



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Northwest Cleaning Service--Request for
Declaration of Entitlement to Costs

File: B-243861.2

Date: January 22, 1992

Chuck Simmons, Jr., for the protester.
Beth Kelly, Esq., Department of the Army, for the agency.
Behn Miller, 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 record shows that agency's amendment of allegedly restrictive requirement mooted the protest because of a change in the agency's needs, but corrective action was not taken in the face of a clearly meritorious protest.

DECISION

Northwest Cleaning Service requests that our Office declare the company entitled to recover the reasonable costs of filing and pursuing its protest against the terms of invitation for bids (IFB) No. DACW57-91-B-0029, issued by the Department of the Army for janitorial services at the Dalles Dam, Dalles, Oregon.

We deny the request.

Northwest first filed an agency-level protest on April 3, 1991, timely challenging five of the IFB's specifications as unduly restrictive. As a result of that protest, the Army began reviewing and amending the solicitation; between April 3 and May 1, the Army issued four amendments to the IFB. On April 26, in light of these amendments, the contracting officer asked Northwest to withdraw its protest. In response to this request, on May 1, Northwest filed a protest with this Office, challenging one of the IFB's specifications that had not been "corrected" by the Army in Northwest's agency-level protest. Specifically, Northwest objected to the Army's use of one bid pricing schedule for

both the base and option year periods since this requirement prevented Northwest from "front-loading" its bid.¹

On August 6, by amendment No. 11, the Army deleted the option year requirement from the contract. Accordingly, bidders were only required to prepare a bid for one contract year. As a result of this amendment, Northwest withdrew its protest.

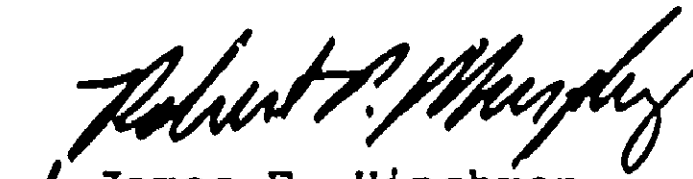
On August 13, the protester filed a claim with our Office under section 21.6(e) of our revised Bid Protest Regulations, 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.6(e)), for the costs of filing and pursuing its protest. Pursuant to the revised regulations, if the contracting agency takes corrective action in response to a protest, we may declare the protester to be entitled to recover the reasonable costs of filing and pursuing its protest. This provision was intended to allow the award of costs where we find that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. PAI Corp. et al., B-244287.5 et al., Nov. 29, 1991, 91-1 CPD ¶ _____. Northwest argues that because the agency took corrective action as a result of its protest, Northwest should be reimbursed for the costs incurred in bringing this matter to the Army's attention. We disagree.

We find that the Army did not take corrective action to remedy a protested violation of statute or regulation as may entitle the protester to recover protest costs. The record shows that the Army has historically procured this janitorial services requirement through the Small Business Administration's (SBA) section 8(a) program, 15 U.S.C. § 637(a) (1988). However, at the time this solicitation was issued, there were no available 8(a) janitorial firms to perform the contract since they had all graduated from the 8(a) program. SBA informed the Army that between 12 and 24 months would be required to locate a qualified 8(a) janitorial services contractor to perform this requirement. Accordingly, this solicitation was issued as an unrestricted procurement. Although the Army apparently hoped to convert this requirement to an 8(a) set-aside after 12 months, an option year requirement was included in the solicitation to cover the possibility that SBA would not locate an 8(a) firm before the base 1-year performance period expired.

¹The IFB required offerors to complete a bid pricing schedule for the base 1-year performance period; at the end of this performance period, in the event the Army decided to exercise the option requirement, the IFB provided that the terms of the base 1-year bid pricing schedule would apply to the option period's performance requirement as well.

On July 30, SBA advised the contracting officer that a qualified 8(a) contractor would be available to perform the required janitorial services on October 1, 1992. Based on this information, the Army determined that the option year requirement was no longer necessary since, due to the amount of time consumed by the protest process, contract performance on this requirement was not scheduled to begin until October 1, 1991.² Accordingly, the Army removed the option year requirement from the solicitation, thereby rendering Northwest's protest moot. In this case the passage of time and SBA's actions simply eliminated the Army's need for an option year. In these circumstances, it cannot be said that the agency has taken corrective action in the face of a clearly meritorious protest. Durodyne, Inc.--Request for Declaration of Entitlement to Costs, B-243382.4, Aug. 27, 1991, 91-2 CPD ¶ 199.

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


James F. Hinchman
General Counsel

²The solicitation's bid opening date was postponed indefinitely pending the outcome of Northwest's protest to this Office; at the time Northwest's request for a declaration of entitlement to costs was filed, bid opening for this solicitation was scheduled to occur in early September 1991.