

*Keypert*



The Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

**Matter of:** Adrian Supply Company--Reconsideration

**File:** B-225440.2

**Date:** March 30, 1987

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## DIGEST

1. Under its Bid Protest Regulations, 4 C.F.R. § 21.2(c) (1986), the General Accounting Office (GAO) will consider an untimely protest if it raises a significant issue. When, upon further review of a protest originally dismissed as untimely, the matter raised appears to involve action by the contracting agency that is inconsistent with statute and regulation, the GAO will invoke the exception.
2. When an invitation for bids permits multiple awards and states that award will be based on the lowest overall cost to the government, a single award at a price more than the total of two awards plus the administrative costs for two contracts is improper. The Competition in Contracting Act of 1984 requires agencies to evaluate sealed bids based solely on the factors stated in a solicitation and to make award considering only price and price-related factors included in the solicitation.
3. Even though the protester's bid for one of five line items is not low, when its bid for all five items combined is less than any other bidder's, the fact that it is on an all-or-none basis does not prevent the agency from considering it.
4. Where corrective action is not possible because contract performance has been completed, successful protester is entitled to recover its bid preparation costs and the costs of filing and pursuing the protest, even though its protest was untimely filed, since the protester would have received an award under a proper bid evaluation and the improper award and contract performance did not result from delays by the protester in raising the protest issue.

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## DECISION

Adrian Supply Company requests reconsideration of our dismissal of its protest against the award of a contract to

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RTE Corporation under invitation for bids (IFB) No. 3655, issued by the Department of the Interior's Bureau of Indian Affairs (BIA) for the acquisition of transformers. Adrian argues that multiple awards--of certain line items to itself and of others to RTE--would have resulted in the lowest overall cost to the government. Since this was the basis for award set forth in the IFB, Adrian concludes that the single award to RTE was improper.

Upon reconsideration, we sustain the protest.

Our Office initially dismissed the protest as untimely because it had not been filed within 10 working days of BIA's September 24, 1986, denial of an identical protest to it. This action was in accord with our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (1986), which provide that when a protest initially is filed with the contracting agency, any subsequent protest to this Office must be filed within 10 working days after the protester knows or should know of initial adverse agency action. Under 4 C.F.R. § 21.2(c), however, we may consider an untimely protest if it raises a significant issue. Upon further review, we find that the matter raised, involving improper action by BIA that is clearly inconsistent with statute and regulation, warrants invoking the significant issue exception to the timeliness rules. See R.P. Densen Contractors, Inc., B-222627, Oct. 7, 1986, 66 Comp. Gen. \_\_\_\_, 86-2 CPD ¶ 401; Industrial Maintenance Services, et al., B-189303 et al., Dec. 15, 1977, 77-2 CPD ¶ 466.

For the reasons indicated below, the award to RTE did not result in the lowest overall cost to the government. The solicitation requested unit and extended prices for various quantities and types of transformers. Line items B-1 through B-5 covered pole-mounted transformers, while line items B-6 and B-7 covered pad-mounted ones. Adrian bid each group of items on an all-or-none basis, which the IFB permitted. Although its total price for items B-1 through B-5 was less than that of any other offeror, its price for item B-5 alone was not low. In view of this and the all-or-none limitation, BIA states, it did not consider Adrian's bid. Instead, as noted above, it awarded a single, \$53,124 contract to RTE as the lowest bidder for all line items, i.e., B-1 through B-7. The agency now acknowledges that this was improper.

As Adrian points out, had BIA instead awarded items B-1 through B-5 to it, and items B-6 and B-7 to RTE, even with the addition of \$500 in administrative costs (\$250 for each separate contract, as provided in the solicitation), the overall cost to the government, \$52,359, would have been

less.<sup>1/</sup> The respective extended prices of the two firms, as shown on the abstract of bids, are as follows:

Item	Single Award to RTE	Multiple Awards
B-1	\$3,960	\$3,720
B-2	6,396	6,180
B-3	12,010	11,600
B-4	12,020	11,600
B-5	4,929	4,950
B-6	5,205	5,205
B-7	8,604	8,604
Total	\$53,124	\$51,859

500

\$52,359

Thus, even though Adrian's bid for item B-5 was not low, its bid for the aggregate of items B-1 through B-5 was less than any other bidder's, and the fact that it was on an all-or-none basis should not have prevented the BIA from considering it for the award for those items. See Canova Moving and Storage Co., B-207168, Jan. 18, 1983, 83-1 CPD ¶ 59.

The Competition in Contracting Act of 1984 requires agencies to evaluate sealed bids based solely on the factors specified in the solicitation and to award a contract to the responsible source whose bid conforms to the solicitation and is most advantageous to the United States, considering only price and other price-related factors included in the solicitation. 41 U.S.C. §§ 253b(a) and (c) (Supp. III 1985). Here, since the solicitation permitted multiple awards, BIA should have selected that combination of bids which resulted in the lowest overall cost to the government--the only evaluation factor stated in the solicitation. The agency's failure to do so thus violates the statute. By letter of today, we are advising the Secretary of the Interior of our findings and recommending that appropriate steps be taken to avoid a recurrence.

Since the transformers were to be delivered within 120 days after award, RTE has completed performance, and an award to

1/ Adrian's initial protest was based on an administrative cost of \$250. Even if, as required by the IFB, this amount is added for each of the two contracts, the resulting total is less than RTE's contract price.

Adrian is not feasible. Adrian requests that if we find corrective action not to be appropriate, the firm should be allowed to recover its bid preparation costs and the costs of filing and pursuing the protest.

Such costs would ordinarily be recoverable since the protester has been unreasonably excluded from the procurement and other remedies are not appropriate. See Nicolet Biomedical Instruments, 65 Comp. Gen. 145 (1985), 85-2 CPD ¶ 700; 4 C.F.R. § 21.6(e). However, in two cases in which protesters filed untimely protests that were considered under the significant issue exception, we found no entitlement to costs. Temps & Co.--Claim for Costs, B-221846.2, Aug. 28, 1986, 65 Comp. Gen. \_\_\_\_\_, 86-2 CPD ¶ 236; R.P. Denson Contractors, Inc., supra. In each instance the protester chose to submit a bid rather than raise a solicitation defect before bid opening, in time for corrective action to ensure a fair and proper award. Thus, we found that the protesters were largely responsible for the state of performance of the contracts which limited the remedies available to our Office, and we denied the requests for the costs of pursuing the bid protests. Since we could not conclude that either protester would have had a substantial chance for award under a corrected solicitation, see Asbestos Abatement of America, Inc., B-221891, et al., May 7, 1986, 86-1 C.P.D. ¶ 441, we denied the requests for bid preparation costs.

Here, Adrian would clearly have been the awardee if the agency had properly evaluated bids, and Adrian raised the issue in a timely protest to BIA, so that we cannot assign responsibility to Adrian for the award to RTE and the performance of the contract. Accordingly, we find that the protester is entitled to recover its bid preparation costs and the costs of filing and pursuing the protests, and we are advising the Secretary of the Interior of this determination. Adrian should submit its claim for such costs directly to the agency. 4 C.F.R. § 21.6(f).

Adrian also requests compensation for anticipated profits. However, there is no legal basis that would permit recovery of anticipated profits or similar monetary damages if a firm that has submitted a timely protest has wrongfully been denied a contract. Houston Fearless 76, B-209576, Apr. 15, 1983, 83-1 CPD ¶ 412.

The protest is sustained.

*for Milton J. Rozler*  
Comptroller General  
of the United States