



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Carl Zeiss, Inc.--Request for Declaration of Entitlement to Costs

File: B-247207.2

Date: October 23, 1992

Douglas R. Duberstein, Esq., Hogan & Hartson, for the protester.

Capt. Paul J. Coelus, Department of the Air Force, for the agency.

Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester is entitled to the costs of filing and pursuing its protest where the agency failed to promptly investigate the protester's allegations until after the protester undertook the time and expense to file comments on the agency's report and did not take corrective action in response to the clearly meritorious protest until 62 days after the protest was filed, despite having access, at the time the protest was filed, to the evidence which supported the validity of the protest.

DECISION

Carl Zeiss, Inc. requests entitlement to the reimbursement of the costs of pursuing its protest against the award of a contract to JEOL USA, Inc., under request for proposals (RFP) No. F41636-91-R0130, issued by Lackland Air Force Base (AFB), Texas, for a high resolution electron microscope. Zeiss contends that the Air Force unduly delayed taking corrective action in response to the protest.

We find that Zeiss is entitled to the costs of filing and pursuing its protest, including reasonable attorneys' fees.

The RFP was issued on August 14, 1991, on a brand name or equal basis, to obtain a high resolution electron microscope for Wilford Hall Medical Center at Lackland AFB. The RFP called for a Carl Zeiss EM 900 PC/ST electron microscope or

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equal. The RFP listed six salient characteristics, including the following three requirements:

"(b) Must provide the following magnifications:

- (i) High contrast (HC) mode: 165X - 100K.
- (ii) High Resolution (HR) mode: 150X - 250K.
- (iii) High Magnification (HM) mode: 400K.

"(d) Must provide a 'Turbo-Molecular Pumping System.'

"(e) Must be compatible with the existing Carl Zeiss EM 10A, Electron Microscope to assure smooth transitions between scopes to allow specimens worked up on one scope [to] be retrospectively processed on the other with exact reproducibility."

On September 19, 1991, the Air Force received proposals from Zeiss and JEOL in response to the RFP. Zeiss proposed to furnish the brand name product, while JEOL proposed to furnish a JEOL manufactured microscope, the JEM-100CXII, an allegedly equal product. The Air Force initially determined JEOL's microscope to be technically unacceptable for failing to meet salient characteristic (e). After conducting discussions during October with JEOL for clarification of its microscope's capabilities, the Air Force determined on November 19 that JEOL's microscope met the RFP requirements. The Air Force requested that best and final offers (BAFO) be submitted by December 17. JEOL submitted the lower priced BAFO of \$139,500 while Zeiss submitted a BAFO price of \$165,269. On December 31, the Air Force awarded JEOL the contract.

On January 13, 1992, Zeiss filed a protest at our Office, contending that JEOL's microscope did not meet the three salient characteristics listed above. In accordance with 4 C.F.R. § 21.3(c) (1992), the Air Force submitted its report on the protest to our Office on February 14, 25 working days from receipt of Zeiss's protest. The Air Force reported that Zeiss's protest should be denied, essentially arguing that JEOL's product met the RFP requirements. In particular, the Air Force asserted that: (1) even though JEOL's microscope utilized a cascade diffusion pumping system, the JEOL pumping system is equivalent to the turbo molecular pumping system of the brand name product; and (2) despite not being compatible with the Zeiss EM 10A specimen and film holders as well as the television recording system, the JEOL microscope was functionally equivalent to Zeiss's microscope.

Zeiss filed comments on February 28 specifically challenging the agency's assertions. Although Zeiss abandoned the contention that JEOL's microscope failed to meet the section (b) salient characteristic, Zeiss reiterated that the Air Force had improperly determined that JEOL's microscope met the other two requirements at issue. Zeiss asserted that the Air Force had erroneously determined that JEOL's microscope met the section (d) characteristic because JEOL's microscope indisputably did not offer a turbo molecular pumping system. Zeiss also argued that the record established that JEOL did not meet the section (e) compatibility/reproducibility requirement, as evidenced by JEOL's admission during the evaluation that its microscope was not compatible with the Zeiss EM IOA specimen holders and would not produce exact reproducibility with the existing Zeiss microscope, and the Air Force's initial determination that JEOL did not meet these requirements.

On April 17, after 62 working days had passed from the date the protest was filed with our Office, and more than 2 months after it filed its report, the Air Force informed us of its decision to terminate JEOL's contract for the convenience of the government. The termination was the result of a critical review that the contracting officer conducted with hospital personnel, which was initiated after the receipt of Zeiss's comments on the protest report. This review concluded that JEOL's microscope did not meet the requirements for a turbo molecular pumping system and compatibility with the existing Zeiss microscope. The Air Force concluded that these requirements were overstated and did not accurately express the government's minimum needs, and that it intended to resolicit for the microscope.

Zeiss contends that it is entitled to recover the costs of filing and pursuing the protest under section 21.6(e) of our Bid Protest Regulations. We may declare a protester entitled to costs under that provision 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. Oklahoma Indian Corp.--Claim for Costs, 70 Comp. Gen. 558 (1991), 91-1 CPD ¶ 558.

The Air Force argues that the protest did not appear clearly meritorious until after the Air Force learned of the error in its original position from reading the protester's comments on the agency report received on March 5. The Air Force asserts that the initial opposition to the protest was not unreasonable, since, at that time, the Air Force considered Zeiss's interpretation of the RFP requirements to be unduly restrictive. The Air Force contends that our Office should measure the promptness of the Air Force's corrective action from the March 5 date, and since

corrective action was taken only 5 weeks after that date, its corrective action was not unduly delayed.

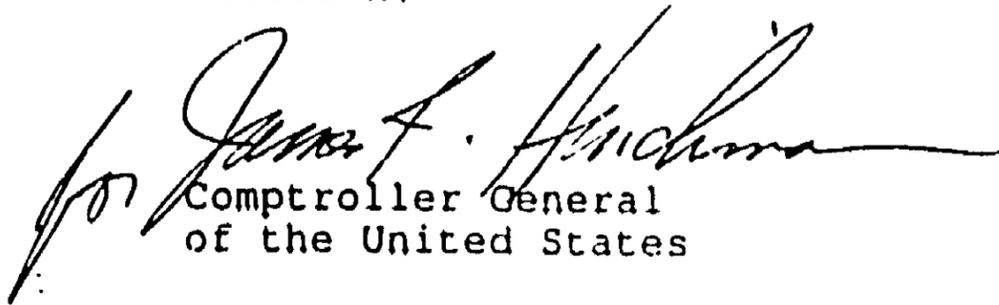
Where, as here, the agency admits that corrective action was taken in response to a meritorious protest, we must decide whether the agency acted promptly. In doing so, we review the record to determine whether the agency took appropriate and timely steps to investigate and resolve the impropriety. See David Weisberg--Request for Declaration of Entitlement to Costs, B-246041.2, Aug. 10, 1992, 71 Comp. Gen. ____, 92-2 CPD ¶ 91.

Based upon our review of the record, we find that the Air Force did not act promptly in investigating Zeiss's allegations. Although the Air Force argues that the protest did not appear clearly meritorious until after review of the protester's comments, the Air Force has not offered a reasonable explanation for why it waited until after Zeiss undertook the time and expense of filing comments before investigating Zeiss's detailed allegations. While the Air Force has argued that it initially considered Zeiss's interpretation of the specifications to be overly restrictive, the record reveals that the agency now accepts Zeiss's interpretation of the specifications, which Zeiss put forth in its initial protest and with which JEOL's offered products cannot comply. The Air Force does not explain how it could have reasonably interpreted the specifications as not including the salient characteristics that were expressly set forth. Indeed, even before Zeiss's protest was filed, the Air Force suspected that JEOL's microscope did not meet the RFP salient characteristics, in particular the requirement for compatibility with the existing Zeiss microscope. As for the additional information provided in Zeiss's comments, the Air Force has not stated why it was precluded from undertaking an investigation upon receipt of Zeiss's January 13 protest, since Zeiss's comments merely addressed issues that Zeiss initially protested.

In sum, it is apparent that the Air Force could have obtained access to the very evidence which supported the validity of the protest at its outset, had it promptly undertaken an investigation of the protest contentions before filing its report on the protest. Given the Air Force's pre-award concerns regarding the acceptability of JEOL's proposal, and Zeiss's protest paralleling these concerns, we find that the only reason that the Air Force was not earlier aware of the clearly meritorious nature of this protest was because it delayed conducting its critical review of the procurement until well into the protest process.

Under the circumstances, we find that the agency's delay in investigating the merits of Zeiss's protest until after Zeiss undertook the time and expense of filing comments on the protest warrants the payment of protest costs to Zeiss. See David Weisberg--Request for Declaration of Entitlement to Cost, supra.

Accordingly, we declare that Zeiss is entitled to the costs of filing and pursuing the protest, including reasonable attorneys' fees. Zeiss should submit its claim for costs directly to the agency within 60 working days of receipt of this decision.


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