



Comptroller General
of the United States

Washington, D.C. 20548

12786

Decision

Matter of: KPMG Peat Marwick--Entitlement to Costs

File: B-251902.2

Date: June 8, 1993

William A. Roberts, III, Esq., and Brian A. Darst, Esq.,
Howrey & Simon, for the protester.
Jonathan Silverstone, Esq., and Robert A. Sonenthal, Esq.,
Agency for International Development, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

Protester is not entitled to costs of filing and pursuing its protest even though the agency did not take corrective action for nearly 2 months after the protest was filed when: (1) the agency promptly acknowledged that the protest had merit; (2) the protester thus was not required to expend resources to convince the agency, or our Office, of the merits of the protest; and (3) the agency's corrective action was reasonably prompt given the complexity of certain issues associated with implementing a remedy to the protest.

DECISION

KPMG Peat Marwick requests that our Office declare it entitled to recover the reasonable costs of filing and pursuing its protest concerning request for proposals (RFP) No. OP/B/AEP-92-003, issued by the Agency for International Development (AID) for technical assistance for macro and international economic analysis.

We deny the request.

On January 4, 1993, Peat Marwick filed a protest in our Office objecting to AID's decision to make awards solely on the basis of initial proposals without holding discussions. The protest also argued that AID failed to follow the evaluation methodology stated in the solicitation.

The protester and the agency agree that almost immediately after the protest was filed, AID acknowledged that the protest had merit, and that the two parties began discussing how the agency could remedy the procurement. On February 11--the due date for the agency report in response

to the protest--AID notified our Office by letter that the protest had "substantial merit." In addition, AID's letter explained that the agency would need additional time before selecting an appropriate remedy and taking corrective action given certain unusual complicating factors at issue in the procurement.¹

AID's caution in fashioning a remedy to the protest arose as a result of two events that caused the agency to be concerned about the wisdom of simply reopening discussions and requesting best and final offers (BAFO) from the offerors in the competitive range. Specifically, AID was considering how it could ameliorate any competitive advantage Peat Marwick might have received when agency personnel answered a Peat Marwick Freedom of Information Act request by providing detailed information about the two awardees' proposals, as well as the evaluators' analysis of all the proposals. AID's second concern arose because Peat Marwick recently audited one of the competitors here on behalf of AID.²

After numerous filings on these issues by both parties, AID decided, by letter dated March 1, to reopen the procurement and to request BAFOs from all offerors in the competitive range. Accordingly, our Office dismissed Peat Marwick's protest as academic on March 4, and on March 11 Peat Marwick filed this request for costs.

Peat Marwick argues that it should be reimbursed for the costs it incurred in pursuing this protest because the agency unreasonably delayed taking corrective action even after admitting that the protest had substantial merit. According to Peat Marwick, it has been unfairly forced to incur legal fees in negotiating with AID regarding the appropriate corrective action for this procurement.

¹Not only did AID's February 11 letter claim that the agency needed more time, but that "[t]he protester has asked that we delay making a final decision on corrective action pending further review and discussion."

²While the resolution of these issues is not before our Office at this juncture, we are advised that Peat Marwick has represented to AID that none of the information at issue in these two disclosures has been made available to Peat Marwick personnel involved in the AID procurement here.

Where an agency takes corrective action prior to our issuing a decision on the merits, we may declare the protester entitled to recover the reasonable costs of filing and pursuing the protest. 4 C.F.R. § 21.6(e) (1993); Metters Indus., Inc.--Entitlement to Costs, B-240391.5, Dec. 12, 1991, 91-2 CPD ¶ 535. This provision is intended to allow the award of costs when agencies unduly delay taking corrective action in the face of a clearly meritorious protest. Oklahoma Indian Corp.--Claim for Costs, 70 Comp. Gen. 558 (1991), 91-1 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 a protest. Id.

We disagree with Peat Marwick's contention that it has been forced to pursue its protest because the agency unduly delayed taking corrective action. From shortly after the time Peat Marwick filed its protest, AID agreed that it acted improperly in awarding the contracts here without discussion. Peat Marwick has not been required to incur costs to convince the agency that the awards were flawed. For example, AID did not file an agency report defending its procurement, so Peat Marwick was not forced to incur the expense of responding to the agency report. Nor has Peat Marwick incurred the expense of any additional filing related to the merits of its protest.

Rather, Peat Marwick has incurred costs related to its attempt to persuade the agency to adopt a remedy that includes terminating the existing contracts and reopening the procurement. In addition, Peat Marwick has presented information to the agency to convince it to allow the company to continue to participate in this procurement. These efforts, while certainly advisable given the possible actions AID could take to remedy its concern about the integrity of this procurement, see Federal Acquisition Regulation §§ 9.505-4 and 9.506, cannot be said to be part of persuading the agency of the merits of Peat Marwick's protest.

Finally, we agree with AID's assertion that the circumstances here present the agency with tough choices requiring careful consideration. Given the complexity of the issues raised by the unique circumstances surrounding this procurement, we do not believe that AID's measured and deliberate approach to selecting a remedy in response to a pro-

test it agrees has merit constitutes undue delay in taking corrective action. Sec Locus Sys., Inc.--Determination of Entitlement, 71 Comp. Gen. 243 (1992), 92-1 CPD ¶ 177, aff'd, B-241441.7, July 13, 1992, 92-2 CPD ¶ 14.

The request is denied.


for James F. Hinchman
General Counsel