



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Moody Bros./Troika, Int'l Inc./C.G. Willis
Inc.--Reconsideration

File: B-237278.4

Date: April 23, 1990

Gerald A. Malia, Esq., Ragan & Mason, for the protester.
Richard P. Burkard, Esq., Andrew T. Pogany, Esq., and
Michael R. Golden, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Prior decision denying claim for quote preparation and protest costs is affirmed since 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.

DECISION

Moody Bros./Troika, Int'l/C.G. Willis, Inc. request that we reconsider our decision, Moody Bros./Troika, Int'l Inc./C.G. Willis Inc.--Claim for Costs, B-237278.3, Dec. 22, 1989, 89-2 CPD ¶ 590, in which we denied its claim for quote preparation and protest costs which it incurred in connection with Military Traffic Management Command rate tender solicitation "BARGE-TK-02," for the shipment of sea sheds from Perryville, Maryland to Port Hueneme, California.

We affirm our prior decision.

In their initial protest, filed on October 4, 1989, Moody Bros., Troika, Int'l and C.G. Willis protested the agency's determination that Troika was not a carrier eligible to submit a tender and that Moody did not have appropriate Interstate Commerce Commission operating authority for the entire movement as required by the solicitation. The agency subsequently canceled the solicitation. The agency reported that, due to an urgent need to ship 70 sheds, it used an alternate procurement procedure to meet this need. The protesters were solicited for the urgent shipments. As a result, the total quantity to be shipped under the protested

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solicitation was reduced 40 percent. The agency anticipated further shipments under this alternate procedure for all its remaining requirements and stated that the protesters would be afforded the opportunity to compete for award of such shipments. Consequently, on November 27, we dismissed the protest without rendering a decision on the merits since cancellation of the solicitation rendered the protest academic.

Subsequently, the protesters did not challenge the agency grounds for cancellation but, as the low bidder under the canceled solicitation, submitted a claim for quote preparation and protest costs.

We denied the protesters' claim for costs because our authority to allow recovery of the costs is predicated upon a determination by our Office that a solicitation for a contract or a proposed award or the award of a contract does not comply with statute or regulation. See 31 U.S.C. § 3554(c)(1) (1988); Teknion, Inc.--Claim for Protest Costs, 67 Comp. Gen. 607 (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. Soltec Corp.--Request for Costs, B-234716.3, June 8, 1989, 89-1 CPD ¶ 539.

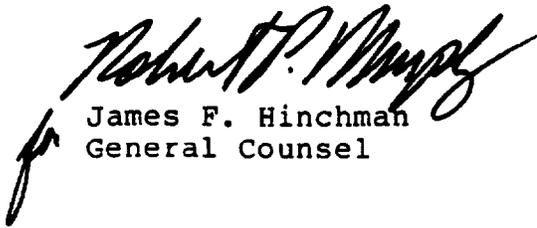
In its request for reconsideration, the protesters argue that because the agency canceled the solicitation and our office dismissed the protest, a sufficient "determination" has been made by our Office. They point out that in our annual report to Congress, we included in a statistical overview a table showing the "corrective action rate" for cases dismissed as academic. The protesters assert that those cases where we determined that the protest was academic because the agency took corrective action constitute a "victory" for the protester sufficient to authorize the recovery of costs and fees. We are considering awarding protest costs based upon agency corrective action, and have proposed regulations to this effect.^{1/} Here, however, we dismissed the protest because the agency canceled the solicitation following a change in

^{1/} Under a proposed revision to the Bid Protest Regulations, if the contracting agency decides to take corrective action in response to a protest and so notifies our Office after the date for submission of its report, we may declare the protester to be entitled to recover reasonable costs of filing and pursuing the protest based upon the pleadings before us and the agency's action. See 55 Fed. Reg. 12,834 (1990).

its requirements. We do not characterize the cancellation as corrective action, nor did we do so in our dismissal notice dated November 27, 1989.

In the alternative, the protesters ask that we consider the merits of the original protest which we dismissed on November 27. The protesters are, in effect, for the first time requesting that we reconsider our dismissal. Such a request, filed more than a month after our original dismissal, is clearly untimely under our Bid Protest Regulations, 4 C.F.R. § 21.12 (1989).

We affirm our prior decision.



James F. Hinchman
General Counsel