



GAO

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Shields & Dean Concessions, Inc.--Reconsideration

File: B-292901.4

Date: March 19, 2004

Ruth G. Tiger, Esq., Saltman & Stevens, for the protester.
Pete Raynor, Esq., Department of the Interior, for the agency.
Jerold D. Cohen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. The Department of the Interior contends that GAO, in stating in Shields & Dean Concessions, Inc., B-292901.2, B-292901.3, Feb. 23, 2004, 2004 CPD ¶ ___, that the National Park Service (NPS) “does not dispute” our Office’s authority to review a protest of the award of a concession contract pursuant to our bid protest authority under the Competition in Contracting Act (CICA), misunderstood the agency’s position. The decision therefore is modified to recognize that NPS in fact does not concede that GAO has authority under CICA to review concession contract protests.

2. While the Competition in Contracting Act (CICA) requires GAO, in fashioning a recommendation when it sustains a bid protest, to disregard any cost or disruption from the proper termination of a contract where the statute’s stay was overridden in the government’s “best interest,” in the absence of a clause that would permit the government to unilaterally terminate a contract “for convenience” a successful protester’s only remedy is reimbursement of proposal preparation and protest costs, since CICA does not require a GAO recommendation that the government breach a contract.

DECISION

Shields & Dean Concessions, Inc. (SHDE) asks that we reconsider the recommendation for corrective action in our decision in Shields & Dean Concessions, Inc., B-292901.2, B-292901.3, Feb. 23, 2004, 2004 CPD ¶ ___. In the decision, we sustained SHDE’s protest of the award of a 10-year concession contract to Global Golf Services, Inc. (GLGO) by the National Park Service (NPS), Department of the Interior, under prospectus No. GATE020-03 for the provision of visitor recreational services at two locations within the Jamaica Bay Unit of the Gateway National Recreation Area in Brooklyn, New York.

We deny the reconsideration request.

The prospectus was issued pursuant to the competitive selection process for the award of concession contracts set out in the National Park Service Concessions Management Improvement Act of 1998, 16 U.S.C. § 5951 et seq. (2000). The agency selected GLGO in a close competition, and SHDE protested the evaluation of proposals, basically contending that the agency did not evaluate them in accordance with the terms of the prospectus.

In response, we found that there indeed were flaws in the evaluation process, any of which could have changed the agency's selection decision. We therefore sustained the protest, stating (at 10-11):

While our recommendation under these circumstances normally would be for the agency to reevaluate proposals, with a view to possibly awarding to a different firm, this remedy is not feasible here because the concession contract awarded to GLGO did not contain a termination for convenience clause.¹ Our Office has held that in the absence of such a clause, we will not recommend termination of an awarded contract, even if we sustain the protest and find the contract award improper. See, e.g., Peter N.G. Schwartz Cos. Judiciary Square Ltd. P'ship, B-239007.3, Oct. 31, 1990, 90-2 CPD ¶ 353 at 11-12; SWD Assocs.--Costs, B-226956.3, Sept. 1, 1989, 89-2 CPD ¶ 206 at 2. For this reason, we recommend that the agency reimburse SHDE for its proposal preparation costs as well as the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d) (2003).

In requesting reconsideration, SHDE points out that our Office has indicated that it is because of the government's exposure to a potentially costly breach of contract action by the contractor that we will not recommend termination of a contract that does not have a termination for convenience clause.² See Adelaide Blomfield Mgmt. Co., B-253128.2, Sept. 27, 1993, 93-2 CPD ¶ 197 at 6.³

¹ A termination for convenience clause permits the government to terminate the contract when it is "in the Government's interest," Federal Acquisition Regulation (FAR) § 49.101(b), and compensate the contractor fairly for work done and preparations made for the terminated part of the contract, including a reasonable allowance for profit. FAR § 49.201.

² For example, anticipatory profits may be available in a breach of contract action, but they are not recoverable as part of the settlement under a termination for convenience. FAR § 49.202(a); see G.L. Christian and Assocs. v. U.S., 312 F.2d 418 (Ct. Cl. 1963).

SHDE further points out that NPS was notified of the protest filing within 10 days after the November 6, 2003 award, and the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-56 (2000), requires, in such case, that the agency suspend performance of the contract while the protest is pending, unless the head of the procuring activity finds that performance is in the government's "best interests," or urgent and compelling circumstances that significantly affect the government's interests will not permit waiting for our resolution of the protest. 31 U.S.C. § 3553(d)(3)(B), (C). SHDE notes that NPS issued what was effectively a best interests override of the required performance suspension through a "Determination to Commence the Concession Contract,"⁴ and that CICA provides that if a "best interests" finding was made, any recommendation by our Office to resolve the protest should be made "without regard to any cost or disruption from terminating, recompeting, or reawarding the contract." 31 U.S.C. § 3554(b)(2). SHDE argues that the cost-exposure consideration behind our policy against recommending termination of contracts like this one "is not applicable nor authorized . . . due to NPS's decision to override the stay otherwise required by CICA." Recon. Request at 4.

Jurisdiction

Before resolving SHDE's reconsideration request, we address a March 4 (post-decision) letter to our Office from the Department of the Interior advising that we had misinterpreted NPS's position on our jurisdiction to hear SHDE's bid protest in the first instance. In our decision, we pointed out, as a threshold matter, that NPS "does not dispute" our Office's authority to review the protest pursuant CICA, which applies to contracts for the procurement of property or services. Decision at 5. We further noted that in addition to providing visitor recreational services for the

(...continued)

³ That case involved an improperly awarded lease that did not include a termination for convenience clause. We stated:

Because of the costs attributable to a breach of contract by the government, this Office does not recommendation cancellation of a contract [where termination for convenience is not an available remedy] unless the award was made contrary to statutory or regulatory requirements because of some action or statement by the contractor, or if the contractor was on direct notice of the violation.

⁴ The document, executed on December 19, 2003, includes the contracting officer's opinion that CICA did not apply to the protest, but that "I have determined that performance of the new concession contract is in the best interests of the United States and the public" for a number of enumerated reasons.

10-year term of the concession contract, the concessioner in this case would be providing services to the government of a more than de minimis value;⁵ citing our decision in Starfleet Marine Transp., Inc., B-290181, July 5, 2002, 2002 CPD ¶ 113 at 6, we concluded that our review of this “mixed transaction” therefore was appropriate.⁶ Decision at 5.

Interior now advises that “NPS’s consistent position has been and continues to be that GAO does not have CICA jurisdiction over NPS concessions matters, including SHDE’s protest.” Interior Letter at 1. Interior states:

To the extent that we acquiesced in GAO review of SHDE’s protest under GAO’s “general authority to review agency actions,” we made clear that this authority was not CICA. We understand that GAO has general authority under 31 U.S.C. 717 to evaluate agency programs and activities, and . . . to consider “non-statutory protests” in accordance with 4 C.F.R. § 21.13 [i.e., section 21.13 of GAO’s Bid Protest Regulations].

Id. at 2.

Our understanding from NPS’s protest submissions regarding our review authority was as we stated in our decision. To the extent that we misunderstood NPS’s position, and that the agency in fact does not believe we have jurisdiction under CICA to review concession contracts, the decision is modified accordingly. Irrespective of this point, however, and as noted above, the contract in issue here was more than a simple concession contract, but rather was a mixed transaction that included the delivery of services to the government (which the government might otherwise have had to purchase or perform itself), of significant value. As we stated in Starfleet Marine (at 8), “[w]here the government invites private offerors to compete for a business opportunity, the performance of which also involves the delivery of property or services to the government, all elements necessary to involve our [CICA] jurisdiction are present.”⁷

⁵ In addition to providing visitor recreational services, the concessioner must provide a variety of maintenance, repair, housekeeping, and groundskeeping services, and undertake a construction and demolition program with a projected cost of more than \$800,000.

⁶ Starfleet Marine also was an NPS concession case.

⁷ In analyzing the protest, we did not apply the CICA provisions, and the implementing FAR provisions, governing the conduct of procurements, since CICA exempts acquisition procedures that are, as was the case here, “otherwise expressly authorized by statute.” 41 U.S.C. § 253(a)(1) (2000). We instead reviewed the record to determine if the agency’s actions were reasonable and consistent with any

(continued...)

Reconsideration Request

SHDE's argument is, basically, that pursuant to CICA we should have disregarded any and all costs to the government that might arise from a recommendation that could lead to contract cancellation, since NPS decided to continue performance, on a best-interests basis, notwithstanding the protest filing. However, as indicated in our decision in Adelaide Blomfield Mgmt. Co., *supra*, we do not view our CICA authority as requiring a recommendation that the government in effect step away from its legal obligations and breach a contract. While our CICA authority does require us, in fashioning a recommendation, to disregard any cost or disruption from the proper termination of a contract where the statute's stay was overridden in the government's "best interests," in the absence of a clause that would permit the government to unilaterally terminate a contract for convenience a successful protester's only remedy is reimbursement of proposal preparation and protest costs.

To prevail on a request for reconsideration, the requesting party must show that our decision contains errors of fact or law, or present information not previously considered that warrants the decision's reversal or modification. 4 C.F.R. § 21.14(a). Because SHDE's request for reconsideration provides no basis for our Office to modify our recommendation, the request is denied.

Anthony H. Gamboa
General Counsel

(...continued)

statutes and regulations that did apply, in this case the ground rules set out in the NPS prospectus.