



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Custom Printing Company--Request for Costs

File: B-275798.3

Date: July 9, 1997

Raymond Fioravanti, Esq., and Daniel B. Abrahams, Esq., Epstein Becker & Green, P.C., for the protester.

Kerry L. Miller, Esq., Government Printing Office, for the agency.

Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's request to recover the costs of filing and pursuing its protest challenging an agency's evaluation of bid prices is granted where the agency failed to promptly or adequately investigate the clearly meritorious protest allegations questioning the propriety of the agency's calculations, and only took corrective action 3 weeks before the decision due date.

DECISION

Custom Printing Company (CPC) requests that we recommend it recover the costs of filing and pursuing its protest challenging the evaluation of bid prices under invitation for bids (IFB) No. 1513-P, issued by the Government Printing Office (GPO) for the production and distribution of various Army publications.

We grant the request.

The IFB was issued on October 9, 1996, and contemplated the award of a 1-year contract to the responsible bidder submitting the lowest-priced, responsive bid. The IFB advised bidders that GPO would determine the lowest bid by applying the unit prices submitted in each bidder's itemized pricing schedule to a corresponding list of estimated production quantities set forth at page 18 of the IFB. The solicitation also advised bidders that "[t]ransportation charges"--the cost of shipping the publications from the contractor's production facility to the designated delivery site--"are a factor in determining award" and required bidders to "state the location of the plant from which [the publications] will be shipped."

By the November 8 bid opening date, five bids were received. On November 13, the contracting officer asked the agency's transportation management section (TMS) to calculate the transportation charges to be added to each bidder's total price. Using 50 delivery orders issued under the predecessor contract for this requirement--

which were randomly selected by TMS--TMS provided the contracting officer with a list of "estimated shipping charges" for each bidder. After adding each bidder's estimated transportation charges to its bid, the contracting officer determined that Braceland Brothers was the apparent low bidder, and CPC was the second lowest-priced bidder.

Most of the publications required under this contract (approximately 90 percent) are to be delivered to St. Louis, Missouri. CPC's production facility is located in Owensville, Missouri, and in its bid CPC stated that "all shipments will be made to St. Louis at no additional cost to the government." In contrast, Braceland Brothers's bid did not offer any transportation rate discounts; moreover, Braceland Brothers's bid stated that all shipments would be made from an Atlanta, Georgia facility.

On November 20, after learning that GPO intended to award the contract to Braceland Brothers, CPC--which was the incumbent for this requirement--filed an agency-level protest with the contracting officer. CPC contended that "[a] review of the print orders which we have produced over the past two years indicates to us that Braceland Brothers' freight assessment should be much larger than ours." CPC also provided a detailed breakdown of its transportation charge calculations and, relying on this breakdown, argued that the agency's apparently different pricing evaluation results "seem[] to be skewed."

On November 27, in exchange for the contracting officer's promise that the agency would reassess its evaluated transportation costs, CPC withdrew its protest. The contracting officer then forwarded a copy of CPC's withdrawn agency-level protest to TMS and asked for a recalculation of the bidders' transportation costs. Using the estimated quantities and destination sites set forth in 107 purchase orders from the predecessor contract, TMS provided a second set of "estimated shipping charges" for each bidder. After reviewing this list, the contracting officer once again determined that Braceland Brothers was the low bidder, and that CPC was the second lowest-priced bidder. On December 11, the agency awarded the contract to Braceland Brothers.

On December 6 and 11, CPC filed a second agency-level protest which set forth a pricing "breakdown of the shipments on a per destination basis" and requested additional details from the agency regarding its pricing evaluation. In its protest, CPC asked to "find out exactly how the [freight] rates were calculated for the shipments." On December 19, CPC filed a protest at our Office which essentially reiterated its agency-level protest grounds. CPC's protest stated that "[d]espite CPC's best efforts, it has not been able to learn the basis for the GPO's estimated shipping cost computations."

GPO submitted its report on the protest to our Office on January 21, 1997. In its report, GPO explained that TMS based its transportation charge estimates on quantities and destinations set forth in 157 delivery orders issued under the

predecessor contract, and further maintained that the contracting officer was entitled to rely on the TMS calculation.¹ The agency also stated:

"We believe the evaluation method used in the instant solicitation was as realistic and accurate a method as possible. [Citation omitted.] The [c]ontracting [o]fficer's analysis used actual weights and destinations from 157 orders under the contract the previous year. The TMS analysis also used actual transportation costs derived from tariffs on file. If the protester knows of another, more accurate method of estimating transportation costs, it has yet to proffer it."

In its report, GPO also asserted that "Custom has presented no evidence which would challenge either the method or result of the [pricing] evaluation."

On February 3, CPC filed a supplemental protest based upon the explanation set forth in the agency report. CPC contended that the agency had deviated from the pricing evaluation scheme in the IFB by using delivery orders issued under the predecessor contract instead of the estimates set forth at page 18 of the IFB to calculate each bidder's transportation costs.

On February 6, this Office held a telephone conference with the parties and issued a written request for the agency to respond to several questions. First, we asked GPO to explain the computation used by TMS to calculate each bidder's transportation costs; although GPO had explained the TMS methodology, no supporting analysis--for example, the actual quantity estimates or delivery destination points culled from the randomly selected delivery orders--was provided. Additionally, our Office asked:

". . . if the current shipping charges are applied to the estimates set forth in the current solicitation, is Braceland still the low bidder? In this regard, why doesn't the GPO agree with the protester's argument that the freight/shipping costs should be calculated based on the current solicitation estimates?"

On February 12, GPO responded with a supplemental agency report which stated, in part:

"[i]t is impossible to take the estimates contained in the current solicitation at page 18 and use them to directly estimate freight costs. The estimates in the solicitation are stated in the aggregate for a

¹The protester received its copy of the agency report on January 23, and at that time first learned how TMS calculated the challenged transportation charge estimates.

12 month period. Actual shipments under Program 1513-S are of much smaller quantities to many different destinations. Therefore, using the past year's actual shipments for weight and destinations, is the most accurate way to predict the 1996-1997 weights and destinations for purposes of estimating transportation costs."

On February 14, CPC filed its comments on GPO's supplemental report. CPC reiterated its position that the agency's pricing evaluation deviated from the evaluation scheme set forth in the IFB--which required the agency to evaluate each bidder's proposed pricing using the estimates set forth at page 18 of the IFB. On February 19, this Office advised the parties that we required a hearing to address this issue. On February 25, the eve of the scheduled hearing, GPO advised that it was contemplating corrective action and that it was reevaluating CPC's and Braceland Brothers's pricing. On March 13, a little more than 2 weeks before the statutory due date (March 31) for a decision on the protest, GPO terminated Braceland Brothers's contract and made award to CPC. That same day, CPC filed this request for reimbursement of its protest costs.

When an agency takes corrective action prior to our issuing a decision on the merits, we may recommend that the protester recover the reasonable costs of filing and pursuing the protest. Bid Protest Regulations, 4 C.F.R. § 21.8(e) (1997). We will make such a recommendation 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. Holiday Inn-Laurel-Protest and Request for Costs, B-270860.3; B-270860.4, May 30, 1996, 96-1 CPD ¶ 259 at 4.

In this case, GPO does not dispute that its corrective action was taken in response to CPC's meritorious protest. Instead, GPO argues that its corrective action was not unduly delayed because "it was not until the filing of the protester's comments on the agency report that the protester first clearly articulated its position." GPO also asserts that the contracting officer's decision to "reconsider his position" was not unduly delayed because the protest "was not a simple matter, as it involved reviewing 157 prior [delivery] orders, each with multiple delivery destinations and bills of lading."

In considering a protester's request for reimbursement of its protest fees and costs by the contracting agency, the determinative question for this Office is whether the agency's corrective action was prompt under the circumstances. Ostrom Painting & Sandblasting, Inc.--Entitlement to Costs, 72 Comp. Gen. 207, 210 (1993), 93-1 CPD ¶ 390 at 4. In this case, we conclude that GPO unduly delayed taking corrective action.

CPC's December 19 protest to this Office clearly called into question "the basis for the GPO's estimated shipping cost computations." CPC's February 6 supplemental protest--filed after it received the first detailed explanation of the evaluation method

used, set out in the agency report on the initial protest--clearly challenged the agency's reliance on orders from the predecessor contract rather than the estimates in the IFB. Similarly, the questions to the agency issued by our Office raised this issue. In fact, the excerpts from the initial and supplemental agency reports, quoted above, themselves indicate that the agency was aware that the protester was challenging its decision to calculate transportation costs based on actual orders under the prior contract rather than on the IFB estimates. Thus, contrary to the agency's assertion that it was unable to ascertain any basis for corrective action until after it received CPC's comments on the agency report on the supplemental protest, the record clearly shows that the issue which prompted the agency's corrective action was squarely presented early in the protest process.²

GPO also asserts that the complexity of reviewing the 157 delivery orders from which the agency's evaluation results were initially derived prevented a more prompt response. We find this argument unpersuasive since it was not the detailed calculations derived from the agency's methodology but the methodology itself--that is, using orders under the prior contract instead of the IFB estimates--that was inconsistent with the IFB and thus was the source of the impropriety on which the corrective action was based.

In sum, we conclude that by waiting until March 13--almost 1 month after receiving CPC's February 14 comments on the agency's supplemental report--the agency unduly delayed taking corrective action. Accordingly, we recommend that CPC recover the costs of filing and pursuing the protest, including reasonable attorneys' fees. CPC should submit its claim for costs, detailing and certifying the time expended and costs incurred, directly to the agency within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The request is granted.

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²As noted above, CPC first raised its concerns about the transportation charge calculations in its November 19 agency-level protest. While the fact that an issue is brought to the agency's attention before the protest is filed at our Office is not dispositive of the promptness of subsequent corrective action, we think the agency's apparent failure to confirm in response to a detailed agency-level protest that it had followed the solicitation's evaluation scheme supports our conclusion that the agency did not act promptly here. See Griner's-A-One Pipeline Servs., Inc.--Entitlement to Costs, B-255078.3, July 22, 1994, 94-2 CPD ¶ 41 at 6, n. 3.