



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Hobart Brothers Company-Reconsideration
File: B-222579.2
Date: September 19, 1986

DIGEST

Where it is not feasible to terminate a contract for the convenience of the government and to resolicit as recommended in a prior decision, the protester, in effect previously determined to have been unreasonably excluded from the procurement, is entitled to its costs of filing and pursuing the protest, including attorney's fees, and also its proposal preparation costs.

DECISION

The Defense General Supply Center, Defense Logistics Agency (DLA), requests reconsideration of the recommendation for corrective action made in our decision in Hobart Brothers Company, B-222579, July 28, 1986, 86-2 CPD ¶ 120 at p. 5. We modify the recommendation contained in that decision.

Briefly, the solicitation, issued to acquire a welding system, identified a brand name product and only permitted consideration of an alternate product that was "physically, mechanically, electrically, and functionally interchangeable" with the named product. Hobart Brothers Company offered the specified product (its own model No. 200409-R3 welding system) at a price of \$209,044. Hobart stated that since it assumed that the specified model, with its particular features, represented DLA's minimum needs, it refrained from offering less expensive or otherwise modified equipment. DLA, however, also received an offer from Sciaky Brothers, Inc. for its model "AcuWeld System 500" at a price of \$165,000. DLA accepted this alternate product from Sciaky. Hobart then filed a protest alleging that DLA accepted an alternate product that deviated from solicitation requirements and had also overstated its minimum requirements in the solicitation.

During our consideration of the protest, DLA, despite the opportunity to do so, did not even attempt to show that the Sciaky product was physically, mechanically, electrically, and functionally interchangeable with the Hobart product as required by the solicitation. Rather, the record showed that DLA accepted the Sciaky product on a simple finding of functional equivalence; DLA did not argue that the Sciaky product met the other mandatory characteristics specified.

Accordingly, we found that the solicitation overstated DLA's needs, represented by the award to Sciaky. Because of the unfairness of DLA's awarding a contract on a different basis from that which was solicited, we stated that the proper remedy in this situation was to resolicit the requirement with revised specifications reflecting the government's actual needs, using appropriate specifications which promoted full and open competition. Therefore, we recommended that the contract awarded to Sciaky be terminated for the convenience of the government and that DLA resolicit.

Further, because the protester was given the opportunity by our Office to compete under a revised solicitation, we denied its request for reimbursement of its costs of filing and pursuing its protest, including reasonable attorney's fees.

DLA does not challenge our conclusion that the contract was improperly awarded to Sciaky but requests that our recommendation for corrective action be modified because delivery of the equipment by Sciaky had occurred prior to the issuance of our decision so that termination of the contract and resolicitation are no longer feasible. According to DLA, the fact of delivery "could have been considered" by our Office because the contract awarded to Sciaky was an enclosure to the DLA report and showed that "the date for completion of contract performance was the date of the decision itself." In fact, DLA now states that delivery occurred on June 24, 1986, six days prior to the conference that was held in connection with this protest.^{1/} We were never specifically informed of delivery of the equipment until the filing of this reconsideration request.

In any event, since delivery has in fact occurred, we withdraw our recommendation. However, since Hobart no longer has the opportunity to compete for the award, we determine that the protester is entitled to costs as requested in the

^{1/} The DLA representative, at the conference on June 30, mistakenly indicated that he did not believe that delivery had occurred and never indicated otherwise thereafter.

protester's response to DLA's request for reconsideration. This determination is based on our finding in our decision that DLA, in effect, unreasonably excluded Hobart from the procurement by not following the stated solicitation requirements in making an award. Indeed, the protester was the only firm properly in line for the award under the terms of the solicitation. Accordingly, by separate letter of today, we are advising the Director of DLA, of our determination that Hobart be allowed to recover its costs of filing and pursuing its protest, including attorney's fees, and also its proposal preparation costs. See 4 C.F.R. § 21.6(d), (e) (1986); Computer Data Systems, Inc., B-218266, May 31, 1985, 85-1 CPD ¶ 624. Hobart should submit its claim for such costs directly to DLA. 4 C.F.R. § 21.6(f).

Milton J. Fowler
for Comptroller General
of the United States