



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: R.H.G. Systems--Request for Reconsideration
File: B-224176.2
Date: November 19, 1986

DIGEST

Prior decision dismissing a protest and denying an attendant claim for the recovery of protest and bid preparation costs is affirmed. It is an essential rule of the General Accounting Office (GAO) bid protest process that a protester's entitlement to costs only arises upon a determination by GAO that an agency's procurement actions were in violation of applicable statute or regulation, and there simply can be no recovery of costs without a decision on the merits sustaining a protest filed with GAO.

DECISION

R.H.G. Systems, Inc. (RHG) requests reconsideration of our decision in R.H.G. Systems, Inc., B-224176, Oct. 2, 1986, 86-2 CPD ¶ ____, dismissing the firm's protest against the cancellation of invitation for bids No. DACA63-85-B-0245, issued by the Army Corps of Engineers (Corps). We dismissed the protest because it was clear from the record submitted by RHG that the reasons advanced by the agency to justify the cancellation were legally sufficient. Accordingly, we denied RHG's attendant claim for the recovery of its protest and bid preparation costs because, there being no determination by this Office that the cancellation was other than proper, RHG was not entitled to the recovery of such costs.

RHG now requests reconsideration of our prior decision on the ground that we misread the firm's submission as a protest against the cancellation of the solicitation. Rather, RHG contends that the actual basis for claiming the recovery of its costs was that, even though the contemplated work was no longer required so as to justify the cancellation, the Corps had nonetheless violated the applicable procurement regulations and acted in bad faith by proceeding with the opening of bids where the agency knew beforehand that the specifications were defective. Therefore, RHG urges that we

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reconsider our prior decision and declare the firm entitled to its protest and bid preparation costs since the agency's actions induced it to submit a bid without the possibility of obtaining an award.

We affirm our prior decision.

The thrust of our October 2 decision was the conclusion that RHG was not entitled to the recovery of its claimed costs because we had not sustained a protest filed by RHG with this Office against the agency's cancellation of the invitation. As we pointed out to the firm, it is an essential rule of our bid protest process that a protester's entitlement to costs only arises upon our determination that an agency's procurement actions were in violation of applicable statute or regulation. 4 C.F.R. §§ 21.6(d) and (e) (1986). If we make no such determination, then a claim for costs is without foundation--there simply can be no recovery of protest or preparation costs without a decision on the merits sustaining a protest filed with this Office. Monarch Painting Corp., B-220666.3, Apr. 23, 1986, 86-1 CPD ¶ 396.

We did not expressly reach RHG's assertion that the agency improperly allowed the procurement to proceed in the presence of deficient specifications because, as RHG itself recognized, the agency was ultimately justified in canceling the invitation since there was no further need for the work, thereby rendering any earlier grounds of protest moot. Moreover, the fact that an agency, through a lack of due diligence, may have brought a procurement to an advanced stage before canceling it provides no basis to sustain a protest or to allow a claim for costs. See Restorations Unlimited, Inc., et al., B-221862, May 28, 1986, 86-1 CPD ¶ 493; Honeywell Information Systems, Inc., B-193177.2, Dec. 6, 1979, 79-2 CPD ¶ 392.

Here, the Corps has acknowledged that because there were serious questions as to the adequacy of the specifications, questions not resolved by the time of the scheduled bid opening, the bid opening likely should have been postponed. However, the agency has also urged that its action, even if it represented an error in judgment, was not taken in bad faith, and we find no support for RHG's allegation to the contrary. The party alleging bad faith must present virtually irrefutable proof that the agency had the specific and malicious intent to injure the party. Spectrum Enterprises, B-221202, Dec. 31, 1985, 86-1 CPD ¶ 5. RHG has offered no evidence approaching that standard to show that the agency

induced it to submit a bid and proceeded with the opening of bids with knowledge that an award under the invitation would not be made. See Restorations Unlimited, Inc., et al., B-221862, supra.

Accordingly, our prior decision is affirmed.

Harry R. Van Cleve
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General Counsel