



Comptroller General
of the United States

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Washington, D.C. 20548

Decision

Matter of: Griner's-A-One Pipeline Services, Inc.--
Entitlement to Costs

File: B-255078.3

Date: July 22, 1994

Jonathan S. Dean, Esq., Dean & Dean, for the protester.
Larry E. Beall, Esq., Department of the Army, for the
agency.
Behn Miller, Esq., and Christine S. Melody, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

Protester is entitled to recover the costs of filing and pursuing its protest where the agency unduly delayed taking corrective action in response to the protest.

DECISION

Griner's-A-One Pipeline Services, Inc. requests that we declare it entitled to reimbursement of the reasonable costs of filing and pursuing its protest challenging the terms of invitation for bids (IFB) No. DACA01-93-B-0123, issued by the Army Corps of Engineers for replacing and rehabilitating sanitary sewers at Patrick Air Force Base (AFB), Florida. Griner's contends that the agency unduly delayed taking corrective action in response to its protest.

We conclude that Griner's is entitled to the costs of filing and pursuing its protest, including reasonable attorneys' fees.

BACKGROUND

On May 4, 1993, the Army advertised this project in a local trade publication. Shortly thereafter, Griner's contacted the project engineer for this requirement and learned that the agency intended to restrict the pipe rehabilitation method to the Insituform process.

¹Insituform is a patented, licensed procedure which inserts a new pipe into a pre-existing corroded pipe by means of a non-excavation procedure. Specifically, Insituform operates
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By letter to the agency dated May 11, Griner's requested that the Army consider other methods of pipeline rehabilitation for this project besides Insituform. To demonstrate that there were other methods available on the market which would serve the agency's minimum needs, Griner's enclosed a copy of a detailed spreadsheet-- excerpted from a July 1992 National Association of Sewer Service Companies publication--which compared and identified specific characteristics of all available pipelining technologies, including Insituform as well as the Am-Liner technology which Griner's had installed.

By letter dated July 7, the Army advised Griner's that only the Insituform method would be permitted for the Patrick AFB project.

On July 26, the agency issued the IFB which restricted bidders to proposing the Insituform method; the bid opening date was August 26. By letter dated July 28, Griner's filed an agency-level protest which asked the Army to permit bids for other non-excavation pipe rehabilitation techniques.

On August 12, Griner's supplemented and reiterated its agency-level protest by requesting that an "or equal" clause be inserted in the IFB, so that Griner's and other bidders could propose other technically equivalent technologies.

While its agency-level protests were pending, Griner's proceeded to submit a bid for this requirement; however, Griner's expressly qualified its bid with the following statement at the top of each of the IFB's pricing schedule pages:

"bid based on using the Am-Liner as the material for lining the main [sewer] lines and using Sika Robotic Liner as the material for lining the [smaller sewer] service laterals."

At the August 26 bid opening, four bids, including Griner's, were received. On August 27, the contracting officer

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by using steam or water pressure to invert and inflate a flexible resin-impregnated tube within the damaged pipe; once the tube is inflated to its full size, the steam or water is then heated until the tube's resin-coated outer layer adheres to the walls of the corroded pipe, resulting in a hardening of the tube forming a new pipe within the corroded pipe. Pipe rehabilitation methods which involve this "curing" stage--such as the Insituform process--are generically referred to in the industry as cured-in-place pipe (CIPP) sewer rehabilitation methods.

advised Griner's by telephone that it was the low bidder and asked for evidence of successfully completed sewer projects, as well as a list of its key personnel. By letter dated August 30, Griner's provided the contracting officer with references at four recently completed CIPP rehabilitation projects where the firm had installed the Am-Liner method; Griner's also provided a list of key personnel and a certified financial statement.

That afternoon, the contracting officer issued a letter by facsimile to Griner's which stated:

"This procurement was limited to firms licensed to use the Insituform process, therefore in addition to the preaward information requested telephonically from your firm on August 27, 1993, it is requested that you include a copy of your license along with your preaward information."

By facsimile dated that same day, Griner's responded that it did not have a license to use the Insituform process, and that--as indicated in its bid--the firm intended to use Am-Liner to line the main sewer pipes and the Sika Robotic Liner to line the laterals.

By letter dated September 17, the agency advised Griner's that its bid was rejected as "technically non-responsive for failure to be licensed by Insituform." On September 22, Griner's filed an agency-level protest with the Army challenging the rejection of its bid, and reiterating its earlier challenge to the IFB's restriction to the Insituform process.

By decision dated December 9, the agency denied the protest. After receiving the agency's denial decision on December 13, Griner's retained outside counsel and filed a protest with this Office on December 22, essentially reiterating its earlier agency-level protests.

² Generally, where a protest challenging the terms of a solicitation is filed with the agency before bid opening, and the agency proceeds with bid opening, any subsequent protest to our Office must be filed within 10 days after bid opening. See 4 C.F.R. §§ 21.0(f) and 21.2(a)(3) (1994). While in this case bid opening was on August 26 and Griner's did not file its protest with our Office until December 22, the protest nevertheless is timely. Given the agency's conduct after bid opening--i.e., advising Griner's that it was the successful bidder despite the qualification in its bid with respect to the method it proposed to use--the protester was not required to file its protest with our

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The agency report responding to the protest was to be filed by January 31; however, because of scheduled computer maintenance at its Washington headquarters, the agency requested an extension of time for filing the report, which we granted. Consequently, the initial January 31 agency report filing deadline date was extended to February 3. The report was filed with our Office on that date; Griner's received its copy on February 8.

In its December 22 protest to this Office, Griner's had filed an extensive document request. In particular, Griner's asked for all documentation pertaining to the Insituform restriction, including the justification and approval (J&A) for other than full and open competition--required by Federal Acquisition Regulation (FAR) § 6.302-1--and all supporting technical research and review. Notwithstanding Griner's detailed document request, the agency only provided the protester and this Office with a copy of the J&A, which was general in nature. While the J&A referenced extensive research, none of this supporting data was provided.

On February 10, Griner's filed a second document request which again requested the documents and research referred to in the J&A; we concurred in the relevance of the document request and directed the Army to provide these materials by February 18.

On February 18, the agency notified this Office and the protester by telephone that the agency was taking corrective action in response to the protest. On February 24, the agency advised this Office and the protester in writing that as a result of the protest, the contracting officer had determined that "it was unduly restrictive of competition to limit the procurement . . . to licensees of the Insituform process." Specifically, the agency advised that:

"At this time, the contracting officer has conducted further technical review of the project site conditions, and based upon this review, has determined that limiting the procurement as such was an overstatement of the [g]overnment's minimum needs."

Because the Army conceded that the IFB was unduly restrictive, and because the agency decided to terminate the contract award under the restrictive solicitation, we

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Office until the agency took adverse action by rejecting its bid. American Material Handling, Inc., B-250936, Mar. 1, 1993, 93-1 CPD ¶ 183.

dismissed Griner's protest as academic. On February 25, Griner's filed this claim for costs.

CLAIM FOR COSTS

Griner's contends that it is entitled to recover the costs of filing and pursuing its protest, including reasonable attorneys' fees, under section 21.6(e) of our Bid Protest Regulations. Under that provision, we may declare a protester entitled to costs, including reasonable attorneys' fees, where, based on the circumstances of the case, we determine that the agency unduly delayed 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.

The Army objects to the award of such costs on the ground that "[c]onsidering the complexity of the protest[,] the delay in deciding the merits was reasonable." Specifically, the agency states that before making a decision on the merits of Griner's protest, the contracting officer sought technical advice from a recognized architect-engineer (A-E) company with extensive experience in sewer rehabilitation; the A-E report agreed with the protester's position. The Army states that although the A-E report was submitted to the contracting officer on January 18, 1994, "the contracting officer needed sufficient time to evaluate all factors before deciding to terminate" the awardee's contract. Consequently, the Army maintains that the agency's corrective action--taken approximately 1 month after the submission of the agency report--was reasonably prompt, and does not warrant awarding protest costs.

Griner's protest specifically questioned the technical basis for the Insituform restriction, and the corrective action was taken specifically because the agency agreed with Griner's contentions. The Army's corrective action thus was taken in response to Griner's protest. The determinative question, then, is whether the corrective action was prompt under the circumstances. Ostrom Painting & Sandblasting, Inc.--Entitlement to Costs, B-250827.2, May 18, 1993, 93-1 CPD ¶ 390. We conclude that the Army unduly delayed taking corrective action here.

The agency delayed over a month after receiving the A-E report--and over 2 weeks after filing its report on the protest--before deciding to take corrective action. Despite the fact that the contracting officer had the A-E report--which concluded that corrective action was warranted--over 2 weeks before the report was due, the agency nevertheless proceeded to file a report disputing the protester's position and arguing that the protest was without merit and should be denied. Because of the position taken in the

agency report, the protester had to incur further expenses in renewing its request for relevant documents which the agency had failed to provide with the report, and in beginning to prepare its comments on the agency report.

We think that the agency's failure to take corrective action until 2 weeks after the agency report was filed, and a month after it received the technical advice on which the corrective action was based, frustrated the intent of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3554 et seq. (1988), by impeding the economic and expeditious resolution of the protest. See *id.* Accordingly, we find that Griner's is entitled to recover the costs of filing and pursuing the protest, including reasonable attorneys' fees. Griner's should submit its claim for costs, detailing and certifying the time expended and costs incurred, directly to the agency within 60 working days of receipt of this decision. 4 C.F.R. § 21.6(f)(1).

/s/ James F. Hinchman
for Comptroller General
of the United States

In addition to the technically detailed submissions in its protest to our Office, Griner's had presented its position, along with detailed supporting technical information, in three pre-bid opening, agency-level protests. While the fact that an issue is brought to the agency's attention before the protest is filed at our Office is not dispositive of the promptness of subsequent corrective action, see Essex Electro Eng'rs, Inc.--Entitlement to Costs, B-252483.2, Apr. 13, 1993, 93-1 CPD ¶ 318; Aquidneck Mgmt. Assocs., Inc.--Entitlement to Costs, B-250479.2, Mar. 17, 1993, 93-1 CPD ¶ 240, we think the extent of the agency's knowledge of the basis of protest and supporting information supports our conclusion that the agency did not act promptly here.

Griner's also requests recovery of its bid preparation costs. Our Bid Protest Regulations do not contemplate the award of such costs where an agency takes corrective action. See Loral Fairchild Corp.--Entitlement to Costs, B-251209.2, May 12, 1993, 93-1 CPD ¶ 378.