

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D. C. 20548

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FILE: B-218634.2

DATE: November 21, 1985

MATTER OF: Resource Consultants, Inc.

DIGEST:

When a Brooks Act procurement is the subject of a protest to the General Services Administration Board of Contract Appeals (GSBCA), GAO's Bid Protest Regulations effectively provide for the dismissal of any protest to GAO involving that same procurement in deference to the binding effect of a GSBCA decision on the federal agency involved, subject to appeal to the United States Court of Appeals for the Federal Circuit. The clear intent of the Competition in Contracting Act of 1984 is to provide for an election of mutually exclusive administrative forums to resolve challenges to Brooks Act procurements.

Resource Consultants, Inc. (RCI) protests the proposed award of a contract to Tidewater Consultants, Inc. (Tidewater) under request for proposals (RFP) No. N00600-84-R-2359, issued by the Department of the Navy for the acquisition of automatic data processing (ADP) equipment support services. The proposed award would be made pursuant to a decision by the General Services Administration Board of Contract Appeals (GSBCA) that held that RCI had been improperly awarded a contract under the solicitation. We dismiss the protest.

Background

Contract award under the RFP was originally made to RCI. Tidewater protested to the GSBCA that the award was improper, and the GSBCA agreed. Tidewater Consultants, Inc., GSBCA No. 8069-P, Sept. 4, 1985. Specifically, the GSBCA found that the protest presented "a clear case of prohibited technical leveling," because, in a request for a second round of best and final offers, RCI and a third

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offeror received explicit suggestions from the agency for improving their technical proposals, but the protester did not. Accordingly, the GSBCA ordered the Navy to immediately terminate RCI's contract for the convenience of the government and to award any continuing requirements the Navy might have under the original solicitation to Tidewater. The Navy then filed a motion for reconsideration of the GSBCA decision, which the GSBCA denied. Tidewater Consultants, Inc., GSBCA No. 8069-P-R, Sept. 27, 1985.

The Navy subsequently filed a motion for relief from the September 27 decision, asking the GSBCA to suspend temporarily its order to terminate RCI's contract for convenience and to award any continuing requirements to Tidewater. In its decision in Tidewater Consultants, Inc., GSBCA No. 8069-P-R, Oct. 3, 1985, the GSBCA found no reason to stay its order to terminate RCI's contract and affirmed that order. (The Navy then immediately terminated the contract.) However, the GSBCA temporarily stayed its order to award any continuing requirements to Tidewater because of a protest filed by RCI with the Small Business Administration (SBA) challenging Tidewater's small business size status, and because the Navy was investigating a possible improper relationship between Tidewater and a former member of the technical review board that had evaluated and scored the technical proposals, who is now in Tidewater's employ. The stay order is still in effect.

RCI never intervened in any of the proceedings before the GSBCA, but filed this protest with our Office on September 20, asserting that the GSBCA's decision of September 4 on the issue of technical leveling was erroneous in light of prior precedent of this Office, and, therefore, that the GSBCA's order to terminate RCI's contract for the convenience of the government was legally insupportable. Moreover, RCI strenuously urges that the order to award any continuing requirements to Tidewater would constitute a prohibited sole-source award. Hence, RCI contends that even if the GSBCA's order to terminate RCI's contract is allowed to stand, the remaining requirements should instead be recompeted rather than awarded to Tidewater. RCI also asserts that the GSBCA lacked jurisdiction to hear the original protest filed by Tidewater.

Analysis

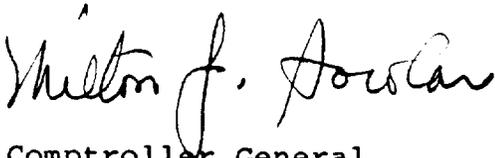
Section 2713(a) of the Competition in Contracting Act of 1984 (CICA), 40 U.S.C.A. § 759(h) (West Supp. 1985), provides that, upon the request of an interested party, the GSBICA shall review any decision by a contracting officer regarding a procurement conducted under the authority of the Brooks Act, 40 U.S.C. § 759 (1982) (including procurements conducted under delegations of procurement authority) which is alleged to violate a statute or regulation.^{1/} CICA also provides that an interested party who has filed a protest with this Office with respect to a procurement or proposed procurement under the Brooks Act may not file a protest with respect to that procurement or proposed procurement with the GSBICA. Concomitantly, our Bid Protest Regulations, which implement section 2741(a) of CICA, 31 U.S.C.A. §§ 3551-3556 (West Supp. 1985), provide that after a particular procurement is protested to the GSBICA, that procurement may not be the subject of a protest to this Office while the protest is before the GSBICA. 4 C.F.R. § 21.3(f)(6) (1985). Therefore, this language effectively provides that once the GSBICA has exercised jurisdiction, any protest to this Office involving the same procurement issue will be dismissed without consideration in deference to the binding effect of a GSBICA protest decision on the federal agency involved, subject to appeal to the United States Court of Appeals for the Federal Circuit. Comdisco, Inc., B-218276.2, Apr. 4, 1985, 85-1 CPD ¶ 391.

It is clear that the intent of CICA is to provide for an election of mutually exclusive administrative forums to resolve challenges to procurements subject to the Brooks Act, whether the forum selected by the challenging party is the GSBICA or this Office. Since Tidewater chose to elect the GSBICA rather than this Office to resolve the matter, RCI should have intervened before the GSBICA to protect its interests and should have raised any questions regarding the GSBICA's jurisdiction at that time. Moreover, since CICA specifically provides that the proper avenue of appeal

^{1/}The Brooks Act grants exclusive procurement authority to the Administrator of General Services to provide for the economic and efficient purchase, lease, and maintenance of ADP equipment by federal agencies. The Administrator may, in turn, delegate such authority to the various federal agencies.

of a GSBICA decision is to the United States Court of Appeals for the Federal Circuit, 40 U.S.C.A. § 759(h)(6)(A) (West Supp. 1985), our consideration of RCI's protest would be inconsistent with the legislative intent because we would, in effect, become an appellate body to review the GSBICA's decision in this matter.

The protest is dismissed.

for 
Comptroller General
of the United States