



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** ManTech Field Engineering Corp.--Request for  
Declaration of Entitlement to Costs

**File:** B-246152.3

**Date:** June 12, 1992

Gena E. Cadieux, Esq., and David P. Metzger, Esq., Davis, Graham & Stubbs, for the protester.  
Robert W. Garrett, Esq., Department of the Army, for the agency.  
Paul E. Jordan, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Where agency corrective action did not result from clearly meritorious protest that would have required sustaining protest, protester is not entitled to the costs of filing and pursuing its protest.

### DECISION

ManTech Field Engineering Corp. requests that our Office declare the firm entitled to recover the reasonable costs of filing and pursuing its protest concerning request for proposals (RFP) No. DAHC90-91-R-0023, issued by the Department of the Army Intelligence and Security Command (INSCOM) for software maintenance and support services at Kunia, Hawaii. The protest, filed October 9, 1991, alleged, among other matters, that INSCOM relaxed a mandatory specification for the awardee, Ball Corporation.<sup>1</sup>

We find that the protester is not entitled to recover its costs of filing and pursuing the protest.

The RFP provided that "[c]ontractor personnel will not be considered unless they can be cleared to Top Secret with a Special Background Investigation (TS/SBI) and have access

<sup>1</sup>ManTech earlier protested that INSCOM had waived a mandatory personnel qualification requirement for Ball and we sustained the protest. ManTech Advanced Sys. Int'l, Inc., B-240136, Oct. 26, 1990, 90-2 CPD ¶ 336. The instant solicitation was issued as a result of our recommendation for corrective action.

054721/1462X

adjudicated by 1 Oct. 1991." In its protest, ManTech alleged that at least one of Ball's proposed personnel should have been excluded from consideration because he had not had his clearance adjudicated as of October 1. In its agency report, and at a hearing conducted by our Office on December 10, INSCOM denied that it had relaxed the pertinent mandatory specification.

On December 19, INSCOM notified our Office that it intended to take corrective action by amending the RFP and reopening negotiations with Ball and ManTech. On December 20, we dismissed the protest as academic. On January 8, 1992, within 10 days of its receipt of written notice of the corrective action, the protester filed this request for a declaration of entitlement to its costs.

As a preliminary matter, the agency argues that the request is untimely since it was filed more than 10 working days after December 19, when the agency orally notified the protester of its intent to take corrective action. See Bid Protest Regulations, 4 C.F.R. § 21.6(e) (1992). While the protester's request was filed more than 10 days after notification, we find that the circumstances of this case warrant our consideration of the request.

On December 20, ManTech telephoned our Office to seek guidance on the filing of hearing comments and to advise us that it had not yet obtained sufficient details of the proposed corrective action to determine whether it considered the action adequate. It also advised that it intended to seek costs from the agency, but was unclear as to the role of our Office under our new regulations. While attempts by a protester to seek clarification from and to work with the agency are appropriate, the protester has the responsibility to meet the timeliness requirements under our regulations. However, in this instance, during the course of ManTech's inquiries to our Office, we may have conveyed the impression that it was appropriate for ManTech to delay filing its request until it obtained additional information. Therefore, we will consider the request.

Pursuant to our regulations, if the contracting agency decides to take corrective action in response to a clearly meritorious protest, we may declare the protester to be entitled to recover reasonable costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.6(e); KIME Enters., Inc.--Request for Declaration of Entitlement to Costs, B-241996.5, Dec. 9, 1991, 91-2 CPD ¶ 523. Our rationale for making such a declaration is our concern that some agencies take 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. KIME Enters., Inc., supra. Whether to award costs is based on the circumstances of each case. While we will not award protest costs in every case in which an agency takes corrective action, we will 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. Id.

INSCOM advises our Office that it took the corrective action in this case based first on the agency's realization that its security requirement was ambiguous. The ambiguity stems from the use of the phrase "can be cleared . . . and have access adjudicated by" October 1. INSCOM explains that it is not simply access which must be adjudicated. All Army security clearances must be adjudicated by its Central Personnel Security Clearance Facility (CCF), even where a clearance has been granted by the Department of Defense or another federal agency. Once the clearance is adjudicated, then access is granted based upon assignment to a contract. Thus, offerors could have been misled into believing that a security clearance granted by another agency would meet the RFP requirement. Further, the word "can" is misleading because neither the contractor, nor INSCOM, has any control over when a favorable adjudication may be made by the CCF. INSCOM has amended the RFP to clarify the intent of the original provision. The new provision advises that contractor personnel must have a TS/SBI clearance adjudicated by the CCF by the date of contract award.

The agency's corrective action also is based on its discovery that the Ball employee not only was not adjudicated for access, but did not possess the required TS clearance from any agency. While the employee had an SBI completed by the National Security Agency, that agency never adjudicated his security clearance. Apparently, the employee was unaware of this fact and Ball represented in its proposal that all personnel possessed a TS/SBI clearance and that only this employee's access adjudication was pending.

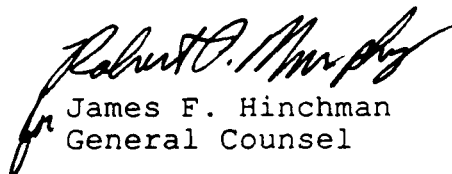
Under the circumstances of this case, we do not find that the corrective action resulted from a clearly meritorious protest. Based upon the Ball employee's failure to have clearance adjudicated by October 1, ManTech protested the agency's relaxation of the RFP security requirement. However, it appears that a similar relaxation would have been necessary for ManTech. In view of the necessity for clearance adjudication by the CCF, only the proposal of incumbent, cleared personnel would meet the requirement as originally stated in the RFP. Since ManTech proposed personnel who were not working on the current contract, it

is not realistic to believe that, had it received the award on September 30, its personnel could have been granted access by October 1. Thus, in order to have been awarded the contract, ManTech also would have had to receive the benefit of agency relaxation of its application of the requirement for access adjudication.

The Ball employee's lack of a TS/SBI clearance does support the agency's decision to take corrective action, but does not necessarily require the conclusion that ManTech's protest clearly was meritorious. The original RFP provision required no particular proof of clearance status and both offerors' proposals simply represented that personnel possessed appropriate clearances. There is no evidence that the employee or Ball intentionally misrepresented the employee's clearance status. Nor is there anything in the record which suggests that the agency's evaluators had any reason to doubt Ball's representation that the employee was cleared. Under these circumstances, it is not clear that we would have sustained the protest on this ground.

In negotiated procurements, contracting officials have broad discretion to take corrective action where the agency determines that such action is necessary to ensure a fair and impartial conclusion. Oshkosh Truck Corp.; Idaho Norland Corp., B-237058.2; B-237058.3, Feb. 14, 1990, 90-1 CPD ¶ 274. Thus, the agency's decision to amend the RFP and reopen negotiations with Ball and ManTech is reasonable and appropriate corrective action irrespective of the separate question of whether the action was taken in the face of a clearly meritorious protest.

Accordingly, ManTech's request for a declaration of entitlement to costs is denied.

  
for James F. Hinchman  
General Counsel