



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Data Management Services, Inc.

File: B-233345.2

Date: March 1, 1989

DIGEST

There is no basis for an award of protest costs where the protester withdraws its request for the General Accounting Office to consider the merits of the protest, since a prerequisite to the award of costs under the Competition in Contracting Act is a decision on the merits of the protest.

DECISION

Data Management Services, Inc. (DMS), requests recovery of the costs of filing and pursuing its protest concerning the award of a contract to SelectTech Services Corporation under request for proposals No. DAKF15-88-R-0025, issued by the Army for operation and maintenance of a computer center. We dismiss the protest and deny the request for costs.

By letter dated October 17, 1988, the Army notified DMS that a contract had been awarded to SelectTech, and listed several purported weaknesses in DMS' proposal. DMS then protested to the contracting officer, on October 19, that there were errors made in the overall technical evaluation of the DMS proposal. After learning that the protest to the Army would not result in a stay of performance, DMS then filed a protest with our Office on October 25; however, it withdrew this protest 2 days later in order to give the Army an opportunity to respond to the merits of the agency protest.

On November 22, the contracting officer advised DMS that the issues in the agency-level protest were considered moot as a result of DMS' withdrawal of its protest before our Office and its decision not to intervene in another offeror's

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protest of the same procurement at the General Services Administration Board of Contract Appeals (GSBCA).^{1/} This protest to our Office followed.

The Army's report on the protest revealed that the technical weaknesses cited in the October 17 letter to DMS were actually another offeror's weaknesses, and, in turn, the other offeror had received a letter addressing DMS's technical weaknesses. After reviewing the report, DMS withdrew its request for our Office to consider the merits of its protest; however, DMS requests that we award it the costs of filing and pursuing the protest, including attorneys' fees.^{2/} In support of its request for costs, the protester argues that, but for the Army's failure to disclose the actual technical weaknesses in DMS' proposal until its report on the protest, it would not have incurred the costs of filing and pursuing the protest.

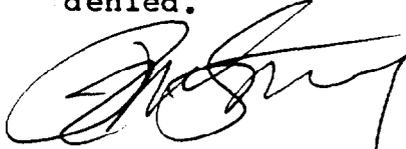
Our authority to allow recovery of the costs claimed by DMS is predicated upon a determination by our Office that the solicitation, proposed award or award of a contract does not comply with statute or regulation. 31 U.S.C. § 3554(c)(1) (Supp. IV 1986); Teknion, Inc.--Claim for Protest Costs, B-230171.22 et al., Sept. 6, 1988, 88-2 CPD ¶ 213. A decision on the merits of a protest is an essential condition to a declaration that the protester is entitled to the award of costs. Brownell & Co., Inc.--Request for Reconsideration, B-225784.4, Aug. 20, 1987, 87-2 CPD ¶ 182. Here, while the agency should have notified

^{1/} The third offeror, A/S/K Associates, filed a protest at the GSBCA on October 24, challenging the weighting of the RFP evaluation criteria under Section M.5 of the solicitation. A/S/K, SelecTech and the Army executed a stipulation and joint motion to dismiss the GSBCA protest with prejudice and, consequently, the protest before the GSBCA was dismissed on November 21.

^{2/} DMS also asked us to direct the Army to conduct a face-to-face debriefing with the firm. The Army has advised us that such a debriefing was conducted with the protester on February 9.

DMS of the actual weaknesses in its proposal earlier in the process, given that DMS has withdrawn its protest on the merits, we have no basis for awarding costs to DMS.

The protest is dismissed and the request for costs is denied.

A handwritten signature in black ink, appearing to read "R. Strong", written in a cursive style.

Robert M. Strong
Associate General Counsel