



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Marinette Marine Corporation--Request for
Declaration of Entitlement to Costs

File: B-245130.2

Date: March 20, 1992

Robert A. Mangrum, Esq., Seyfarth, Shaw, Fairweather & Geraldson, for the protester.
Newton L. Klements, Esq., and Michael J. Adams, Esq., Department of the Army, for the agency.
Linda S. Lebowitz, Esq., and Michael R. Golden, 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 the contracting officer issued a formal amendment deleting the challenged delivery limitation provision in the solicitation on the day the agency report on the protest was to be filed with our Office, and record does not establish undue delay in taking corrective action.

DECISION

Marinette Marine Corporation requests that our Office declare it entitled to recover the costs of filing and pursuing its protest in connection with invitation for bids (IFB) No. DACW61-91-B-0042, issued by the United States Army Corps of Engineers, Department of the Army, for the design, construction, and delivery of an 84-foot triple screw towboat for use on the Mississippi River and the Illinois Waterway System and tributaries.

We deny the claim.

The solicitation contained a performance limitation provision which restricted the vessel's operation to rivers and intracoastal waterways as defined by the American Bureau of Shipping (ABS) and stated that a "[c]ontractor shall not launch, float, operate, or tow (on its own bottom) [the] vessel in waters other than those for which the vessel is intended to operate."

The protester, a contractor located in the State of Michigan, had intended to tow the vessel from Lake Michigan to the Illinois Waterway System where the vessel would proceed to the delivery site on the Mississippi River. On July 17, 1991, the protester filed a letter with the agency from the ABS, an organization whose requirements and rules for constructing and outfitting a vessel were to be used by the agency in determining whether a contractor's vessel conformed to the specifications. The ABS stated it could foresee no problems with the protester's proposed towing arrangements. On August 8, the protester filed a protest with our Office challenging the performance limitation provision as restrictive of competition. The protester asserted that it and other Great Lakes contractors would be prohibited from towing a vessel on Lake Michigan to the Illinois Waterway System because Lake Michigan was not considered a "water of intended operation" and these contractors would be forced to incur substantial expenses to barge a vessel on the Great Lakes to "water of intended operation." The protester requested that our Office recommend that the agency either eliminate the performance limitation provision or impose reasonable restrictions regarding a contractor's towing arrangements.

By letter dated September 16, the day the agency report was to be filed with our Office, counsel at agency headquarters in Washington, D.C. informed our Office that corrective action had been taken by the contracting officer. The contracting officer issued an amendment deleting the limitation on transport and providing for consideration of alternate procedures for the accomplishment of launching, testing, and delivering the vessel. On September 19, we dismissed the protester's protest as academic in light of the action taken by the contracting officer.

On September 30, the protester filed a request for a declaration of entitlement to its protest costs incurred in filing and pursuing its protest with our Office. The protester argues it is entitled to these costs because, approximately 3 weeks prior to filing its protest, it provided documentation to the contracting officer, including the ABS opinion letter, establishing that the performance limitation provision was restrictive of competition. The protester maintains that the agency unduly delayed reviewing the information from the ABS and taking corrective action.

Where an agency takes corrective action prior to our issuing a decision on the merits of a protest, we may declare a protester entitled to "recover reasonable costs

of filing and pursuing the protest." Id. (1991) (to be published as 4 C.F.R. 201.6). Every provision is intended to allow the agencies to take prompt corrective action in the face of a clearly meritorious protest. Salah-Dine Indus. Inc.--Claim for Costs, 79 Comp. Gen. 558 (1991), 91-2 CPD ¶ 558. A protester is not entitled to costs where, under the facts and circumstances of a given case, an agency takes prompt corrective action in response to the protest. Id. For example, corrective action taken by an agency 2 days after the agency report on the protest was due to be filed with our Office does not constitute undue delay in taking corrective action where the delay was justified on the record. Metters Indus., Inc.--Request for Declaration of Entitlement to Costs, B-240391.5, Dec. 12, 1991, 91-2 CPD ¶ 535.

The agency advises that the operation of a vessel designed for inland waterways on the Great Lakes, which have rougher waters, caused it safety concerns. In an affidavit, the project manager and the naval architect for the solicitation state that the protester's proposed approach and the letter from the ABS, submitted 3 weeks prior to the protest, required a detailed technical evaluation which was time-consuming. The affiants assert that regardless of the protester's belief that these submissions should have been sufficient to show the agency that its position concerning the performance limitation was incorrect, the affiants reasonably decided to review the matter to satisfy their concerns about the transport of a vessel through waters for which it was not intended to operate. While we think the affidavit could have been more specific as to the nature and extent of the review, we are not prepared to say that the decision to evaluate the protester's approach because of safety concerns was unjustified or the time taken to conduct the review was unreasonable.

The agency explains that when the protest was filed with our Office, the bid opening was indefinitely postponed. The agency, represented by counsel at agency headquarters in Washington, D.C., reviewed and evaluated the protester's allegation and supporting documentation concerning the restrictiveness of the performance limitation provision in the solicitation. Based on the technical and legal reviews, the contracting officer took corrective action by issuing a formal amendment deleting the performance limitation provision on the day the agency report was to be filed with our Office. In view of the technical review conducted, counsel's review process and the time necessary to issue a

formal amendment, we do not believe the agency has
delayed taking corrective action. Although the
protester's request for a declaration of estoppel
costs. Id.

Robert P. Hinchman
for James F. Hinchman
General Counsel