



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Pulse Electronics, Inc.--Request for
Declaration of Entitlement to Costs

File: B-243625.3

Date: August 30, 1991

Edward C. DeSaussure for the protester,
Vera Meza, Esq., and Philip Paschall, Esq., Department of the
Army, for the agency.
Glenn G. Wolcott, Esq., and Paul I. Lieberman, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

Protester is not entitled to the costs of filing and pursuing its protest where, in response to protest which challenged the specifications in a request for proposals (RFP) and sought cancellation of the RFP and resolicitation under sealed bidding procedures, the agency modified the RFP specifications approximately 2 weeks after the protest was filed and, 2 weeks later, canceled the RFP.

DECISION

Pulse Electronics, Inc. requests that our Office declare it entitled to recover its costs of filing and pursuing its protest. On April 11, 1991, Pulse protested the terms of request for proposals (RFP) No. DAAB10-91-R-1028, issued by the Department of the Army. Pulse challenged as unduly burdensome several provisions of the RFP, including the requirement that offerors submit cost and pricing data. Pulse concluded that "the best decision would be to have [the Army] cancel this solicitation and resolicit under the sealed bid format."

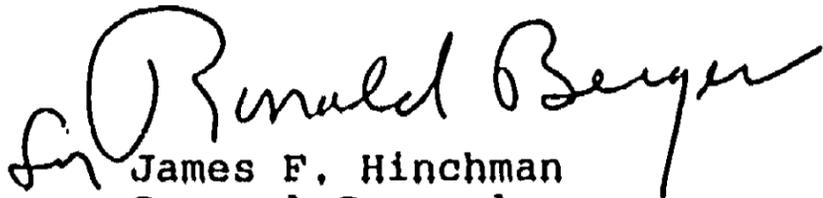
On April 26, in response to Pulse's protest, the Army amended the solicitation by deleting several RFP provisions, including the requirement for submission of cost and pricing data. On May 1, Pulse filed an amended protest, asserting that the RFP, as amended, remained overly burdensome and renewing its request that the Army cancel the RFP and resolicit using sealed bidding. On May 16, the Army canceled the solicitation, stating that it intended to resolicit under sealed bidding procedures. Therefore, on May 20, we dismissed Pulse's protests as academic.

Section 21.6(e) of our Bid Protest Regulations permits us to award protest costs when, before we issue a decision, an agency takes corrective action in response to a protest. See 56 Fed. Reg. 3,759 (1991). Prior to the effective date of this section, our Office did not award costs in such cases. We became concerned, however, that some agencies were taking longer than necessary to initiate corrective action in the face of meritorious protests, thereby causing protesters to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. We believed that providing for the award of costs in cases where the agencies delayed taking corrective action would encourage agencies "to recognize and respond to meritorious protests early in the protest process." 55 Fed. Reg. 12834, 12836 (1990).

As initially proposed, section 21.6(e) would have provided for the award of costs in cases where the agency notified us of a decision to take corrective action after the due date for submission of the agency report on the protest. 55 Fed. Reg. 12838. As adopted, section 21.6(e) provides for the possible award of costs without regard to the report due date. We stated in the explanatory material accompanying the promulgation of the final regulations that deciding whether to award costs was more appropriately based on the circumstances of each case, including when in the protest process the decision to take corrective action was made and communicated to us and the protester, rather than on the report due date. We noted in this respect that there may be circumstances where the award of costs, even where corrective action was taken after submission of the report, would not be justified, just as there may be circumstances where the award of costs would be appropriate even where corrective action was taken prior to report submission. 56 Fed. Reg. 3,759 et seq.

Obviously, it was not our intention in adopting the revised provision to award protest costs in every case in which the agency takes corrective action in response to a protest. Since our concern was that some agencies were not taking corrective action in a reasonably prompt fashion, our intent is to award costs where, based on the circumstances of the case, we find that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Here, the agency took initial action 15 days after Pulse's protest was filed and, when Pulse continued to complain, it canceled the solicitation, as Pulse requested, approximately 2 weeks after it received Pulse's second submission. Such action, taken early in the protest process, is precisely the kind of prompt reaction to a protest that our regulation is designed to encourage. It provides no basis for a determination that

the payment of protest costs is warranted. See Oklahoma Indian Corp.--Claim for Costs, B-243785.2, June 10, 1991, 70 Comp. Gen. _____, 91-1 CPD ¶ 558. Accordingly, Pulse's request for a declaration of entitlement to costs is denied.


James F. Hinchman
General Counsel