



Comptroller General
of the United States

7541910

Washington, D.C. 20548

Decision

Matter of: Atlas Powder International, Ltd.--
Reconsideration

File: B-254408.6

Date: September 28, 1994

David P. Salley, Esq., Sessions & Fishman, for the
protester.

Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

Denial of entitlement to costs is affirmed where agency's
action in response to protest was prompt and the protest was
not clearly meritorious.

DECISION

Atlas Powder International, Ltd. requests that we reconsider
our decision in Atlas Powder Int'l, Ltd.--Entitlement to
Costs, B-254408.5, April 26, 1994, 73 Comp. Gen. ____, 94-1
CPD ¶ 278, in which we denied Atlas's request that our
Office declare the firm entitled, pursuant to 4 C.F.R. §
21.6(e) (1994), to recover the costs of filing and pursuing
three protests concerning request for proposals (RFP) No.
CNI-648-750-03; issued by the Panama Canal Commission (PCC),
for detonating fuses and explosive cartridges to be used for
submarine blasting during channel dredging operations in the
Panama Canal. We denied Atlas's request because we found
that the agency took prompt corrective action in response to
Atlas's protests.

We affirm our decision denying entitlement to costs.

As explained in our previous decision, we will find a
protester entitled to costs pursuant to 4 C.F.R. § 21.6(e)
only where an 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. As explained below, not only do we believe
the agency took prompt corrective action in response to
Atlas's protests under the circumstances, but Atlas's
protests were not "clearly" meritorious.

The agency issued the RFP on July 16, 1993, requesting proposals for the explosives be submitted by August 31. On August 5, Atlas filed a protest in our Office generally challenging various terms of the RFP as defective and unduly restrictive of competition. Atlas supplemented its protest on August 24 and 26, raising numerous additional challenges to the terms of the RFP. Nevertheless, Atlas submitted a proposal. On September 27, the agency submitted a consolidated report responding to each of the allegations Atlas raised in its three protests. In its comments on the agency report, Atlas expressly agreed with the PCC's rationale for including various protested provisions in the RFP, but continued to challenge other terms of the solicitation as defective or unduly restrictive of competition. On October 12, we held a telephone conference with the parties to focus on the issues remaining following Atlas's comments, and to clarify the complex technical issues raised by Atlas. On October 22, within 8 working days of that telephone conference, the agency amended the RFP, specifically revising or deleting some of the challenged provisions. Atlas was apparently satisfied by the changes that were made and withdrew its protests on November 1.

We denied Atlas's subsequent request that we declare the firm entitled to recover the costs of filing and pursuing the three protests. In so doing, we concluded that given the numerous allegations that Atlas had raised in its three protests and the technical complexities underlying them, we did not think that the agency's corrective action, taken within only 8 days following the telephone conference, constituted undue delay under the circumstances. See KPMG Peat Marwick--Entitlement to Costs, B-251902.2, June 8, 1993, 93-1 CPD ¶ 443.

In its reconsideration request, Atlas argues that the PCC could have taken corrective action soon after Atlas filed its initial protest on at least one of the issues it raised, and that we should have considered the time elapsed between August 5, 1993--when Atlas filed its initial protest, and October 22--when the PCC ultimately took corrective action, as undue delay on the part of the PCC. We disagree.

While Atlas is correct that its initial protest raised what the firm now characterizes as its central objection to the RFP--the alleged exclusion of emulsions (a type of explosive) from the RFP--this protest and the two supplemental protests raised numerous other alleged defects in the RFP's specifications. For instance, Atlas argued that the specifications regarding weight restrictions and dimensions of the cartridges were incongruent and rendered performance under the contemplated contract impossible. In addition, Atlas challenged other terms of the solicitation

as unduly restrictive of competition, e.g., it contended that the solicitation's evaluation criteria were subjective.

Moreover, the agency's report asserted that contrary to Atlas's protest emulsion products--such as Atlas's--were acceptable under the RFP. Nevertheless, Atlas continued to pursue this "central objection" to the RFP in its comments, even though it was not clear that Atlas's protest of this issue was sustainable at that point, given the agency's position.

Thus, contrary to the protester's suggestion that its protest raised a relatively simple solicitation impropriety that could have been easily corrected earlier in the bid protest process, the three protests together presented a myriad of technically complex issues that required careful and deliberate consideration by the PCC. As explained in our earlier decision, given the complex and confusing nature of Atlas's three protests, we cannot conclude that the PCC unduly delayed taking corrective action, such that the payment of protest costs is warranted. See Oklahoma Indian Corp.--Claim for Cost, supra.

Atlas nevertheless argues that it is entitled to recover at least the costs of pursuing the "central" issue it raised--i.e., the exclusion of emulsions from the RFP. In this connection, Atlas states that in May 1993, it filed a protest in our Office (B-253314) specifically challenging the PCC's exclusion of emulsions under a different solicitation (RFP No. CSI-648,500-03) for explosives, and that the PCC subsequently canceled that solicitation and promised to cure this alleged defect. According to the protester, in determining the promptness of the agency's corrective action under the RFP at issue here, we should have considered the 5 months that elapsed from May 1993, when Atlas filed protest B-253314 of the previous solicitation, until October 1993, when the PCC took corrective action in response to the three protests at issue here, as undue delay by the PCC.

While the PCC concluded that canceling the previous solicitation (No. CSI-648,500-03) was an appropriate response to Atlas's earlier protest involving the emulsions

¹Even if we were to accept Atlas's contention that without its protests, the PCC ultimately might not have received explosives that meet its needs, and might not have taken the corrective action deemed appropriate, our Regulations do not contemplate reimbursement except in cases of undue delay, Dynair Elec., Inc.--Recon. and Entitlement to Costs, B-244290.2, Sept. 18, 1991, 91-2 CPD ¶ 260, and that is not the case here.

issue, as noted above, the agency specifically stated in its report to our Office on these three protests that the solicitation at issue here allowed for, and that the PCC would consider, Atlas's emulsion product.² Indeed, Atlas submitted a proposal offering emulsions and the agency, in fact, considered Atlas's proposal to be acceptable. Under these circumstances, it is not clear that Atlas's protest of this solicitation was so clearly meritorious on the emulsions issue that we would have sustained the protest on that basis. See GVC Cos.--Entitlement to Costs, B-254670.4, May 3, 1994, 94-1 CPD ¶ 292. Since its protest was not clearly meritorious, the fact that the PCC canceled the previous RFP in response to Atlas's earlier protest and promised to correct the allegedly defective specifications does not, standing alone, mean that the protester is entitled to recover the costs of pursuing its protest of this RFP. Id.; compare Commercial Energies--Recon. and Entitlement to Costs, 71 Comp. Gen. 97 (1991), 91-2 CPD ¶ 499 (where we found entitlement because the agency unduly delayed taking promised corrective action in response to a clearly meritorious protest).

The decision denying entitlement to costs is affirmed.

/s/ James A. Spangenberg
for Robert P. Murphy
Acting General Counsel

²It could be argued that this representation in the report was essentially prompt corrective action in response to this aspect of Atlas's protest.