



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: LORS Medical Corporation--Entitlement to Costs

File: B-270269.2

Date: April 2, 1996

Jacob B. Pompan, Esq., and Gerald H. Werfel, Esq., Pompan, Ruffner & Werfel, for the protester.

Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for entitlement to protest costs is denied where the agency promptly took corrective action in response to a protest by the due date for the agency report. Protester's approach for determining the promptness of the agency's corrective action and whether the protester is entitled to recover its protest costs--by measuring the time period from the improper evaluation of its proposal and the elimination of its proposal from the competitive range to the time when the corrective action was taken--is not a viable approach since it could have the effect of discouraging such corrective action rather than encouraging it.

DECISION

LORS Medical Corporation requests that our Office recommend that the Department of Veterans Affairs (VA) pay LORS the reasonable costs of filing and pursuing its protest, including attorneys' fees. On October 23, 1995, LORS protested the evaluation of its proposal, the elimination of its proposal from the competitive range, and the subsequent award by the VA to Red Ball Medical Supply, Inc. under request for proposals No. 667-21-96. By letter dated November 27, the day the agency's administrative report responding to the protest allegations was due, the VA notified our Office that it was taking corrective action in response to its "review of the procurement [which] revealed flaws in the evaluation process of the proposals." Specifically, the VA directed the contracting officer to reevaluate proposals, to conduct discussions with all offerors, including LORS, whose proposals were either acceptable or capable of being made acceptable, and to request best and final offers from all competitive range offerors, including LORS. The VA stated that if a firm other than Red Ball was in line for award, the contracting officer would terminate Red Ball's contract and make an award to the other firm. In light of the corrective action, the VA requested that we dismiss LORS' protest as academic. On December 5, since the VA was granting the relief requested by LORS, that is, placing

its proposal in the competitive range for purposes of conducting discussions, we dismissed LORS' protest as academic.

Under section 21.8(e) of our Bid Protest Regulations, 60 Fed. Reg. 40,737, 40,743 (Aug. 10, 1995) (to be codified at 4 C.F.R. § 21.8(e)), if the contracting agency decides to take corrective action in response to a protest prior to our issuing a decision on the merits, we may recommend that the agency pay the protester its reasonable costs of filing and pursuing its protest, including attorneys' fees. However, we will make such a recommendation only where the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. CSL Birmingham Assocs.; IRS Partners--Birmingham--Entitlement to Costs, B-251931.4; B-251931.5, Aug. 29, 1994, 94-2 CPD ¶ 82. A protester is not entitled to protest costs where, under the facts and circumstances of a given case, the agency has taken reasonably prompt corrective action. Id.

Here, although the VA, basically by its own admission, took corrective action in response to a clearly meritorious protest, in general, if an agency takes corrective action in response to a protest by the due date of its report on the protest, we consider such action to be prompt and decline to recommend reimbursement of protest costs. See, e.g., PLX, Inc.--Request for Declaration of Entitlement to Costs, B-251575.2, Mar. 10, 1993, 93-1 CPD ¶ 224. The agency took corrective action on the due date for its report. We further point out that even if LORS had filed an agency-level protest, the time spent in pursuing the agency-level protest would not be relevant to determining whether there was undue delay in taking corrective action. See GS Elektro-Schewe GmbH, B-259103.2, Apr. 13, 1995, 95-1 CPD ¶ 196.

Notwithstanding the promptness of the agency's corrective action from the date when the protest was filed, LORS requests that we recommend, in the exercise of our discretionary authority and given the circumstances of this case, its recovery of its protest costs because it was the improper actions of the contracting officer in the first instance during the procurement process itself which gave rise to the "protest process," leaving LORS no other choice but to incur the costs of filing a protest in order to vindicate its rights to a proper evaluation and a reasonable opportunity for award. In other words, for purposes of determining whether corrective action was promptly taken, LORS believes that the "protest process" began when the contracting officer improperly evaluated its proposal and eliminated its proposal from the competitive range. It is from this point that LORS maintains that the corrective action was not promptly taken, thus entitling it to the recovery of its costs.

LORS does not dispute that the purpose of section 21.8(e) is to encourage agencies to take corrective action in response to meritorious protests before protesters have expended additional unnecessary time and resources pursuing their protests. Here, the VA satisfied this purpose in all respects. The record shows that LORS did not

incur costs other than those associated with its initial protest filing to convince the VA that the contracting officer unreasonably evaluated and eliminated its proposal from the competitive range; LORS did not incur the costs associated with filing comments on the agency report since the VA did not file an agency report defending the contracting officer's evaluation and competitive range determination; and, LORS did not incur the costs of any additional filings related to the merits of its protest. See Neal R. Gross & Co., Inc.--Entitlement to Costs, B-254033.4, Sept. 30, 1993, 93-2 CPD ¶ 199.

As described above, LORS' approach for determining that corrective action was not promptly taken by an agency, thus entitling a protester to the recovery of its protest costs, would result in a contracting agency's having to pay protest costs in a large number of cases, even though it took effective corrective action shortly after the protest was filed with our Office, simply because it responded positively to the protest. This could have the effect of discouraging such corrective action rather than encouraging it. This is not the intent of our Regulations. Id. For this reason, we conclude that the filing of an initial protest with our Office establishes the appropriate date for determining the promptness of an agency's corrective action. CSL Birmingham Assocs.; IRS Partners--Birmingham--Entitlement to Costs, supra.

Since we therefore conclude that the agency acted promptly in this case, LORS is not entitled to recover its protest costs.

The request for costs is denied.

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