



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Oklahoma Indian Corporation--Claim for Costs

File: B-243785.2

Date: June 10, 1991

Lisa Smith Sanders, Esq., Spriggs & Hollingsworth, for the protester.
C. Douglas McArthur, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester is not entitled to award of the costs of filing and pursuing its protest where agency promptly took corrective action within 2 weeks of when the protest was filed.

DECISION

Oklahoma Indian Corporation (OIC) requests that our Office declare the protester entitled to recover reasonable costs of filing and pursuing its protest. OIC had protested the rejection of its proposal under request for proposals (RFP) No. F34650-91-R-0164, issued by the Department of the Air Force. The protester contended that the agency had violated statute and regulation by finding the protester, a small business, nonresponsible without referring the matter to the Small Business Administration (SBA) for a certificate of competency.

OIC filed its protest on April 26, 1991; on May 10, the agency acknowledged the legitimacy of the protester's contentions and agreed to refer the matter of the protester's responsibility to the SBA. We therefore dismissed the protest as academic.

On May 17, the protester filed a claim with our Office under section 21.6(e) of our revised Bid Protest Regulations, 55 Fed. Reg. 3,759 (1991) (to be codified at 4 C.F.R. § 21.6(e)), for the costs of filing and pursuing the protest.

Pursuant to the revised regulations, if the contracting agency decides to take corrective action in response to a protest, we may declare the protester to be entitled to recover reasonable costs of filing and pursuing the protest, including attorneys' fees.

Prior to revision of the regulations, we did not award costs in cases where an agency took corrective action prior to our issuing a decision on the merits of the protest. We became concerned, however, that some agencies were taking longer than necessary to initiate corrective action in the face of meritorious protests, thereby causing protesters to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. We thought that providing for the award of costs in cases where the agencies delayed taking corrective action would encourage agencies "to recognize and respond to meritorious protests early in the protest process." 55 Fed. Reg. 12834, 12836 (1990).

As initially proposed, section 21.6(e) would have permitted us to award costs in cases where the agency notified us of a decision to take corrective action after the due date for submission of the agency report on the protest. 55 Fed. Reg. 12838. As adopted, section 21.6(e) permits the award of costs without regard to the report due date; we stated in the explanatory material accompanying the promulgation of the final regulations that deciding whether to award costs was more appropriately based on the circumstances of each case, including when in the protest process the decision to take corrective action was made and communicated to us and the protester, rather than on the report due date. We noted in this respect that there may be circumstances where the award of costs, even where corrective action was taken after submission of the report, would not be justified, just as there may be circumstances where the award of costs would be appropriate even where corrective action was taken prior to report submission. See 56 Fed. Reg. 3,759 et seq.

Obviously, it was not our intention in adopting the revised provision to award protest costs in every case in which the agency takes corrective action in response to a protest. Since our concern was that some agencies were not taking corrective action in a reasonably prompt fashion, our intent was to award costs where, based on the circumstances of the case, we find that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Here, the agency took corrective action within 2 weeks of the filing of the protest. Such action, taken early in the protest process, is precisely the kind of prompt reaction to a protest

that our regulation is designed to encourage. It provides no basis for a determination that the payment of protest costs is warranted. Accordingly, the protester's claim for costs is denied.


for James F. Hinchman
General Counsel