

C. Morrow
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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Tri-Ex Tower Corporation

File: B-245877

Date: January 22, 1992

Alan M. Lestz, Esq., Witte, Lestz & Hogan, P.C., for the protester.

Gregory H. Petkoff, Esq., Department of the Air Force, for the agency.

Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Procuring agency's cancellation of a competitive solicitation in order to conduct sole-source procurement renders academic a protest against unduly restrictive solicitation specifications based on the proposed sole-source's product; protest of proposed sole-source is premature since no solicitation has been issued for this requirement.

2. Procuring agency's cancellation of solicitation, after receipt of the report on the protest and the protester's comments on the report, does not entitle the protester to recover protest costs, where the cancellation does not constitute corrective action in response to a protest.

DECISION

Tri-Ex Tower Corporation protests alleged unduly restrictive specifications contained in request for proposals (RFP) No. F08675-91-R-0214, issued by Eglin Air Force Base, Florida, for two transportable microwave antenna tower systems.

We dismiss the protest and deny the claim for protest costs.

On September 26, Tri-Ex protested the specifications, essentially contending that the statement of work described the product of Dornier GmbH, which product could not be provided by any other competitor, and that other products, such as Tri-Ex's, could meet the agency's requirements. The Air Force received proposals under the RFP on the September 27 closing date; Tri-Ex did not submit a proposal. On November 4, the Air Force submitted a report on the protest, asserting that the RFP requirements were not unduly

restrictive and that competition had been obtained. Tri-Ex commented on the agency report on November 25.

On December 12, the Air Force informed our Office that it had decided to cancel the RFP and plans to initiate a sole-source award to Dornier for the antennas. The Air Force thus requested our Office to dismiss the protest.

Tri-Ex opposes the Air Force's request and argues that we should consider the issue of the propriety of the proposed sole-source procurement in the context of this protest. Tri-Ex contends that the record is fully developed on the issue of whether there was adequate support for the RFP specifications based on Dornier's product. Tri-Ex also argues that no useful purpose would be served in permitting the agency to again justify, this time as a sole-source basis, a procurement based on the Dornier product and in requiring the protester to incur the additional expenses of separately protesting the sole-source procurement.

The cancellation of the RFP renders Tri-Ex's protest of the RFP's specifications academic. See Morey Mach., Inc.--Request for Recon., B-233793.2, Aug. 3, 1989, 89-2 CPD ¶ 102. Under the Competition in Contracting Act of 1984, 31 U.S.C. § 3551 (1988), and our Bid Protest Regulations, 4 C.F.R. § 21.1(a) (1991), our Office's jurisdiction is limited to considering protests involving solicitations already issued by federal agencies and awards made or proposed to be made under those solicitations. Consequently, we only consider protests against specific procurement actions and will not render to a protester what would be, in effect, an advisory decision. See Events Analysis, Inc.--Recon., B-220080.2, Nov. 22, 1985, 85-2 CPD ¶ 589; East West Research Inc.--Recon., B-233623.2, Apr. 14, 1989, 89-1 CPD ¶ 379.¹

¹The limitation of bid protests to challenges of actual or proposed actions is similar to the restriction on other forums that decide "cases or controversies." See, e.g., Triverton Bd. of License Comm'rs v. Pastore, 469 U.S. 238 (1985) (case is moot where the issues presented are no longer live and speculation that a decision on the merits might affect the substantive rights of other parties does not provide a basis for the court to pass a substantive issue absent evidence of a prospect of immediacy and reality); State ex rel. Smith v. Ocasek, 46 Ohio St.2d 200, 346 N.E.2d 773 (1976) (courts have a responsibility to refrain from giving parties opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies).

Since no solicitation has been issued for the proposed sole-source procurement (nor has any appropriate justification been prepared), any protest of that procurement would be speculative and premature. See General Elec. Canada, Inc., B-230584, June 1, 1988, 88-1 CPD ¶ 512. If, in the future, the agency takes concrete action that may properly form the basis for a valid bid protest, the protester may file with our Office at that time.²

Tri-Ex requests the costs of filing and pursuing the protest, including reasonable attorneys' fees. Section 21.6(e) of our Regulations governs the entitlement to such costs and provides that if the contracting agency takes corrective action in response to a protest, we may declare that the protester is entitled to recover the reasonable costs of filing and pursuing the protest. 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.6(e)). This provision was intended to allow the award of costs where we find that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. PAI Corp. et al., B-244287.5 et al., Nov. 29, 1991, 91-2 CPD ¶ ____.

We find that the Air Force's cancellation of the competitive RFP was not corrective action in response to the protest. Tri-Ex was seeking less restrictive specifications so that antennas other than Dornier's could be considered. The Air Force, rather than correcting its alleged unduly restrictive specification, indicates a belief that its needs mandate a specification limited to the Dornier product. While the Air Force did not determine to cancel the solicitation until after its submission of a report on the protest and the receipt of the protester's comments on the report, this does not entitle the protester to its protest costs where, as

²The planned sole-source award must be preceded by a notice in the Commerce Business Daily and the execution of a Justification and Approval document. See 10 U.S.C. § 2304(f)(1) (1988). Tri-Ex thus will have the opportunity to convince the agency that its needs do not require a sole-source award and to protest on the basis of specific agency actions and justifications therefor.

here, the agency's action does not constitute corrective action as contemplated by our Regulations.' Id.; Building Servs. Unltd., Inc.--Claim for Costs, B-245735.3, Aug. 27, 1991, 91-2 CPD ¶ 200. Therefore, Tri-Ex is not entitled to recover its protest costs.

The protest is dismissed and the claim for costs is denied.


James F. Hinchman
General Counsel

³In this regard, an agency properly may cancel a solicitation no matter when the information precipitating the cancellation first surfaces or should have been known, even if the solicitation is not canceled until after proposals are submitted and protesters have incurred costs in pursuing the award or protest. PAI Corp. et al., supra.