

147111



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: John Bransby Productions, Ltd.--Request
for Declaration of Entitlement to Costs

File: B-246210.2

Date: July 15, 1992

Robert W. Ruth, Esq., and James S. Roberts, Jr., Esq.,
Sirote & Permutt, for the protester.
Annie Burlene Childers for Childers Service Center, an
interested party.
Craig E. Hodge, Esq., and Walter A. Baker, Esq., Department
of the Army, for the agency.
Linda C. Glass, Esq., and Michael R. Golden, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

Protester is not entitled to the costs of filing and pursuing its protest where, during the course of the protest involving allegations of conflict of interest, the agency after receipt of information from the protester promptly initiated an investigation into matter and discovered a contradiction in the sworn statements of the government employee which led to corrective action--the termination for convenience of the contract on the same day preliminary results of the investigation were received by the agency.

DECISION

John Bransby Productions, Ltd. requests reconsideration of the dismissal of its protest of the award of a contract to Childers Service Center under request for proposals (RFP) No. DAAH03-91-R-0089, which was issued on June 11, 1991, for audio-visual support services by the U.S. Army Missile Command, Redstone Arsenal, Alabama (MICOM). Bransby requests that we sustain its original protest, direct the agency to reopen the solicitation, disqualify Childers and recommend award to Bransby as the next lowest offeror. Bransby also claims the costs of pursuing its protest.

We dismiss the request for reconsideration and deny the claim for costs.

Bransby in its protest, filed on October 11, 1991, alleged that Childers maintained a close relationship with, was aided by, stated its intent to employ (if awarded the contract), and ultimately did employ the spouse of the contracting officer's representative (COR) for the predecessor contract. Bransby maintained that the awardee's participation in the procurement violated the Ethics in Government Act of 1978, 18 U.S.C. § 208 (Supp. I 1989).¹ Bransby asserted that the COR on Bransby's predecessor contract possessed historical workload and performance data which, if combined with her knowledge of the independent government estimate, would make it possible for the awardee to safely underbid those line items which were suspected to be overestimated and thus produce an artificially low bid.

The Army, in its report filed with our Office on November 19, stated that the employee in question was the alternate COR on the protester's prior contract. The record showed that the employee, as alternate COR, typed the monthly delivery order to be issued to Bransby and prepared modifications to delivery orders as required. The employee also approved overtime for the contractor, gathered workload data for the visual information reports and provided workload information to the regular COR. With respect to the current solicitation, the Army stated that the employee's duties were limited to typing the Statement of Work, Section B of the solicitation and a cover memorandum forwarding the independent government estimate to another office. The Army reported that once the solicitation was issued, the employee had no access to source selection information and did not participate in the source selection process. The employee further stated that she was not aware that her spouse would be working for Childers until long after she ceased to be involved with the solicitation and until before contract award.

The Army also concluded that the employee was not a procurement official within the meaning of the Act and was precluded from participation in the instant procurement following the issuance of the solicitation. The Army states that the employee was advised regarding the provisions of the Office of Federal Procurement Policy (OFPP) Act, 41 U.S.C. § 423 (1988 and Supp. I 1989), and submitted sworn

¹18 U.S.C. § 208 generally prohibits federal employees from participating personally and substantially as a government employee in an application, contract, or other particular matter in which, to his knowledge, he, his spouse, or the organization in which he is serving has a financial interest.

statements that she had not disclosed such information. The agency found that Bransby's allegations were unsubstantiated.

Based on the protester's comments to the agency report received by the agency on December 19, 1991, which contained more specific information concerning potential wrongdoing by the agency employee, the Criminal Investigation Division (CID) was requested to look into the allegations within 5 days of the receipt of the protester's comments. In an interview with the CID on January 31, 1992, the employee admitted she had told her spouse about the protested procurement in "general terms." This information was reported to the agency by the CID on February 7, and on that same day the agency decided to terminate the protested contract since this statement was inconsistent with prior statements made by the employee and her spouse. Also, on February 7, the agency reported to our Office that as a result of the investigation there was reason to believe the integrity of the procurement process had been jeopardized and that although the investigation would continue in order to determine the full extent of the corrective action which would be required, the agency had decided to terminate the contract. We dismissed Bransby's protest on February 7, as academic in light of the action taken by the agency.

On March 29, Bransby requested reconsideration of the dismissal of its protest as academic and asked that our Office direct that the contract be awarded to Bransby as the lowest qualified, responsible offeror. Bransby also requested that we determine it entitled to its proposal preparation and protest costs related to its initial protest. Bransby argued that our Office should not simply dismiss the protest as academic as a result of the agency's termination of the protested contract, but rather must determine whether the agency's action protects the integrity of the instant procurement.

At the time Bransby's request for reconsideration was filed, the CID investigation was ongoing and the agency had not determined the full extent of the corrective action to be taken. However, the agency has since concluded its investigation and decided to cancel and resolicit. On June 12, the agency published in the Commerce Business Daily its intent to issue a solicitation for a portion of the services required under the subject solicitation. The agency has advised us that Childers will be allowed to participate in this new procurement. On June 26, Bransby protested the issuance of the new solicitation for the same reasons raised in its request for reconsideration. Since the agency has not had the opportunity to respond to these

issues, we are dismissing the request for reconsideration and will issue a consolidated decision addressing the issues raised in both the request for reconsideration and the new protest.

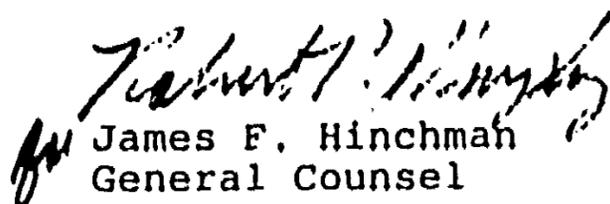
With respect to Bransby's claim for costs, where an agency takes corrective action prior to our issuing a decision on the merits of protest, we may declare a protester entitled to "recover reasonable costs of filing and pursuing the protest." 4 C.F.R. § 21.6(e) (1992).² This regulatory provision is intended to allow the award of costs when agencies unduly delay taking corrective action in the face of a clearly meritorious protest. Oklahoma Indian Corp.-- Claim for Costs, 70 Comp. Gen. 558 (1991), 91-1 CPD ¶ 558. A protester is not entitled to costs where, under the facts and circumstances of a given case, an agency takes prompt corrective action in response to the protest. Id.

Here, the protester in its initial protest stated that the award was improper because a government employee whose spouse was employed by the awardee had access to procurement sensitive information. The agency conducted an internal investigation of the allegations and received sworn statements from the employee and her spouse denying any wrongdoing and concluded that there was no "family effort" to prevent the award of a new contract to Bransby or to favor Childers. On the basis of the employee's repeated sworn denial of any wrongdoing, the agency filed a report with our Office on November 19 defending its actions. In its comments to the agency report, Bransby submitted several affidavits which suggested that the employee's spouse was actively soliciting resumes for Childers prior to contract award. These affidavits also suggested that the employee's stepson, a Bransby employee, was also involved in the resume collection process. When the agency received with the protester's comments to the agency report information including affidavits which raised questions about the veracity of the statements made by its employee and her spouse, the agency immediately initiated an investigation by the CID into Bransby's protest allegations. Based on the preliminary results of that investigation, the agency concluded that the integrity of procurement system may have been compromised and immediately terminated the contract.

We do not think that on the basis of Bransby's initial protest, the agency was required to institute a CID investigation simply because Bransby raised allegations involving conflict of interest and the improper release of

²Despite Bransby's suggestion to the contrary, Section 21.6(e) does not confer authority to award proposal preparation costs.

procurement sensitive information. The record showed that the agency reasonably conducted an internal investigation and received several sworn statements denying any wrongdoing from the parties allegedly involved. Once Bransby provided the agency with sworn affidavits that appeared to contradict the statements made by the employee and her spouse, the agency immediately referred the matter to the CID. Under these circumstances, given that the record before the agency which included an internal investigation did not show that the employee acted improperly and that once the agency was provided contradictory evidence, it immediately requested a criminal investigation. Accordingly, we do not believe that the Army unduly delayed taking corrective action. We deny Bransby's request for a declaration of entitlement to costs. Oklahoma Indian Corp., supra.


James F. Hinchman
General Counsel