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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: R.J. Sanders, Inc.--Claim for Costs

File: B-245388.2

Date: April 14, 1992

Jared H. Silberman, Esq., and Dennis J. Riley, Esq., Elliott, Bray & Riley, for the protester. Gregory H. Petkoff, Esq., Department of the Air Force, for the agency. Christine F. Bednarz, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester is not entitled to the costs of filing and pursuing its protest, where the protest elicited corrective action on the part of the agency 1 month after it was filed with the General Accounting Office, even though the protester filed an agency-level protest of the same matter.

DECISION

R.J. Sanders, Inc. requests that our Office declare it entitled to recover the reasonable costs of filing and pursuing its protest of invitation for bids (IFB) No. F34650-91-B-0048, issued by the Department of the Air Force, for the repair of boilers and the abatement of asbestos at Tinker Air Force Base.

On March 29, 1991, R.J. Sanders received the award of a contract for the subject boiler repair and asbestos abatement services. On May 22, 1991, R.J. Sanders learned that the Air Force had terminated its contract for convenience because it had not obtained Oklahoma licensure for asbestos abatement services prior to award, as the IFB required. On July 1, 1991, R.J. Sanders protested to the agency that the requirement for pre-award Oklahoma licensure was unnecessarily restrictive and, thus, did not form a proper basis for the termination of its contract.

The Air Force denied R.J. Sanders's protest and rescinded the procurement. On August 27, 1991, prior to bid opening, R.J. Sanders protested to our Office that the IFB was unnecessarily restrictive in that it required pre-award Oklahoma licensure for asbestos abatement work and prohibited asbestos abatement subcontracting. The agency

amended the solicitation on September 25, 1991, to remove the allegedly restrictive specifications and opened bids on October 7, 1991. R.J. Sanders did not submit a bid. Owing to the agency's corrective action, our Office dismissed the protest as academic on October 7, 1991.

On October 8, 1991, R.J. Sanders filed a claim with our Office under section 21.6(e) of our revised Bid Protest Regulations for the costs of filing and pursuing the protest. 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.6(e)). Under the revised Regulations, we may declare the protester entitled to recover the reasonable costs of filing and pursuing the protest, including attorneys' fees, if the contracting agency decides to take corrective action in response to a clearly meritorious protest. See Oklahoma Indian Corp.--Claim for Costs, 70 Comp. Gen. 558 (1991), 91-1 CPD ¶ 558.

Prior to the revision of the Regulations, we did not award costs in cases where an agency took corrective action before we issued 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 clearly 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 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, the Air Force amended the solicitation less than 1 month after R.J. Sanders filed its protest with our Office. We consider this corrective action sufficiently prompt to warrant the denial of the protester's claim for costs. See Dynair Elecs., Inc.--Claim for Costs, B-244290.2, Sept. 18, 1991, 91-2 CPD ¶ 260; Leslie Controls, Inc.--Claim for Costs, B-243979.2, July 12, 1991, 91-2 CPD ¶ 50.

R.J. Sanders argues that the filing of a bid protest with our Office should not alone serve as the measure for determining the promptness of an agency's corrective action and that we should measure the promptness of an agency's response from the time the agency first learned of the protest grounds. The protester states that since it first apprised the Air Force of its protest grounds in its July 1, 1991, agency-level protest, this date should serve as the

measure for determining the promptness of the agency's corrective action.¹

We disagree. The Competition in Contracting Act of 1984 (CICA) limits our protest jurisdiction to written objections to a solicitation, proposed award, or award of a contract filed with our Office. 31 U.S.C. §§ 3551(1), 3552 (1988). Our authority to declare entitlement to protest costs extends to parties whose protests to our Office support a finding that a procurement statute or regulation was violated. 31 U.S.C. § 3554(c)(1). The modification of our Bid Protest Regulations to provide for the possibility of an award of costs where an agency takes corrective action in response to a protest was not intended to ensure the fairness of agency-level protest processes. That is the responsibility of the procuring agencies involved. The purpose of our provision is to ensure a fair treatment of those protesters to our Office, who make substantial investments of time and resources in pursuit of clearly meritorious protests, but who do not have the opportunity to recoup their costs because of agency corrective actions. See Propulsion Controls Eng'g--Request for Declaration of Entitlement to Costs, B-244619.2, Mar. 25, 1992, 92-1 CPD ¶ ____.

Accordingly, R.J. Sander's request for entitlement to a declaration of costs is denied.


James F. Hinchman
General Counsel

¹By the same logic, R.J. Sanders suggests that an earlier agency-level protest filed by another offeror, raising similar protest grounds, is also relevant to its entitlement to protest costs.