



Comptroller General
of the United States

Washington, D.C. 20548

Ayer

Decision

Matter of: Systems Engineering and Management Company--
Reconsideration

File: B-234047.4

Date: August 20, 1990

Paul G. Dembling, Esq., and Dennis A. Adelson, Esq., Schnader, Harrison, Segal & Lewis, for the protester. Kenneth B. Weckstein, Esq., Epstein, Becker & Green, P.C., for TRW Environmental Safety Systems, Inc., an interested party. L. James Tillman, Department of Energy, for the agency. Roger H. Ayer, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

General Accounting Office will not consider protest questioning the proper scope of a contract under negotiation where the protest is a collateral attack on the orders of the Claims Court and appeals pending before the Court of Appeals for the Federal Circuit could decide the propriety of the award.

DECISION

Systems Engineering and Management Company (SEMCO) requests reconsideration of our dismissal of its protest of allegedly improper agency actions under request for proposals (RFP) No. DE-RP01-88RW00134, issued by the Department of Energy (DOE) for management services related to the design and development of a national nuclear waste management system. SEMCO asserts that DOE is negotiating a different contract with TRW Environmental Safety Systems, Inc. than that solicited by the RFP.

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We previously dismissed the protest since the matter involved was and is the subject of litigation before a court of competent jurisdiction.^{1/}

We affirm the dismissal.

The RFP is for a multi-year, cost-reimbursement contract having a potential ultimate cost of approximately \$1 billion. Bechtel National Inc., SEMCO, and TRW submitted proposals under the RFP. DOE evaluated the best and final offers and ranked them as follows: (1) Bechtel, (2) SEMCO, and (3) TRW. In December 1988, DOE announced its selection of Bechtel as the offeror for negotiation of a contract.

On December 23, 1988, TRW filed suit in the United States Claims Court (Cl. Ct. No. 747-88C) challenging the selection of Bechtel. TRW asked the court to order DOE to select its proposal for contract award. On February 13, 1989, TRW filed for a preliminary injunction. At this point, Bechtel timely intervened on DOE's side as a party defendant. On March 8, the Claims Court granted TRW a preliminary injunction, TRW Environmental Safety Systems, Inc. v. United States, 16 Cl. Ct. 520 (1989), and scheduled a hearing for a permanent injunction on March 30.

On March 16, SEMCO filed a motion in the Claims Court to intervene as a party plaintiff. SEMCO contended that its proposal was evaluated and ranked as second only to Bechtel's proposal, and only recently learned that a DOE selection official had an organizational conflict of interest with Bechtel and, consequently, that DOE's selection of Bechtel breached the implied contract to fairly consider SEMCO's proposal. SEMCO urged that it be allowed to intervene because the court might otherwise direct the selection and award of the contract to TRW simply because TRW was the only plaintiff before the court. SEMCO indicated that such an order would preclude it from the

^{1/} Our Bid Protest Regulations provide that:

"The General Accounting Office will not consider protests where the matter involved is the subject of litigation before a court of competent jurisdiction, unless the court requests a decision by the General Accounting Office. The General Accounting Office will not consider protests where the matter involved has been decided on the merits by a court of competent jurisdiction." 4 C.F.R. § 21.3(m)(11) (1990).

award and would eliminate the possibility of it competing under a reprocurement of the requirement. SEMCO, like TRW, requested a permanent injunction enjoining DOE from awarding the contract to any firm other than itself and ordering DOE "to select SEMCO for negotiations leading to contract award, or else order DOE to resolicit this procurement."

The Claims Court denied SEMCO's motion to intervene as untimely filed on March 22. TRW Environmental Safety Systems, Inc. v. United States, 16 Cl. Ct. 516 (1989). The court found SEMCO knew on December 28, 1988, at the latest, that TRW's complaint sought injunctive relief directing DOE to award the contract to TRW. The court characterized the situation as follows:

"[I]t was apparent to SEMCO, *i.e.*, they then actually knew, that its interest was substantially in conflict with that of TRW even though both parties, presumably, sought to prevent DOE from awarding the . . . contract to Bechtel."

The court determined that SEMCO's entry into the litigation would significantly prejudice DOE and Bechtel since in the limited time (9 working days) remaining before the March 30 hearing they would have to redirect their energies toward SEMCO's case. Finding that the defendants were incurring "great costs" every day that the contract is not awarded, the court denied SEMCO's motion to intervene citing the rule that "equity aids the vigilant, not those who sleep on their rights." SEMCO did not appeal the Claims Court denial of its motion to intervene.

On August 24, the Claims Court granted TRW a permanent injunction enjoining: (1) DOE "from awarding a contract and disbursing funds under [the RFP] to anyone other than [TRW];" and (2) Bechtel "from executing, receiving, and performing on any contract, and from receiving any funds disbursed by the United States, the Department of Energy, or any other government agency under [the RFP]." TRW Environmental Safety Systems Inc. v. United States, 18 Cl. Ct. 33 (1989).

The defendants appealed and the plaintiff cross-appealed the Claims Court's judgment to the United States Court of Appeals for the Federal Circuit (CAFC Nos. 90-5013, 90-5014, 90-5020, consolidated). On December 18, the parties to the appeal (DOE, Bechtel, and TRW) filed a joint stipulation with the Court of Appeals regarding settlement discussions which they anticipated concluding before February 1, 1990. News of the discussions was published on January 8 in two trade publications, Inside Energy and Nuclear Fuel.

SEMCO reacted to the Inside Energy report--that the discussions might result in a settlement under which DOE would split the contract between TRW and Bechtel--by writing to DOE on January 9. In its letter SEMCO observed that "the Claims Court clearly exceeded its authority when it ruled that the . . . contract could not be awarded to anyone except TRW."

On January 17, 1990, SEMCO filed a request for equitable relief in the Claims Court (Cl. Ct. No. 90-52C) based on this same theory. Among other things, SEMCO sought: (1) modification of the Claims Court's August 24 injunction "to eliminate any provision that DOE may not make an award to anyone other than [TRW];" and (2) no less than \$1.5 million in proposal preparation and related costs. An accompanying motion for permanent injunction sought "an order enjoining DOE from conducting any contract negotiations that exclude SEMCO."

On January 19, SEMCO filed a motion to intervene in the consolidated appeals of DOE, Bechtel, and TRW with the Court of Appeals (CAFC Nos. 90-5013, 90-5014, 90-5020). Citing the news of the settlement discussions, SEMCO argued that unless it was allowed to intervene a joint settlement could be made to the prejudice of SEMCO, even though "the Claims Court was incorrect in stating that no one but [TRW] should be awarded this procurement."

On February 1, SEMCO amended its Claims Court complaint (Cl. Ct. No. 90-52C) deleting its request that the court modify its August 24 injunction and instead requesting the court to: (1) order DOE to refrain from discussions, or award action under the RFP that excluded SEMCO; (2) order a resolicitation; and (3) pay SEMCO its proposal preparation costs.

The Court of Appeals was the first to respond to SEMCO's filings. On February 27, the Court of Appeals denied SEMCO's January 19 motion to intervene since (1) SEMCO could have been a party in the Claims Court, but instead "chose to stand on the sidelines," and (2) SEMCO did not appeal the Claims Court's denial of SEMCO's motion to intervene.

On March 2, SEMCO filed a motion for reconsideration by a three-judge panel with the Court of Appeals. SEMCO contended that its intervention was justified by recent events occurring after the case had left the Claims Court--presumably the DOE, Bechtel, and TRW settlement discussions,

and the possibility that, in the event of a settlement, the appeal might never be decided. A Court of Appeals three-judge panel denied SEMCO's motion for reconsideration on April 3 without comment.

On April 4, the Claims Court responded to SEMCO's amended complaint for equitable relief (Cl. Ct. No. 90-52C), and granted the government's motion for partial summary judgment for all of SEMCO's claims for equitable relief, except the issue of SEMCO's bid preparation costs which it reserved for future proceedings. The court ruled that SEMCO's request for an order directing DOE to resolicit the procurement constituted an impermissible collateral attack on its prior proceedings. The court rejected SEMCO's characterization of its request for an order directing resolicitation as an alternative argument, finding instead that it was SEMCO's primary request for relief. Observing that a collateral attack "is an attempt to avoid, defeat, or evade a judicial decree, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it," the court noted that "[t]he proper course for a dissatisfied litigant is to appeal alleged errors in the prior judgment, not through a collateral attack on that judgment in a separate law suit," and that "[e]ven if the second suit 'has an independent purpose and contemplates some other relief, it is a collateral attack if it must in some fashion overrule a previous judgment.'" Systems Engineering and Management Company v. United States, No. 90-52C, slip op. at 10 (Ct. Cl., Apr. 4, 1990). Since the court's injunction restrained an award "to anyone other than [TRW]" the court found that granting the relief SEMCO sought (i.e., resolicitation, creating the possibility of an award to SEMCO in whole or in part) would require modification of that injunction; would divest TRW of rights conferred by the injunction; and would implicitly countermand DOE options under the injunction. Id. at 10-11. The court concluded that:

"[I]t is plainly apparent that, after the smoke clears, SEMCO, as in its original complaint, simply seeks a modification of our August 24, 1989 injunction. Its request for an order directing resolicitation is, in fact, nothing more than a thinly disguised, impermissible back-door attack on the relief rendered in that opinion. In addition, we view SEMCO's request for resolicitation as little more than a method designed to circumvent this court's denial of SEMCO's motion to intervene in the original complaint." Id. at 11.

On April 25, 1990, SEMCO filed an appeal with the Federal Court of Appeals of the Claims Court's April 4 order.

The propriety of the August 24 injunction and SEMCO's exclusion from consideration for award is now pending before the Federal Court of Appeals both as a result of the DOE, Bechtel, and TRW appeals (CAFC Nos. 90-5013, 90-5014, 90-5020) and as a result of SEMCO's appeal of the Claims Court's April 4 order.

SEMCO protests that DOE intends to award TRW a contract materially different from the contract solicited. SEMCO bases this contention on Bechtel's internal memoranda advising its employees that DOE "has decided to begin negotiations leading to award of a reduced scope short-term contract to TRW," and a newspaper report that a DOE spokesman "said the job that will be offered to TRW will be 'a whole different thing than what Bechtel' was offered." We dismissed the protest because the matter involved is related to the litigation in the Claims Courts and the Court of Appeals.

In requesting reconsideration, SEMCO asserts that the protest issue is neither pending before a court nor decided by a court, since it has not been presented to any court for adjudication. In effect, SEMCO is arguing that its protest does not concern the RFP which because of the August 24 injunction can only be awarded to TRW, but a materially different never-announced contract that will be improperly awarded to TRW, and that this would violate the Competition in Contracting Act of 1984 (CICA).

DOE advises that it is negotiating with TRW, but asserts "there will be no change of scope to the original contract." DOE and TRW assert that this protest was properly dismissed and the dismissal should be affirmed. We agree.

It is plain that CICA and our Bid Protest Regulations are designed to prevent protesters from maintaining the same action in separate forums. See Electronic Sys. Assocs., Inc.--Request for Recon., B-235323.2; B-235323.3, June 23, 1989, 89-1 CPD ¶ 596; 31 U.S.C. § 3556 (1988). For this reason, our Bid Protest Regulations require dismissal of protests that are the subject matter of litigation before the Claims Court or other courts of competent jurisdiction, unless they express an interest in our decision. Although SEMCO's latest assertion--that the scope of the TRW contract is different from that solicited--was not precisely before the court, SEMCO is essentially requesting us to limit the relief granted by the Claims Court. This would be entirely inappropriate because the court's order is binding on DOE

and our Office, see Ames-Avon Indus., B-227839.3, July 20, 1987, 87-2 CPD ¶ 71, particularly since the courts have resisted similar challenges by SEMCO of the relief granted on this procurement.

The record clearly demonstrates that SEMCO's goal throughout this proceeding has been to position itself to reenter the procurement from which it was barred by its failure to timely file its intervention with the Claims Court. We regard SEMCO's protest as yet another collateral attack on the Claims Court order and DOE implementation of that order. In this regard, we note that the Claims Court and the Court of Appeals have so far consistently rejected SEMCO's attempts to reenter this procurement on the basis of allegedly prejudicial and improper actions by DOE occurring after the Claims Court's issuance of the injunction granting TRW's requested relief. For these reasons, this protest is inappropriate for consideration under our Bid Protest Regulations.

Moreover, the Court of Appeals has several pending appeals involving this procurement which could dispose of the broader issue of which of the three offerors DOE can properly contract with or whether it is required to resolicit. If the court agrees with SEMCO, DOE may be free to negotiate with SEMCO or resolicit. Conversely, the court could agree with the lower court's determination that DOE may only contract with TRW under this RFP. In short, the Court of Appeals has pending appeals which directly impact the propriety of any award under the solicitation. Therefore, we will not review the issue of the propriety of DOE's negotiations with TRW, particularly since the Court of Appeals has not expressed an interest in our opinion. See Solano Garbage Co., B-233876, Jan. 23, 1989, 89-1 CPD ¶ 62; Travelogue, Inc., B-216673.10; B-216673.11, Apr. 8, 1985, 85-1 CPD ¶ 399.

The dismissal is affirmed.



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