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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: RANA Technologies--Costs

File: B-400471.2

Date: February 3, 2009

Gerald H. Werfel, Esq., Pompan, Murray & Werfel, PLC, for the protester.
Maj. David Abdalla, Department of the Army, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the
General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation that protest costs be reimbursed is denied where record establishes neither that action rendering the protest academic was taken in response to the protest nor that protest was clearly meritorious.

DECISION

RANA Technologies of Kabul, Afghanistan requests that we recommend that it be reimbursed the costs of filing and pursuing its protest of the rejection of its proposal under request for proposals (RFP) No. W91B4M-08-R-4040, issued by the Department of the Army, Kabul Regional Contracting Center for printers, copiers, and ink and toner cartridges. We dismissed the protest after the agency notified us that it had cancelled the solicitation. The protester contends that its protest was clearly meritorious and that the agency unreasonably delayed taking corrective action in response to it, and that it is therefore entitled to its protest costs.

We deny the request.

The RFP, as originally issued, included a schedule consisting of 15 contract line items (CLIN). Each CLIN identified a particular type of printer (or other item of equipment, such as ink cartridge) by make and model number; the CLIN also specified the quantity of the item to be furnished. For example, CLIN 0003 identified the item to be provided as follows:

HP LaserJet 3600dn Printer

FFP

Model: Q5988A/See section 2.3 in the statement of work (SOW) for minimum specifications

FOB: Destination

RFP at 3. Section 2.3 of the SOW defined the required characteristics of the printers, such as print quality, processor speed, memory, and warranty. With respect to power for this model, the SOW specified 220-240 volts. Section 2.3 also instructed offerors that “[n]o substitutions are allowed on this item to ensure maintenance sustainability.” Id. at 26. The solicitation provided for award to the offeror submitting the lowest-priced proposal “meeting or exceeding the acceptability standards as described in the statement of work.” Id. at 14.

Prior to the closing date for submission of proposals, the agency issued two amendments to the RFP. Of relevance to this protest, amendment No. 0001 included a response to an offeror’s question regarding CLIN 0003. The offeror noted that while the SOW had specified an HP model 3600dn with 220 volts power, his research had revealed that the model 3600dn was not available in 220 volts; accordingly, the offeror sought permission to submit an alternative model that was available in 220 volts. RFP amend. 1, at 3. The agency responded that the offeror was correct that the model specified was not available and that the solicitation would be updated with new specifications. The amendment went on to advise offerors as follows with regard to CLIN 0003:

The CLIN description has changed from HP LaserJet 3600dn Printer to HP Color LaserJet cp3505dn Printer.

The CLIN extended description has changed from Model: Q5988A/See section 2.3 in the statement of work (SOW) for minimum specifications to Model: CB443A/See section 2.3 in the statement of work (SOW) for minimum specifications.

Id. The amendment also revised the item description for CLINs 0008, 0009, 0010, and 0011, all of which were for print cartridges, to specify cartridges for the new printer model cp3505dn. While the agency revised the line item descriptions and the corresponding specifications in the SOW, it did not furnish a revised version of the price schedule incorporating the amended descriptions.

The protester submitted a proposal prior to the specified closing date. RANA entered its prices on the schedule that had been furnished with the original solicitation; that is, it furnished a price for CLIN 0003 on a page that described that item as an HP LaserJet 3600dn printer (and prices for line items 0008, 0009, 0010, and 0011 on pages that described the items to be furnished as HP Laserjet 3600dn print

cartridges). The protester also furnished a signed acknowledgment of amendment 0001.

Upon review of the proposals received, the contracting officer determined that the protester's overall price was low. The agency's technical evaluator determined, however, that RANA had proposed HP LaserJet 3600dn printers and cartridges rather than the required HP LaserJet cp3505dn printers and cartridges and that its proposal was therefore technically unacceptable. Accordingly, the contracting officer selected the next lowest-priced proposal, which had been determined technically acceptable, for award. Upon learning of the rejection of its proposal, RANA requested, and was furnished with, a debriefing; RANA then protested to our Office.

After award, the awardee notified the contracting officer that it could not fulfill the RFP's requirements, and the government terminated its contract. While at the time it submitted its agency report responding to RANA's protest, the agency intended to proceed with award to the offeror next in line for award, the agency subsequently notified our Office that it had decided to cancel the RFP and issue a new solicitation for the items. On October 20, we dismissed RANA's protest as academic.

By letter dated November 4, RANA requested that we recommend that it be reimbursed for the reasonable costs of filing and pursuing its protest. RANA alleged that the protest raised clearly meritorious issues that would have warranted a decision on the merits in its favor, and that the agency unduly delayed by failing to take corrective action until after it had submitted, and the protester had commented on, the agency report.

Under the Competition in Contracting Act of 1984, our Office may recommend that protest costs be reimbursed where we find that the agency's action violated a procurement statute or regulation. 31 U.S.C. § 3554(c)(1) (2000). Our Bid Protest Regulations provide that where the contracting agency decides to take corrective action in response to a protest, we may recommend that the protester be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(e) (2008). This does not mean that we will recommend that costs be reimbursed in every case in which an agency takes action that renders a protest academic; rather, we will recommend that a protester be reimbursed its costs only where the record establishes that (1) the agency action that rendered the protest academic was taken in response to the protest, see Takota Corp.--Costs, B-299600.2, Sept. 18, 2007, 2007 CPD ¶ 171 at 3, and (2) the agency unduly delayed taking the action in the face of a clearly meritorious protest. Baine Clark--Costs, B-290675.3, Sept. 23, 2002, 2002 CPD ¶ 166 at 2. We consider a protest to be clearly meritorious when a reasonable agency inquiry into the protester's allegations would show that the agency lacked a defensible legal position. SDA, Inc.--Costs, B-298216.2, Sept. 11, 2006, 2006 CPD ¶ 133 at 2.

Here, it is not clear from the record that the agency decided to cancel the RFP in response to RANA's protest. While we recognize that the contracting officer represented in the agency's request for dismissal of the underlying protest that the solicitation was being cancelled "due to" RANA's protest, Agency Letter to GAO, Oct. 15, 2008, at 2, which suggests that there was a link between the protest and the decision to cancel, the agency explained in its response to the protester's request for costs that it did not decide to cancel in response to RANA's protest; rather, the agency maintained that it decided to take this action "only after learning that the awardee, as well as offerors next in line for award, were unwilling or unable to commit to the prices originally offered in their proposals." Agency Response to Protester's Request for Recommendation for Reimbursement, Nov. 17, 2008, at 2.

Whether the agency decision to cancel was a response to RANA's protest is not critical to the outcome of our decision here, however, because in any event we are not persuaded that RANA's protest was clearly meritorious. RANA argues that by submitting its prices on the price schedule furnished in the RFP and acknowledging amendment No. 0001, it committed itself to deliver the items identified in the amendment for the prices that it entered on the schedule, and that its protest objecting to the rejection of its proposal as technically unacceptable was thus clearly meritorious. We disagree. In our view, it was unclear from RANA's proposal whether it was offering to furnish the items described in the price schedule (*i.e.*, the model 3600dn printer and cartridges) or the items described in the amendment (*i.e.*, the model cp3505dn printer and cartridges). Faced with an ambiguity as to what the protester was proposing to furnish (and thus an ambiguity as to whether it was proposing to furnish items meeting the requirements of the solicitation, as amended), we think that the agency's rejection of RANA's proposal was reasonable. See All Bldg. Servs., Inc., B-293519, Mar. 23, 2004, 2004 CPD ¶ 73 at 2-3.

The request for a recommendation that the agency reimburse RANA's protest costs is denied.

Gary L. Kepplinger
General Counsel