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Comptroller General  
of the United States

United States Government Accountability Office  
Washington, DC 20548

# Decision

**Matter of:** Department of Commerce--Reconsideration

**File:** B-294121.5

**Date:** April 12, 2005

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Joseph M. Sullivan, Esq., Mundt MacGregor, for the protester.  
William T. Grimm, Esq., Davis Grimm Payne & Marra, for NWO, Inc., an intervenor.  
Mark Langstein, Esq., Department of Commerce, for the agency.  
Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General  
Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

GAO will not reconsider a prior decision where the request is based on information that was available to the requester and could have been presented during consideration of the protest.

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## DECISION

The Department of Commerce asks that we reconsider our decision in Saltwater, Inc.--Recon., B-294121.3, B-294121.4, Feb. 8, 2005, 2005 CPD ¶ 33, in which we reversed our dismissal of Saltwater's protest of the award of a sole-source contract to NWO, Inc. by the Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), for fisheries observer services, and sustained the protest on the merits. Commerce alleges that our reconsideration decision contained both factual and legal errors.

We deny the request for reconsideration.

## BACKGROUND

### The Initial Protest

In January 2003, NOAA issued request for proposals (RFP) No. AB1330-03-RP-0024, seeking fisheries observer services in connection with NOAA's National Marine Fisheries Service (NMFS) Pacific Islands Region Observer Program (PIROP), under a fixed-rate contract, for a base year and one option year. Saltwater and NWO both submitted proposals, and on July 11, 2003, Saltwater was awarded the contract, the

first year of which was to expire on June 30, 2004 and which had a 1-year option ending on June 30, 2005. Following a protest filed by NWO, the agency held discussions and twice permitted the offerors to submit final proposal revisions (FPR). In its second request for FPRs, Commerce advised Saltwater that if the agency again selected Saltwater, its contract would be modified to include certain overtime pay requirements.

In December 2003, Saltwater was again selected for award and was given, for execution, a modification to its earlier-awarded contract. Saltwater declined to execute the modification on the basis that it did not accurately reflect the terms of Saltwater's FPR. In January 2004, NOAA informed Saltwater that it intended to terminate the firm's contract and make award to NWO. Saltwater protested this decision to our Office, and we denied the protest in our decision, Saltwater Inc., B-293335.3, Apr. 26, 2004, 2004 CPD ¶ 106.

Following our decision, rather than terminate Saltwater's contract for convenience, the contracting officer decided to wait for the base period of the contract to expire on June 30, 2004. The agency awarded a contract for the requirement to NWO on June 18, to commence performance on July 1. This contract award was for a base period of July 1, 2004 through December 31, 2004, with an option (which has since been exercised) for an additional year extending to December 31, 2005.

Saltwater protested that the award to NWO was improper, and the attorney from our Office handling the protest conducted an alternative dispute resolution (ADR) conference call with the parties in an attempt to resolve the matter. During that discussion, the GAO attorney advised the parties that he anticipated that our Office would sustain the protest on the basis that the award was made on a sole-source basis without justification. The GAO attorney indicated that the protest would be rendered academic if the agency: (1) prepared and executed a Justification and Approval (J&A) adequate to support the award to NWO, or (2) recompeted the acquisition. Commerce then advised our Office by telephone, and confirmed in writing, that the agency would recompeted the services as part of a restructuring of fishery observer services nationwide, and that it envisioned that it would require at least 15 months to develop the solicitation. In addition, Commerce stated that it would, "as expeditiously as possible, make a determination as to the necessity for a sole-source contract and thereafter prepare and execute an appropriate J&A for the contract file." Agency Letter of Aug. 23, 2004. Based on Commerce's representation, we dismissed the protest as academic by decision of August 25.

#### Saltwater's Reconsideration Request

After we dismissed Saltwater's protest, Saltwater filed a request for reconsideration on September 1, 2004, arguing that we should not have dismissed the protest because Commerce's proposed corrective action did not, in fact, render the protest

academic, especially given the way the corrective action had been implemented. We agreed.

In response to Saltwater's filing, Commerce maintained that the award to NWO in fact did not constitute a sole-source award requiring a J&A because it was based on the 2003 competition. Specifically, in its September 30, 2004 opposition to Saltwater's reconsideration request, Commerce stated:

The agency submits that GAO's 'outcome prediction' that the agency had made a sole source award to NWO, Inc. is incorrect and not supported by the record. The record clearly shows that the award to NWO, Inc., was based on full-and-open competition and occurred as part of the culmination of numerous protests . . . .

Agency's Opposition to Recon. Request at 7 n.6.

Because Commerce repeatedly argued that the award to NWO was not an improper sole-source and because Commerce had not identified a J&A in support of the award to NWO in any of its filings with our Office, we understood Commerce as having decided not to execute a J&A in support of the award to NWO. As a consequence, we reversed our dismissal and considered the merits of Saltwater's protest.

#### Merits of Saltwater's Protest

Saltwater protested that the award to NWO was improper because it was made on a basis other than the original RFP, and we agreed.

The competitive award to Saltwater had been based upon a 1-year contract, which specified an end date of June 30, 2004, with a 1-year option expressly ending on June 30, 2005. However, the award to NWO was for a 6-month contract period from July 1, 2004 to December 31, 2004, with an option to extend the contract 1 year, *i.e.*, to December 31, 2005, which Commerce has exercised. Because the period of performance under NWO's contract was to extend beyond June 30, 2005, we found that it was inconsistent with the basis for the competition and therefore improper. See Tennessee Valley Serv. Co., B-188771, Dec. 8, 1977, 77-2 CPD ¶ 442. That is, the extension of NWO's contract beyond June 30, 2005 constituted an improper sole-source award, since it was not supported by a J&A.

Since the contract with NWO is now in its option year, we recommended that Commerce meet its needs after June 30 competitively (through limited competition if full and open competition is not feasible) and terminate NWO's contract as of the date of the new award, if NWO is not the successful offeror. We further recommended that the agency reimburse Saltwater for the costs of filing and pursuing its protests, including reasonable attorneys' fees.

#### COMMERCE'S REQUEST FOR RECONSIDERATION

In requesting reconsideration, Commerce essentially complains that our decision is inconsistent with our ADR advice and dismissal of Saltwater's protest. According to Commerce, in order to render Saltwater's protest academic in accordance with GAO's advice during ADR, it represented to our Office that it intended to recompetete the PIROP effort in 15 months and to prepare a J&A if it deemed necessary. Commerce asserts that these proposed actions were "confirmed" since we dismissed Saltwater's protest as academic, and maintains that it has not deviated from the stated corrective action. Request for Reconsideration at 1. Commerce argues that, by subsequently concluding that the agreed-upon corrective action was insufficient, our Office has effectively retracted the ADR advice "at whim," and reversed our precedent concerning the implementation of GAO recommendations, which we have always considered to be within the sound discretion of the agency. Id.

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. § 21.14(a) (2004). The agency has failed to meet this standard.

As noted above, during ADR the GAO attorney advised Commerce that he anticipated that our Office would sustain Saltwater's challenge of the NWO contract as an improper sole-source award unless Commerce took corrective action in either of two ways--recompetete NWO's contract, or prepare a J&A in support of the award to NWO. In response, Commerce represented that it would prepare a J&A if it determined that a sole-source contract was necessary. Subsequently, however, Commerce repeatedly asserted that a J&A was not needed to support award to NWO--this was in direct opposition to our ADR advice. In addition, the other aspect of the corrective action proposed by Commerce, the future recompetition of the PIROP effort, failed to address Saltwater's challenge of NWO's current contract.<sup>1</sup>

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<sup>1</sup> With regard to the recompetition of the PIROP effort, Commerce asserts that our decision erred in stating that the agency had agreed to take corrective action by "promis[ing] to include the PIROP effort as part of the broader restructuring of the nationwide fishery observer program for which a solicitation would be developed in future." Saltwater, Inc.--Recon., supra, at 3. According to Commerce, "the PIROP effort was never intended to be part of a larger solicitation." Request for Reconsideration at 2. Commerce maintains that the "broader restructuring" merely referenced its effort to "fairly resolve the important and complex policy and legal issues raised by this series of protests . . . so that all future competitions, including the PIROP re-competition, could be conducted on the same fair, lawful basis." Id. While the precise meaning of Commerce's statement is not entirely clear, the alleged error, in any case, is irrelevant and therefore does not provide a reason for reversing our decision. The fact remains that NWO's performance after June 30, 2005 is

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In sum, while we initially dismissed Saltwater's protest as academic based on Commerce's proposed corrective action, after further reflection and argument from the parties, we reversed that determination because we concluded that the corrective action proposed and Commerce's subsequent actions did not address the impropriety of the sole-source award to NWO and therefore Saltwater's protest had not been rendered academic.

Commerce suggests that our reversal was improper because we had tacitly approved the manner of Commerce's corrective action when we dismissed Saltwater's protest. This contention, however, fails to recognize that our reconsideration process is expressly designed to address situations such as the one presented in this case where our initial decision warrants reversal. See 4 C.F.R. § 21.14. The simple fact is that, as subsequent events revealed, our Office should not have dismissed Saltwater's protest as academic; we remedied the situation when we reversed the dismissal of Saltwater's protest.

Commerce also argues that our February 8 decision mistakenly concluded that the award to NWO was not supported by a J&A. For the first time, Commerce has now provided a copy of a J&A dated September 21, 2004, purporting to justify the sole-source award to NWO. Commerce's reliance on this J&A as a basis for reconsideration is inappropriate. We will not reconsider a prior decision where the request is based on information that was available to the requester and could have been presented during our initial consideration of the protest. Affording consideration to such information would undermine the goal of our bid protest forum--to produce fair and equitable decisions based on consideration of both parties' arguments on a fully developed record. Department of the Army--Recon., B-254979.2, Sept. 26, 1994, 94-2 CPD ¶ 114 at 3; Department of the Navy-- Recon., B-228931.2, Apr. 7, 1988, 88-1 CPD ¶ 347 at 2; Newport News Shipbuilding and Dry Dock Co.--Recon., B-221888.2, Oct. 15, 1986, 86-2 CPD ¶ 428 at 3.

Here, the J&A now offered by the agency was available to Commerce when it opposed Saltwater's request for reconsideration, yet Commerce failed to bring this information to our attention. Rather, as noted above, Commerce expressly argued before our Office in its September 30, 2004 opposition to Saltwater's reconsideration request, after the J&A had apparently been executed on September 21, that NWO's contract was not a sole-source award. See also Agency's Opposition to Recon. Request at 8 ("the agency does not agree that it made an improper sole-source award

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beyond the scope of the competition conducted, and Commerce's future plans for recompetition do not address this concern.

to NWO, Inc.”). In light of Commerce’s insistence that no sole-source award had been made, and in light of the fact that Commerce failed to inform our Office of the J&A when that information was clearly available to the agency, Commerce may not now rely on that J&A as a basis for reconsideration of our decision. See Department of the Army--Recon., supra; Department of the Navy-- Recon., supra; Newport News Shipbuilding and Dry Dock Co.--Recon., supra.

In view of our conclusion that the request for reconsideration is without merit, we recommend that Saltwater be reimbursed the additional costs incurred in responding to the agency’s request for reconsideration. See Department of the Navy-- Modification of Remedy, B-284080.3, May 24, 2000, 2000 CPD ¶ 99 at 4; Department of the Army--Recon., B-270860.5, July 18, 1996, 96-2 CPD ¶ 23 at 5; Pacific Northwest Bell Tel. Co., Mountain States Bell Tel. Co.--Claim for Costs, B-227850.3, June 6, 1988, 88-1 CPD ¶ 527 at 2. Saltwater’s certified claim for these additional costs, detailing the time spent and the costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The request for reconsideration is denied.

Anthony H. Gamboa  
General Counsel