



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Harbert International, Inc.

File: B-236864.3

Date: March 30, 1990

Howard Dyer-Smith, for the protester.
Lester Edelman, Esq., Office of the Chief Counsel, United States Army Corps of Engineers, for the agency.
Kathleen A. Gilhooly, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest filed more than 10 days after protester was orally informed that its agency-level protest had been denied, together with the basis for the denial, is untimely under General Accounting Office's Bid Protest Regulations.
2. There is no basis for an award of proposal preparation costs where the protest was dismissed as academic, since a prerequisite to the award of costs is a decision on the merits of a protest.

DECISION

Harbert International, Inc., protests any award under request for proposals (RFP) No. DACA63-89-R-0039, issued by the U.S. Army Corps of Engineers (the Corps) for the design and construction of a central distribution center at Red River Army Depot, Texarkana, Texas. Harbert contends that the corrective action proposed by the Corps in response to previous protests is inappropriate, unhelpful, and prejudicial to all competitors except the offeror who previously had been selected, Red River Constructors.

We dismiss the protest.

The RFP was initially issued on January 5, 1989. By the April 11 deadline for submission of initial proposals, the Corps received five proposals, all of which were included in the competitive range. Best and final offers (BAFO) were submitted by August 11 and award was made to Red River Constructors on August 28. By letter dated September 5, Metric Constructors, Inc., filed an agency-level protest alleging that proposals were not properly evaluated and that meaningful discussions were not held. By letter dated September 7, Harbert protested the award to our Office on the basis that its proposal was technically acceptable and lower in cost. By letter dated October 5, Rust International Corporation also protested the award on similar grounds to our Office.

In reviewing Metric's protest, the Corps determined that proposals were improperly evaluated because the RFP's evaluation criteria did not reveal the relative weights of the evaluation factors and significant subfactors, as applied in the evaluation process. Consequently, the Corps sustained Metric's protest. After the Corps informed our Office of its determination to take corrective action, we dismissed the protests as academic on October 25.

By letter dated October 30, the Corps transmitted to all offerors amendment No. 16, setting forth the relative weights of the evaluation factors and significant subfactors. The letter advised offerors of the opportunity to participate in another round of oral discussions on November 17 and that a second round of BAFOs would then be requested. By letter to the Corps dated November 14, Harbert objected to the corrective action being taken, contending that the Corps should either take Harbert's recommended corrective action of evaluating proposals using factors and subfactors of equal weight, or pay Harbert's proposal preparation costs. The Corps orally communicated to Harbert on November 17 its decision to proceed with the corrective action it was taking, notwithstanding Harbert's objections, and confirmed its position in writing by letter dated November 27. Harbert protested the Corps' proposed corrective action to our Office on December 14.

We regard Harbert's November 14 letter to the Corps as an agency-level protest, since it is a written statement containing both an expression of dissatisfaction over the

agency's conduct of the procurement and a request for corrective action. See Reeves Brothers Inc. et al., B-212215.2; B-212215.3, May 2, 1984, 84-1 CPD ¶ 491. Under our Bid Protest Regulations, where a protest initially is filed with the contracting agency, a subsequent protest to our Office must be filed within 10 working days after the protester learns of adverse action on the protest at the agency-level. 4 C.F.R. § 21.2(a)(3) (1989). We have held that oral notification of the contracting agency's denial of the agency-level protest, together with the reasons for the denial, starts the 10-day period running, Elite Bldg. Servs., B-230867.2, June 10, 1988, 88-1 CPD ¶ 556, and that a protester may not delay filing its protest until it has received the agency's position in writing. Universal Fuel, Inc., B-231870, Oct. 4, 1988, 88-2 CPD ¶ 318. Here, since the oral notification on November 17 began the 10-day period, the December 14 protest to our Office is untimely.

In comments on the agency report, Harbert contends its December 14 protest to our Office is timely because it was submitted prior to the date for receipt of the second requested BAFOs. Presumably, Harbert is arguing that its protest is timely under section 21.2(a)(1) of our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1), which provides that alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested no later than the next closing date for receipt of proposals following the incorporation.

However, we find Harbert's protest is covered by section 21.2(a)(3) of our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3), which specifically provides that in cases where an alleged impropriety in a solicitation is timely protested to a contracting agency, any subsequent protest to our Office must be filed within 10 days of formal notification of or actual or constructive knowledge of initial adverse agency action. Thus, Harbert's protest, filed with our Office before the next closing date, but more than 10 days after Harbert was orally informed that its agency-level protest had been denied (with the reasons for the denial), is untimely.

Harbert also requests that it be provided proposal preparation costs in connection with its September 7 protest to our Office which we dismissed as academic. We find no basis for this claim. We have consistently held that a

protester is not entitled to reimbursement of such costs where the protest is dismissed as academic, so that we do not issue a decision on the merits. See Maytag Aircraft Corp.--Request for Recon.; Claim for Protest Costs, B-237068.2, Nov. 13, 1989, 69 Comp. Gen. ____, 89-2 CPD ¶ 457.

The protest is dismissed and the claim denied.



Robert M. Strong
Associate General Counsel