



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Allied Materials & Equipment Co.--Request for
Declaration of Entitlement to Costs

File: B-243631.3

Date: October 31, 1991

Michael Hatcher, Esq., Israel and Raley, for the protester.
Jeffrey J. Kessler, Esq., Department of the Army, for the
agency.

Barbara C. Coles, Esq., Mary G. Curcio, Esq., and Andrew T.
Pogany, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Where protest was dismissed as untimely, and agency subsequently takes corrective action while protester's request for reconsideration of dismissal is pending, protester is not entitled to recover protest costs where record shows that protest was in fact untimely filed since prerequisite to recovery of such costs is a clearly meritorious protest pending before the General Accounting Office at the time the procuring agency takes corrective action.

DECISION

Allied Materials & Equipment Co. requests that our Office declare the firm entitled to recover the reasonable costs of filing and pursuing its protest concerning request for proposals (RFP) No. DAAA09-91-R-0266, issued by the Department of the Army for a butt stock for the M14 Rifle.

We deny the request.

The initial protest, filed April 15, 1991, challenged the RFP as restrictive because it did not reflect various waivers and deviations granted a prior producer of the butt stock. On May 6, in response to a request from the Army, we dismissed the protest as untimely because it challenged an alleged impropriety in the solicitation that should have been raised before the closing time for receipt of proposals. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991). On May 9, Allied requested that we reconsider our decision to dismiss its protest as untimely. On May 29, while Allied's request for reconsideration was pending, the Army informed us that in light of Allied's protest and Allied's request that it be granted the same waivers and deviations

as a previous producer, it planned to review the specifications in relation to the government's minimum needs. The Army canceled the solicitation pending the outcome of the review. As a result, we dismissed as academic the request for reconsideration of our prior dismissal.


On May 31, Allied filed a claim with our Office under section 21.6(e) of our revised Bid Protest Regulations, 56 Fed. Reg. 3759 (to be codified at 4 C.F.R. § 21.6(e)), for the cost of filing and pursuing the protest. Pursuant to the revised regulations, if the contracting agency takes corrective action in response to a protest to our Office, we may declare the protester to be entitled to recover the reasonable costs of filing and pursuing the protest, including attorneys' fees.

Our intent under these revised regulations is to award costs when the agency unduly delays taking corrective action in the face of a clearly meritorious protest. Oklahoma Indian Corp.--Claim for Costs, B-243785.2, June 10, 1991, 70 Comp. Gen. ___, 91-1 CPD ¶ 558. A meritorious protest is one that would otherwise have been successful--that is, it must involve a matter over which we have jurisdiction, be filed by an interested party in a timely fashion, and otherwise comply with the requirements of our Bid Protest Regulations, and the record must establish that the agency prejudicially violated a procurement statute or regulation.

Here, Allied asserts that it is entitled to the costs of pursuing its protest because the agency took corrective action only as the result of the protest. The protest it filed with our Office, however, was dismissed as untimely. The agency subsequently took corrective action while the protester's request for reconsideration of the dismissal was pending before our Office. While we initially dismissed the request for reconsideration because the solicitation had been canceled, we have now reviewed it in connection with Allied's declaration of entitlement request. Our review confirms our initial conclusion that the protest was untimely. Specifically, in the request for reconsideration, Allied argued that its protest was based on an amendment to the solicitation issued on March 28 which indicated that no waivers or deviations from prior contracts would be granted. Allied argues that because its protest was filed before the April 12 deadline for best and final offers established by the amendment, its protest is timely. The amendment, however, did not incorporate the defect into the solicitation. Rather, it was clear from the initial solicitation that the specifications did not incorporate the prior waivers and deviations. Accordingly, Allied was required to have raised this issue prior the time set on March 4 for the receipt of initial proposals.

Allied also argues that its protest to our Office was timely because it was filed within 10 working days after Allied received notice of adverse agency action on an agency-level protest it filed with the Army. See 4 C.F.R. § 21.2(a)(1), as amended by 56 Fed. Reg. 3759. The alleged agency-level protest Allied is referring to was contained in a cover letter that the firm submitted with its proposal. Our Office does not regard a protest of a solicitation that is submitted with a proposal as a timely protest to the agency since there is no requirement that an agency open or read proposals before the closing time. See Paramount Sys., Inc., B-229648.2, Dec. 30, 1987, 87-2 CPD ¶ 646.

Consequently, we continue to view Allied's protest as untimely. That being so, at the time the Army took corrective action there was no clearly meritorious protest pending before our Office. Allied therefore is not entitled to recover the costs of pursuing its protest.


James F. Hinchman
General Counsel