The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Department of the Interior; Presentations South, Inc.--Request for Reconsideration

File: B-229842.3

Date: August 15, 1988

DIGEST

Prior recommendation to conduct additional discussions with a view to terminating a contract award depending on the results of these discussions, based on General Accounting Office's (GAO) belief that contract performance had been suspended immediately, is withdrawn, where contracting activity erroneously permitted substantial performance to continue before suspending performance. Because additional discussions and termination are neither practicable nor in the government's best interest, GAO now finds the protester entitled to the costs of filing and pursuing the protest and of proposal preparation, but not to any anticipated profits.

DECISION

The Department of the Interior, National Park Service, requests approval of an agreement between the Park Service and Presentations South, Inc. (PSI), in lieu of conducting further discussions, the recommended corrective action in Presentations South, Inc., B-229842, Apr. 18, 1988, 88-1 CPD ¶ 374. We will consider the request as one for reconsideration of our recommendation, which we now modify.

We sustained PSI's protest against an award to Creative Dimension Group, Inc. (CDGI), on the basis that the agency failed to conduct meaningful discussions because it did not advise PSI of its low proposed level of effort, the primary deficiency in its technically acceptable, low priced proposal. We recommended that Interior conduct further discussions and, if a contractor other than CDGI were selected as a result, we further recommended termination of CDGI's contract.

The protest had been filed within 10 days after the contract award, and this recommendation was based on our understanding that contract performance had been suspended immediately, pending the resolution of the protest, as required under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(d)(1) (Supp. IV 1986). However, our Office

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was subsequently advised by Interior that although the agency received notice of the protest from our Office within 10 working days of the award, the particular Park Service procuring activity did not understand that appropriate timely notification had been provided and, therefore, mistakenly permitted CDGI to continue to perform for approximately 30 days before suspending contract performance.

Interior subsequently advised our Office that, as a result, approximately one-third of the contract had been performed and, therefore, that it was not feasible to implement our recommendation. Instead, Interior proposed to enter into a settlement agreement with PSI, which would include payment of costs and of some anticipated profit. By letter of June 22, we advised Interior that, under the circumstances, our Office would not object to a negotiated settlement, but that there was no legal authority which permitted recovery from the government of anticipated profits under such a settlement.

Interior now states that $17,000 of its proposed $26,200 settlement constitutes anticipated profits as an inducement and consideration to PSI, and requests that our Office concur in this payment on the basis that a contracting agency has the inherent authority to pay anticipated profits under a negotiated settlement.

First, we note that Interior agrees that PSI's protest was, in fact, filed within 10 days after award, and that our Office notified Interior of the protest within 1 working day of receipt, as required under CICA, 31 U.S.C. § 3553(b)(1). Accordingly, under CICA, 31 U.S.C. § 3553(d)(1), the contracting agency should have immediately directed CDGI to cease performance under the contract pending resolution of the protest. Apparently, the failure to immediately stay performance was the result of a good faith error on the part of the local contracting activity. Under these circumstances, and in view of the fact that at the time we made our recommendation we were not aware that substantial contract performance had taken place before the agency had suspended performance as required, we agree that implementation of our recommendation is not feasible. See The Department of the Navy; Yanke Container, Inc.--Request for Reconsideration, B-220327.2, Apr. 23, 1986, 86-1 CPD ¶ 395.

Since no other corrective action is appropriate, we withdraw our previous recommendation and find that PSI is entitled to recover its proposal preparation costs and the costs of filing and pursuing its protest, including attorneys' fees.

See Bencor-Petrifond-Casagrande, B-225408.2; B-225827, Apr. 10, 1987, 87-1 CPD ¶ 396; The Department of the Navy; Yanke Container, Inc.-Request for Reconsideration, B-220327.2, supra.

However, we can not approve any payment that includes compensation for PSI's anticipated profits. CICA, 31 U.S.C. § 3554(c)(1), explicitly provides for the allowance of the costs of filing and pursuing a protest, including reasonable attorneys' fees, and for bid and proposal preparation costs, but does not provide for the recovery of anticipated profits. Further, there is no legal authority which permits payment by the government of anticipated profits. On the contrary, both the courts and our Office have consistently held that payment of anticipated profits is not permissible even where a firm has been wrongfully denied a contract by the government. See HBH, Inc., B-225126, Feb. 26, 1987, 87-1 CPD ¶ 222; The Department of the Navy; Yanke Container, Inc.--Request for Reconsideration, B-220327.2, supra; La Strada Inn., Inc. v. United States, 12 Cl. Ct. 110 (1987); Heyer Products Company Inc. v. United States, 140 F. Supp. 409 (Ct. Cl. 1956).

Our recommendation is modified accordingly.

for Milton J. Socolar

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of the United States