



Comptroller General  
of the United States  
Washington, D.C. 20548

# Decision

**Matter of:** Adventure Tech, Inc.--Reconsideration and Entitlement to Costs  
**File:** B-253520.2; B-253520.3  
**Date:** February 9, 1994

Ronald K. Henry, Esq., Kaye, Scholer, Fierman, Hays & Handler, for the protester.  
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

1. Request for reconsideration of a decision denying a protest that the specifications in a commercial item acquisition for raingear are unclear and preclude competition on an equal basis is denied where the request fails to show that the original decision erroneously concluded that the specifications adequately describe the products sought.
2. Protester is not entitled to the costs of filing and pursuing its protest under 4 C.F.R. § 21.6(e) (1993) by virtue of an agency's issuance of an amendment during the pendency of the protest that incorporates the proper warranty provision in place of an inappropriate warranty provision where the protester at no time argued that the solicitation failed to contain the proper warranty provision.

## DECISION

Adventure Tech, Inc. requests reconsideration of our decision in Adventure Tech, Inc., B-253520, Sept. 29, 1993, 93-2 CPD ¶ 202, which denied Adventure Tech's protest of the terms of invitation for bids (IFB) No. DAKF23-93-B-0048, issued by the Department of the Army for lightweight rain jackets and trousers. Adventure Tech also requests that we declare it entitled to its protest costs because of an amendment issued by the agency that added the proper warranty clause to the IFB.

We deny the request for reconsideration and the request for a declaration of entitlement to costs.

The IFB, issued on April 12, 1993, contemplates the award of a firm, fixed-price contract with six contract line items (CLIN). CLIN Nos. 0001 through 0003 are for rain jackets in sizes large, medium, and small, respectively, and CLIN Nos. 0004 through 0006 are for rain trousers in sizes large, medium, and small, respectively. The IFB requires that the successful bidder furnish "commercial items," that is, "items regularly used in the course of normal business operations." See Defense Federal Acquisition Regulation Supplement (DFARS) §§ 252.211.7000-7005. As amended, the IFB specifies in this regard that:

"[1]line item [Nos.] 0001 through 0003 provide full length light weight rain jacket, camouflage woodland pattern, jacket shall be machine washable, waterproof, moisture vapor permeable, with a minimum of two front pockets with closures, elastic or velcro sleeves."

The IFB contains a similar notation applicable to CLIN Nos. 0004 through 0006. During the course of the protest (after receipt of the agency report and the protester's comments thereon), the agency, by amendment, incorporated into the IFB the standard warranty for commercial items as contemplated by DFARS § 211.7005(b)(27), and set forth at Federal Acquisition Regulation (FAR) § 52.246-17, Alternate I.<sup>1</sup> Prior to this amendment, the IFB contained a warranty

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<sup>1</sup>The warranty provision set forth at FAR § 52.246-17, Alternate I, as included in the solicitation here, provides, in pertinent part:

"(1) Notwithstanding inspection and acceptance by the [g]overnment of supplies furnished under the contract or any condition of this contract concerning conclusiveness thereof, the Contractor warrants that for one (1) year all supplies furnished--

"(i) Are of quality to pass without objection in the trade under the contract description;

"(ii) Are fit for the ordinary purposes for which the supplies are used;

"(iii) Are within the variations permitted by the contract, if any, of an even kind, quality, and quantity within each unit and among all units;

(continued...)

provision--FAR § 52.246-17--not intended for use in commercial item acquisitions.

Adventure Tech protested that the IFB precludes competition on an equal basis because it fails to provide any guidance as to the minimum standards for, among other things, "waterproofness," "moisture vapor permeability," and "durability." The protester also argued that the IFB is deficient because it does not set forth any design and construction requirements, and questioned whether the IFB is soliciting bids for "tailored military style jackets or shapeless poncho-type garments," as well as what constitutes small, medium, and large sizes.

We denied Adventure Tech's protest based on our conclusion that the agency had adequately described its needs in terms ordinarily used in the commercial marketplace in the specifications for the raingear. We noted that the agency's effort here is consistent with the policy set forth by Congress that Department of Defense (DOD) agencies and the National Aeronautics and Space Administration "promote the use of commercial products whenever practicable," 10 U.S.C. § 2301(b)(6) (1988), and the related requirement that, to the maximum extent practicable, DOD agencies state their needs in functional or performance terms or essential physical characteristics and satisfy their needs by the competitive acquisition of nondevelopmental/commercial items. 10 U.S.C. § 2325(a) (1988 & Supp. IV 1992); DFARS § 211.7004-1(d).

We determined that Adventure Tech had not established that vendors would not be able to compete intelligently or on a common basis because of the lack of specificity of the item description. Nothing in the record suggested that the protester or other potential bidders would be unable to submit bids for commercial raingear which meets the agency's stated requirements for rain jackets and trousers--that is, raingear "of quality to pass without objection in the trade" as, for example, waterproof and moisture vapor permeable, and "fit for the purposes for which the [raingear will be] used." We concluded that given the agency's discretion in defining its minimum needs, see Sturm, Ruger & Co., B-250555, Feb. 2, 1993, 93-1 CPD ¶ 92, and the DOD preference for acquiring commercial items, the agency has adequately stated its needs "in terms of

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<sup>1</sup>(...continued)

"(iv) Are adequately contained, packaged, and marked as the contract may require; and

"(v) Conform to the promises or affirmations of fact made on the container."

performance required and form, fit and function." DFARS § 211.7004-1(d).

In its request for reconsideration, Adventure Tech again argues that the IFB is unclear and precludes competition on an equal basis because it does not provide any guidance as to the minimum standards for "waterproofness" and moisture vapor permeability, and fails to adequately inform bidders of the agency's minimum needs with regard to design and construction, pocket sizes, or garment sizes. While there may be a broad range of meanings for "waterproofness" and moisture vapor permeability (and the other terms in the item description), Adventure Tech has still not shown that these terms, as used in the commercial market place, fail to adequately describe the agency's needs such that vendors will be unable to provide raingear "of quality to pass without objection in the trade" and "fit for the ordinary purposes for which [the raingear will be] used."

Under our Bid Protest Regulations, to obtain reconsideration the requesting party must show that our decision may contain either errors of fact or law or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.12(a) (1993). Adventure Tech's mere repetition of its argument made during our consideration of its original protest that the IFB precludes competition on an equal basis because the terms of the IFB are unclear, and mere disagreement with our decision, do not meet this standard. R.E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274.

Adventure Tech also claims entitlement to recover its protest costs pursuant to section 21.6(e) of our Bid Protest Regulations, 4 C.F.R. § 21.6(e). That section provides for the recovery of protest costs in appropriate circumstances where an agency takes corrective action in response to a clearly meritorious protest. See PAI Corp. et al., B-244287.5 et al., Nov. 29, 1991, 91-2 CPD ¶ 508. The protester contends that the agency's issuance of amendment No. 0002 to the IFB, which substituted the standard warranty clause for commercial item acquisitions, FAR § 52.246-17, Alternate I, for the general warranty provision for noncomplex items, FAR § 52.246-17, was in response to Adventure Tech's protest.

The protester, however, did not argue at any time during the consideration of its protest that the IFB as issued was defective because it erroneously contained the general warranty provision for noncomplex items, rather than the standard warranty provision for commercial item acquisitions as required by the FAR. We thus do not agree that the agency's issuance of amendment No. 0002 to the IFB evidenced that the agency was taking corrective action in response to

Adventure Tech's protest. See Tri-Ex Tower Corp.--Recon.,  
B-245877.2, Mar. 23, 1993, 93-1 CPD ¶ 258. Accordingly, we  
do not find that Adventure Tech is entitled to the costs of  
pursuing its protest.

The request for reconsideration and claim for costs are  
denied.

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Acting General Counsel