

P. Ahearn



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Durodyne, Inc.--Request for Declaration of Entitlement to Costs

File: B-243382.4

Date: August 27, 1991

Thomas L. McGovern III, Esq., Hogan & Hartson, for the protester.

M. Penny Ahearn, Esq., and John M. Melody, Esq., Office of General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for declaration of entitlement to costs of filing and pursuing a protest against a proposed sole-source award is dismissed where agency action affects only subsidiary protest argument and does not resolve ultimate issue of protest, the legal propriety of sole-source justification.

DECISION

Durodyne, Inc. requests a declaration of entitlement to reimbursement of the costs of filing and pursuing its protest under our file number B-243382.3, in light of the contracting agency's decision to take action concerning a subsidiary issue in the firm's protest against the proposed sole-source award of a contract to Goodyear Tire & Rubber Company under request for proposals (RFP) No. DLA770-91-R-2611, issued by the Defense Logistics Agency (DLA) for refueling hoses. See Bid Protest Regulations, 56 Fed. Reg. 3,759 (1991) (to be codified at 4 C.F.R. § 21.6(e)).

We deny the request.

In its protest, Durodyne alleged on several grounds that DLA's justification for the proposed sole-source award to Goodyear was insufficient. One aspect of the protest, concerning the agency's contention that a waiver of the solicitation's first article test (FAT) was necessary to meet the agency's required delivery schedule, was Durodyne's argument that DLA improperly determined that Goodyear was the only potential offeror eligible for a FAT waiver, based on the company's having previously passed a FAT. Durodyne asserted that, in fact, Goodyear failed to pass an ozone test required for the FAT because it was impossible to perform. Following Durodyne's

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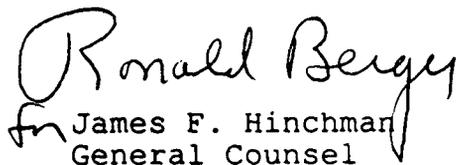
protest on this ground, DLA amended the ozone test procedure and decided to require those companies otherwise eligible for a waiver of FAT, i.e., Goodyear, to reperform the ozone test portion of the FAT.

Durodyne contends that amending the ozone test constituted agency corrective action in response to its protest, and that it therefore is entitled to reimbursement of its protest costs related to this portion of its protest.

Under our Regulations, we may find a protester entitled to reimbursement of its protest costs where we determine that a solicitation, proposed award, or award does not comply with statute or regulation. 56 Fed. Reg. 3,759, supra (to be codified at 4 C.F.R. § 21.6(d)). Where an agency takes corrective action in response to a protest, we will make this determination by considering whether to issue a declaration of entitlement to costs. 56 Fed. Reg. 3,759, supra (to be codified at 4 C.F.R. § 21.6(e)).

There is no basis for finding an entitlement here, since the amendment of the ozone test did not constitute corrective action within the intent of our Regulations. The basis of Durodyne's protest is that the proposed sole-source award to Goodyear is contrary to statute and regulation, and Durodyne has presented several legal arguments intended to support that conclusion. The agency's action merely addressed one of these arguments; it remains DLA's position that a sole-source award to Goodyear is warranted based on that firm's having previously passed a FAT. Absent action reflecting a change in this position, it cannot be said that the agency has taken corrective action.

The request for a declaration of entitlement to costs is denied.


for James F. Hinchman
General Counsel