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**Comptroller General
of the United States**

Washington, D.C. 20548

90-2 CPD 406
PR

Decision

Matter of: State Machine Products, Inc.--Reconsideration

File: B-240630.2

Date: November 19, 1990

James H. Roberts, III, Esq., Winston & Strawn, for the protester.
Philip F. Eckert, Jr., Esq., Defense Logistics Agency, for the agency.
Linda C. Glass, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Request for reconsideration of dismissal of protest alleging that solicitation was improperly issued as a negotiated procurement is denied where, after filing of protest, agency agreed with the protester and canceled the solicitation. Although the protester's requested relief was for the agency to correct the deficiency by amending the solicitation to change the procurement method from negotiated to sealed bid, corrective action taken by the agency to cancel the solicitation was reasonable.
2. Claim for protest costs where agency took corrective action remedying alleged procurement defect in response to protest is denied since award of protest costs is contingent upon issuance of decision on merits finding that agency violated a statute or regulation in the conduct of a procurement.

DECISION

State Machine Products, Inc. requests reconsideration of our September 21, 1990, dismissal of its protest alleging that request for proposals (RFP) No. DLA400-90-R-3267, issued by the Defense Logistics Agency (DLA) for gas field range units was improperly issued as a negotiated procurement. State Machine requests that its protest be reinstated, that a decision be issued on the merits, and that it be awarded its protest costs.

We deny the request for reconsideration and the claim for costs.

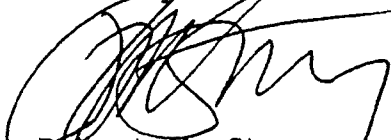
In its protest filed with our Office on July 31, 1990, State Machine argued that the solicitation was improperly issued as a negotiated procurement since no technical proposal was required and since the only evaluation criteria were price and information relating to responsibility matters. State Machine requested our Office to direct DLA to amend the solicitation to change the procurement method from negotiated to sealed bidding. On September 21, after written comments on the agency report were filed by State Machine, DLA advised our Office that it was canceling the solicitation and that it would reissue a solicitation for sealed bids in the near future. We dismissed the protest as academic based on DLA's decision to take corrective action.

State Machine claims that its protest is not academic because DLA should have simply amended the solicitation to provide for sealed bids instead of canceling the RFP. In this regard, State Machine argues that DLA's cancellation was deficient because the amendment canceling the solicitation did not state a basis for the cancellation.

There is no basis for reopening the file. DLA canceled the RFP because it agreed with the protester's argument that the solicitation should have been issued as a sealed bid procurement and that the evaluation criteria were defective. The agency's decision to cancel and resolicit did render the protest--which, as stated above, challenged the issuance of the solicitation as a negotiated procurement and the evaluation criteria--academic. Although State Machine requested different relief, we think that the corrective action taken by the agency was reasonable for the deficiencies alleged.

With respect to State Machine's claim for protest costs, including attorneys' fees, our authority to allow the recovery of such costs is predicated upon a determination by our Office that an agency has acted contrary to law or regulation. 31 U.S.C. § 3554(c)(1) (1988); Technology & Management Servs., Inc., B-231025.4, June 1, 1988, 88-1 CPD ¶ 513. A decision on the merits of a protest is an essential condition to a declaration that the protester is entitled to the award of costs. Id. Since we have made no such determination here, we have no basis for awarding costs to State Machine.

The request for reconsideration and the claim are denied.



Robert M. Strong
Associate General Counsel