



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Spectrum Analysis & Frequency Engineering,  
Inc.--Request For Protest Costs  
File: B-222635.2  
Date: September 13, 1988

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### DIGEST

Request for award of protest costs is denied where, in response to a recommendation made in connection with a sustained protest, the contracting agency amended the solicitation, allowed the protester to revise its proposal, and awarded a contract to the protester under the amended solicitation for the same duration as provided for in the initial solicitation.

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### DECISION

Spectrum Analysis & Frequency Engineering, Inc. (SAFE), requests that we award the firm the costs it incurred in filing and pursuing its protest of the award by the Federal Communications Commission (FCC) of a contract to Spectrum Management Systems, Inc., under request for proposals (RFP) No. 86-03. We deny the request for costs.

The RFP was for providing the public with direct electronic access to data bases generated by the FCC. Five offerors, including SAFE and Spectrum, submitted technically acceptable offers. For purposes of evaluating offerors' prices, the RFP required each offeror to furnish its per-second customer usage charges, as well as the number of seconds of computer time that would be required to perform three sample jobs. As amended, the RFP indicated that the evaluation would be based on transmission of 60 characters of data per line of output. In Spectrum Analysis & Frequency Engineering, Inc., B-222635, Oct. 8, 1986, 86-2 CPD ¶ 406, we sustained SAFE's protest of the award to Spectrum because Spectrum's low evaluated price had been based on transmission of fewer than 60 characters per line. We recommended that the FCC amend the RFP to establish a common basis for evaluation and allow both SAFE and

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Spectrum, the two offerors in the competitive range, to submit modified proposals. We recommended further that in the event SAFE became the low offeror, the agency should terminate Spectrum's contract, which the agency had awarded on May 14, 1986, and make award to SAFE.

In accordance with our recommendation, the FCC amended the solicitation, received revised proposals from and conducted discussions with SAFE and Spectrum, and on July 6, 1987, awarded a contract to SAFE. The contract was for 1 year, beginning November 2, with two 1-year options. The contract with Spectrum, which also had been for 1 year with two 1-year options, was extended through October 30. The agency reports that SAFE was not able to commence performance until January 11, 1988, and that it therefore assessed liquidated damages against the firm.

SAFE contends that it is entitled to an award of protest costs basically for three reasons. First, the firm points out that by the time the FCC awarded it a contract, the base year of the contract awarded to Spectrum had expired. SAFE relies on our decision, EHE National Health Services, Inc., 65 Comp. Gen. 1 (1985), 85-2 CPD ¶ 362, and others, in which we have said that an award of protest costs is appropriate where a successful protester has lost the opportunity to compete for and be awarded a contract for a substantial portion of the protested procurement. Second, SAFE notes that in enacting recent changes to our Bid Protest Regulations concerning the award of protest costs, we indicated that we would award such costs in appropriate cases without regard to whether other remedies also might be recommended. 52 Fed. Reg. 46,445 (1987). Finally, SAFE says that an award of protest costs is warranted in this case because its protest advanced the broad purpose of the Competition in Contracting Act of 1984 (CICA)--to enhance competition in federal procurements--citing Kavouras, Inc., B-219508, Nov. 12, 1985, 85-2 CPD ¶ 535, among other cases.

The recent changes in our Bid Protest Regulations apply only to those protests filed on or after January 15, 1988. Thus, because SAFE's protest was filed and decided in 1986, SAFE's request for costs incurred in connection with that protest must be decided under the regulations in existence at that time, as interpreted and applied in our decisions. See Sperry Marine, Inc.--Claim for Bid Protest Costs, B-227106.8, Mar. 29, 1988, 88-1 CPD ¶ 315.

In 1986, section 21.6 of our Regulations, 4 C.F.R. § 21.6 (1986), provided, in part:

"(d) If the General Accounting Office determines that a solicitation, proposed award, or award does not comply with statute or regulation it may declare the protester to be entitled to reasonable costs of:

"(1) Filing and pursuing the protest, including attorney's fees . . . .

. . . . .

"(e) The General Accounting Office will allow the recovery of costs under paragraph (d)(1) of this section where the contracting agency has unreasonably excluded the protester from the procurement except where the General Accounting Office recommends . . . that the contract be awarded to the protester and the protester receives the award."

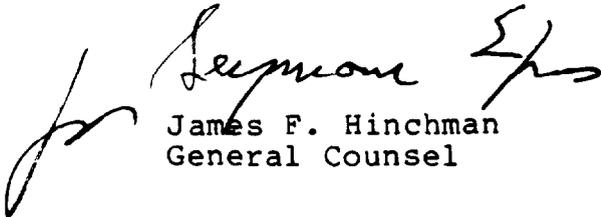
In applying these provisions we have said that, as a general rule, when a protester is given an opportunity to compete for an award under a corrected solicitation, recovery of the costs of filing and pursuing a protest is not appropriate. The Hamilton Tool Co., B-218260.4, Aug. 6, 1985, 85-2 CPD ¶ 132; Federal Properties of R.I., Inc., B-218192.2, May 7, 1985, 85-1 CPD ¶ 508. Conversely, where the protester essentially has lost the opportunity to compete for and be awarded a contract under the protested solicitation (receiving only the opportunity to compete for a subsequent award), the award of protest costs may be an appropriate remedy. EHE National Health Services, Inc., 65 Comp. Gen., supra; Pride Computer Services, Inc., B-227805, Sept. 25, 1987, 87-2 CPD ¶ 302; Consulting and Program Management Services, Inc.--Request for Reconsideration, B-225369.2, July 15, 1987, 87-2 CPD ¶ 45; E. H. Pechan Associates, Inc., B-221058, Mar. 20, 1986, 86-1 CPD ¶ 278; Consolidated Construction, Inc., B-219107.2, Nov. 7, 1985, 85-2 CPD ¶ 529. In each of these cases, we awarded protest costs because the circumstances were such that while the successful protester could compete under future solicitations, the protester effectively had been deprived of a fair opportunity to compete for award under the solicitation at issue.

In this case, SAFE did not lose the opportunity to compete for and be awarded a contract under the solicitation. The RFP here, both as issued initially and as revised in

accordance with our recommendation, contemplated the award of a 1-year contract, with two 1-year options, and that is exactly the contract for which SAFE competed and which the firm ultimately received. The fact that the award to SAFE was delayed in order to allow the agency to take the necessary corrective action did not detract in any meaningful sense from the relief our decision afforded SAFE, since the action taken effectively restored the firm to the same position it would have enjoyed in this procurement had the evaluation not been flawed.<sup>1/</sup> There is no basis, therefore, for the additional remedy of protest costs. Environmental Tectonics Corp., B-225474.5, July 28, 1987, 87-2 CPD ¶ 96.

Finally, there is no merit to SAFE's contention that it is entitled to an award of protest costs on the basis that its protest advanced the broad purpose of CICA, promoting competition in federal procurements. While furthering CICA's underlying purpose may be an appropriate basis for the award of protest costs where the basis for protest was the agency's unexcused failure to obtain competition in awarding a contract, see, e.g., Kavouras, Inc., B-219508, supra; Washington National Arena Limited Partnership, B-219136, Oct. 22, 1985, 85-2 CPD ¶ 435, this case did not involve an improper noncompetitive procurement. The applicable standard for determining SAFE's entitlement to protest costs is that articulated in The Hamilton Tool Co., B-218260.4, supra; under that standard, SAFE is not entitled to an award of protest costs.

The request for protest costs is denied.

  
James F. Hinchman  
General Counsel

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<sup>1/</sup> In this regard, we note that while five firms submitted technically acceptable offers in this procurement, only SAFE and Spectrum were allowed to revise their proposals as a result of our decision.