R. Arsenoff

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter: General Services Administration--Reconsideration

File: B-239569.2

Date: February 13, 1991

Robert C. MacKichan, Jr., Esq., and Amy J. Brown, Esq., General Services Administration, for the agency.
Donald E. Barnhill, Esq., and Joan K. Fiorino, Esq., East & Barnhill, for IBI Security Service, Inc., an interested party.
Robert C. Arsenoff, Esq. and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Prior decision is modified to delete recommendation that agency's requirements be resolicited without a clause placing a ceiling on option year price adjustments for increases in Service Contract Act wage rates, and that options under awardee's contract not be exercised, since the agency has obtained a deviation to the Federal Acquisition Regulation, which removed the single legal impediment to using the ceiling clause and has, thus, obviated the need for the recommended corrective action.

2. Protester's entitlement to the costs of filing a protest is unaffected by agency's good faith reliance on the validity of a solicitation clause which was found not to be authorized by the Federal Acquisition Regulation in earlier decision; the purpose of awarding costs is not to impose a penalty on the government but to reimburse the protester with valid claims for pursuing them.

DECISION

This matter involves a request for reconsideration by the General Services Administration (GSA) concerning the award of protest costs as well as a request for modification of the corrective action recommended in our decision: IBI Sec. Serv., Inc., B-239569, Sept. 13, 1990, 69 Comp. Gen. ___, 90-2 CPD ¶ 205.

IBI protested invitation for bids (IFB) No. GS-05P-90-GAC-0070, issued by GSA for guard services to protect buildings in the State of Wisconsin for a 1-year base period with two 12-month options. The protester raised numerous objections

to GSA's inclusion of an agency clause1/ placing a ceiling on price adjustments allowable for option year increases in wage rates established pursuant to the Service Contract Act (SCA) of 1965, 41 U.S.C. §§ 351 et seq. (1988). IBI alleged, for example, that the clause was restrictive of competition, and that the ceiling violated the SCA by interfering with the Department of Labor's authority to establish wage rates for service employees and with the employer's rights to meaningful collective bargaining.

These arguments were addressed and rejected in our decision; we did, however, sustain IBI's protest on one ground: that the agency's ceiling clause did not comply with Federal Acquisition Regulation (FAR) § 22.1006(c)(d). That provision authorizes the use of agency-created clauses only when they accomplish the "same purpose" as the clause prescribed in FAR § 52.222-43, which is a total pass-through to the government of SCA wage rate increases during contract option years.

In addition to finding that IBI was entitled to its reasonable costs of filing and pursuing the protest, we noted that an award has been made and that performance had begun. We recommended that GSA promptly resolicit its requirements using a solicitation which is in compliance with the FAR and that the present contract be terminated when an award is made under the new solicitation. We also recommended that the agency not exercise any options under its contract.

GSA has informed us that on November 30, 1990, it obtained a class deviation2/ from FAR § 52.222-43 to use the contested agency ceiling clause in all solicitations issued and contracts awarded after September 13, until such time as an alternative approach can be developed. In GSA's view, the FAR deviation constitutes "sufficient corrective action, eliminating the necessity of resoliciting the requirement for guard services in the State of Wisconsin and terminating the contract [at issue] or declining to exercise options thereunder." We agree. The basis for our recommendation was to insure that GSA's procurement practices were in conformance with the FAR; in our view, the class deviation from the requirements of FAR § 52.222-43 obviates the need for the recommendation and now that the single legal impediment to using the ceiling clause has been removed, the agency is free to procure the guard services without regard to the conditions set forth in our earlier decision.

1/ The clause appears at General Services Acquisition Regulation (GSAR) § 552.222-43.

2/ See FAR § 1.404; GSAR § 501.404.

Accordingly, the previous decision is revised to eliminate the recommendation for corrective action with regard to the guard services contract. See Bush Painting, Inc.--Modification of Remedy, B-239904.2, Jan. 11, 1991, 91-1 CPD ¶ ___.

GSA also requests that we reconsider whether IBI is entitled to be reimbursed for its protest costs. The agency bases this request on an assertion that it issued the protested IFB with a good faith belief in the validity of the ceiling clause and in reliance on our previous decisions, which had upheld the validity of similar clauses.3/

The award of costs is intended to relieve protesters with valid claims, such as IBI, of the burden of vindicating the public interests which Congress seeks to promote; it is not intended as a reward to prevailing protesters or as a penalty imposed on the government and, thus, bears no relationship to whether an agency acted in good faith or not as GSA seems to suggest. See W.S. Spotswood & Sons, Inc.--Claim for Costs, B-236713.3, July 19, 1990, 69 Comp. Gen. ___, 90-2 CPD ¶ 50. Accordingly, we continue to find that IBI is entitled to be reimbursed for its reasonable costs of filing and pursuing the protest.

Milton J. Socolar

for Comptroller General
of the United States

3/ Our decision in this matter specifically overruled two earlier decisions approving of GSA's use of a ceiling clause: Echelon Serv. Co., 62 Comp. Gen. 542 (1983), 83-2 CPD ¶ 86; International Bus. Invs., Inc., B-213723, June 26, 1984, 84-1 CPD ¶ 668.