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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Inter-Con Security Systems, Inc.; CASS, a Joint Venture--Costs

File: B-284534.7; B-284534.8

Date: March 14, 2001

James J. Regan, Esq., Thomas P. Humphrey, Esq., John E. McCarthy, Esq., Daniel R. Forman, Esq., and Jennifer L Pomeranz, Esq., Crowell & Moring, and Neil H. O'Donnell, Esq., and Allen Samelson, Esq., Rogers, Joseph, O'Donnell & Quinn, for Inter-Con Security Systems, Inc.; Joseph J. Petrillo, Esq., and Karen D. Powell, Esq., Petrillo & Powell, for CASS, a Joint Venture.

Richard J. Webber, Esq., Matthew S. Perlman, Esq., and David A. Vogel, Esq., Arent Fox Kintner Plotkin & Kahn, for Wackenhut Services, Inc.

Dennis J. Gallagher, Esq., Department of the State, for the agency.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. General Accounting Office (GAO) recommends that protesters be reimbursed the reasonable costs of filing and pursuing their protests challenging the evaluation and selection process where the contracting agency unduly delayed taking corrective action in response to the protests, which were clearly meritorious; corrective action was taken only after a GAO attorney conducted "outcome prediction" alternative dispute resolution.

2. The Federal Acquisition Streamlining Act of 1994 provides the head of an executive agency with the authority to pay protest costs and proposal preparation costs where, in connection with a protest, the head of the agency determines that a solicitation, proposed award, or award does not comply with the requirements of law or regulation.

DECISION

Inter-Con Security Systems, Inc. and CASS, a Joint Venture, request that we recommend that the firms be reimbursed the costs of filing and pursuing their protests challenging the award of a contract to Wackenhut Services, Inc. by the Department of State (DOS) under request for proposals No. S-OPRAQ-99-R-0001 for uniformed protective services for domestic DOS facilities.

We recommend that DOS reimburse Inter-Con and CASS their protest costs.

The RFP provided for the award of an indefinite-delivery/indefinite-quantity contract to provide uniformed protective services at various locations for a base year with 4 option years. A cost/technical tradeoff basis for award was provided, and the RFP listed the following evaluation factors in descending order of importance: technical/management; relevant experience/past performance; and cost/price. With respect to cost/price, offerors were informed that cost/price would be evaluated for reasonableness and cost realism.

Proposals were received from a number of firms, including Inter-Con, CASS, and Wackenhut, whose proposals were included in the competitive range. Discussions were conducted, and revised proposals received. Wackenhut's proposal was selected to receive award, and Inter-Con and CASS protested to our Office (B-284534.3, B-284534.4, B-284534.5, B-284534.6).

Inter-Con and CASS challenged the technical evaluation, cost realism evaluation, conduct of discussions, and source selection decision. The agency filed a report responsive to the protests, and the protesters and intervenor filed comments on the agency's report.

On January 19, 2001, after receipt of the comments, the General Accounting Office (GAO) attorney handling the protests conducted an "outcome prediction" alternative dispute resolution (ADR) conference with the parties.¹ The parties were informed that from our review of the record, including the parties' arguments, it was clear that there was a core problem with the agency's procurement actions relating to the agency's price evaluation that infected the agency's selection decision.² We also

¹ In outcome prediction ADR, the GAO attorney handling a protest convenes the parties, at their request or at GAO's initiative, and informs the parties what the GAO attorney believes the likely outcome will be, and the reasons for that belief. A GAO attorney will engage in this form of ADR only if she or he has a high degree of confidence regarding the outcome. Where the party predicted to lose the protest takes action obviating the need for a written decision (either the agency taking corrective action or the protester withdrawing the protest), our Office closes the case. Although the outcome prediction reflects the view of the GAO attorney, and generally that of a supervisor as well, it is not an opinion of our Office, and it does not bind our Office, should issuance of a written decision remain appropriate.

² During the ADR conference, the GAO attorney identified specific facts supporting the outcome prediction. This information was subject to a protective order issued in connection with these protests. Given that and that this procurement is subject to further competition, this decision is necessarily general.

expressed significant concern with the agency's conduct of discussions in this respect. In sum, the parties were informed that the likely outcome of the protests was that the protests would be sustained. They were also informed that the likely protest recommendation would be to reopen the competition, conduct new discussions that would inform offerors of the basis upon which their price proposals would be considered and that would obtain sufficient information to allow a reasonable assessment of cost realism, and make a new source selection decision.

On January 23, the DOS informed us and the parties that the agency had decided to take corrective action in response to the protests by reopening the competition and amending the solicitation. On January 26, we dismissed Inter-Con's and CASS's protests as academic.

Inter-Con and CASS now request that we recommend pursuant to section 21.8(e) of our Bid Protest Regulations the reimbursement of their costs of filing and pursuing the protests. 4 C.F.R. § 21.8(e) (2000). In response to our request for a response from the agency, DOS does not contend that Inter-Con and CASS should not be reimbursed for the firms' protest costs but states that:

we do not feel that we can safely proceed as a matter of appropriations law to pay protest cost in the absence of a recommendation by GAO that protest costs be paid in these specific cases. Accordingly, the Department of State requests that the GAO issue a recommendation as to whether the protesters should be paid their costs of filing and pursuing their protests.

Letter from DOS to GAO (Feb. 22, 2001).

Where a procuring agency takes corrective action in response to a protest, our Office may recommend that the agency reimburse the protester its protest costs where, based on the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing protesters to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Pemco Aeroplex, Inc.—Recon. and Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 5. A protest is clearly meritorious when a reasonable agency inquiry into the protest allegations would show facts disclosing the absence of a defensible legal position. The Real Estate Ctr.—Costs, B-274081.7, Mar. 30, 1998, 98-1 CPD ¶ 105 at 3. As noted above, a GAO attorney will inform the parties through outcome prediction ADR that a protest is likely to be sustained only where there is a high degree of confidence regarding the outcome, such that the willingness to provide an outcome prediction is generally an indication that the protest is viewed as clearly meritorious. See York Bldg. Servs., Inc.; Olympus Bldg. Servs., Inc.—Costs, B-282887.10, B-282887.11, Aug. 29, 2000, 2000 CPD ¶ 141 at 4; Millar Elevator Servs. Co.—Costs, B-284870.3, Aug. 3, 2000, 2000 CPD ¶ 126 at 3.

There is no dispute here that the protests were clearly meritorious and that the agency unduly delayed taking corrective action. Accordingly, we recommend that Inter-Con and CASS be reimbursed the reasonable costs of filing and pursuing their protests, including those costs incurred here for requesting a recommendation for costs. York Bldg. Servs., Inc.; Olympus Bldg. Servs.-Costs, supra, at 6. The protesters should file their certified claims for costs with DOS within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

With respect to DOS's concern with their authority to reimburse protesters for the costs of filing and pursuing protests at GAO in the absence of a recommendation from our Office, the Federal Acquisition Streamlining Act of 1994, § 1066, 41 U.S.C. § 253b(1) (Supp. IV 1998), provides that if, in connection with a protest, the head of an executive agency determines that a solicitation, proposed award, or award does not comply with the requirements of law or regulation, the agency head may pay the costs described within section 3554(c)(1) of title 31 of the United States Code (protest costs and proposal preparation costs) within the limits stated in section 3554(c)(2). See also Federal Acquisition Regulation § 33.102(b). This provides the agency with authority for the payment of costs in connection with a protest even in the absence of a recommendation from our Office.

Anthony H. Gamboa
General Counsel