



United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Department of the Navy--Modification of Remedy

File: B-284080.3

Date: May 24, 2000

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Stephen A. Elliott, Esq., Department of the Navy, for the protester.

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DIGEST

Agency request that General Accounting Office modify a prior sustained decision by deleting recommendation that the protester be reimbursed the cost of pursuing its protest, including reasonable attorneys' fees, because the agency acted in good faith reliance upon information given it by another agency is denied, as recommendation for reimbursement of protest costs bears no relationship to whether agency acted in good faith, and is not intended to penalize the agency, but instead exists to relieve protesters of the financial burden of vindicating the public interests which Congress was seeking to promote when it passed the Competition in Contracting Act of 1984.

DECISION

The Department of the Navy requests that our Office modify the recommendation in our decision DRS Precision Echo, Inc., B-284080, B-284080.2, Feb. 14, 2000, 2000 CPD ¶ 26, in which we sustained DRS's protest of the issuance of a purchase order by the Navy to TEAC America, Inc. for 238 cockpit video recorder systems for use on F/A-18 aircraft. Since TEAC's Federal Supply Schedule (FSS) contract with the General Services Administration (GSA) was not in effect at the time the Navy ordered the recorder systems, we held that the order was an improper sole-source award.

The Navy does not ask that our Office reconsider the decision to sustain the protest, but requests that we delete the recommendation that DRS be reimbursed the cost of pursuing its protest, including attorneys' fees. Alternatively, the Navy asks that we

limit any reimbursement of protest costs to those incurred prior to January 7, 2000, when GSA apparently offered to reimburse DRS for the attorneys' fees incurred in pursuing its protest up to that date.

We deny the request.

As set forth in our prior decision, the Navy purchase order (No. N00383-99-F-6019) to TEAC for 238 recorder systems was issued on September 23, 1999, for a total price of \$2,021,096. In an October 4 agency-level protest, and in a subsequent protest to our Office, DRS argued that GSA's FSS contract with TEAC had expired and was not available for use by the Navy. The Navy denied the agency-level protest and defended its actions in the protest here. On January 19, 2000, in response to a request for information from our Office, GSA conceded that when the Navy placed its order, TEAC's contract had expired, and that no contract with TEAC was in place until GSA's contracting officer made a subsequent award¹ on December 2, 1999. On February 1, the Navy also conceded that the GSA schedule contract had expired at the time the order was placed, but urged our Office not to recommend payment of DRS's protest costs because the Navy proceeded in good faith and was misled by GSA representatives who indicated that TEAC's FSS contract remained in place. DRS Precision Echo, Inc., supra, at 2-3.

On February 14, our Office sustained DRS's protest and recommended that the company be reimbursed its protest costs. Our decision acknowledged that the Navy had apparently acted in good faith when it placed its purchase order in September, but suggested that there was evidence that should have led the Navy to suspect that GSA had not extended TEAC's schedule contract before it expired. Thus, we concluded that the Navy's actions had contributed to prolonging the dispute and increasing the cost to the protester, and we recommended that the Navy, not DRS, bear the cost of filing and pursuing the protest. Id. at 3-4.

In requesting that our Office revise the recommendation that the agency pay protest costs, the Navy disputes our conclusion that it had a basis for suspecting that GSA had not extended TEAC's contract before it expired. The Navy disputes our conclusion out of an apparent belief that our award of protest costs was intended to punish the agency. Specifically, the Navy points out that GSA's representatives continued to assure representatives of the Navy that the contract was still valid, and argues that the Navy reasonably relied upon those assurances. The Navy's request

¹ For the record, we note that GSA "awarded" to TEAC by modifying TEAC's FSS contract approximately 4 months after its expiration. This modification, signed by GSA's contracting officer on December 2, 1999, exercised an option that extended the performance period in the earlier contract from August 1, 1999 through July 31, 2004. GSA Report, Jan. 19, 2000, at 2.

raises two issues: first, whether DRS should be reimbursed its costs at all; and second, whether the Navy should be required to reimburse DRS's protest costs.

The authority of the General Accounting Office (GAO) to recommend reimbursement of the costs of filing and pursuing protests, including reasonable attorneys' fees, was established in the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3554(c)(1)(A) (1994). The underlying purpose of CICA's provisions relating to bid protest costs is to relieve protesters of the financial burden of vindicating the public interest which Congress seeks to promote. E&R, Inc.--Claim for Costs, B-255868.2, May 30, 1996, 96-1 CPD ¶ 264 at 2. In this regard, the bid protest process, as mandated by CICA, "was meant to compel greater use of fair, competitive bidding procedures 'by shining the light of publicity on the procurement process, and by creating mechanisms by which Congress can remain informed of the way current legislation is (or is not) operating.'" Lear Siegler, Inc., Energy Prods. Div. v. Lehman, 842 F.2d 1102, 1104 (9th Cir. 1988), quoting Ameron v. U.S. Army Corps of Eng'rs, 809 F.2d 979, 984 (3rd Cir. 1986).

In our view, DRS's protest served precisely the purpose anticipated by CICA. Specifically, DRS highlighted a failure by GSA to properly maintain the FSS program, and showed that absent appropriate maintenance of the program, the Navy's order of cockpit video recorders was made without the benefits of competition, and was, in essence, an improper sole-source award. As between DRS and the government, we think CICA clearly anticipates that the government should reimburse DRS for acting as a private attorney general in shining the light of publicity here. Thus, we conclude that DRS should be reimbursed for the cost of pursuing this protest. See Agency for Int'l Dev.; Development Alternatives, Inc.--Recon., B-251902.4, B-251902.5, Mar. 17, 1994, 94-1 CPD ¶ 201 at 8-9.

We next turn to the Navy's contention that it should not be required to reimburse DRS for its protest costs because the agency acted in good faith in relying on GSA's representations. As we stated in our prior decision, we have no basis to conclude, nor do we think, that the Navy acted in less than complete good faith in placing this order. DRS Precision Echo, Inc., supra, at 3. In addition, our prior decision did not intend to suggest that the Navy acted in bad faith in defending DRS's protest. Instead, the decision reflected only a limited concern about the continued defense of this purchase given GSA's inability over a period of several months to produce any evidence that a contract slated to expire had not done so. Id. Nonetheless, despite the Navy's claims of good faith, and despite any concern by our Office that the Navy may have unnecessarily prolonged the dispute, the decision whether to recommend an award of costs bears no relationship to whether the agency acted in good faith; rather, as stated above, costs are awarded to relieve protesters of the financial burden of the public service they perform. General Servs. Admin.--Recon., B-239569.2, Feb.13, 1991, 91-1 CPD ¶ 163 at 3.

Alternatively, the Navy urges our Office to limit DRS's protest costs to those incurred prior to January 7, 2000, when GSA--prior to advising our Office that it had not

extended TEAC's FSS contract before it expired--apparently offered to reimburse the protester for its attorneys' fees. In the Navy's view, since all of the recording systems ordered had been delivered to the Navy and were being installed, DRS had no reasonable expectation of any remedy beyond payment of its protest costs, and thus should not be reimbursed for extending the process further.

We disagree. While we share the Navy's concern about conserving resources when there appears to be little likelihood of any remaining meaningful relief, we cannot agree that DRS's recovery of protest costs should now be limited because the company chose not to accept GSA's settlement offer. In our view, while a protester might elect to accept the type of settlement offer made here, there is no requirement that a protester relinquish its right to a decision by our Office on the propriety of an agency action in return for only the agency's offer to pay its protest costs.

After making its settlement offer, GSA produced a report to our Office on January 19, and acknowledged that TEAC's FSS contract had been allowed to expire. We asked both DRS and the Navy to address any remaining issues in light of GSA's admission, and both elected to do so. In our view, these costs incurred shortly before our Office sustained the protest on February 14, as well as those incurred here--i.e., defending against the Navy's request for modification of remedy--should be included among the protest costs reimbursed by the Navy. Pacific Northwest Bell Tel. Co., Mountain States Bell Tel. Co.--Claim for Costs, B-227850.3, June 6, 1988, 88-1 CPD ¶ 527 at 2.

The request for modification of remedy is denied.

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