

Protest of ) Date: November 6, 1991  
AUTOMATED BUSINESS PRODUCTS, INC. )  
Solicitation No. 104230-90-A-0167 ) P.S. Protest No. 91-16

### **ON RECONSIDERATION**

Brandt, Inc. requests reconsideration of our decision in Automated Business Products, Inc., P.S. Protest No. 91-16, June 12, 1991, in which we sustained the protest, finding that none of the seven rationales<sup>1/</sup> advanced by the contracting officer to support his determination that Automated was a nonresponsible offeror were supported by substantial evidence. Since, in the interim, a contract had been awarded to Brandt, the relief granted was that the option quantities not be awarded to Brandt, pending a reevaluation of Automated's responsibility.

Brandt alleges both factual and legal errors in our decision. It states that the contracting officer considered all the information placed before him and came to the determination that Automated had failed to demonstrate affirmatively that it was a responsible offeror.<sup>1/</sup> It contends that there was sufficient factual evidence to support this determination, which should have been upheld.

More specifically, Brandt argues that six of the contracting officer's expressed

<sup>1/</sup> Those rationales were:

- a) the unclear relationship between Automated and its subcontractor, JCM Cash Machine Co., Ltd. (JCM);
- b) the lack of an existing system of testing, inspection, or quality control at Automated's facility;
- c) the insufficiency of Automated's quality control manual;
- d) the insufficiency of Automated's facility;
- e) the inadequacy of the number of available personnel;
- f) the failure to provide a complete commercial customer list in a timely manner; and
- g) the failure of Automated to be a "regular dealer" under the Walsh-Healey Act.

<sup>2/</sup> Procurement Manual (PM) 3.3.1 a. requires an offeror to "affirmatively demonstrate its responsibility," and PM 3.3.1 e.1. states that "In the absence of information clearly showing that a prospective contractor meets the applicable standards of responsibility, the contracting officer must make a written determination of nonresponsibility."

rationales were valid.<sup>1/</sup> Brandt asserts that Automated's information regarding its relationship with JCM was incomplete, vague and untimely. It strongly asserts that the presence of the general manager of JCM American Corp. at the preaward survey and his repeated assurances that equipment would be forthcoming in a timely manner were immaterial, since the assertions of JCM American could not, as a matter of law, bind JCM.

Brandt further alleges that Automated failed to establish evidence of adequate quality control. It asserts that the detailed JCM quality control flow chart which Automated offered failed to show testing and inspection procedures at JCM, and that Automated's simplified flow chart of its own testing and inspection procedures was inadequate. Further, Brandt asserts that the QA manual prepared by Automated was inadequate overall, specifically contending that the decision misstates the major deficiency of the manual.<sup>1/</sup> It also states that the decision failed to address substantively the other deficiencies identified by the QA specialist, many of which it characterizes as very serious, as well as the overall vagueness of the manual.

<sup>3/</sup> The exception is the finding that Automated was not a Walsh-Healy "regular dealer." The decision had faulted the contracting officer's failure to afford Automated the opportunity to contest the adverse determination, as PM 10.2.5 required.

Brandt does assert that the contracting officer need not have made a "regular dealer" determination prior to the rejection of Automated's offer since Automated was not the "apparently successful offeror" pursuant to PM 10.2.5 h.2.

The contracting officer now asserts that his previous finding was incorrect because Automated, having proposed a machine manufactured in Japan, is exempt from the regular dealer requirement of the Act.

The CFR provides, at 41 CFR { 50-206.55 (1990), that "[b]uyers from whom foreign-made goods consigned directly to the Government are purchased need not qualify as regular dealers . . . since the contract itself is not subject to the Act." We express no opinion as to the applicability of this interpretation to the circumstances presented here.

<sup>4/</sup> Brandt correctly describes the decision as characterizing the deficiency as the manual's failure to address the subject of the control or disposition of nonconforming material. Brandt sees the deficiency, rather, as a failure to include the matter of control or disposition of nonconforming material under the QA manager.

The decision noted the QA specialist's conclusion that the manual "fails to adequately address the five functional areas outlined in Clause 2-1, Inspection--Fixed-Price . . . ." One of those functional areas is control or disposition of nonconforming material. The decision noted that while the contracting officer's statement relied on the host of deficiencies noted by the QA specialist, "the only specific omission cited . . . [was] the failure to address the control or disposition of nonconforming material."

The exact words of the contracting officer's statement were:

The preaward survey report found [Automated]'s inspection/quality control system to be deficient in that it did not address item number 5, Control and Disposition of Nonconforming Material.

There is, therefore, no factual basis for Brandt's position as to this issue.

Brandt further suggests that the contracting officer's determination that Automated lacked adequate facilities and personnel to perform the contract adequately was properly based on the sketchy and incomplete information provided by Automated, which failed to establish affirmatively that it was a responsible offeror. It asserts that Automated failed to provide a plan for the inspection and testing of machines at its warehouse space; failed, in response to a direct request by the contracting officer, to demonstrate the existence and suitability of temporary personnel for peak delivery periods; and failed to explain how it planned to use its field personnel on the contract.

Brandt faults Automated for the late delivery of its customer list and notes that, in the absence of information from these customers, our office should have accepted the contracting officer's conclusion that Automated was nonresponsible. It also alleges that there was no evidence, other than the unsubstantiated allegations of Automated, to support the conclusion that Automated's deficient performance on a New York Transit Authority contract, on which the contracting officer relied in finding Automated nonresponsible, was distinguishable because that was a maintenance contract while this was a supply contract.<sup>5/</sup>

As legal errors, Brandt first asserts that the decision failed to give due deference to the contracting officer's determination of Automated's nonresponsibility. It notes that the contracting officer has "considerable discretion" in making such a decision, which is not disturbed unless it is "arbitrary, capricious, or not reasonably based on substantial evidence." Cardinal Glove Co. Inc., P.S. Protest No. 89-84, November 14, 1989. In establishing its case, a protester must overcome the "presumption of correctness which accompanies the statements of the contracting officer." N.R.F. Enterprises, Inc., P.S. Protest No. 90-13, April 24, 1990. Brandt argues that the decision "objectively determine[d] whether the [contracting officer's] determination was right or wrong," which was inconsistent with this standard of review.

Brandt also states that the decision improperly shifted the burden of proof from the protester to the contracting officer. It argues that the decision accepted the protester's unsupported allegations and forced the contracting officer to rebut them. Brandt further argues, given the facts on the record, we were obligated to rule against Automated since it failed to carry its burden of proof.

Finally, Brandt asserts that our office acted arbitrarily in communicating ex parte with Automated at the protester's protest conference, which Brandt could not attend. It argues that we have violated PM 4.5.7 d. of our protest regulations, as information was orally transmitted from Automated to our office at the conference without such information being furnished to it. Brandt cites Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977) as support for the assertion that such ex parte contacts are impermissible and argues that its exclusion from Automated's protest conference denied Brandt due process of law.

<sup>5/</sup> Brandt notes that there is a warranty provision in the present contract, which gives the contractor possible maintenance responsibilities for which the New York Transit Authority contract would be relevant.

The contracting officer has submitted comments on the request for reconsideration. In general, he states that the bases on which he determined Automated to be nonresponsible were neither "unsubstantive" nor "frivolous." He maintains that neither the preaward survey nor the review of Automated's QA manual were flawed, and that they provide a sufficient basis for the determination. He states that the determination of Automated's nonresponsibility was made "only after careful examination and assessment of all documentation submitted by Automated," and that he was "improperly denied the opportunity" to attend Automated's protest conference.

Two attachments accompany the contracting officer's comments. The first is a chronology concerning the solicitation and specific responses to particular points raised in the decision. Its recitation of the facts do not vary in any significant respect from those set forth in the protest decision.<sup>17</sup> It refers to United Converters and Printers, P.S. Protest No. 80-19, July 24, 1980, and Fairfield Stamping Corporation, P.S. Protest No. 88-04, June 3, 1988, where appropriate deference was given to the nonresponsibility determination of the contracting officer, as cases which are particularly relevant to this case.

On specific factual questions, the contracting officer argues that the general manager of JCM American could not bind or obligate JCM, and that the agreement between JCM and Automated was unenforceable by its own terms and for want of consideration. He states that Automated's failure to have a binding agreement with JCM shows a lack of a "sound business relationship" with JCM which justifies the determination of nonresponsibility. The contracting officer further argues that the two "sketchy flow charts" do not prove Automated's ability to obtain quality control. He criticizes the distinction drawn between compliance with the terms of the solicitation and meeting responsibility criteria.<sup>18</sup> He notes again that the additional storage space put forward by Automated was supported only by an undated letter without an acceptance signature by the provider of the space. Doubts concerning Automated's manpower are said to arise from an inability to assess the technical expertise of the temporary employees Automated proposed should additional personnel be necessary during peak periods. The contracting officer contends that reliance on the New York Transit Authority contract was reasonable, as the solicitation contained a requirement for maintenance as to which the experience of Automated in the previous contract was relevant. Additionally, he dismisses Automated's late customer reference list as "self-serving," since it consisted primarily of Automated's dealers.

<sup>17</sup> A footnote in the decision had faulted the substitution of providing written information in lieu of an oral debriefing. The contracting officer now asserts that a telephone debriefing was held with Automated in late February, 1991. No mention of that debriefing was set forth in the contracting officer's previous statements.

<sup>18</sup> The distinction is: If an offeror's proposal cannot meet the requirements of the solicitation, it may be found technically unacceptable. That finding is different from a determination that an offeror fails to meet a particular responsibility criteria. The determinations are made at different times and at different stages of the process of proposal evaluation and award.

The contracting officer concludes by noting that, in apparent conflict with the presumption of correctness which attends his statements, Automated's statements have been given much greater credence than his statements, despite the former's unpersuasiveness. He regrets that our office never contacted him for additional information, and argues that the decision, if left unchanged, "would diminish his vested authority and . . . would have a chilling effect on the procurement community as a whole."

The second attachment to the contracting officer's comments is a further response from the Quality Assurance Division, which restates its earlier comments that Automated was properly found to be nonresponsible. In general, it asserts that Automated's statements lack credibility and exhibit a confused and unsophisticated understanding of necessary quality controls, that the flaws in Automated's QA manual were of major significance, and that Automated's information was untimely, incomplete, and contradictory.

In its response to the request for reconsideration, Automated accuses Brandt of ignoring and distorting portions of the record selectively to create a fact pattern to suit its arguments. Automated asserts that the facts alleged by Brandt were already considered in the decision, and are, therefore, not an appropriate basis for reconsideration. It asserts that specific portions of Brandt's request are factually inaccurate or merely reiterate arguments previously made by Brandt and rejected by our office.<sup>1/</sup> Automated notes that a contracting officer's determinations are not entitled to deference if they are arbitrary, capricious, or not supported by substantial evidence and that a contracting officer's decision based on inaccurate reports is incomplete (citing Cardinal Glove Company, Inc., supra, and National Fleetway, Inc., P.S. Protest No. 80-26, July 3, 1980, respectively). Automated notes that each rationale the contracting officer advanced to support his determination of Automated's nonresponsibility was found to lack a reasonable basis in substantial evidence. It states that the decision did not improperly shift the burden of proof to the contracting officer but merely weighed the evidence to determine whether the contracting officer's determination was reasonably based on substantial evidence. Automated asserts that, rather than interpreting the regulatory language as to an offeror's "ability to obtain" certain responsibility criteria in an absurd manner, the decision interpreted the language in a straightforward, common sense way. Finally, Automated asserts that the protest

<sup>1/</sup> Thus, Automated claims that Brandt's arguments that the contracting officer's decision occurred only after review of all the information and documentation, and that Automated failed to provide affirmative proof of its responsibility despite the contracting officer's continued cooperation merely repeat arguments Brandt made earlier in the protest process. Further, Automated contends that the record does not support the assertion that the contracting officer considered all the information submitted by Automated before finding it nonresponsible, that there is no evidence that the contracting officer expressly asked Automated to produce evidence that an adequate pool of trained temporary employees existed, that the record is clear regarding the contemporaneous favorable comments given by its customers and that JCM's involvement in the manufacture, inspection, and quality control of the machines is supported in the record.

procedure concerning conferences are fair and constitutional.<sup>1/</sup>

In further comments, Brandt claims that:

[T]hrough use of misdirection, unsupported and contradictory statements, [Automated] attempts to obfuscate the serious flaws in the General Counsel's decision. [Automated's] version of the facts is revisionist, its interpretation of the law questionable.

While restating many of the points made in its request for reconsideration, Brandt specifically rebuts three factual claims made by Automated.<sup>1/</sup> It restates its claims that the decision failed to defer to the contracting officer's determination of nonresponsibility and that the Automated protest conference resulted in ex parte communications which denied it due process of law. Brandt further maintains that Automated failed to prove that there was "no rational basis" to the contracting officer's decision,<sup>1/</sup> and that the acceptance of Automated's unsupported assertions over the determination of the contracting officer constituted an impermissible shifting of the burden of proof. Brandt also reemphasizes the inadequacy of Automated's QA manual as supporting the contracting officer's decision that Automated lacked the ability to obtain adequate quality controls.

## DISCUSSION

The Procurement Manual (PM) establishes the criteria for a request for reconsideration:

The request for reconsideration must contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not considered.

PM 4.5.7 n. Prior precedent indicates the limited scope of our review of a request for reconsideration:

Information not previously considered refers to that which a party believes may

<sup>9/</sup> Automated was permitted to file a further statement concerning the reasonableness and constitutionality of our protest procedures. Brandt objects to this filing as untimely and states that we should not consider these comments. Brandt has had, however, an opportunity to address them in its final comments.

<sup>10/</sup> According to Brandt: (a) the contracting officer's post-protest statements that he considered all the information presented by Automated in finding it to be nonresponsible are conclusive as to that issue (b) the record clearly shows Automated's failure to respond to specific postal requests for more information as to its staffing resources; and (c) the JCM flow chart submitted by Automated did not adequately address the testing and inspection requirements of the solicitation.

<sup>11/</sup> This statement of the standard of review is incorrect. Automated had to prove that the contracting officer's decision was "arbitrary, capricious, or not reasonably based on substantial information." Cardinal Glove Company, Inc., supra.

have been overlooked by our office or to information which a party did not have access to during the pendency of the original protest. J. Fiorito Leasing, Ltd., On Reconsideration, P.S. Protest No. 83-5, September 27, 1983; accord Beacon Winch Co. -- Reconsideration, Comp. Gen. Dec. B-206513.3, October 1, 1982, 82-2 CPD | 304; B&M Marine Repairs, Inc. -- Request for Reconsideration, Comp. Gen. Dec. B-202966.2, February 16, 1982, 82-1 CPD | 131. Reconsideration is not appropriate where the protester simply wishes us to draw from the arguments and facts considered in the original protest conclusions different from those we reached in that decision. Reassertion of arguments previously considered and rejected by this office does not constitute a ground for reconsideration. Beacon Winch Co. -- Reconsideration, *supra*; accord GSCD, Inc., On Reconsideration, P.S. Protest 83-18, October 25, 1983. Similarly, where information and arguments were known or available to the protester during the development of its protest but were not presented in the original proceeding, such information and arguments may not be considered in a request for reconsideration. Beacon Winch Co. -- Reconsideration, *supra*; accord J. Fiorito Leasing, Ltd., supra; Logan Co., On Reconsideration, P.S. Protest No. 82-65, February 9, 1983.

Fort Lincoln New Town Corporation, On Reconsideration, P.S. Protest No. 83-53, November 21, 1983. Brandt has raised no factual issues which were not considered in the decision. The point of Brandt's request, as it pertains to factual issues, is to cause us to draw different conclusions from the previously considered arguments, based on facts which were in the record, and no new facts which were unknown or unavailable to Brandt at the time of the original proceeding have been adduced.

Similarly, the contracting officer has sought to restate factual information that was or should have been supplied in the initial proceeding. Although no appropriate factual challenge has been asserted, we restate the factual predicate for our decision, as it appears that the parties may not have correctly understood it.

- The contracting officer ordered a pre-award survey of Automated. That survey found certain problems with Automated's proposed plan for delivery of the machines. Rather than finding Automated nonresponsible based on the preaward survey, the contracting officer permitted Automated to present additional evidence in support of its responsibility. Automated did so.<sup>12/</sup>
- Despite the contracting officer's strong protestations that he considered the additional information tendered by Automated before making his determination that it was nonresponsible, the evidence does not support

<sup>12/</sup> Brandt and the contracting officer fault Automated for late delivery of this information. Their criticism is misplaced. While a contracting officer need not indefinitely delay award while an offeror attempts to cure the causes behind a finding of nonresponsibility, Graphic Technology, Inc., P.S. Protest No. 85-66, December 30, 1985, when there is no particularly urgency to the source selection, the offeror's delay is not significant. Here, the contracting officer appears not to have imparted any sense of urgency to the offeror. The determination of Automated's nonresponsibility was not made until almost two weeks after the final pieces of information were received from Automated and more than a month after most of Automated's additional information was received.

those contentions and we did not find them creditable. Very little of all the additional information obtained from Automated was considered in the determination of nonresponsibility dated February 5, 1991.<sup>13/</sup> Otherwise, the determination relied completely on the points made by the QA specialist in her pre-award survey.

- By not considering all the information available to him, the contracting officer improperly placed the entire burden of justifying its responsibility on the offeror. National Fleetway, Inc., supra; see also Graphic Technology, Inc., supra:

A contracting officer should reconsider his nonresponsibility determination when two conditions are present: ample time and a material change in a principal factor on which the determination is based.

- The contracting officer was in possession of most of Automated's additional information by late December, 1990. Indeed, throughout January, 1991, the contract specialist requested additional information from Automated, but did not attempt to resolve the problems with that information which the contracting officer now states made that information inadequate. Additionally, the contracting officer failed to contact any third parties who could have shed light on the apparent omissions in Automated's information that.<sup>14/</sup>
- The flaws in the contracting officer's determination, thus, were two: the failure to take into account all of the information provided by Automated, and the failure, despite the time available to do so, to attempt to resolve the concerns about the information provided by Automated. Given that Automated's information was, on its face, responsive to those concerns, the contracting officer's reliance on information which was contrary to Automated's information, without further investigation or analysis why that further information was not worthy of credit, was unreasonable, rendering the nonresponsibility determination unreasonable.<sup>15/</sup>

<sup>13/</sup> The contracting officer noted that Automated/JCM agreement, which had been supplied on December 28, was unenforceable. In addition, he noted that the QA Manual, submitted January 8, 1991, was unsatisfactory for the reasons stated in the report of the QA Specialist. On the other hand, the contracting officer made no note of the commitment letters from JCM American, the letter concerning available storage space from Donadio Distributing Corp., the list of twenty-nine commercial customers, and the responses to the specific questions posed by the contract specialist.

<sup>14/</sup> These included: JCM and JCM American, to clarify the relationship between these two concerns and their relationship to Automated; Donadio Distributing Corp., to clarify the nature and extent of the facilities they could provide Automated; and the commercial customers on list provided by Automated, to inquire as to their experiences with Automated.

<sup>15/</sup> The contracting officer has expressed a fear that this decision will preclude finding any offeror nonresponsible without interminable delay while the offeror attempts to patch up its deficiencies.

As to the legal arguments made by Brandt, they are also insufficient. We found that the bases on which the contracting officer rested his nonresponsibility determination were not reasonable, that is, by implication, they were not "reasonably based on substantial evidence." Cardinal Glove Co., Inc., supra. The presumption of correctness which attaches to the statements of the contracting officer is rebuttable, and is premised upon reasonable support for the statement in the record. See Mike and Candace Russell, P.S. Protest No. 91-13, May 6, 1991. We did not undertake to determine the validity of the contracting officer's position objectively; rather, we left it to the contracting officer to redetermine whether Automated was responsible, based on an analysis of all the information available. (At this point, that would include all the information furnished in the course of the protest, as well as such additional information as the offeror may submit or the contracting officer solicit.)<sup>14</sup>

Brandt's argument that we impermissibly shifted the burden of proof from the protester to the contracting officer overlooks the limited holding of our decision as well as the unrebutted nature of Automated's allegations, which, despite Brandt's claims, were supported in the record. Automated carried its burden of proof, and, because it did so, was entitled to have its protest sustained.

Brandt's argument that we engaged in prohibited ex parte communications with Automated at its protest conference is without merit. PM 4.5.7 j. states:

The protester, or any interested party, may request a conference with the General Counsel in connection with any protest under consideration by the General Counsel. . . . When more than one party to a protest requests a conference, separate conferences will be held.

As we have recently stated (in response to the same issue presented by the same party in a similar context):

This regulation specifically establishes that separate conferences will be held for the interested parties who request them. Brandt did not request its own conference or object, in the course of the protest, to its lack of opportunity to attend Cummins' conference. This matter is untimely raised now since Brandt had access to the information that it could not attend Cummins' conference during the pendency of

However, there are several ways in which a contracting officer can prevent a responsibility determination from undue delay. For example, he may proceed to a finding of nonresponsibility based on a negative pre-award survey without seeking additional information from the offeror; he may limit requests for additional information to specific matters directly relevant to concerns, rather than soliciting general information; he may establish and enforce reasonable time limits within which information must be sent; and, he may use third parties as sources for information.

<sup>16/</sup> The contracting officer's protestations that the decision will have a chilling effect seem to suggest no circumstances in which the contracting officer could exceed his discretion in that regard. Such an assertion is incorrect. The concerns expressed also overlook the past decisions of our office which have sustained protests against determinations of nonresponsibility without the dramatic effects predicted.

the original protest. International Business Machines Corporation, On Reconsideration, P.S. Protest No. 90-66, February 22, 1991. Similarly, the contracting officer was not disadvantaged by the fact that he was not afforded a conference; while the regulation does not expressly provide for such a conference, the contracting officer had a full opportunity to provide information in his initial statement on the protest and to comment on the submissions of the interested parties.

Cummins-Allison Corporation, On Reconsideration, P.S. Protest No. 91-18, September 16, 1991. Therefore, this aspect of Brandt's request for reconsideration must fail.

On reconsideration, we affirm our decision.

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