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DECISION



J. Carter
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-186842

DATE: May 5, 1978

MATTER OF: **Systems Research Laboratories, Inc. -
Reconsideration**

DIGEST: Use by GAO of agency records (cost proposals and technical evaluations) not provided to protester does not constitute denial of due process rendering prior decision invalid. Resolution of bid protests under 31 U.S.C. §§ 71, 74 (1970) is distinct from litigation in court. Procedural fairness is satisfied by Bid Protest Procedures which give reasonable notice and opportunity to be heard to protester and interested parties. Protester's exclusive remedy under Freedom of Information Act for agency denial of access to documents is appeal to courts.

Counsel for Systems Research Laboratories, Inc. (SRL), has requested reconsideration of our decision Centro Corporation; Systems Research Laboratories, Inc., B-186842, June 1, 1977, 77-1 CPD 375, in which we concurred with the recommendation of the Air Force that serious deficiencies had occurred during the negotiation process which culminated in an award to SRL. In view of the advanced state of the contract, we recommended that the option years of the contract should be resolicited. We have been advised that the option requirements were broken into three separate procurements and competed independently.

SRL contends that our Office, in issuing the above decision, deprived SRL of procedural due process of law. Specifically, SRL contends that we used documents which had not been made available to it for review--namely Centro Corporation's (Centro) cost proposal and technical evaluation. SRL argues that a decision based upon data received ex parte renders that decision invalid. In addition, SRL requested that the Air Force be required to reveal all item prices in Centro's proposal. SRL's request was subsequently withdrawn.

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Our Office has consistently held that we may properly consider restricted documents such as cost proposals and technical evaluations not furnished to a protester in deciding a bid protest. See RCI Microfilm, B-182169, April 10, 1975, 75-1 CPD 220; Techplan Corporation, B-180795, September 16, 1974, 74-2 CPD 169. Section 20.5 of our Bid Protest Procedures, 4 C.F.R. § 20.5 (1977), provides that:

"The Office of General Counsel, General Accounting Office, shall, upon request, make available to any interested party information bearing on the substance of the protest which has been submitted by interested parties or agencies, except to the extent that withholding of information is permitted or required by law or regulation * * * (Emphasis supplied.)

The Air Force rejected SRL's request to review the files containing Centro's technical evaluation and proposal under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1970). In the absence of a determination by the contracting agency or a reversal by a higher authority, or a court, as provided for in the act, we conclude that our Office properly withheld the documents under section 20.5 of our procedures.

SRL argues that data not releasable to the protester or another interested party for rebuttal must be rejected as evidence to support the case and that to do otherwise is to deny the procedural due process rights of the nonproponent. We do not agree with SRL's assessment of our treatment of such cases under our Bid Protest Procedures.

The resolution of bid protests by this Office is an administrative procedure distinct from the conduct of litigation in the courts. Our bid protest authority is based upon our authority to adjust and settle accounts and to certify balances in the accounts of accountable officers under 31 U.S.C. §§ 71, 74 (1970). See, e.g.,

Tele-Dynamics, Division of AMBAC Industries, 55 Comp. Gen. 674 (1976), 76-1 CPD 60. Neither of these sections prescribes the form or procedure in which bid protests are to be resolved. We are of the view that to whatever extent due process is required under these sections, procedures affording the protester and interested parties a reasonable opportunity to present their case are a satisfactory and fair method. Compare 21 Comp. Gen. 244 (1941). Furthermore, we do not consider it necessary to satisfy due process requirements in administrative proceedings of this nature that a party be apprised of all of the information in the record. In considering this question as it relates to suspension proceedings, the United States Court of Appeals for the District of Columbia Circuit stated:

"A court concerned with a real possibility of abuse of discretion -- i.e. of a suspension without 'adequate evidence' against the contractor -- would have latitude to consider the problem without courting injury to the Government's legitimate interests, by inspection in camera of at least some of the evidence held by the Government." Horne Brothers Inc. v. Laird, 463 F.2d 1268, 1272 (1972).

Our Bid Protest Procedures are intended to provide fair and equitable procedural standards for the protection of all parties to a protest. Notice of the protest is required to be given to all bidders or proposers which appear to have a "substantial and reasonable prospect of receiving an award if the protest is denied." 4 C.F.R. § 20.3(a) (1977). The agency is required to submit a report responsive to the protest to this Office with copies to the protester and interested parties. 4 C.F.R. § 20.2(c) (1977). The protester and interested parties are entitled to examine and comment on the agency report. 4 C.F.R. § 20.3(d) (1977).

A protester or other party denied access to documents furnished to this Office by an agency may seek disclosure of those documents under the provisions of the FOIA. Where, as here, the records sought to be disclosed are agency records, we have held that this Office is without

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authority under the FOIA to determine what records must be released and the protester must make application to the agency for release of the documents. 53 Comp. Gen. 40 (1973); DeWitt Transfer and Storage Company, 53 Comp. Gen. 533(1974), CPD 47. Once a party has sought disclosure from the agency and been denied, his sole remedy is by suit in the United States District Court. Bannercraft Clothing Company v. Renegotiation Board, 466 F.2d 345, 358 (1972); DeWitt Transfer and Storage Company, *supra*. A protester may make and we may honor a request that our Office withhold action on the protest during the pendency of an FOIA request. See Unicare Health Services, Inc., B-180262, B-180305, April 5, 1974, 74-1 CPD 175. Where a request to withhold action is denied by our Office, the party may still seek reconsideration of our decision on the protest on the basis of new information obtained through its FOIA request. 4 C.F.R. § 20.9 (1977).

We think that this procedure affords all parties both reasonable notice and an opportunity to be heard and we are satisfied that these procedures are fair. We are not dissuaded from this view by SRL's assertions. Furthermore, we note that SRL apparently elected not to pursue its remedy before the courts after SRL's request for disclosure of the documents in question was denied by the Air Force. In these circumstances, we perceive no denial of procedural fairness and are of the view that these documents were properly withheld by our Office.

We consider inapposite SRL's assertion that the court in Grey Advertising Inc. v. The Honorable William J. Middendorf, II, et al., (D.D.C., Civ. Action No. 75-1473), 663 F.C.R. A-1, 19 Gov't. Contractor 39, would consider the technical evaluation and cost proposal given only to our Office as ex parte communications and would consider a decision based on this information to be invalid. We note that the present matter involves the withholding of documents specifically authorized under our Bid Protest Procedures unlike the situation before the court.

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In view of the foregoing, we are of the opinion that SRL has failed to demonstrate any error of law or fact in our prior decision. Accordingly, our prior decision is affirmed.


Deputy Comptroller General
of the United States