



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Black Hills Refuse Service--Claim for Costs

File: B-228470.2

Date: July 29, 1988

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### DIGEST

Protester may recover the costs of filing and pursuing its protest, including reasonable attorney fees, where the protest has been sustained, resulting in likely cost savings to the government, and no other remedy is available.

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### DECISION

Black Hills Refuse Service has submitted a claim for reimbursement of the costs of filing and pursuing its protest, which we sustained in Black Hills Refuse Service, B-228470, Feb. 16, 1988, 67 Comp. Gen. \_\_\_, 88-1 CPD ¶ 151. We grant the claim.

The protest involved invitation for bids (IFB) No. R2-03-88-01, issued by the United States Forest Service, Department of Agriculture, as a total small business set-aside for garbage hauling. Black Hills, a large business, protested the award to Fish Sanitation, the only responsive bidder, on the ground that Fish's price was improperly determined to be reasonable. Specifically, Black Hills claimed that the government estimate had been improperly calculated as a result of erroneous figures and misunderstandings about the sanitation industry, and that the price reasonableness determination based upon this estimate therefore was invalid. Black Hills argued further that Fish's price was unreasonable under a correct government estimate, and asked that the contract to Fish be terminated, that the set-aside be withdrawn, and that the solicitation be reissued on an unrestricted basis.

We sustained the protest on the basis that the government estimate had been calculated unreasonably because in estimating a predicted increase in dumping fees the agency failed to account for the effect of trash compaction, the norm in the sanitation industry, which would have greatly reduced the amount of fees that could be expected to arise under the contract. We recommended that the contracting

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officer recalculate the government estimate, taking into account prevailing industry norms and other relevant information, including the fees actually in effect at the time of recalculation. If, based on this information, Fish's bid price was found unreasonable, we recommended that the requirement be resolicited and that the validity of the set-aside determination be reexamined.

In response to our decision, the contracting officer recalculated the government estimate along the lines that we recommended and determined that Fish's price was in fact unreasonable. As a result, he decided to issue a request for quotations for the balance of the fiscal year and to terminate Fish's contract for convenience when award was made. The procurement was maintained as a small business set-aside, however, because at that time five small businesses were judged capable of performing the contract, and three of those, none of which had bid on the contract previously, expressed interest in quoting. The contracting officer concluded that the set-aside was still justified under Federal Acquisition Regulation (FAR) § 19.502-2, which requires that there be a reasonable expectation that offers will be obtained from at least two responsible small businesses and that award can be made at a reasonable price, in order to set aside a procurement for small businesses. The Vollrath Company, B-230029, Jan. 29, 1988, 88-1 CPD ¶ 99. As a result of this determination, Black Hills is not eligible to compete on the resolicitation.

We find Black Hills entitled to reimbursement of its protest costs. A protester may be awarded the reasonable costs of filing and pursuing its protest, including attorneys' fees, where our Office determines that a solicitation, proposed award or award does not comply with a statute or regulation. 31 U.S.C. § 3554(c) (Supp. IV 1986). Under the regulations applicable to this protest (4 C.F.R. § 21.6(d) (1987)), we consistently have held that a protester is entitled to recover such costs where the protester has been unreasonably excluded from the procurement, unless we recommend that the contract be awarded to the protester and the protester receives the award. See Harwell Construction Co., Inc., B-229549.2, Apr. 13, 1988, 88-1 CPD ¶ 360. Since the only other small business bidder had been rejected as nonresponsive and, moreover, had bid a price 80 percent higher than offered by Fish, the Forest Service, in failing initially to discern the unreasonableness of Fish's price, in effect excluded Black Hills from an opportunity to compete; as we recognized in our prior decision, in view of the limited small business competition and the absence of a reasonable small business bid, an initial finding of price unreasonableness could have led to withdrawal of the set-aside and an opportunity for Black Hills to compete. The fact that

the agency subsequently has found sufficient small business competition to maintain the set-aside, and that Black Hills therefore will not have an opportunity to obtain the award, does not preclude the award of protest costs. See Fisher and Porter Co., B-227941.3, Apr. 1, 1988, 67 Comp. Gen. 88-1 CPD ¶ 327. On the contrary, the absence of any other available remedy here, where Black Hill's protest has resulted in likely cost savings to the government (from terminating a contract improperly awarded at an unreasonable price), indicates that allowing protest costs is appropriate. See Patio Pools of Sierra Vista, Inc., B-228187, et al., Dec. 31, 1987, 87-2 CPD ¶ 650.

In any case, as a result of Black Hills' successful challenge and our subsequent recommendation, competition for the procurement has been widened with the addition of three small businesses interested in bidding on the contract. In such a case, recovery of protest costs is consistent with the broad purpose of the Competition in Contracting Act of 1984, 10 U.S.C. § 2301 (Supp. IV 1986), which is to increase and enhance competition in federal procurements. Harwell Construction Company, Inc., B-229549.2, supra.

Black Hills should submit its claim for reimbursement of its costs directly to the Forest Service. If the parties cannot reach agreement within a reasonable time, this Office will determine the appropriate amount to be paid. 4 C.F.R. § 21.6(e) and (f) (1987).



**Acting** Comptroller General  
of the United States