



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Martin Widerker, Inc.--Request for
Reconsideration

File: B-223159.3

Date: March 18, 1987

DIGEST

1. Protest originally dismissed for failure to file timely comments on agency report will be considered on the merits where General Accounting Office (GAO) letter advising of responsibility to contact GAO within 7 days after report due date was sent by surface rather than air mail to protester's counsel in West Germany and was not received for more than 2 months, and protester's comments on the report were filed with GAO within 7 days after the date protester actually - received the agency report.
2. Reasonable basis exists for canceling request for proposals (RFP) for road and grounds maintenance services where consolidating requirements under canceled RFP with overall base maintenance contract will reduce the total cost for all the services needed and the costs of contract administration.
3. Protester is not entitled to recover its proposal preparation costs under canceled RFP where cancellation was proper and there is no indication that contracting agency originally issued the RFP in bad faith.

DECISION

Martin Widerker, Inc. requests reconsideration of our decision to dismiss its protest concerning cancellation of request for proposals (RFP) No. DAJA37-86-R-0315, issued by the Army for road and grounds maintenance services at Patch Barracks, USMC Stuttgart, West Germany. We dismissed the protest because the protester failed to submit comments on the Army's report on the protest or advise our Office that it had not received the report within 7 working days after the date on which the Army's report was due. We will consider the protest but deny it on the merits.

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Widerker's initial protest was filed with our Office on July 23. That same day, we sent the protester a letter acknowledging receipt of the protest and advising that the Army was required to file a report in response to the protest by August 27. The letter also stated that the protester's comments were due within 7 working days after receipt of the report, and informed the protester that it should advise our Office if the report was not received by the due date, since we would close our file on the protest unless we heard from the protester by that date.

The Army subsequently filed its report with our Office on August 20, 1 week before the due date. The report stated that a copy had been sent to the protester's counsel, located in West Germany. Widerker's comments on the report were due at the latest by September 8, 7 working days after the August 27 report due date, but were not filed in our Office until late afternoon on September 9. Accordingly, we dismissed the protest based on the protester's failure to timely file its comments.

In early December, the protester's counsel called our Office to inquire about the status of the protest; he had not yet received our September 9 notice dismissing the protest. He also stated, and later reiterated in the request for reconsideration, that our initial letter acknowledging receipt of the protest had been sent by surface rather than air mail, and had not been received until September 28. As a result, the protester now argues, it had no timely notice of its responsibility to either submit comments or advise us that it had not received the report within 7 days after the August 27 due date. Under these circumstances, and because the protester's September 9 comments were filed within 7 days of September 1, the date Widerker states it actually received the Army report, as required by our Bid Protest Regulations, 4 C.F.R. § 21.3(e) (1986), we reverse our original dismissal and will consider the protest on the merits.

The RFP, issued on February 12, 1986, called for road and grounds maintenance services at Patch Barracks, USMC Stuttgart, through December 31, 1986. Initial proposals were due on March 12. In April, the Army issued two amendments to the RFP and called for submission of best and final offers on April 30. After considering the best and final offers, the Army determined that Widerker was in line for award. A preaward survey performed on March 24 recommended that no award be made to Widerker. The contracting officer had some question concerning the survey, however, which was at that time about 3 months old. Consequently the contracting officer met with Widerker on May 12 to discuss issues relating to that firm's responsibility.

Based on that meeting, the contracting officer concluded that Widerker had misunderstood the scope of work to be performed for the three main tasks, mowing grass, gardening, and miscellaneous tasks. The contracting officer then issued Amendment No. 3 to the RFP on May 20, in order to ascertain if the other offerors also had misunderstood the Army's requirements. After reviewing the responses to Amendment No. 3, the contracting officer concluded that not all the offerors had interpreted the RFP as the Army intended and, as a result, no award could be made without clarifying the Army's requirements and reopening negotiations. The contracting officer estimated this process would take 30-45 days, thus delaying contract award until July 15.

The Army states that the services covered by the RFP originally were to be included in the overall base maintenance contract scheduled to begin on October 1, 1986. Because the road and grounds maintenance services were needed sooner than the October 1 start date of the overall maintenance contract, however, the RFP here had been issued with plans to phase those services into the overall contract as of January 1, 1987. Since award under the RFP had been delayed at least until mid-July, however, the contracting officer decided in late June to cancel the RFP and immediately incorporate the road and grounds maintenance into the procurement for the overall maintenance contract scheduled to begin on October 1.

According to the Army, canceling the RFP was justified because consolidating its requirements in the overall base maintenance contract will lower the total cost for all the services needed and will reduce the Army's contract administration costs. Widerker argues that the cancellation was improper because the defects in the RFP which ultimately delayed award under the RFP and led to the cancellation were due to the Army's "gross negligence" in drafting the RFP. Widerker contends that it should either be awarded a contract under the canceled RFP or be allowed to recover its proposal preparation costs.^{1/} We disagree.

^{1/} Widerker also challenges the Army's decision not to release to Widerker the abstract of offers or the preaward survey documents. To the extent that Widerker's complaint relates to the Army's duty to furnish documents in connection with the protest pursuant to the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(f) (Supp. III 1985), the contracting agency has the initial responsibility for determining which documents are subject to release. Cottage Grove Land Surveying, B-223207, Sept. 12, 1986, 86-2 CPD ¶ 291.

(Fn. cont'd)

In a negotiated procurement, the contracting officer has broad discretion in deciding whether to cancel the RFP and need only have a reasonable basis to do so, as opposed to the "cogent and compelling" reason required for cancellation after bid opening in a procurement using sealed bidding. Dohrman Machine Production, Inc., B-223307, Aug. 25, 1986, 86-2 CPD ¶ 221. In our view, the contracting officer had a reasonable basis for canceling the RFP in this case in light of his determination that incorporating the Army's requirements into the overall base maintenance procurement would result in cost savings to the government. See Business Communications Systems, Inc., B-218619, July 29, 1985, 85-2 CPD ¶ 103.

Since the cancellation was proper and the protest thus is without merit, there is no basis on which to require the Army to make award to Widerker under the canceled RFP^{2/} or to allow Widerker to recover its proposal preparation costs. See 4 C.F.R. §§ 21.6(d) and (e). Even assuming, as Widerker contends, that the Army was negligent in failing earlier to correct the defects in the RFP, and thus was responsible for the delays which ultimately made award under the RFP impracticable, such mistakes or lack of diligence provide no basis on which to allow recovery of proposal preparation costs where, as here, there is no indication that the Army

(Fn. 1 continued)

To the extent that Widerker is requesting the release of documents pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1982), only the contracting agency and the courts have the authority to decide what information the agency must disclose under the FOIA. In any event, we do not think that the abstract of offers or the preaward survey would be relevant to the protest, which concerns the propriety of the cancellation, not the protester's price, which the Army agrees was the lowest offered, or its responsibility.

^{2/} The Army could not properly make award under the RFP even before it was canceled in view of the contracting officer's determination, discussed above, that the RFP did not adequately describe the Army's needs and prevented offerors from competing on an equal basis.

originally issued the RFP in bad faith, and the subsequent cancellation was proper. See Computer Resource Technology Corp., B-218292.2, July 2, 1985, 85-2 CPD ¶ 14.

The protest and request for costs are denied.

for Seymour Fio
Harry R. Van Cleve
General Counsel