



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Moon Engineering Co., Inc.--Request for
Declaration of Entitlement to Costs

File: B-247053.6

Date: August 27, 1992

Terence Murphy, Esq., and Patrick H. O'Donnell, Esq.,
Kaufman & Canoles, for the protester.
Rhonda L. Russ, Esq., Department of the Navy, for the
agency.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

1. Request that the General Accounting Office declare the protester entitled to award of the costs of filing and pursuing the first of three separate protests filed in connection with one solicitation will not be considered where request was filed more than 10 days after the agency notified protester of corrective action taken following the filing of initial protest; request related to subsequent protests will be considered where filed within 10 days after the agency notified protester of corrective action taken in response to those protests.
2. Protester is not entitled to award of the costs of filing and pursuing two protests in connection with one solicitation where agency promptly took corrective action by canceling solicitation within 1 week after protests were filed.
3. General Accounting Office Bid Protest Regulations do not provide for award of proposal preparation costs in cases where agency has taken corrective action.

DECISION

Moon Engineering Co., Inc. (MECO) requests that our Office declare the firm entitled to recover the reasonable costs of filing and pursuing its protests concerning request for proposals (RFP) No. N00024-91-R-8535, issued by the Department of the Navy, Naval Sea Systems Command (NAVSEA). The RFP sought proposals for the phased maintenance of the USS Austin, the USS Pensacola, and the USS Portland, three LSD/LPD class vessels homeported in Norfolk, Virginia. In

three separate protests, MECO challenged the initial award to Metro Machine Corporation; objected to NAVSEA's subsequent corrective action; and objected to NAVSEA's inadvertent disclosure of MECO's proprietary protest documents to Metro. After initially taking corrective action, NAVSEA ultimately decided to cancel the solicitation.

We dismiss the request in part and deny it in part.

BACKGROUND

On December 19, 1991, MECO protested the award to our Office (B-247053), essentially arguing that NAVSEA had improperly evaluated technical and cost proposals; had failed to conduct meaningful discussions with MECO; and had created an improper auction.¹ While preparing its report on MECO's protest, NAVSEA discovered that during negotiations, MECO and another offeror, the Bethlehem Steel Corporation, were given incorrect and misleading information regarding their proposed costs. Although the agency had correctly identified for those two offerors costs for certain contract line items (CLIN) that significantly deviated from the government's estimates, NAVSEA had reversed the direction of the deviation. Specifically, NAVSEA had indicated that some costs those two offerors proposed for certain CLINs were understated, when in fact they actually exceeded the government's estimate.

During telephone conferences between the parties on January 9 and 13, 1992, the agency informed our Office that it had discovered the error, and in a January 15 letter, requested that we dismiss MECO's protest based upon the following proposed corrective action: (1) terminate for convenience the contract awarded to Metro, with the exception of the first availability on the USS Austin; (2) amend the RFP to reflect the reduction from nine to eight in the number of availabilities required; (3) reveal the proposed costs and fees all offerors submitted in response to best and final offers (BAFO) on the original nine availabilities; and (4) conduct another round of discussions with all offerors in the competition, including Metro, and request new BAFOs for the remaining eight availabilities. MECO subsequently withdrew its protest based upon NAVSEA's proposed corrective action.

¹In accordance with Federal Acquisition Regulation § 33.104(c)(2)(ii), the head of the procuring activity determined that urgent and compelling circumstances significantly affecting the interests of the United States did not permit suspending performance of the contract pending our decision on the protest, and directed Metro to continue performance of the first availability on the USS Austin.

On February 4, MECO protested to our Office the agency's implementation of the corrective action (B-247053.3). MECO asserted that in connection with requesting second BAFOs, rather than disclosing total costs proposed for the initial nine availabilities, as MECO anticipated, NAVSEA disclosed all costs and fees all offerors proposed for each CLIN and sub-line item in their initial BAFOs.² In accordance with our Bid Protest Regulations, MECO furnished a copy of its protest to the contracting agency. See 4 C.F.R. § 21.1(d) (1992). Throughout its protest, MECO expressly identified material which it considered proprietary and which should not be disclosed to any party except those admitted under the protective order issued by our Office in connection with MECO's protest. See 4 C.F.R. § 21.3(b).

Notwithstanding MECO's notice that its protest documents contained proprietary information that should be protected, NAVSEA inadvertently provided an unredacted copy of MECO's protest to Metro. NAVSEA immediately informed MECO and our Office of the disclosure. On February 7, MECO supplemented its earlier protest, this time objecting to the inadvertent disclosure of its protest documents to Metro (B-247053.4). On February 10, NAVSEA issued amendment No. 0017 canceling the RFP.³ Once NAVSEA decided to cancel the RFP, we dismissed MECO's protests (B-247053.3; B-247053.4) as academic on February 14.

On February 21, the protester filed with our Office this request for a declaration of entitlement to its costs of filing and pursuing all three of its protests (B-247053; B-247053.3; and B-247053.4). MECO also requests reimbursement of its proposal preparation costs.

DISCUSSION

Timeliness

As a preliminary matter, the agency argues that MECO's request concerning its December 19, 1991, protest (B-247053) is untimely and should not be considered since the request was filed more than 10 working days after MECO was notified of NAVSEA's intent to take corrective action. See 4 C.F.R. § 21.6(e).

²MECO also alleged that disclosing all CLIN prices rendered defective various terms of the solicitation, including the government's revised work estimates and the RFP's evaluation scheme.

³For a discussion of the propriety of the agency's decision to cancel the RFP, see Norfolk Shipbuilding & Drydock Corp., B-247053.5, June 11, 1992, 92-1 CPD ¶ 509.

NAVSEA advised MECO that it had discovered the negotiations error and of its intent to take corrective action during the telephone conferences held between the parties on January 9 and 13, 1992; the agency confirmed its proposed corrective action in a letter dated January 15. On that same day, MECO withdrew its initial protest. To be timely under our Regulations, MECO had to have filed its request for the costs of filing and pursuing its initial protest within 10 days after January 13, or by January 28. Since MECO did not file this request until February 21, we dismiss as untimely those aspects of its request pertaining to MECO's filing and pursuing its initial protest challenging the award to Metro (B-247053).

MECO argues that it should not be barred from filing its request for protest pursuit costs in connection with its initial protest because MECO's withdrawal of that protest was expressly conditioned on the agency's agreement to waive our timeliness rules in any subsequent proceeding related to this procurement. The protester points to MECO's letter withdrawing its initial protest, which MECO alleges memorializes the agreement reached between the parties during the telephone conferences of January 9 and 13.⁴

Preliminarily, we note that the agency's January 15 letter to our Office requesting that we dismiss MECO's protest based upon its proposed corrective action does not in any way suggest acquiescence in a waiver of our timeliness rules. On the contrary, the agency's letter specifically states that it would not object to MECO's "timely" filing a request for protest pursuit costs, which, as already discussed, MECO failed to do here as related to its initial protest. In any event, contrary to MECO's suggestion, and

⁴The protester's letter states in relevant part:

"MECO hereby withdraws [its protest B-247053.1] subject to the following conditions and understanding reached in telephone conference calls between [the parties]:

.

"The General Accounting Office shall dismiss [MECO's protest] without prejudice and subject to [NAVSEA's] agreement that all protest grounds, including . . . claims for protest pursuit fees (i.e., attorney and consultant fees) . . . shall be preserved without waiver or prejudice of [MECO's] right to assert such grounds in any subsequent protest of this procurement."

notwithstanding its own version of the agreement reached between the parties, agencies may not waive our timeliness requirements. See The Jonathan Corp., B-247053.7, May 15, 1992, 92-1 CPD ¶ 446.

Award of Costs for Supplemental Protests

Where an agency takes corrective action prior to our issuing a decision on the merits, we may declare the protester entitled to recover the reasonable costs of filing and pursuing the protest. 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. This provision is intended to allow the award of costs when agencies unduly delay taking corrective action in the face of a clearly meritorious protest. Oklahoma Indian Corp.--Claim for Costs, 70 Comp. Gen. 558 (1991), 91-1 CPD ¶ 558. A protester is not entitled to costs where, under the facts and circumstances of a given case, an agency takes prompt corrective action in response to the protest. Id.

Here, NAVSEA decided to take corrective action by canceling the RFP within 1 week after MECO filed its supplemental protests against the implementation of the corrective action and objecting to the inadvertent disclosure of its proprietary documents. We view such action, taken early in the protest process, as precisely the kind of prompt reaction to a protest that our Regulation is designed to encourage. It provides no basis for a determination that the payment of protest costs is warranted. See Leslie Controls, Inc.--Claim for Costs, B-243979.2, July 12, 1991, 91-2 CPD ¶ 50 (protester not entitled to award of the costs of filing and pursuing its protest where agency took corrective action within 1 month after protest was filed); Oklahoma Indian Corp.--Claim for Costs, supra (corrective action taken by an agency within 2 weeks of when the protest was filed does not constitute undue delay in taking corrective action).

The protester relies on our decision in Commercial Energies, Inc.--Recon. and Declaration of Entitlement to Costs, 71 Comp. Gen. 97 (1991), 91-2 CPD ¶ 499, to argue that since NAVSEA waited nearly 2 months after MECO filed its first protest to cancel the RFP, we should declare MECO entitled to the award of its costs. MECO also argues that since NAVSEA directed Metro to continue performance of the first availability on the USS Austin, the agency's corrective action did not provide MECO with an adequate remedy.

In Commercial Energies, we found the protester entitled to the award of its costs of filing and pursuing the protest where, notwithstanding promises of corrective action and without any explanation, the agency waited nearly 5 months

to perform the promised corrective action. By contrast here, NAVSEA initially took corrective action within 1 month after MECO filed its first protest (and within 2 weeks from when NAVSEA discovered the error in the negotiations), and ultimately decided to cancel the RFP within 1 week of MECO's filing of both its supplemental protests. In fact, NAVSEA decided to cancel the RFP within only 3 days after MECO filed its protest against the inadvertent disclosure of its proprietary protest documents to Metro. We cannot conclude from such prompt responses that NAVSEA unduly delayed taking corrective action here.

MECO's argument that the partial termination of Metro's contract following its initial protest did not provide MECO with a satisfactory remedy is an untimely attempt to revive its initial protest against the award to Metro. At the latest, MECO knew on January 15, 1992, that NAVSEA was only partially terminating the award to Metro, and that the agency would leave in place the first availability on the USS Austin.⁵ If the firm had any objections to any aspect of the agency's then proposed corrective action, MECO was required to protest within 10 working days from that date. See 4 C.F.R. § 21.2(a)(2). Since these comments were not filed until February 21, more than 1 month after MECO knew of the agency's intent to leave the first availability in place, its attempt to revive its challenge to the initial award to Metro is untimely and will not be considered. The Jonathan Corp., B-247053.7, May 15, 1992, 92-1 CPD ¶ 446.

As for MECO's request for proposal preparation costs, our revised Bid Protest Regulations do not anticipate reimbursement of protesters for such costs in cases where the agency takes corrective action. 4 C.F.R. § 21.6(e); Dynair Elecs., Inc.--Request for Declaration of Entitlement to Costs, B-244290.2, Sept. 18, 1991, 91-2 CPD ¶ 260. MECO argues, however, that 4 C.F.R. § 21.6(e) notwithstanding, it is entitled to recover its proposal preparation costs under section 21.6(d)(2).⁶


⁵MECO's January 15, 1992, letter withdrawing its initial protest confirms MECO's understanding that as part of the agency's proposed corrective action, "[NAVSEA shall] partially terminate for convenience [Metro's contract] by permitting Metro to complete only that work authorized for the USS Austin. . . ."

⁶Section 21.6(d)(2) provides as follows:

"If the General Accounting Office determines that a solicitation, proposed award, or award does not comply with statute or regulation it may declare
(continued...)"

Under section 21.6(d)(2), we will consider awarding proposal preparation costs where, based on a developed record, we sustain a protest. See, e.g., Sierra Eng'g, B-237820, Jan. 16, 1990, 90-1 CPD ¶ 58. MECO's request for costs in this case, in contrast, arises in the context of corrective action taken by the agency in response to protests, not as a result of a decision by our Office sustaining those protests. In such circumstances, section 21.(6)(e) of our Regulations limits the type of costs which may be awarded to protest costs. Our Regulations simply do not contemplate the award of proposal preparation costs in such cases.⁷

The request is dismissed in part and denied in part.


for James F. Hinchman
General Counsel

⁶ (...continued)

the protester to be entitled to reasonable costs of . . . [b]id and proposal preparation."

⁷In any case, MECO would not be entitled to these costs since it will have the opportunity to compete for the remaining availabilities under a resolicitation. See KIME Enters.--Request for Declaration of Entitlement to Costs, B-241996.5, Dec. 9, 1991, 91-2 CPD ¶ 523. The agency states that canceling the RFP and resoliciting the requirements will likely mitigate or completely eliminate any possible prejudice caused by the release of the unredacted copy of MECO's protest documents. Rather than a single solicitation for all the remaining availabilities, NAVSEA plans to issue separate solicitations for different portions of the work. NAVSEA issued an RFP on March 11, 1992, for the first of the remaining eight availabilities, which was scheduled to commence on the USS Pensacola on June 1. The agency states that it plans to issue an invitation for bids in July for the second availability scheduled for the USS Portland, and anticipates issuing an RFP for the remaining availabilities in August.