



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: El Paso Analytics, Inc.--Entitlement to Costs

File: B-274315.2

Date: October 18, 1996

Thomas L. McGovern III, Esq., and S. Gregg Kunzi, Esq., Hogan & Hartson L.L.P, for the protester.

Jerold D. Cohen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting agency terminated delivery order issued under a small disadvantaged business's section 8(a) contract 3 weeks after another section 8(a) firm protested that the order was outside the contract's scope and denied the protester the chance to compete for the work. Protester is not entitled to protest costs notwithstanding its section 8(a) status since the General Accounting Office's concern with respect to entitlement claims is whether the contracting agency reacted quickly in response to a protest filing to review its actions and correct an impropriety, and in this case corrective action was taken promptly, early in the protest process.

DECISION

El Paso Analytics, Inc. requests that our Office recommend the payment of El Paso's costs of filing and pursuing its protest of the award of a delivery order to Innovative Logistics Techniques, Inc. (Innolog) under contract No. DAAB07-95-D-H004 with the Army's Communications-Electronics Command (CECOM).

We deny the request.

El Paso protested the delivery order, which was for warehousing, maintenance, and inventory services, as being outside the scope of Innolog's contract on August 23, 1996. On September 12 the agency terminated the order and asked that we therefore dismiss the protest as academic, which we did on September 20.

Our Bid Protest Regulations, § 21.8(e), 61 Fed. Reg. 39039, 39046 (1996) (to be codified at 4 C.F.R. § 21.8(e)), provide that we may recommend that an agency pay protest costs, including attorneys' fees, where the agency decides to take corrective action in response to a protest. El Paso argues that even though CECOM corrected its procurement error soon after El Paso protested, El Paso is entitled to costs both because the protest was clearly meritorious, and based on "special circumstances":

"This protest involved CECOM's improper manipulation and avoidance of procurement regulations designed specifically to benefit small disadvantaged businesses. El Paso is a small disadvantaged business There are compelling policy reasons why an agency should be held to a stricter standard in assessing the timeliness of corrective action where the procurement impropriety arises from an improper attempt to avoid regulations aimed at assisting small disadvantaged businesses. . . ."

A decision whether to award costs in a particular case is based primarily on where in the protest process the decision to take corrective action was made and communicated. See Pulse Electronics, Inc.--Request for Declaration of Entitlement to Costs, B-243625.3, Aug. 30, 1991, 91-2 CPD ¶ 222. Our Regulations do not envision the payment of costs in every circumstance; rather, the provision was adopted to encourage agencies to take corrective action in a reasonably prompt fashion. Thus, we will recommend payment of protest costs only where the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. See Diez Management Sys., Inc.--Entitlement to Costs, B-250831.3, Apr. 13, 1993, 93-1 CPD ¶ 313.

In its protest El Paso stated that the delivery order work added to Innolog's section 8(a)¹ contract--which El Paso termed an "'omnibus' indefinite delivery support contract" for technical services--had been the subject of El Paso's own expiring 8(a) contract with CECOM. El Paso's protest basis was that the added work was outside the scope of Innolog's contract, and that CECOM's action improperly denied El Paso the opportunity to compete for it or to be considered for a sole-source 8(a) award to continue its performance. Notwithstanding El Paso's point that in determining protest cost entitlement an agency's procurement error should be viewed particularly critically where small disadvantaged businesses are involved, our concern with respect to entitlement claims is, as stated above, whether the contracting agency reacted quickly in response to a protest filing to review its actions and correct an impropriety. Here, the agency terminated the protested delivery order 3 weeks after the protest was filed. Such corrective action, taken early in the protest process, is precisely the kind of prompt reaction to a protest

¹Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1994), authorizes the Small Business Administration to enter into contracts with government agencies and arrange for the performance of the contracts by letting subcontracts to socially and economically disadvantaged small business concerns.

that our Regulations are designed to encourage. See Special Sys. Servs., Inc.--
Entitlement to Costs, B-252210.2, June 8, 1993, 93-1 CPD ¶ 445.

El Paso's request is denied.

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