

Richard Burkard



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Department of Commerce--Reconsideration

File: B-238452.3

Date: October 22, 1990

Christopher R. Brewster, Esq., Kaye, Scholer, Fierman, Hays & Handler, for Instruments S.A., Inc., and Samuel P. Sears, Jr., Esq., Burns & Levinson, for VG Instruments Inc., the protesters.

James K. White, Esq., Department of Commerce, for the agency. 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

Successful protesters are entitled to protest costs even where their protests are sustained (based on the General Accounting Office's in camera review of evaluation documents) on ground which was not argued by the protesters.

DECISION

The Department of Commerce requests that our Office reconsider our decision, Instruments S.A., Inc.; VG Instruments Inc., B-238452; B-238452.2, May 16, 1990, 90-1 CPD ¶ 476, insofar as that decision awarded the costs of pursuing the protests, including attorneys' fees, to the protesters. The agency contends that it should not be required to pay attorneys' fees concerning protest issues on which the protesters were unsuccessful.

We affirm our decision.

Instruments S.A., Inc. and VG Instruments Inc. protested the award of a contract to Emcore Corporation under request for proposals (RFP) No. 52RANB9031, issued by the National Institute of Standards and Technology, Department of

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Commerce, for a chemical beam epitaxial growth system. Both protesters generally alleged that the agency did not evaluate Emcore's proposal in accordance with the evaluation scheme contained in the RFP and that the agency improperly found Emcore's proposal to be technically superior despite the firm's lack of specific experience. As relevant here, the RFP required offerors to provide the source code for their computer control software to permit the government to customize system operation. Based on our in camera review of the agency's evaluation documents, we found that Emcore's offer did not meet the RFP requirement that offerors provide the source code for their computer control software, and we therefore sustained the protest and awarded protest costs.

The agency asserts that our Office specifically found that the agency properly determined the awardee to be technically superior. The agency states that the issue upon which we sustained the protest was unrelated to the unsuccessful grounds of protest advanced by the protesters. The agency contends that since the protesters did not incur costs in connection with the issue upon which the protests were sustained, the protesters should not be awarded their protest costs. We disagree.

Our authority to award protest costs derives from the Competition in Contracting Act of 1984, 31 U.S.C. § 3554(c)(1) (1988), which authorizes us to determine that a "solicitation for a contract," "proposed award," or "award of a contract" does not comply with statute or regulation. Thus, our purpose is to insure that federal procurements are conducted reasonably and in accordance with applicable statute or regulation. We cannot perform this function without relying on interested parties (with a direct economic interest essentially acting as private attorney generals) to bring to our attention potential violations. If such a violation is brought to our attention, we think the successful protester should be "made whole" by payment of protest costs for having furthered the public policy of full and open competition. Here, the protesters filed good faith protests which brought to our attention such a violation. The protesters' allegations raised protest issues which were not considered frivolous and which warranted development and review by our Office.^{1/} Consequently, we consider the protests to be successful. We will not limit the award of attorney's fees to successful protesters unless part of their fees are allocable to a protest issue which is so severable as

^{1/} The precise issue of Emcore's compliance with the RFP's source code requirement was not, and could not have been, discussed by the protesters because they were not provided with the relevant source selection documents.

to, in effect, constitute a separate protest. That is not the case here. Compare Interface Flooring, 66 Comp. Gen. 597 (1987), 87-2 CPD ¶ 106.

We affirm our prior decision and also find that the protesters are entitled to their costs incurred in responding to this unsuccessful reconsideration request by the agency, including reasonable attorneys' fees. Pacific Northwest Bell Telephone Co.; Mountain States Bell Telephone Co.--Claim for Bid Protest Costs, 67 Comp. Gen. 441 (1988), 88-1 CPD ¶ 527.



Acting Comptroller General
of the United States