



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Alban Engine Power Systems--Request for
Declaration of Entitlement to Costs

File: B-247614.2

Date: April 8, 1992

Anne H. Warner, Esq., Howrey & Simon, for the protester.
Joseph R. Standell, Esq., Federal Aviation Administration,
for the agency.
Daniel I. Gordon, Esq., and Paul I. Lieberman, 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 the agency took corrective
action approximately 2 weeks after the issuance of the
General Accounting Office's decision with respect to Federal
Supply Schedule requote procedures which provided the first
interpretation establishing the necessity for the corrective
action taken by the agency.

DECISION

Alban Engine Power Systems requests that our Office declare
the firm entitled to recover the reasonable costs of filing
and pursuing its protest with respect to request for
quotations (RFQ) No. DTFA-02-94-0-01790, issued by the
Federal Aviation Administration (FAA) for engine generator
sets. Alban filed a protest February 14, 1992, challenging
the award made under the RFQ to DMT Corporation and arguing
that the requote procedures used in the context of the
Federal Supply Schedule (ESS) program violate the
Competition in Contracting Act of 1984 (CICA), 41 U.S.C.
§ 253 (1988).

On March 6, the FAA terminated its contract with DMT and
determined that it would procure the engine generator sets
through a means other than the requote procedures. The FAA
based its action on our decision in Komatsu Dresser Co.,
B-246121, Feb. 19, 1992, 71 Comp. Gen. _____, 92-1 CPD ¶ 202,
in which we found that the ESS requote procedures do not
satisfy CICA's requirement for full and open competition.
We subsequently dismissed Alban's protest as academic.

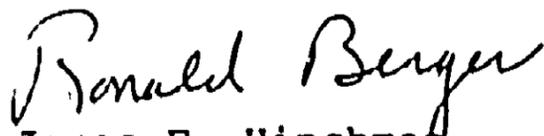
On March 30, the protester filed a claim with our Office under section 21.6(e) of our revised Bid Protest Regulations, 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.6(e)), for the costs of filing and pursuing its protest. Pursuant to the revised regulations, if the contracting agency decides 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 its protest, including attorneys' fees.

Prior to this revision of our 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 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).

As initially proposed, section 21.6(e) 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. 12838. As adopted, section 21.6(e) provides for the possible 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 to 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 could be circumstances where the award of costs would be appropriate even where corrective action was taken prior to report submission. See 56 Fed. Reg. 3759 et seq.

It was thus not our intention in adopting the revised provision to award protest costs in every case in which an 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 is 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 protest issue--the noncompliance of the

requote procedures with CICA's competition requirements--was an unsettled area of the law that our Office first addressed in the Komatsu decision. Approximately 2 weeks after the date of issuance of that decision, which established that the requote procedures in the FSS program were inconsistent with CICA, the FAA took the appropriate corrective action by terminating the contract at issue in this case. Such action is precisely the kind of prompt reaction that our regulation is designed to encourage. It provides no basis for a determination that the payment of protest costs is warranted. See KIME Enters., Inc.--Request for Declaration of Entitlement to Costs, B-241996.5, Dec. 9, 1991, 91-2 CPD ¶ 523. Accordingly, Alban's request for a declaration of entitlement to costs is denied.

for 
James F. Hinchman
General Counsel