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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Baurenovierungsgesellschaft, m.b.H.
File: B-220809.2; B-220813.2; B-220817.2
Date: August 5, 1986

DIGEST

Protester is not entitled to recover the costs of filing and pursuing its successful protest even though the General Accounting Office (GAO) recommended that the protested contracts be awarded to the protester and the protester did not receive the awards. The protester entered into a voluntary agreement with the agency whereby it waived its right to the contract awards in exchange for an alternative, mutually agreeable remedy, and under these circumstances, GAO finds that the protester has obtained a sufficient remedy and is entitled to no further recovery.

DECISION

Baurenovierungsgesellschaft, m.b.H. (BRG) requests recovery of the costs of filing and pursuing its successful protest against the Department of the Army's negative responsibility determinations under request for proposals (RFP) Nos. DAJA76-85-R-0411, DAJA76-85-R-0444, and DAJA76-85-R-0596. See Decker and Co.; Baurenovierungsgesellschaft, m.b.H., B-220807 et al., Jan. 28, 1986, 86-1 CPD ¶ 100. We deny BRG's request.

In our prior decision, we found that the negative responsibility determinations were based on inaccurate and misleading information. Specifically, the negative preaward survey report relied on by the contracting officers did not disclose that the unsatisfactory performance cited in the report was that of Decker, an affiliated firm, rather than BRG's. We rejected the agency's assertion that it was reasonable to attribute Decker's performance to BRG because the two firms had common management and therefore were affiliates. We noted that the Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.104-3(d) (1984), provides that affiliated concerns normally are considered separate entities for purposes of responsibility, and we concluded that even if the firms were affiliates, affiliation per se did not provide a proper basis for a nonresponsibility determination. We also noted that the contracting officers clearly had never considered BRG's own record of performance in making their responsibility determinations for the protested contracts, but that when the agency later investigated BRG's record in connection with four other contracts, the firm was found responsible. Therefore, we sustained the protest. We recommended that the Army reconsider the nonresponsibility determinations based on accurate information. We also recommended that if BRG was found responsible, the protested contracts should be terminated and reawarded to BRG.

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Generally, we will allow the recovery of the costs of filing and pursuing a protest, including attorneys' fees, where the protester unreasonably is excluded from the procurement, except where we recommend that the contract be awarded to the protester and the protester receives the award. 4 C.F.R. § 21.6(e) (1986). BRG bases its request for recovery of its protest costs on two theories. The first of these is that our Office did not recommend that BRG receive the contract awards, but instead recommended that the nonresponsibility determinations be reconsidered. The second theory is that even though BRG was found responsible upon reconsideration by the agency, BRG in fact did not receive the contract awards.

We find no merit to BRG's contention that our recommendation was not a recommendation that BRG receive the contract awards. Although we did recommend that the agency first reconsider BRG's responsibility based on accurate information, as we specifically stated in a footnote to our recommendation, an affirmative responsibility determination is a prerequisite to any contract award. Accordingly, if a firm is reasonably found nonresponsible, it is not entitled to contract award in any event.^{1/} In other words, even in cases where the basic protest does not concern responsibility and we simply recommend that a protester receive the award, it must be understood that the recommendation is contingent upon the protester's first being found responsible. We therefore consider BRG's argument, that our recommendation was something other than that BRG receive the contract award, to be clearly unreasonable.

BRG's second theory supporting its request for recovery of protest costs is that even though the agency did reconsider the firm's responsibility and reach an affirmative determination, BRG did not in fact receive the contract awards. While this theory appears on its face to be reasonable, the circumstances surrounding BRG's failure to receive the award are somewhat unusual. When these circumstances are taken into account, we conclude that the theory lacks merit.

After BRG filed its original protests with our Office, it also filed suit in the United States District Court for the District of Columbia seeking declaratory and injunctive relief (Baurenovierungsgesellschaft, m.b.H. v. United States Department of the Army, Civil Action No. 85-3835).^{2/} This action, which was still pending at the time of our decision on BRG's protest, was subsequently dismissed with prejudice pursuant to a settlement agreement between the parties. As part of the settlement, BRG agreed "to waive its rights to the [protested] contracts." In exchange,

^{1/} Of course, a firm in that position could not then reasonably claim that it was entitled to recover its protest costs because it did not receive the recommended contract award.

^{2/} The lawsuit involved essentially the same issues as those raised in BRG's protest. We continued our consideration of the case because, in a stipulation approved by the court, the court indicated that it wanted our opinion. See 4 C.F.R. § 21.9(a).

the Army agreed to award contracts to Decker under RFP Nos. DAJA76-85-R-0445 and DAJA76-85-R-0593. Decker previously had been found nonresponsible under these solicitations and had protested these determinations. We denied those protests in the same decision in which we sustained BRG's protests. See Decker and Co. et al, B-220807 et al., supra. It appears that, nevertheless, the Army changed its mind and reconsidered the non-responsibility determinations regarding Decker, finding the firm responsible. In other words, in exchange for the award to Decker of the two contracts that Decker was not entitled to under our original decision, BRG agreed to waive its rights to the award of the contracts we recommended in that same decision.

As part of the settlement agreement, the Army also agreed to pay BRG's attorneys' fees and expenses incurred in bringing the civil suit. In addition, the parties agreed "that this settlement and dismissal . . . shall not, in any way, prejudice BRG's right to apply for, and obtain from the Department of the Army, pursuant to the Competition in Contracting Act and 4 C.F.R. § 21.6, payment of the attorneys' fees it incurred regarding its bid protests filed with the General Accounting Office [GAO]"

The Army argues that BRG's waiver of its rights to the contract awards under the protested procurements in return for the awards to Decker should preclude BRG's recovery of its protest costs. The Army notes that its contention that BRG and Decker are under common management apparently is correct and asserts that BRG is a beneficiary of the contract awards to Decker. In addition, the agency states that the language in the settlement agreement concerning BRG's right to pursue a claim for its protest costs was not intended to acknowledge any actual entitlement to such costs. Rather, it simply was recognition that the rules governing recovery of attorneys' fees in the District Court and before the GAO are different and that each proceeding should be treated as a separate matter.

BRG characterizes the agency's comment about the apparent correctness of its contention that BRG and Decker are under common management as "unjustified editorializing." BRG states that it entered into "arms-length negotiations with Decker, an independent company" only after the Army complained about the substantial costs it would have to pay in order to terminate the protested contracts and reaward them to BRG.^{3/} BRG also contends that the Army's position is a breach of its agreement that BRG was free to apply for and obtain payment of its attorneys' fees for the bid protest at GAO.

To the extent BRG is arguing that the Army is precluded from opposing the firm's request for recovery of its protest costs because of the language in the settlement agreement that there would be no prejudice to BRG's

^{3/} The contracts protested by Decker apparently were still unawarded and thus not subject to the same basis for complaint.

right to apply for and obtain such costs, we disagree. We think the agency's position concerning its intent is reasonable and we find that the language in question simply does not preclude the Army's opposition to BRG's request. Rather, we think the language merely indicates that the settlement agreement is not a bar to BRG's right to request a ruling concerning its entitlement to recovery of its protest costs.^{4/}

Concerning the effect of BRG's waiver of its right to the contract awards in exchange for the award to Decker, we note that neither the agency nor BRG has provided anything more than a cursory explanation of how this agreement came about. We do consider it significant, however, that there is no evidence that the Army either refused to follow our recommendation that the awards be made to BRG, or that BRG was in any way coerced into waiving its rights to the awards. In fact, the evidence in the record suggests that BRG was amenable to the arrangement and in fact did benefit from it.

Specifically, the agency has submitted a copy of an affidavit of the Army contracting officer who was given responsibility over the contracts challenged by BRG. The affidavit originally was taken in connection with BRG's civil suit. In the affidavit, the contracting officer states that he met with Mr. Liedtke and Ms. Martinez of BRG to discuss the settlement of their protest to GAO and the actions to be taken in response to the GAO decision. The contracting officer also states that he informed the BRG representatives that he had found BRG responsible for the contested contracts. He states that after some further general discussion, he informed the BRG representatives that the terminations would cost the Army \$800,000 in fiscal year 1985 funds, and that funds for the award to BRG would come from "scarce" fiscal year 1986 funds.

At some point, according to the contracting officer, the conversation drifted into a "what if" mode:

"The question came up as to whether there were any other satisfactory resolutions to the situation other than terminating and reawarding the contracts. I do not recall who first posed this question. BRG expressed regret that the process was going to be so costly to the Government. I requested Mr. Liedtke to tell me if he couldn't perform and didn't want these contracts before we terminated them. He said he wished he had won on the Decker cases and then he would be in a better position to deal with the BRG cases. In this phase of the

^{4/} BRG also argues that the agency cannot rely on the settlement agreement at all in opposing the firm's application for protest costs, and that we should render our decision without regard to the agreement. We find this position totally without merit since BRG's own argument, that it is entitled to recover its costs because it did not receive the contract awards, necessarily requires our consideration of the effect of the agreement. We can hardly overlook the fact that it is because of the agreement that BRG did not receive the awards.

discussion the question of solutions other than terminating and awarding to BRG surfaced clearly. They were clearly interested in knowing what my latitude of action was and wanted to know if they could still be considered for the two Decker cases or if we could reach some settlement for costs on the BRG cases. I told them I didn't think I had much room to maneuver at this point but I said I would discuss it with my legal advisers."

Based on the information in the record, we think it is reasonably clear that the agreement between the Army and BRG was one that was viewed by the parties as mutually beneficial and that BRG's participation in it was arrived at freely. Further, we also think it is reasonably apparent that whatever the legal relationship between Decker and BRG may or may not be, at the very least, there is some mutuality of interest between the firms. This is supported by Mr. Liedtke's statement that he wished he had won on the Decker cases as he would then be in a better position to deal with the BRG cases, as well as his question concerning whether "they could still be considered for the two Decker cases." In addition, we note that it is Mr. Liedtke who the agency has alleged is the common management link between BRG and Decker, and BRG has admitted that Mr. Liedtke is the managing director and a shareholder of BRG, as well as the owner of Decker.

Under these circumstances, we do not consider BRG to be entitled to recovery of the costs of filing and pursuing its protest. The thrust of our regulation providing for the recovery of protest costs where the protester is unreasonably excluded from the procurement, except where we recommend that the contract be awarded to the protester and the protester receives the award, is that in cases where the protester obtains an award, the award is a sufficient remedy in itself. See Federal Properties of R.I., Inc., B-218192.2, May 7, 1985, 85-1 CPD ¶ 508. In that same vein, although BRG did not actually receive the contract awards here, we think its interests have been sufficiently protected by the awards to Decker, in exchange for which BRG voluntarily agreed to waive its rights to the contract awards recommended in our decision. Cf. The Hamilton Tool Co., B-218260.4, Aug. 6, 1985, 85-2 CPD ¶ 132 (where we recommended recompetition of a procurement under which the protester's proposal was improperly rejected, but denied recovery of protest costs even though other potential contractors benefited from the resolicitation, because we concluded that the protester's interest was sufficiently protected by our recommendation, so that there was no need to allow protest costs). While the extent to which BRG will derive any direct benefit from this arrangement is not clear, the record at least supports a conclusion that BRG considered the agreement to be in its own interest. We therefore find that BRG has obtained a sufficient remedy as a result of the settlement agreement and that the additional recovery of its protest costs is inappropriate.

Furthermore, we do not agree with BRG's implicit assertion that our Bid Protest Regulations should be interpreted to provide for the recovery of protest costs where a protester, such as itself, does not receive the contract award we recommended because it freely enters into an alternative agreement with the contracting agency. In effect, BRG struck a bargain with the Army for a remedy different from the one recommended in our decision. Having done so, we are not persuaded that it has any basis for obtaining any further remedy from our Office.

We deny BRG's request for recovery of the costs of filing its protest, including attorneys' fees.

for Milton J. Jordan
Comptroller General
of the United States