



Comptroller General
of the United States

302710

Washington, D.C. 20548

Decision

Matter of: SDA Inc.

File: B-253355; B-253522; B-253577; B-253577.2

Date: August 24, 1993

James H. Roberts, III, Esq., Manatt, Phelps & Phillips, for the protester.

Barry D. Segal, Esq., General Services Administration, for the agency.

Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester was properly excluded from competition where it had been suspended on the basis of detailed, un rebutted allegations of misconduct which were contained in a civil complaint filed by a federal government entity in United States District Court.

DECISION

SDA Inc. protests its exclusion from the competition for a contract under solicitations for offers (SFO) Nos. 93-01, RNE-92071, and RIA-13999, issued by the General Services Administration (GSA) for acquisition of leased space for federal offices. SDA was excluded from competing on the basis of its status as a suspended contractor. SDA contends that its suspension was improper, and that the company's resulting exclusion from the competition was therefore also improper.

We deny the protests in part and dismiss them in part.

On December 15, 1992, the Resolution Trust Corporation (RTC) filed a civil complaint, No. 92-2465, in the United States District Court for the District of Colorado against Stephen M. Biagiotti, then the president of SDA. The complaint contains detailed allegations asserting that Biagiotti was involved in fraudulent real estate transactions involving substantial sums of money.

On April 2, 1993, the GSA's assistant inspector general for investigations recommended that GSA consider instituting suspension proceedings against Biagiotti, SDA, and several affiliated companies, based on the allegations in the RTC

civil complaint. GSA followed that recommendation and, in an April 20 letter to SDA, informed the company that it had been suspended on a temporary basis, effective from the date of the letter, pending resolution of the Colorado litigation. The letter stated that SDA was permitted to submit information and argument in opposition to the suspension.

The agency agreed to Biagiotti's request for an immediate hearing, and a meeting was scheduled for April 29. In an April 27 letter to GSA, Biagiotti's counsel (who is also SDA's counsel) advised the agency that, at the April 29 meeting, Biagiotti would address the allegedly "spurious nature" of the RTC allegations and "correct factual inaccuracies" in the RTC complaint. In addition, Biagiotti's counsel argued in the April 27 letter that the suspension was improper because it was based solely on the allegations contained in a civil complaint. He contended that, as a matter of law, allegations in a civil complaint could not constitute the "adequate evidence" on which a suspension must be based pursuant to Federal Acquisition Regulation (FAR) § 9.407-2(a)(5).

At the April 29 meeting, Biagiotti corrected certain minor factual matters in the RTC complaint, such as the date of incorporation of the suspended companies and the relationship among the companies. However, other than these minor matters and a blanket denial of the RTC allegations, Biagiotti did not address the substance of the allegations. In particular, he offered no specific information which purported to refute the accuracy of the allegations.

In a May 4 letter, GSA informed SDA that the suspension precluded the company from receiving a GSA contract and that offers from the company under outstanding SFOs would not be evaluated. The letter advised that, if the suspension were lifted prior to award, the contracting officer was permitted, but not required, to consider an offer that the company had submitted.¹

In its protests, which all concern SFOs under which SDA submitted an offer, SDA repeats the argument made to GSA that a suspension must be legally inadequate if based solely

¹In fact, the Colorado litigation was settled in mid-July, and the suspension was lifted on July 20. Accordingly, GSA decided to consider offers which had been received from SDA under two solicitations which are not the subject of these protests. As to the solicitations which are at issue here, however, the agency determined that, because best and final offers had already been submitted (or, in one instance, because award had already been made), SDA's offer would not be considered.

on allegations contained in a civil complaint. SDA has not addressed the substance of the allegations at all, and at no point during the protest process has SDA provided any information or argument that would cast into doubt the accuracy of the allegations in the RTC complaint.

The FAR provides for procedures for the suspension and debarment of contractors, and prohibits agencies from soliciting offers from, or making award to, suspended or debarred contractors unless the agency's head or his or her designee determines that there is a compelling reason for such action. FAR § 9.405(a).

Suspensions are imposed for a temporary period before suspected misconduct is proven and while an investigation of the contractor is taking place. FAR § 9.407-4. An agency may suspend a contractor suspected, upon "adequate evidence," of misconduct indicating a lack of business integrity. FAR § 9.407-2. "Adequate evidence" is more than uncorroborated suspicion or accusation. Horne Bros., Inc. v. Laird, 463 F.2d 1268, 1271 (D.C. Cir. 1972). The FAR provides that, in assessing the adequacy of the evidence, agencies should consider, among other factors, "how much information is available, how credible it is given the circumstances, [and] whether or not important allegations are corroborated." FAR § 9.407-1(b)(1).

Because suspensions are imposed in order to provide immediate protection of the government's interest where contractor misconduct is suspected, there is no requirement that a contractor be afforded an opportunity to be heard prior to the suspension. See FAR § 9.407-3(b). Following the suspension, however, the contractor must be afforded an opportunity to submit information and argument in opposition to the suspension.² Id.

Generally, our Office does not review protests of suspension or debarment decisions, since the appropriate forum for challenging the sufficiency or correctness of the agency's reasons for imposing the suspension or debarment is with the agency after notice of the suspension or proposed debarment

²In contrast to suspensions, which serve as protective measures, debarments are imposed where misconduct has been established. Where an agency proposes a contractor for debarment and, after proceedings where the contractor is afforded the opportunity to dispute material facts, the agency concludes that the cause of debarment has been established by a preponderance of the evidence, the agency may then debar the contractor for a period commensurate with the seriousness of the causes. FAR §§ 9.406-3, 9.406-4.

has been given, FAR § 9.407-3(b); TS Generalbau GmbH; Thomas Stadlbauer, B-246034 et al., Feb. 14, 1992, 92-1 CPD ¶ 189. However, when a protester alleges that it has been improperly suspended or debarred during the pendency of a procurement in which it was competing, we will review the matter to ensure that the agency has not acted arbitrarily to avoid making an award to an offeror otherwise entitled to award, and also to ensure that minimum standards of due process have been met. Far West Meats, 68 Comp. Gen. 488 (1989), 89-1 CPD ¶ 547; TS Generalbau GmbH, supra.

SDA does allege that it was improperly suspended during the pendency of procurements in which it was competing for award. However, SDA does not allege that GSA suspended the company in order to avoid awarding it a contract or that the agency failed to afford the protester procedural due process. There is no suggestion in the record that GSA suspended the protester for the purpose of avoiding awarding a contract to the company. As to the process afforded SDA, GSA provided SDA an opportunity to be heard immediately after the suspension was imposed, both in a face-to-face meeting and through numerous written submissions. As noted above, there is no requirement that the company be provided an opportunity to be heard prior to imposition of the suspension. In terms of the limited review conducted by our Office in this area, therefore, neither SDA's protest nor the record before us raises any concern which would call into question the propriety of GSA's action.

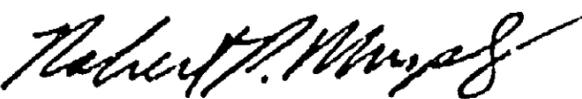
SDA's allegation really goes to the sufficiency of the evidence relied on by the agency in deciding to suspend the company, a matter generally outside the scope of our review. SDA would have our Office rule that it is a per se violation of the FAR requirement that suspensions be based on adequate evidence for an agency to base a suspension on the content of a civil complaint. We decline to do so.

Even if it is assumed, as SDA argues, that the mere fact that allegations are included in a civil complaint does not generally constitute adequate evidence for the purposes of suspension decisions, here the civil complaint was filed by a federal government entity in the course of its official duties. As noted above, in determining whether information available constitutes adequate evidence of suspected misconduct, agencies are to consider the credibility of the information. FAR § 9.407-1(b)(1). It is reasonable and appropriate for GSA to attribute a substantial level of credibility to allegations which a federal entity has determined form a sufficient basis for instituting litigation in

federal court; such allegations need not be treated as mere uncorroborated suspicions or accusations.³ In this regard, we will presume that government officials have acted in good faith. See, e.g., SDA Inc., B-248528.2, Apr. 14, 1993, 93-1 CPD ¶ 320. GSA reasonably was entitled to presume that the RTC did not initiate district court litigation based on unsupported suspicions and without reasonable inquiry.

We therefore disagree with SDA's blanket proposition that the FAR prohibits agencies from considering as evidence adequate for suspension another agency's federal district court complaint presenting detailed allegations of misconduct, where no doubt has been raised concerning the accuracy, reliability, or fairness of those allegations. Within the confines of our limited review in this area, SDA has not established that GSA acted improperly in suspending SDA, and the protester's exclusion from the competitions at issue was therefore also proper.⁴

The protests are denied in part and dismissed in part.


for James F. Hinchman
General Counsel

³The inadequacy of the general proposition advocated by SDA is reinforced here, because SDA, despite repeated opportunities to do so, has not (other than in a blanket denial) pointed to any inaccuracies in the factual allegations in the complaint, nor has the protester asserted that the RTC acted arbitrarily or in bad faith in filing the complaint.

⁴SDA also protests the agency's award of a contract to Court Avenue Partners, L.L.C., under SFO No. RIA-13999, after SDA had been suspended. Because the agency's suspension of SDA was proper, SDA is not an interested party to challenge award to Court Avenue Partners, since SDA would not be in line for award, even if its protest were sustained.
4 C.F.R. § 21.0(a) (1993); Pacrak, Inc., B-236798, Nov. 7, 1989, 89-2 CPD ¶ 442. Accordingly, we dismiss this protest ground.