



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: QuanTech, Inc.--Costs

File: B-278380.3

Date: June 17, 1998

Alan M. Grayson, Esq., and Ira E. Hoffman, Esq., Grayson and Associates, for the protester.

Terry Hart Lee, Esq., Department of Commerce, 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

1. Request that General Accounting Office reinstate an earlier protest and issue a decision on the merits after an agency cancels the underlying solicitation--or, alternatively, recommend reimbursement of the cost of pursuing that protest--is denied where the agency responded to the protest by canceling its initial award shortly after the protest was filed and reopening the competition, thus rendering the earlier protest academic, prior to properly canceling the procurement.
2. Protester is not eligible to recover its proposal preparation costs where the solicitation was canceled before award was made, the decision to cancel appears reasonable, and the protester expressly declines to challenge the basis for the cancellation decision.

DECISION

QuanTech, Inc. requests that our Office recommend that it recover its proposal preparation costs, and the costs of filing and pursuing its earlier protest concerning request for proposals (RFP) No. 52-EANF-7-00025, issued by the Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), for fishery observers in the northwest Atlantic Ocean. Alternatively, QuanTech asks that we reopen its earlier protest and issue a decision on the merits.

We deny the request.

NOAA issued the RFP here on January 21, 1997, and made an initial award to Atlantic Inspection Services, Inc. (AIS) on September 29. QuanTech filed a protest of the award with our Office on October 14, and a second disappointed offeror filed a protest shortly thereafter. On November 3--less than 3 weeks after QuanTech filed its protest--the agency agreed to take corrective action, and QuanTech

withdrew its protest. In its letter of November 3, the agency explained that it intended to:

clarify the evaluation factors set out in the RFP (and to notify offerors thereof), to notify offerors in the competitive range of all material deficiencies and weaknesses in their proposals (both technical and cost), re-open, schedule and hold meaningful discussions, request and evaluate a new round of [best and final offers (BAFO)] and then make an award.

After QuanTech's protest was withdrawn, the agency took the following actions: it terminated the award to AIS on November 5; it twice amended section M of the RFP, on December 4 and 16; it held face-to-face discussions with all competitive range offerors, including QuanTech, on January 14 and 15, 1998; and it requested and received BAFOs, which were sent to the evaluation committee for review on February 9. By memorandum dated March 19, however, the project director for the fisheries effort here requested that the contracting officer cancel the pending procurement because of significant changes to the fisheries program since issuance of the original RFP. On March 20, the contracting officer canceled the RFP and this request followed.

As a preliminary matter, there is no legal basis for our Office to reopen QuanTech's protest and render a decision. The agency has effectively conceded that the initial award decision was improper, and terminated the contract awarded to AIS. Thus, the procurement decision that QuanTech would have us consider no longer exists, and any dispute about that decision is academic. Pemco Aeroplex, Inc.--Recon. and Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 5.

QuanTech also seeks reimbursement of its proposal preparation and protest costs because the agency's decision to cancel the procurement means that NOAA will not complete the claimed corrective action--i.e., the agency will not make award as it represented in its corrective action letter of November 3 (quoted above). In its comments on the agency report, QuanTech expressly concedes that an agency may properly cancel an RFP when its needs change, and QuanTech does not challenge the agency's decision to cancel here. Instead, it argues that since no contract will be awarded, it should be paid both its proposal preparation and protest costs. Again, we disagree.

With respect to protest costs, QuanTech correctly notes that our Office may recommend that a protester be reimbursed the costs of filing and pursuing a protest where the contracting agency decides to take corrective action in response to the protest. 4 C.F.R. § 21.8(e) (1998). Such recommendations are generally based upon a concern that an agency has taken longer than necessary to initiate corrective action in the face of a clearly meritorious protest, thereby causing protesters to expend unnecessary time and resources to make further use of the protest process

in order to obtain relief. Pemco Aeroplex, Inc., supra. The decision by the agency here to initiate corrective action in response to QuanTech's protest was made less than 3 weeks after the protest was filed. As a result, QuanTech was not required to file comments in defense of its protest. Under these circumstances, recovery of protest costs is not appropriate. See Dynair Elecs., Inc.--Declaration of Entitlement, B-244290.2, Sept. 18, 1991, 91-2 CPD ¶ 260 at 2 (where agency took corrective action within 4 weeks of protest, agency did not unduly delay taking action and request for costs is denied).

Also, the fact that the agency did not completely implement the corrective action, standing alone, does not warrant payment of protest costs. There is no evidence that at the time it offered the corrective action, the agency had any intention of not carrying it out fully; in fact, as noted above, the corrective action was carried out substantially as promised, and at no point did the agency unreasonably delay the competition. The only reason that the process was not brought to conclusion with a new award is that due to changed circumstances--i.e., significant changes in the fisheries program--the agency concluded that the RFP no longer reflected its needs, and the propriety of the cancellation is not in dispute. Since the agency made a good faith effort to implement its corrective action, and there is no evidence of undue delay, we have no basis to recommend that QuanTech recover its protest costs.

With respect to its proposal preparation costs, QuanTech seeks more than it is due. The protest--which apparently had merit--resulted in a decision to reopen the competition, and QuanTech participated in that reopened competition on the same footing as the other competitive range offerors. Thus, QuanTech--and the others--faced equally the potential danger of a proper decision to cancel the procurement.

The situation here is analogous to that in Orange Personnel Servs., Inc.--Recon.; Eastex Maritime, Inc.--Modification, B-256164.2, B-256164.3, Jan. 18, 1995, 95-1 CPD ¶ 26. There, after our Office sustained Eastex's protest and concluded that it should receive the award, the agency properly canceled the underlying procurement. Since the procurement was properly canceled, we concluded that the protester should not recover its bid preparation costs, even though there was no doubt that it was in line for award. Id. at 3. Here, QuanTech cannot even claim--as did Eastex--that it was in line for award at the time of the cancellation. Instead, QuanTech is no more entitled to payment of its proposal preparation costs than any of the other competitive range offerors. Absent a showing that the cancellation was improper--and QuanTech does not maintain that it was--QuanTech is not entitled to its proposal preparation costs. Id.

The request is denied.

Comptroller General
of the United States