

P. Ahearn



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Hadson Defense Systems, Inc.--Claim for Protest Costs

File: B-227285.8

Date: March 13, 1991

Joseph Dyer, Esq., Seyfarth, Shaw, Fairweather & Geraldson, for the protester.
M. Penny Ahearn, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Claim for costs of filing and pursuing protest is denied where protester withdrew protest based on agency's corrective action remedying procurement defect alleged by protester, since award of protest costs is contingent upon issuance of decision on merits finding that agency violated a statute or regulation in the conduct of the procurement.
2. General Accounting Office's Bid Protest Regulations providing for award of costs in some cases where contracting agency takes corrective action is inapplicable to protest filed before Regulations' effective date, April 1, 1991.

DECISION

Hadson Defense Systems, Inc. requests reimbursement of the costs of filing and pursuing its protest, including attorneys' fees, as a result of the Department of the Army's cancellation of its intended sole-source reprocurement through Unisys Corporation, under request for proposals (RFP) No. DAAB10-87-R-9001.

We deny the claim.

In its protest, Hadson, the defaulted contractor on contract No. DAAB10-87-C-0070, which covered the requirement being reprocured, alleged that the Army's reprocurement was being conducted on an improper sole-source basis, and argued that the agency should be required to conduct the reprocurement competitively. Subsequently, the Army canceled the solicitation on the ground that Unisys' best and final offered cost could not be determined fair and reasonable, and decided

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to conduct a competitive reprocurement for the requirement. Based on this corrective action, which rendered the protest academic, Hadson withdrew its protest.

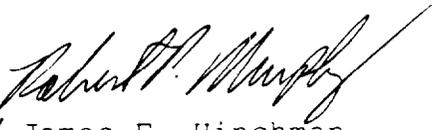
In its claim, Hadson argues that it is entitled to its protest costs because its bringing of the protest was the moving force behind the agency's decision to cancel the sole-source solicitation and reprocure on a competitive basis, which was the remedy Hadson sought. The firm argues that our Office should adopt the position of the General Services Administration Board of Contract Appeals (GSBCA) and award costs in cases such as this, where the protester has "prevailed," even absent a decision on the merits. Further, Hadson contends that we should award costs here because recently enacted changes to our Bid Protest Regulations allow recovery of costs when a contracting agency takes corrective action.

Under our current applicable Bid Protest Regulations, we may find a protester entitled to recover its protest costs where we determined that a solicitation proposed award or award does not comply with statute or regulations. 4 C.F.R. § 21.6(d) (1990). Applying these Regulations, we have consistently held that a protester is not entitled to reimbursement of its protest costs where the protest is withdrawn or dismissed as academic, so that we do not issue a decision on the merits. See, e.g., Service Ventures, Inc., 68 Comp. Gen. 642 (1989), 89-2 CPD ¶ 172; Monarch Painting Corp., B-220666.3, Apr. 23, 1986, 86-1 CPD ¶ 396. Under this standard, Hadson is not entitled to recover its protest costs. We also previously have stated our view that the GSBCA's procedures for the awarding of costs are inappropriate for disposition of protests filed with our Office. See Teknon, Inc.--Claim for Protests Costs, 67 Comp. Gen. 607 (1988), 88-2 CPD ¶ 213.

Although changes in our Regulations recently published in the Federal Register (56 Fed. Reg. 3759 (1991)) include a provision (section 21.6(e)) for the awarding of costs in some cases where the contracting agency takes corrective action, this provision is inapplicable here, since Hadson's protest was filed before the rule's effective date, April 1, 1991. Hadson argues that this provision indicates that our prior decisions denying such costs are inconsistent with the Competition in Contracting Act (CICA), 31 U.S.C. § 3554(c)(1) (1988), and that the new provision thus should be applied to allow Hadson's costs here. Our current applicable Regulations are in no way inconsistent with CICA; CICA does not mandate reimbursement of protest costs where agency corrective action is taken. Further, it would be inappropriate to apply our revised Regulations without putting contracting agencies

and other parties on notice of the changes; the April 1 effective date provides a suitable notice period.

The claim is denied.


for James F. Hinchman
General Counsel