



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: DuraMed Enterprises, Inc.--Request for Costs

File: B-271793.2

Date: October 4, 1996

D. Whitney Thornton II, Esq., Seyfarth, Shaw, Fairweather & Geraldson, for the protester.

Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

General Accounting Office will not recommend that protester recover the costs of filing and pursuing its protest where the agency's corrective action, taken on the day its report was due, was not unduly delayed.

DECISION

DuraMed Enterprises, Inc. requests that our Office recommend that it recover the reasonable costs of filing and pursuing its protest of the award of a contract to Bay Area Home Healthcare under request for proposals (RFP) No. 662-71-95, issued by the Department of Veterans Affairs (VA) for home oxygen services.

We deny the request.

The original solicitation contained a Standard Industrial Classification (SIC) code of 7352. However, when the solicitation was revised and reissued, the contracting officer inadvertently left the section reserved for the SIC code blank. After Bay Area received award, DuraMed protested the firm's eligibility as a small business concern under SIC code 7352 with the Small Business Administration (SBA). SBA dismissed the protest because the contracting officer had advised the agency that the solicitation's SIC code was 3842, not 7352. DuraMed appealed the dismissal to SBA, and simultaneously filed a protest in our Office, primarily asserting that the VA failed to provide the correct SIC code information to all offerors or, in the alternative, that the VA failed to provide the correct SIC code to SBA.

During the size status protest, SBA asked the contracting officer for the section of the solicitation containing the SIC code clause. Instead of retrieving these pages from the solicitation, which left the SIC code information blank, the contracting officer retrieved them from Bay Area's proposal, which contained the typewritten SIC code 3842. After the protest was filed in our Office, the contracting officer

discovered her mistake and informed SBA. SBA's Office of Hearings and Appeals remanded the matter to the SBA Regional Office for a size status determination based upon SIC code 7352. Since an SBA decision that Bay Area was other than small would render the protest academic, the contracting agency requested and received an extension of its report due date until June 6, 1996, 2 days after SBA was scheduled to issue its decision. On June 6, the VA notified our Office that SBA had determined that Bay Area was other than small, and that the agency would terminate Bay Area's contract and make award to DuraMed. Accordingly, we dismissed the protest as academic.

DuraMed argues that since its protest prompted VA to correct the misinformation it had provided to the SBA, the agency clearly took corrective action in response to the protest. Dura Med asks that we recommend that it recover its costs associated with filing the protest.

When an agency takes corrective action prior to our issuing a decision on the merits, we may recommend that the protester recover the reasonable costs of filing and pursuing the protest. Bid Protest Regulations, 4 C.F.R. § 21.8(e) (1996). We will make such a recommendation only where, based on the circumstances of the case, the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Oklahoma Indian Corp.--Claim for Costs, 70 Comp. Gen. 558 (1991), 91-1 CPD ¶ 558. A protester is not entitled to costs where, under the facts and circumstances of a given case, the agency has taken reasonably prompt corrective action. Id.

Even assuming that DuraMed's protest was clearly meritorious, we have no basis to conclude that the firm should recover its protest costs because the corrective action, taken the day the report was due, was not unduly delayed. Boaz Towing, Inc.--Entitlement to Costs, B-257883.2, Feb. 22, 1995, 95-1 CPD ¶ 109; CSL Birmingham Assocs.; IRS Partners-Birmingham--Entitlement to Costs, B-251931.4; B-251931.5, Aug. 29, 1994, 94-2 CPD ¶ 82. That the agency was given an extension of time in which to file its report does not alter this conclusion, as the agency never filed a full report and the protester was not put to the time and expense of filing comments in response to such report. VSE Corp.--Recon. and Entitlement to Costs, B-258204.3; B-258204.4, Dec. 28, 1994, 94-2 CPD ¶ 260. The purpose of section 21.8(e)--to encourage agencies to take corrective action in response to meritorious protests before protesters have expended additional unnecessary time and resources pursuing their claim--was served here. See Boaz Towing, Inc.--Entitlement to Costs, supra.

The request is denied.

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