



United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Minolta Corporation--Costs

File: B-285010.2

Date: September 26, 2000

Robert S. Brams, Esq., and Rodney A. Grandon, Esq., Patton Boggs, for the protester. Marshall J. Doke, Jr., Esq., Gardere & Wynne, and Kavita Kalsy, Esq., Bureau of the Public Debt, for the agency. Paul E. Jordan, Esq., Glenn G. Wolcott, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

General Accounting Office recommends that protester be reimbursed the costs of filing and pursuing its protest where the agency unduly delayed taking corrective action in response to the protest, which was clearly meritorious.

DECISION

Minolta Corporation requests that we recommend that it be reimbursed the costs of filing and pursuing its protest challenging the issuance of delivery order No. FBA-00-0001 by the Department of the Treasury, Bureau of Public Debt's Franchise Business Activity-West (FBA-West), to Ricoh Corporation for certain copier services.¹ The delivery order was issued pursuant to Ricoh's General Services Administration (GSA) federal supply schedule (FSS) contract No. GS-26F-1015B.

We recommend that the Department of the Treasury reimburse Minolta its protest costs.

The matter at issue is under a follow-on to a contract awarded by FBA-West to Minolta in 1995, under which Minolta provided copier services to various federal agencies in the southern California vicinity. Seeking to expand the prior area of performance to cover the entire country, the agency decided that, "[i]n the interest of

¹ FBA-West provides contracting services for other government agencies, charging the user agencies a 1-percent administrative fee.

time and effort,” this procurement would be negotiated using the GSA schedule instead of “a formal acquisition.” Agency Report, Tab 13, Narration of Acquisition, at 1. To this end, in June 1999, the agency contacted several potential offerors who held GSA schedule contracts for copier services, provided them with Minolta’s prior contract for use as a “model,” and advised them that they must propose rates for various identified services, propose both digital and color copiers, and propose performance nationwide. Agency Report, Tab 13, Narration of Acquisition, at 1-3; Tab 2, Memorandum for the Record, Sept. 21, 1999.

Four offerors, including Minolta, submitted initial proposals. The agency conducted discussions with Minolta and obtained proposal revisions from it. Based on its evaluation of the proposals, the agency concluded that “Ricoh was the only contractor to comply with all of the Terms & Conditions, technical and configuration requirements.” Agency Report, Tab 13, Narration of Acquisition, at 6. Accordingly, the agency issued delivery order FBA-00-0001 to Ricoh on October 28.

Minolta was notified of the award on November 4 and, by letter dated November 17, filed a Freedom of Information Act (FOIA) request, seeking specified information related to the procurement. The agency provided the requested information to Minolta on March 16, 2000, and Minolta filed its initial protest with our Office on March 24.

In its protest Minolta asserted, among other things, that the delivery order issued to Ricoh included services and supplies that were not on Ricoh’s supply schedule contract. Protest at 2, 10. Minolta specifically identified Ricoh’s proposal reference to “open market items,” and further specifically objected that, “where the offered services (e.g., the minimum copy volumes, Monthly Effectiveness Level, new machine requirement) are less than that permitted under the GSA schedule, the agency has effectively procured services not included on the GSA schedule.” Protest at 10.

In the April 26 agency report, the contracting officer generally denied Minolta’s allegations and requested that the protest be dismissed or denied. The contracting officer specifically represented that “[a]ll of the items procured under the delivery order are on the GSA Schedule.” Contracting Officer’s Statement at 10. After submission of Minolta’s May 5 comments on the report, by letter dated May 31, the agency advised our Office that it was taking corrective action in response to the protest. Specifically the agency stated: “In light of information gained in conversations between the Bureau of the Public Debt, FBA-West, and GSA, it was determined that delivery order FBA-00-0001 against Ricoh Corporation’s GSA Schedule GS-26F-1015B is out of scope for cost-per-copy (CPC) and flat-rate-monthly fee (FRMF) services.” Letter from Department of Treasury to GAO 1 (May 31, 2000). In taking corrective action, the agency continued performance throughout the remainder of the base period ending September 30, 2000, but agreed not to exercise any options, and to recompet the requirements for copier services beyond that date.

Accordingly, by decision dated June 15, 2000 (B-285010), we dismissed Minolta's protest as academic.

Minolta requests that we recommend reimbursement of its protest costs on the basis that the agency unduly delayed taking corrective action.

Where a procuring agency takes corrective action in response to a protest, our Office may recommend that the agency reimburse the protester its protest costs 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, thereby causing the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Pemco Aeroplex, Inc.--Recon. and Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 5. A protest is clearly meritorious when a reasonable agency inquiry into the protest allegations would show facts disclosing the absence of a defensible legal position. The Real Estate Ctr.--Costs, B-274081.7, Mar. 30, 1998, 98-1 CPD ¶ 105 at 3.

In its response to Minolta's request for costs, the agency asserts that the initial protest was not clearly meritorious because the original protest allegation was connected to an argument that the Ricoh items were not compliant with the Buy American Act (BAA). Since the products were BAA compliant, FBA-West argues that it was not on notice of any potentially meritorious issue until Minolta's May 5 comments on the agency report which specifically identified the non-schedule compliant copiers and services. We disagree.

With respect to the merits of the protest, the agency conceded in its May 31 letter that the delivery order was out-of-scope in two significant areas. While the agency claimed "confusion" as to whether the proposed copiers were on the applicable FSS price list, the record demonstrates otherwise. A simple comparison of the delivery order with Ricoh's GSA schedule contract makes plain that only one of nine delivery order copiers was on Ricoh's contract for CPC or FRMF services. GSA Comments, June 13, 2000, at 2-3. Thus, the merit of the specific protest allegation that Minolta raised in its initial protest submission was clearly discernible at a point early in the protest process.

However, we will sustain a protest only where the protester demonstrates a reasonable possibility that it was prejudiced by the agency's improper actions, that is, but for the agency's actions, the protester would have had a substantial chance of receiving the award. See McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). The relevant question here is whether the protester was prejudiced by the agency's admitted errors.

FBA-West asserts that Minolta was not prejudiced by "any procedural irregularities . . . alleged" because the agency "satisfied the CICA's mandate for full and open

competition” and Minolta was not deprived of that competition. Agency Response to Request for Costs at 4. On the contrary, while Minolta participated in the “competition” and its proposal was found unacceptable, all of the other proposals--including Ricoh’s--were also, in fact, unacceptable, thus Minolta could participate in a recompetition under the appropriate corrective action. See Wilcox Indus. Corp., B-281437.2 et al., June 30, 1999, 99-2 CPD ¶ 3 at 5. Accordingly, Minolta was prejudiced by the agency’s issuance to Ricoh of an improper delivery order.

Regarding the other prong of our analysis, the question of the promptness of the agency’s corrective action, we generally do not consider corrective action to be prompt where it is taken after the due date for the agency report. See CDIC, Inc.--Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 2. Here, as explained above, the agency was plainly on notice of the relevant issue as a result of Minolta’s March 24 protest, which included quotations of Ricoh’s own proposal references offering “open market” items, and a simple comparison of the delivery order and applicable Ricoh schedule contract would have established the merits of the protest. Yet FBA-West did not propose corrective action until May 31, well after the agency had submitted its report defending the propriety of its action, and after the protester had incurred the time and expense necessary to respond to that report. Under these circumstances, we do not consider the corrective action to have been prompt. Tri-Ark Indus., Inc.--Costs, B-274450.2, Oct. 14, 1997, 97-2 CPD ¶ 101 at 4-5. Accordingly, we recommend that Minolta be reimbursed its protest costs.² Minolta should submit its claim for such costs, detailing and certifying the time expended and costs incurred, directly to the agency within 60 days of receipt of this decision. Bid Protest Regulations, 4 C.F.R. § 21.8(f)(1) (2000).

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² The agency also asserts that Minolta’s recovery of costs should be limited to those incurred after the date of Minolta’s comments to the agency report because, in the agency’s view, the “out of scope” delivery order issue was not raised until that time. In general, we consider a prevailing protester entitled to costs incurred with respect to all issues pursued, not merely those upon which it prevails. The Real Estate Ctr.--Costs, supra, at 5 n.2. Where a protester prevails on one of a number of related grounds of protest, the allocation of cost between winning and losing issues is generally unwarranted, and costs are not limited to the effort spent on the issue upon which the protester prevails. Id. We will limit a successful protester’s recovery of protest costs when a part of the costs is allocable to a losing protest issue that is so clearly severable as to constitute a separate protest. Price Waterhouse--Costs, B-254492.3, July 20, 1995, 95-2 CPD ¶ 38 at 3. Here, the “out of scope” issue was raised in the initial protest and was intertwined with related issues throughout Minolta’s submissions. Under these circumstances, there is no basis to limit Minolta’s recovery of costs.