

Burkard



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: FXC Corporation--Reconsideration
File: B-242099.2
Date: February 22, 1991

Sheldon I. Matzkin, Esq., Wachtel, Ross & Matzkin, for the protester.
Richard P. Burkard, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester may not be awarded the costs of filing and pursuing its protest, including attorneys' fees, where protest was dismissed and thus no decision on the merits has been issued.

DECISION

FXC Corporation requests that we reconsider our December 7, 1990, dismissal of its protest in which it alleged that the U.S. Army Materiel Command (AMC) failed to obtain full and open competition in meeting its requirements for parachutes and parachute equipment on a sole-source basis under request for proposals (RFP) No. DAAK01-91-R-0003. FXC also requests an award of its protest costs, including attorneys' fees. We dismissed the initial protest since we found that it merely anticipated improper agency action that had not yet taken place.

We affirm our dismissal and deny the claim for costs.

In response to the original protest, the agency advised our Office and the protester that AMC contemplated a sole-source award to Para-Flite, Inc. The agency stated that a synopsis of the proposed sole-source award was published in the Commerce Business Daily (CBD) on August 28, 1990, but that during a review of the contract file after the filing of the protest, it discovered that CBD Note 22, which requests other potential sources to submit expressions of interest showing their capability to perform, was omitted from the synopsis. The agency therefore amended the synopsis to include CBD Note 22 and extended the closing date for receipt of expressions of interest in the requirements. Moreover, AMC

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specifically invited FXC to submit a response to the new CBD notice.

On December 7, we dismissed the protest because the record showed that AMC would consider an expression of interest from FXC. We found that the protest merely speculated that the agency's future actions would improperly restrict competition.

In its request for reconsideration, the protester asserts that its protest was not anticipatory and should therefore not have been dismissed. We have reviewed the record and find that dismissal was appropriate even if we were to agree with the protester that the protest was not premature. We so conclude because the protester itself admitted that the addition of Note 22 granted it the relief which it sought in its bid protest--the opportunity to demonstrate to the agency that it was capable of meeting the agency's requirements. The agency's action thus clearly rendered the protest academic and subject to dismissal. See, e.g., Steel Circle Bldg. Co., B-233055; B-233056, Feb. 10, 1989, 89-1 CPD ¶ 139.

FXC also argues that it should be awarded its protest costs because the agency corrected its inadequate CBD notice in response to FXC's protest. Under the rules applicable to this protest, we allow recovery of the costs of filing and pursuing a protest only if we determine in a formal decision that a solicitation for a contract or a proposed award or the award of a contract does not comply with statute or regulation. See 4 C.F.R. § 21.6(d) (1990); Teknion, Inc.--Claim for Protest Costs, 67 Comp. Gen. 607 (1988), 88-2 CPD ¶ 213; Soltec Corp.--Request for Costs, B-234716.3, June 8, 1989, 89-1 CPD ¶ 539. Here, since we dismissed the protest, we have no basis for awarding costs to FXC.

We affirm our prior dismissal and deny the claim for costs.



Ronald Berger
Associate General Counsel