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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: David Weisberg--Request for Declaration of Entitlement to Costs

File: B-246041.2

Date: August 10, 1992

William M. Weisberg, Esq., Barton, Mountain & Tolle, for the protester, Michele W. Curran, Esq., and Gary E. Bernstecker, Esq., U.S. Department of Labor, for the agency. Catherine M. Evans, Esq., David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester is entitled to the costs of filing and pursuing its protest where the agency failed to promptly and adequately investigate protest allegation of awardee's "bait and switch" tactic for at least 7 weeks after protest was filed, and then failed to take corrective action for 2 more months after receiving additional information in support of allegations.

DECISION

David Weisberg requests that we declare him entitled to reimbursement of the costs of pursuing his protest under request for proposals (RFP) No. L-A-91-20, issued by the U.S. Department of Labor (DOL) for government employee classification services.

We find Mr. Weisberg entitled to reimbursement of his protest costs.

On October 3, 1991, Mr. Weisberg protested the award of a contract to Technical Assistance and Training Corporation (TATC). The protest was grounded in the fact that TATC had proposed Mr. Weisberg, the incumbent, as the position classifier based on a rate of \$25 per hour, despite TATC's knowledge that Mr. Weisberg had only agreed to work for TATC at a rate of \$30. Mr. Weisberg had proposed the same \$30 rate for his services in his own proposal, and refused to work for TATC at the lower rate after that firm received the award, leaving TATC to perform with an alternate classifier included in its proposal. Mr. Weisberg argued that TATC knowingly, and improperly, had engaged in a "bait and

switch," competing for the award based on its proposal of Mr. Weisberg (and thereby receiving a superior score in the comparative evaluation), while knowing that Mr. Weisberg would not perform at the proposed rate.

In its report filed on November 8, DOL primarily argued that the protest should be denied because Mr. Weisberg had not established that TATC had included him in its proposal knowing that he would not work at a rate of \$25 per hour; in particular, Mr. Weisberg had presented no evidence of an agreement with TATC to work for \$30 per hour.

On November 25, Mr. Weisberg filed his comments on the agency's report. These comments included sworn statements that: (1) Mr. Weisberg had an oral agreement with TATC to work for \$30 per hour; (2) three named DOL officials, including the evaluation panel chairperson, knew the price Mr. Weisberg had quoted TATC; and (3) Mr. Weisberg had rejected TATC's president's request, prior to submitting its best and final offer, that he lower his \$30 per hour price.

On January 22, 1992, DOL informed our Office of its decision to terminate TATC's contract for the convenience of the government. This decision was the result of an investigation following the statements in Mr. Weisberg's November 25 comments and affidavit. This investigation confirmed that during the procurement Mr. Weisberg's named technical contact, who was the head of the technical evaluation panel for this procurement, had discussed with Mr. Weisberg his \$30 hourly rate and his intent to be paid at that rate whether working for TATC or himself. Since this should have put the head evaluator on notice that TATC's proposal should not have been credited with Mr. Weisberg as a prospective employee, DOL concluded that the evaluation was flawed. DOL stated that it was terminating TATC's contract and not reinitiating the selection process due to the perceived impropriety of Mr. Weisberg's conversation with the head of the evaluation panel, and the need to reduce expenditures as a result of DOL budget reductions.

Mr. Weisberg argues that reimbursement of his costs is warranted because DOL took corrective action in response to the protest allegations, and that action was unreasonably delayed until 2-1/2 months after the agency filed its report. DOL responds that reimbursement is not warranted because its corrective action: (1) was in response to the procurement improprieties discovered during the investigation of Mr. Weisberg's November 25 comments, such as improper communications with procurement officials, and not his initial protest allegation of a "bait and switch"; and (2) was reasonably prompt since Mr. Weisberg did not present the information necessary to conduct an investigation until he filed his November 25 comments.

Under section 21.6(e) of our Bid Protest Regulations, we may declare a protester entitled to reimbursement of its costs of filing and pursuing a protest where the contracting agency decides to take corrective action in response to the protest, 4 C.F.R. § 21.6(e) (1992). This provision reflects our concern that in some cases agencies were taking longer than necessary to initiate corrective action in the face of meritorious protests, thereby causing protesters to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. We adopted it based on our belief that providing for the award of costs in cases where an agency unduly delayed taking corrective action would encourage agencies "to recognize and respond to meritorious protests early in the protest process," 55 Fed. Reg. 12834 (1990). Our intent is to award costs where, based on the circumstances of the case, we find that the agency unduly delayed 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.

In our view, DOL's corrective action was at least in part in response to Mr. Weisberg's protest. While the agency concluded that the integrity of the evaluation process had been compromised by Mr. Weisberg's conversations with the head of the evaluation panel, it also validated that Mr. Weisberg's protest--that TATC's proposal was improperly credited with Mr. Weisberg as a prospective employee--was correct. In this regard, we have sustained protests on the ground that the awardee proposed key personnel it had no assurance would be available to perform the contract. See CBIS Federal Inc., B-245844.2, March 27, 1992, 71 Comp. Gen. 319, 92-1 CPD ¶ 308; ManTech Field Eng'g Corp., B-245886.4, March 27, 1992, 92-1 CPD ¶ 309; RGI, Inc., GSBGA 11752-P, June 2, 1992, 92-2 BCA____, 1992 BPD____ (and cases cited therein). Therefore, even if DOL is correct that the corrective action was warranted by improper discussions with evaluation personnel, it was also warranted by Mr. Weisberg's claim, as confirmed by the agency's investigation, that TATC's proposal had been miscalculated.

Although DOL also cited budgetary reasons as a basis for terminating TATC's contract, the record does not indicate that this was an independent reason for termination. TATC's contract was not terminated until nearly 2 months after the passage of DOL's budget, and then only after the agency had concluded that the award was improper. Cf. PAI Corp. et al., B-244287.5 et al., Nov. 29, 1991, 91-2 CPD ¶ 508 (cancellation of solicitation which resulted from clearly established material reduction in agency requirements was not corrective action).

The determinative question, then, is whether the corrective action was prompt under the circumstances. In deciding this

question, we will review the record to determine whether the agency took appropriate and timely steps to investigate and resolve the impropriety. See Commercial Energies, Inc., 71 Comp. Gen. 97 (1991), 91-2 CPD ¶ 499; Locus Sys., Inc., 71 Comp. Gen. 243 (1992), 92-1 CPD ¶ 177. As explained below, we find that DOL unduly delayed taking corrective action.

First, we believe that the agency did not adequately investigate the merits of Mr. Weisberg's protest allegations when the protest first was filed. Rather than interview contracting officials, the agency simply responded 5 weeks later in its November 8 report on the protest that Mr. Weisberg had not offered any evidence of its \$30 rate agreement with TATC; the agency concluded that there was no reason to believe that TATC misrepresented Mr. Weisberg's availability in its proposal. Not until the agency received Mr. Weisberg's November 25 comments on the report, in which Mr. Weisberg stated that he had spoken with members of the evaluation panel about his rate agreement, did the agency make any inquiry beyond the written evaluation record. Second, even after it received this additional information, the agency took another 2 months to complete its investigation and to initiate corrective action; during this time, TATC continued to perform under the improperly awarded contract.

We think the agency acted unreasonably in responding to the initial protest without first checking with the individuals involved in the evaluation of proposals to determine whether there was any merit to Mr. Weisberg's allegations. It is clear from the record that the contracting officer could have confirmed the allegations by a simple inquiry to the evaluation team chairperson when the protest was first filed. Moreover, having been advised in Mr. Weisberg's comments that the allegations could be easily confirmed by the chairperson, it is not clear why the agency took nearly 2 months before confirming the allegations with the chairperson and then implementing corrective action; the agency offers no explanation for this delay. Under these circumstances, we find that the agency's failure to promptly and adequately inquire into the protest allegations for at least 7 weeks after it first learned of them, combined with its subsequent unexplained delay in taking corrective action once it became aware of all the facts, frustrated the intent of the Competition in Contracting Act of 1984, 31 U.S.C. § 3554 et seq. (1988), by impeding the economic and expeditious resolution of the protest. See Commercial Energies, Inc., supra. This is precisely the type of agency inaction and delay that section 21.6(e) was intended to address.

Accordingly, we declare Mr. Weisberg to be entitled to the costs of filing and pursuing the protest, including reasonable attorneys' fees. Mr. Weisberg should submit his claim for his costs directly to the agency within 60 working days of receipt of this decision.

Milton J. Howler
for Comptroller General
of the United States

B-247983

August 7, 1992

DIGESTS

1. Where an agency's prompt notification of an overpayment of pay to an employee precludes him from relying on the accuracy of the payment to his detriment, waiver under 5 U.S.C. § 5584 is inappropriate since collection of the payment would not be against equity and good conscience despite the absence of fault on the part of the employee.

2. Section 8138, Pub. L. 102-172, Nov. 26, 1991, the 1992 Appropriations Act for the Department of Defense, which authorizes the Secretary of Defense to cancel the indebtedness, up to \$2,500 of any member or former member of the uniformed services, if the debt was incurred in connection with Operation Desert Shield/Storm, is independent of and separate from the Comptroller General's authority to grant waiver under 5 U.S.C. § 5584. Requests for cancellation of debts under section 8138 are for consideration by the Department of Defense.