activities at the Air Force Flight Test Center, Edwards Air Force Base, California.

We deny the request for reconsideration.

The RFP provided for the award of a "hybrid" contract on a cost-plus-fixed-fee basis for certain services, a cost basis for other direct costs, and a fixed-price-plus-award-fee for the phase-in period. Award was to be made on a "best value" basis, considering various identified evaluation factors. The RFP incorporated by reference the "Notice of Total Small Business Set-Aside" clause, Federal Acquisition Regulation (FAR) § 52.219-6, and the "Limitation on Subcontracting" clause, FAR § 52.219-14. At issue here is the latter clause's provision that "[a]t least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern." FAR § 52.219-14(b)(1).

The Air Force received proposals from four small business offerors, evaluated them, conducted discussions, and requested and received final proposal revisions from the four offerors. The agency selected CENTECH's proposal for award. TYBRIN, after receiving a debriefing, filed a protest in our Office on May 26, 2006, broadly challenging the agency's evaluation of proposals as well as the source selection. After receiving the agency report in response to the protest, TYBRIN filed three supplemental protests.

In one of its protests, TYBRIN argued that CENTECH's proposal had failed to comply with the subcontracting limitation discussed above, and that the proposal should therefore have been considered unacceptable. TYBRIN alleged that under the terms of CENTECH's proposal, approximately 44 percent of the cost of contract performance incurred for personnel would be for CENTECH personnel, with the remaining majority of the cost of contract performance for personnel being incurred for CENTECH's subcontractors.

In response, the Air Force conceded that CENTECH's proposal provided that only 43.2 percent of the cost of contract performance incurred for personnel would be for CENTECH's personnel. However, relying on a memorandum issued by the Air Force Materiel Command (AFMC) in 2004 that provided an analysis of the limitation on subcontracting rule and essentially stated that the requirements of the FAR clause could be "met by the cooperative efforts of the small business prime contractor and the small business members of the subcontractors group," the Air Force concluded that CENTECH's proposal complied with the clause because the "collective efforts" of CENTECH and its small business subcontractors would amount to 66.2% of the cost of contract performance for personnel.

Our Office solicited the views of the SBA on this matter. In essence, SBA advised that the AFMC's guidance was inaccurate and stated that generally, "a small business receiving a prime contract award as a result of a solicitation set aside for [small business concerns] must meet the subcontracting limitation set forth in statute and regulations itself." After receiving this information, the Air Force proposed to take corrective action by reconsidering whether CENTECH met the requirements for award of the contract, taking into consideration the standards articulated in the SBA's memorandum. We dismissed TYBRIN's protest as academic.

The contracting officer subsequently executed a "Determination of Non-Responsibility," concluding that "CENTECH does not meet the subcontracting limitation requirements as set forth in statute and regulation and as such is considered nonresponsible and is not eligible to receive the contract award for the ARDTEAS effort." The contracting officer informed CENTECH of this conclusion, adding that the Air Force had decided to rescind the award of the contract to CENTECH and that the matter of CENTECH's compliance with the subcontracting limitation would be referred to the SBA for consideration under the SBA's certificate of competency (COC) procedures.

In its memorandum referring the matter of CENTECH's compliance to the SBA, the contracting officer informed the SBA that, based "solely on the information received with CENTECH's proposal, the Air Force has determined that CENTECH will perform 43.2% of the work," and that "the two small business subcontractors will perform 18.2% and 4.9% respectively for a total small business performance of 66.2%." The memorandum added that the contracting officer had "found that the CENTECH GROUP did not meet the subcontracting limitation requirements set forth in statute and regulation," and had rescinded the award.

The SBA informed the Air Force by letter of December 4, 2006 that while "the Centech Group's numbers" set forth in its proposal provided that "around 42%" of the cost of contract performance incurred for personnel would be expended for CENTECH employees, nevertheless, in the SBA's view, CENTECH would indeed comply with the subcontracting limitation during its performance of the contract," and that the SBA found CENTECH responsible and had issued a COC to CENTECH. This conclusion was based in part on the SBA's consideration of material provided by CENTECH during the COC process (including its plans for staffing the contract), from which the SBA found that CENTECH would be able to meet this limitation. The Air Force reinstated the award to CENTECH based upon the SBA's issuance of the COC.

TYBRIN again protested the award, arguing that because CENTECH's proposal clearly provided that only 43.2 percent of the cost of contract performance would be expended for CENTECH employees, the proposal should have been evaluated as unacceptable by the Air Force, such that CENTECH's proposal could not form the basis for award, and we agreed. Although, as a general matter, an agency's judgment as to whether a small business offeror will be able to comply with a subcontracting limitation presents a question of responsibility for review by the SBA, we found the circumstances here distinguishable: as we pointed out, we consistently have held that where a proposal, on its face, should lead an agency to the conclusion that an offeror has not agreed to comply with the subcontracting limitation, the matter is one of the proposal's acceptability. As we stated in our decision, a proposal that fails to conform to a material term or condition of the solicitation, including the subcontracting limitation, is unacceptable and may not form the basis for an award. Accordingly, we sustained the protest and recommended that the Air Force reopen discussions and request and review revised proposals, evaluate those submissions consistent with the terms of the solicitation, and make a new source selection decision.

In requesting reconsideration, the SBA takes issue with our statement that "the record establishes that it was clear to the Air Force that CENTECH's proposal as submitted and as evaluated provided that the 43.2 percent of the cost of contract performance incurred for personnel would be expended for CENTECH employees." The SBA contends that it was never clear to the Air Force whether CENTECH's proposal met or did not meet the limitation in issue, arguing that "it is not uncommon for contracting officers and procuring agencies to misunderstand the limitations on subcontracting requirements and how to calculate the requirement." The SBA maintains that the referral to the SBA, "the expert in this subject area," therefore was appropriate.

Under our Bid Protest Regulations, to obtain reconsideration the requesting party must set out the factual and legal grounds upon which reversal or modification of the decision is deemed warranted, specifying any errors of law made or information not previously considered. 4 C.F.R. § 21.2(a)(1) (2006). The repetition of arguments

made during our consideration of the original protest and disagreement with our conclusions do not meet our standard for reconsideration.

We do not find persuasive the SBA's suggestion that the Air Force did not understand the subcontracting limitation, which in part is based on the contracting officer's reference to CENTECH's proposal offering to perform "43.2% of the work" with its own personnel—as opposed to performing a percentage of "the cost of the contract for personnel with its own employees." Taken as a whole, the record is replete with statements evidencing the Air Force's understanding and its recognition that CENTECH's proposal did not meet the subcontracting limitation requirements; in this context, we consider "43.2% of the work" to be a shorthand version of the longer phrase. Moreover, in its attempts to parse the language of the contracting officer's statements, the SBA's arguments ignore the basic fact that CENTECH's proposal on its face clearly did not meet the material term of the solicitation embodied in the 50-percent subcontracting limitation. SBA's reconsideration request merely disagrees with our conclusions on this central issue and repeats arguments made and fully considered during the course of TYBRIN's protests, and thus does not meet our standard for reconsideration as set forth above.

The request for reconsideration is denied.

Gary L. Kepplinger
General Counsel