



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Everite Machine Products, Inc.--Request for
Declaration of Entitlement to Costs

File: B-246582.2

Date: April 6, 1992

Elizabeth A. Kaiser, Saul, Ewing, Remick & Saul, for the
protester.

Demetria T. Carter, Esq., Department of the Navy, for the
agency.

Stephen J. Gary, Esq., and John M. Melody, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

Where agency promptly investigated allegation that award was
improperly made on the basis of initial proposals, and took
appropriate corrective action 7 working days after being
notified of the protest, thus promptly granting the relief
requested, protester is not entitled to costs of filing and
pursuing the protest.

DECISION

Everite Machine Products, Inc. requests that our Office
declare it entitled to recover the costs of filing and
pursuing its protest in connection with request for
proposals (RFP) No. N68335-91-R-0097, issued by the
Department of the Navy for hinge protector plates.

We deny the request.

The solicitation was issued to provide 42 hinge protector
plates for use by the Naval Air Engineering Center. On
October 30, 1991, Everite received notice of award of the
contract to S.W. Electronics & Manufacturing Corp., and
protested the award to our Office on November 7. Everite
objected that the Navy had improperly awarded the contract
on the basis of initial proposals to other than the low
offeror, itself. We notified the Navy of the filing by
Everite and indicated that the agency's administrative
report on the protest would be due in our Office on
December 16.

On November 18, the Navy advised the protester that, after reviewing the record of the procurement, the agency agreed that award had been made improperly on the basis of initial proposals, and that it was therefore taking appropriate corrective action. The Navy stated it would reopen discussions with all offerors in the competitive range, including Everite, no later than December 7, and would then request best and final offers. The Navy also advised Everite the agency was in the process of terminating the awardee's contract for the convenience of the government. As a consequence of these actions, Everite notified our Office it was withdrawing its protest, which we formally dismissed as academic (on the ground the agency had granted the relief requested) on December 3.

In requesting reimbursement of the costs of filing and pursuing its protest, Everite notes that in prior decisions we have taken the position that costs should not be awarded where the agency's corrective action was taken, as in this case, prior to the agency report due date. Everite requests, however, that we reevaluate this position.

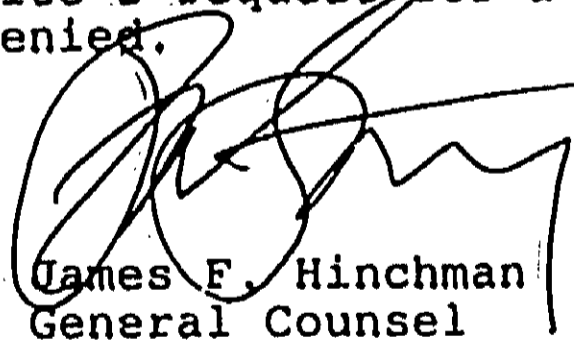
There is no basis for allowing Everite's costs here. Our Bid Protest Regulations provide that, where an agency takes corrective action prior to our issuing a decision on the merits, we may declare a protester entitled to "recover reasonable costs of filing and pursuing the protest." 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.6(e)); Metters Indus., Inc.--Request for Declaration of Entitlement to Costs, B-240391.5, Dec. 12, 1991, 91-2 CPD ¶ 535. Prior to the effective date of this section, our Office did not award costs in such cases. See Pulse Electronics, Inc.--Request for Declaration of Entitlement to Costs, B-243625.3, Aug. 30, 1991, 91-2 CPD ¶ 222. 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 believed 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).

In this case, there is no question the agency acted promptly. The Navy contacted Everite only 7 working days after receiving formal notification of the protest from our Office, and provided the remedy the protester had requested. (Subsequent to Everite's filing this request, the record shows that, as promised in the Navy's November 18 communication to the protester, discussions were held with Everite on December 6.) Such corrective action, taken early in the protest process, is precisely the kind of prompt reaction to

a protest that our regulation is designed to encourage, Pulse Electronics, Inc., supra. It provides no basis for a determination that the payment of protest costs is warranted.

In asking that we reconsider our position on the award of costs, Everite has incorrectly characterized our position. The corrective action is taken relative to the agency report due date, contrary to Everite's suggestion, is not the critical factor in our consideration of entitlement to costs. It is true that, as initially proposed, section 21.6(e) of our Bid Protest Regulations would have provided for the award of 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. 12834, 12838 (1990). As adopted, however, section 21.6(e) provides for the possible award of costs without regard to the report due date, 56 Fed. Reg. 3759, 3764 (1991) (to be codified at 4 C.F.R. § 21.6(e)). As we stated in the explanatory material accompanying the promulgation of the final regulations, 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. Id.; Pulse Elecs., Inc., supra. Thus, we acknowledged there may be circumstances where the award of costs would be appropriate even where corrective action was taken prior to report submission, 56 Fed. Reg. 3759 et seq.; Pulse Elecs., Inc., supra. As discussed, the circumstances here do not warrant the award of costs.

Everite's request for a declaration of entitlement to costs is denied.



James F. Hinchman
General Counsel