GAO

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Millar Elevator Service Company--Costs

File: B-281334.3

Date: August 23, 1999

Susan L. Schor, Esq., McManus, Schor, Asmar & Darden, for the protester.
Cameron Gore, Esq., Department of Veterans Affairs, for the agency.
Christine S. Melody, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reimbursement of protest costs is denied where agency decides to take corrective action in response to protest but the issue on which the corrective action was based is not clearly meritorious.

DECISION

Millar Elevator Service Company requests that we recommend that it recover the costs, including attorneys' fees, incurred in connection with its protest challenging award of a contract for elevator services to Centric Elevator under request for proposals (RFP) No. 648-65-98, issued by the Department of Veterans Affairs (VA).

We deny the request.

Millar filed its protest challenging the award to Centric on March 31, 1999, arguing that VA failed to evaluate the proposals it received consistent with the evaluation criteria in the RFP; failed to conduct meaningful discussions; and, by awarding to Centric, procured services in excess of its needs. The agency filed its report responding to the protest on May 3, rebutting each of the arguments Millar made. Subsequently--and 1 day before Millar's comments on the agency report were due--VA advised that it would take corrective action.[1] In light of the agency's decision, we

[1]The agency orally advised Millar and our Office of its decision to take corrective action by telephone call on May 20; the decision was confirmed in writing by letter dated and received May 28.

dismissed Millar's protest as academic on June 1. Millar now requests that we recommend that VA reimburse it for 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. 4 C.F.R. § 21.8(e) (1999). Under this provision, we will recommend recovery of protest costs where, based on the circumstances of the case, we conclude that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Griner's-A-One Pipeline Servs., Inc.--Entitlement to Costs, B-255078.3, July 22, 1994, 94-2 CPD ¶ 41 at 5. For a protest to be clearly meritorious, the issue involved must not be a close question. J.F. Taylor, Inc.--Entitlement to Costs, B-266093.3, July 5, 1996, 96-2 CPD ¶ 5 at 3. Rather, the record must establish that the agency prejudicially violated a procurement statute or regulation. Tri-Ark Indus., Inc.--Declaration of Entitlement, B-274450.2, Oct. 14, 1997, 97-2 CPD ¶ 101 at 3. The fact that an agency decides to take corrective action does not establish that a statute or regulation clearly has been violated. J.F. Taylor, Inc.--Entitlement to Costs, supra. As explained below, based on the circumstances of the case here, we conclude that it is not appropriate to recommend that the protester recover its protest costs.

Section 2.5.1 of the RFP listed seven subfactors under the most important technical evaluation factor, drives. Since the RFP was silent as to their relative weights, the offerors reasonably assumed that the subfactors were of equal weight. Foundation Health Fed. Servs., Inc.; Humana Military Healthcare Servs., Inc., B-278189.3, B-278189.4, Feb. 4, 1998, 98-2 CPD ¶ 51 at 6. The record shows, however, that in performing the evaluation of offers, the agency actually assigned different weights to the subfactors. After filing its report on the protest, the agency decided to take corrective action based on the failure to indicate in the RFP the relative weights of the subfactors under the drives factor.[2]

While agencies are required to advise offerors of the relative weights of significant subfactors, Federal Acquisition Regulation § 15.304(d), we would have sustained the protest on this ground only if it were evident that Millar had been prejudiced by the agency's failure to do so. See Lithos Restoration, Ltd., B-247003.2, Apr. 22, 1992, 92-1 CPD ¶ 379 at 5-6 (prejudice is an essential element of a viable protest). The record shows that Millar and Centric received identical point scores in six of the seven technical subfactors at issue; given this equality, it is not clear that Millar was prejudiced by the agency's failure to advise offerors that the subfactors would not be equally weighted. In other words, it appears that Millar's competitive standing relative to Centric would be the same whether the subfactors were weighted differently--as was done in the actual evaluation--or equally, as the RFP indicated.

[2]As corrective action, the agency reissued the solicitation as an IFB, with bids due on August 12.

Millar asserts that it was prejudiced, arguing that it would have revised its proposal if it had known that VA was placing "so much emphasis" on the training subfactor--the one subfactor of the seven under which Millar and Centric received different scores. Third Affidavit of Steven R. Vining, Aug. 9, 1999, at ¶ 4. This assertion is simply not persuasive. The assumption behind Millar's argument is that the training subfactor "was rated higher than any of the other Drives subfactors." Protester's Comments, Aug. 10, 1999, at 1. This assumption is erroneous; in fact, the record shows that the seven subfactors under the drives factor were listed in descending order of importance, and that the first two subfactors listed were significantly more important than the five other subfactors, including training.[3] Since Millar asserts that it would have revised its proposal had it known that training was "so heavily weighted," id. at 2, and since training in fact was one of the less important subfactors, there is no basis to assume that Millar would have materially altered its proposal had it been advised that the subfactors were listed in descending order of importance.

Given that the existence of prejudice to Millar is, at a minimum, not readily apparent, we conclude that the issue which prompted the corrective action was a close question, and thus that the protest was not clearly meritorious on this ground. J.F. Taylor, Inc.--Entitlement to Costs, supra. Since a prerequisite to a

[3]Specifically, the subfactors and their respective weights in points were as follows: harmonics (20); non-proprietary software (10); training (5); availability of technical support (5); easy access to the drive (3); ease of programming (2); and, easily serviced (2), for a total of 47 available points. As stated above, Millar and Centric received identical scores under all the subfactors except training, for which Millar received 4 of 5 available points and Centric received 5 points.

recommendation for the recovery of costs is that the corrective action be taken in response to a clearly meritorious protest, there is no basis on which to recommend that Millar recover its protest costs in this case.[4]

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[4] Another prerequisite to the recovery of costs is that the corrective action be unduly delayed. Griner's-A-One Pipeline Servs., Inc.--Entitlement to Costs, supra. The promptness of the agency's action is measured relative to the time when the issue which prompts the corrective actions is raised. Usually this is in the protest itself, although there are situations where the dispositive issue does not become clear until later in the protest process. See Tidewater Marine, Inc.--Request for Costs, B-270602.3, Aug. 21, 1996, 96-2 CPD ¶ 81 (corrective action taken shortly after dispositive issue was first squarely drawn was not unduly delayed); Baxter Healthcare Corp.--Entitlement to Costs, B-259811.3, Oct. 16, 1995, 95-2 CPD ¶ 174 (same). In this case it does not appear that the specific issue on which the corrective action was based was raised in the initial protest. In fact, Millar itself states that it first raised the issue in a telephone conversation with VA counsel on May 13, after it received the agency report and exhibits, and well after the protest was filed on March 31. Given that the agency advised of its decision to take corrective action on May 20, only 1 week after the date on which Millar states that it raised the subfactor weighting issue, it appears that the agency's decision to take corrective action was not unduly delayed. Apparently recognizing that it actually could not have raised this specific issue until after it received the agency report and exhibits revealing how the agency had weighted the subfactors, Millar argues that it was sufficient for it to have raised a related issue--that the training subfactor was given more weight than the third evaluation factor, construction impact. Protester's Comments, supra, at 3. This assertion is not only factually incorrect--the record shows that the training subfactor and the construction impact factor were each assigned 5 points--but it is clearly not the issue on which the corrective action was based.