

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

# Decision

**Matter of:** Digital Systems Group, Inc.--Entitlement to Costs

**File:** B-257835.2

**Date:** April 3, 1995

John W. Fowler, Jr., Esq., Blank, Rome, Comisky & McCauley, for the protester.  
Gary Winter, Esq., Agency for International Development, for the agency.  
Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

Protester is not entitled to reimbursement of protest costs where the agency's cancellation of the solicitation, which rendered the protest academic, was not the result of the protest.

## DECISION

Digital Systems Group, Inc. (DSG) requests that our Office declare it entitled to reimbursement of the reasonable costs of filing and pursuing its protest challenging the terms of letter of interest (LOI) No. OP/A/AOT-LOI-94-I-005, issued by the United States Agency for International Development (AID) for computer software and support services.

We find that DSG is not entitled to protest costs.

On May 10, 1994, AID issued the LOI to all firms holding contracts under the General Services Administration (GSA) multiple-award schedule contracts program for financial management systems software (FMSS). See Federal Information Resources Management Regulation (FIRMR) § 201-39.804-4. The LOI contemplated issuance of a delivery order under the contract of the firm whose proposal was selected for award.

The FMSS Schedule, which is awarded by GSA, is a multiple-award schedule for commercially available accounting/financial management systems software packages to modernize and standardize the federal government's financial management systems. Unless a waiver is obtained from GSA, FIRMR § 201-39.804-3(c), use of the FMSS Schedule is mandatory for all federal executive agencies, including the Department of Defense, for acquisition of commercial

software for primary accounting systems and for the acquisition of services and support related to the implementation of such software.

In its protest, DSG argued that AID should have set aside the LOI for exclusive small business participation. It also contended that many of the specific terms of the LOI were unduly restrictive or otherwise improper. For example, it alleged that some terms and conditions of the LOI, such as delivery order terms, were improper because they were inconsistent with terms of the FMSS Schedule. DSG also challenged as unduly restrictive of competition the amount of experience that the LOI required proposed personnel to possess.

After the agency had filed its report on the protest to our Office and DSG had submitted its comments on that report, AID canceled the LOI. AID stated that it was taking this action because it did not receive any proposals that satisfied the LOI requirements; the one proposal which was received failed to address certain material LOI requirements. Because cancellation of the LOI rendered the protest academic, we closed our file without further action.

DSG contends that it is entitled to recover the costs of filing and pursuing its protests, including reasonable attorneys' fees, under section 21.6(e) of our Bid Protest Regulations, 4 C.F.R. § 21.6(e) (1995). Under that provision, we may declare a protester entitled to costs, including reasonable attorneys' fees, where, based on the circumstances of the case, we determine 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.

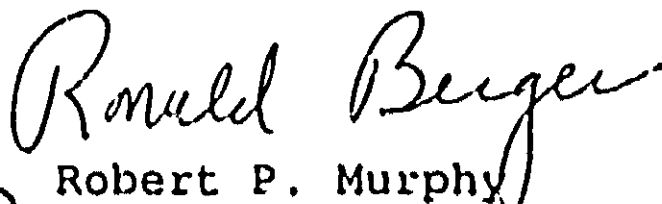
AID argues that cancellation of the LOI was not corrective action because it was not taken in response to the protest. Where an agency takes action that renders a protest academic for reasons unrelated to the protest allegations, the agency's action does not constitute corrective action, that is, the agency action does not indicate that the agency recognizes the merit of the protest and is taking the action to remedy the impropriety identified by the protester. Accordingly, in such circumstances, there is no basis to award costs. See, e.g., Loral Fairchild Corp.--Entitlement to Costs, B-251209.2, May 12, 1993, 93-1 CPD ¶ 378.

Here, DSG argues that the absence of proposals satisfying the LOI requirements demonstrates that those requirements were unduly restrictive of competition, and thus proves the merit of its protest. We disagree. While the receipt of a number of compliant proposals might have indicated that the challenged requirements did not unduly restrict competition,

see, e.g., Machinewerks, Inc., B-258123, Dec. 12, 1994, 94-2 CPD ¶ 238, the converse may not be inferred. We cannot ascertain from the record why no technically acceptable proposals were received; firms decide not to submit proposals for many reasons, and DSG's hypothesis that the LOI specifications deterred potential offerors is no more than speculation.

More importantly, even if it could be determined that it was the specifications challenged by DSG which deterred FMSS contractors from submitting proposals, this would not establish that those specifications were improper. Solicitation requirements, even ones that preclude some firms from competing, are not improper as unduly restrictive of competition unless they exceed the agency's legitimate needs. See 41 U.S.C. § 253a(a)(2) (1988); Corbin Superior Composites, Inc., B-242394, Apr. 19, 1991, 91-1 CPD ¶ 389. The record provides no basis to conclude that the LOI specifications exceeded AID's legitimate needs.<sup>1</sup>

In short, the fact that AID canceled the LOI does not establish that the protest was clearly meritorious. For that reason, DSG is not entitled to reimbursement of its protest costs.

  
 for Robert P. Murphy  
 General Counsel

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<sup>1</sup>If the specifications do reflect the agency's legitimate needs, the absence of proposals from FMSS contractors could provide a basis for the agency to obtain a waiver from GSA in order to solicit offers outside the framework of the FMSS program. FIRMR § 201-39.804-3(c).