



Comptroller General  
of the United States

3011910

Washington, D.C. 20548

# Decision

**Matter of:** PRAXAIR, Inc.--Entitlement to Costs

**File:** B-253503.2

**Date:** October 19, 1993

Kenneth S. Kramer, Esq., John W. Chierichella, Esq., and Douglas E. Perry, Esq., Fried, Frank, Harris, Shriver & Jacobson, for the protester.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

Where, in response to protest against terms of solicitation, agency issues amendment addressing all of protester's concerns prior to time for submission of agency report, protester is not entitled to the costs of filing and pursuing protest.

## DECISION

PRAXAIR, Inc. requests that we find it entitled to the costs of filing and pursuing its protest against the terms of request for proposals (RFP) No.10-S-0046-2, issued by the National Aeronautics and Space Administration (NASA) to acquire liquid hydrogen. PRAXAIR argues that, since NASA took corrective action in direct response to its protest, it is entitled to recover its protest costs.

We deny the request.

PRAXAIR initially filed its protest in our Office on May 20, 1993, alleging that several portions of the RFP improperly restricted competition for the acquisition. In accordance with our Bid Protest Regulations, 4 C.F.R. § 21.3(c) (1993), NASA was required to file a report responding to the protest no later than June 25. NASA provided our Office with a complete report and provided the protester and interested parties redacted versions of the report on that date. The report showed that on June 21, NASA had issued an amendment to the RFP addressing the concerns of the protester.

After receiving its redacted version of the report, PRAXAIR asked that we furnish its outside counsel (who had been admitted to a protective order issued in connection with the case) with the protected documents included with the agency

report. In response to that request, our Office asked PRAXAIR to submit a statement of any protest grounds remaining in light of the agency's amendment to the RFP. The protester declined to provide the requested statement, maintaining that the protected documents were necessary to its determination of whether any protest grounds remained.

In our decision, PRAXAIR, Inc., B-253503, July 13, 1993, 93-2 CPD ¶ 19, we dismissed the protest, finding that NASA's solicitation amendment apparently had satisfied all of PRAXAIR's concerns. We noted in our decision that it was unnecessary for PRAXAIR to review the protected documents, since its initial protest related to the terms of the RFP and any new or outstanding bases for protest would necessarily be evident from a reading of the agency's amendment.

PRAXAIR now asks that we find it entitled to the costs of filing and pursuing its bid protest. The protester maintains that because the agency's corrective action was in direct response to its protest, it is entitled to its protest costs. In addition, PRAXAIR objects to our earlier dismissal of the protest without first providing it access to the protected documents. According to the protester, our refusal to provide it with the documents was improper and inconsistent with our Bid Protest Regulations.

Our regulations, 4 C.F.R. § 21.6(e), provide that we may declare a protester entitled to the cost of filing and pursuing its protest where an agency takes corrective action in response to the protest. A protester may be entitled to such costs where, based on the circumstances of the case, the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. PLX, Inc.--Request for Declaration of Entitlement to Costs, B-251575.2, Mar. 10, 1993, 93-1 CPD ¶ 224.

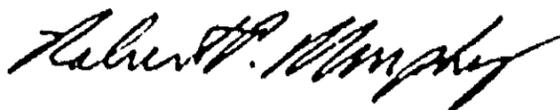
PRAXAIR's protest raised a large number of objections to the terms of the RFP. In our view, NASA needed a reasonable amount of time to assess and respond to all of the allegations, and to satisfy itself that the solicitation was otherwise proper. NASA issued its corrective action amendment some 21 working days after the protest was filed (4 working days before NASA's report was due in our Office), and we consider it to have acted promptly in view of the number and complexity of protest issues raised. Since NASA did not unduly delay corrective action in the face of a clearly meritorious protest, we have no basis for awarding PRAXAIR its protest costs.

Regarding PRAXAIR's concern over our dismissal of the protest without affording it access to the protected materials, that action was consistent with our regulations. The

Competition in Contracting Act, 31 U.S.C. § 3553(f), requires agencies to disclose in bid protests only those documents "relevant to a protested procurement action," and our implementing regulations similarly limit required disclosure to "relevant" documents. 4 C.F.R. § 21.3(c), (d) and (e). The regulatory provisions governing the issuance of protective orders are intended to provide a protester's attorneys with access to "relevant" procurement sensitive or privileged documents where access by the protester itself would give it a competitive advantage. This relevancy requirement is particularly important with respect to releases of documents under a protective order, because such a release necessarily creates some risk of an inadvertent disclosure of sensitive information. Our admission of attorneys to a protective order reflects our determination that this risk is sufficiently minimal to permit the admitted party to review the materials, but in view of the presence of such a risk, we do not require disclosure of documents unnecessary or irrelevant to the outcome of the case.

In this case, we asked PRAXAIR for a statement of the outstanding protest issues following NASA's corrective action amendment. We made this request in order to find out whether we should continue considering the protest, and if so, to determine what information was relevant and thus releasable under the protective order. The protester had the agency's amendment, and needed no other information to identify which of its concerns had not been addressed by the agency's modification to the solicitation. PRAXAIR needed simply to review the terms of the amendment and provide a statement of remaining issues. We concluded that PRAXAIR no longer took objection to the procurement and we dismissed its protest when the protester declined to identify any continuing or new problem with the solicitation. This action was consistent with our obligation to provide for the "inexpensive and expeditious resolution of protests," and to dismiss "frivolous" protests and those which do not state valid bases for protest. 31 U.S.C. § 3554(a)(1) and (3).

The request for costs is denied.



for James F. Hinchman  
General Counsel