



Comptroller General
of the United States

Washington, D.C. 20548

348743

Decision

Matter of: Neal R. Gross & Company, Inc.--Entitlement to
Costs

File: B-254033.4

Date: September 30, 1993

James McAleese, Jr., Esq., McAleese & Associates, for the
protester.

William E. Thomas, Jr., Esq., Department of Veterans
Affairs, for the agency.

Tania L. Calhoun, Esq., and Christine S. Melody, 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 to the General Accounting Office (GAO)
where agency took corrective action 16 working days after
protest was filed with GAO; protester was not required to
expend resources to convince the agency, or our Office, of
the merits of the protest.

DECISION

Neal R. Gross & Company, Inc. requests that our Office
declare the firm entitled to recover the reasonable costs
of filing and pursuing its protest concerning an alleged
solicitation defect contained in request for quotations
(RFQ) No. 101-93-4-034-0065, issued by the Department of
Veterans Affairs (VA) for court reporting services for
proceedings of the VA Board of Contract Appeals.

We deny the request.

The RFQ was issued by the VA after it terminated the
predecessor contract for the services at issue, which had
been awarded to Gross. Gross's contract was terminated
and the requirement resolicited based on the contracting
agency's determination--apparently in response to an agency-
level protest filed by another bidder--that the predecessor
RFQ was defective for failing to include any estimate of
the required services by category according to transcript
delivery time. On July 12, 1993, Gross filed a timely
protest in our Office arguing that the RFQ's failure to
contain an estimate of how many diskettes might be required
under the resulting contract rendered the solicitation

defective.¹ Sixteen working days later, on August 3, the VA advised our Office of its determination that it was not sufficiently clear how many diskettes might be required under the RFQ. On August 4, the agency amended the RFQ to include an estimate for the diskettes and proceeded to seek additional bids upon the amended requirement.² In response to this corrective action, Gross withdrew its protest on August 5.

Gross argues that it is entitled to recover its protest costs because the agency took its corrective action in direct response to the specific allegations raised in its protest.

Where an agency takes corrective action prior to our issuing a decision on the merits of a protest, we may declare the protester entitled to recover the reasonable costs of filing and pursuing the protest. 4 C.F.R. § 21.6(e) (1993); Metters Indus., Inc.--Entitlement to Costs, B-240391.5, Dec. 12, 1991, 91-2 CPD ¶ 535. We will find an entitlement to costs only where an 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.

Here, the VA notified our Office of its intention to take corrective action on August 3, 16 working days after the protest was filed. 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

¹This protest was the second of three protests filed by Gross in connection with this solicitation. In both of the other protests, B-254033 and B-254033.3, Gross primarily argued that the VA improperly considered the agency-level protest since it was untimely filed, and improperly failed to allow Gross an opportunity to respond to the agency-level protest. We concluded that both protests failed to state a valid basis since, even accepting Gross's contention that there were procedural errors in the VA's consideration of the agency-level protest, Gross made no showing as to why the agency decision to cancel and resolicit was improper. As a result, we dismissed the protests on July 13 and July 29, respectively, prior to obtaining agency reports.

²On August 13, Gross was awarded the contract under this solicitation.

protest costs is warranted. Cantu Servs., Inc.--Entitlement to Costs, B-250592.2, Feb. 23, 1993, 93-1 CPD ¶ 164 (protester not entitled to award of protest costs where agency took corrective action 15 days after protest was filed); Aquidneck Mgmt. Assocs., Inc.--Entitlement to Costs, B-250479.2, Mar. 17, 1993, 93-1 CPD ¶ 240 (protester not entitled to award of protest costs where agency took corrective action 17 days after protest was filed).

Gross asks that our Office exercise its discretionary authority to declare the firm entitled to recover its protest costs, notwithstanding the promptness of the agency's corrective action, because of the "unique circumstances" of this protest. Gross states that while the total maximum value of services ordered under the blanket purchase agreement resulting from this solicitation will be less than \$8,500, the protest costs incurred by the firm to date are approximately \$10,554. Gross argues that our failure to declare it entitled to recover its protest costs will result in undue hardship to the firm.

Our concern in promulgating 4 C.F.R. § 21.6(e) was that some agencies were not taking corrective action in a reasonably prompt fashion, and we believed that providing for the award of costs in cases where the agency 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). As we stated in the explanatory material accompanying the promulgation of the final regulation, deciding whether to award costs is appropriately based on the circumstances of each case, including when in the protest process the decision to take corrective action was made and communicated to us and the protester. 56 Fed. Reg. 3759, 3764 (1991); Pulse Elecs., Inc.--Entitlement to Costs, B-243625.3, Aug. 30, 1991, 91-2 CPD ¶ 222. Gross correctly asserts that we have acknowledged that there may be circumstances where the award of costs would be appropriate even where corrective action was taken prior to the submission date for the agency report. Id. However, we believe that, in many cases, there would be little incentive for agencies to provide timely corrective action if they were to incur the same costs in settling a protest as they would going through the entire process and losing on the merits of our final decision. Consequently, our Regulations do not contemplate reimbursement except in cases of undue delay by agencies. Instrumentation Laboratory Co.--Entitlement to Costs, B-246819.2, June 15, 1992, 92-1 CPD ¶ 517.

Here, Gross concedes that the corrective action taken by the VA was not unduly delayed; the agency verbally advised Gross of its intention to take corrective action on August 2, 15 working days after the protest was filed. Moreover, we do not agree that the circumstances of this protest warrant reimbursement of Gross's protest costs. While it is not clear exactly why protest costs in the amount claimed by Gross were incurred,¹ the record shows that Gross has not been required to incur costs other than those associated with its initial filing to convince the agency that the RFQ was flawed. For example, the VA did not file an agency report defending the RFQ, so Gross was not forced to incur the expense of responding to the agency report. Nor has Gross incurred the expense of any additional filings related to the merits of its protest. See KPMG Peat Marwick--Entitlement to Costs, B-251902.2, June 8, 1993, 93-1 CPD ¶ 443.

Since we find that the purpose of section 21.6(e)--to encourage agencies to take corrective action in response to meritorious protests before protesters have expended additional unnecessary time and resources pursuing their claims--was served here, see, e.g., Crown Eng'g--Entitlement to Costs, B-251584.2, May 24, 1993, 93-1 CPD ¶ 403, we do not find sufficient circumstances to declare Gross entitled to recover its protest costs.

The request is denied.



James F. Hinchman
General Counsel

¹As Gross correctly states, our Bid Protest Regulations do not require a protester to provide certified documentation of its costs until after we have determined it entitled to such costs. 4 C.F.R. §§ 21.6(e), 21.6(f)(1).