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Decision

Matter of: Waterfront Technologies, Inc.–Costs

File: B-401948.8

Date: September 14, 2010

Nancy L. Berardinelli-Krantz, Esq., Jones Day, for the protester.
Herman J. Narcho, Esq., and Peter J. Dickson, Esq., Department of Labor, for the agency.
Nora K. Adkins, Esq., and James A. Spangenberg, 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 has not unduly delayed taking corrective action and the protest grounds were not clearly meritorious.

DECISION

Waterfront Technologies, Inc. of Baltimore, Maryland, requests that our Office recommend reimbursement of Waterfront's protest costs associated with three protests it filed challenging the award of a contract by the U.S. Department of Labor (DOL), Employment and Training Administration, under request for proposals (RFP) No. DOL099RP20703 for Enterprise IT Services to support the Office of Foreign Labor Certification system (formerly titled the iCERT Visa Portal System).

We deny the request.

The solicitation was issued as a total small business set-aside for section 8(a) firms on June 29, 2009 and was amended five times with a final closing date for receipt of proposals of July 29. The RFP required offerors to hold "an interim secret facility clearance prior to the RFP closing date." RFP amend. 5, at 2. The DOL rejected Waterfront's proposal submitted in response to the RFP as "non-responsive" because it did not include an interim secret facility clearance and did not include requested pricing information. Waterfront protested this action on October 5.

On October 15, prior to the submission of an agency report, our Office's representative conducted an outcome prediction alternative dispute resolution (ADR) conference with parties, in which she advised that Waterfront's asserted

failure to provide an interim facility security clearance was a matter of “responsibility” rather than “responsiveness” or technical acceptability, and predicted that our Office would likely sustain Waterfront’s protest. We also advised the parties that since Waterfront was a small business concern, a finding of non-responsibility would require the DOL to submit the matter to the Small Business Administration (SBA) for a possible certificate of competency (COC). Based on the ADR, the DOL notified our Office that it would determine Waterfront to be not responsible and refer the matter of Waterfront’s responsibility to the SBA. This rendered the protest academic and we dismissed it on October 21.¹

Waterfront filed its next protest on October 26. This protest was filed as a result of information provided to Waterfront during a debriefing conducted by the DOL concerning the evaluation of its proposal under the technical, past performance, and price factors. We dismissed the protest as premature on October 29 because the COC was still pending at the SBA and the COC determination would have an impact on the rejection of Waterfront’s proposal.

On November 12, the SBA notified the DOL that, based upon its review of the DOL’s evaluation documents and communications with the contracting officer, “[w]e find that [Waterfront] is not in-line for the award if there was a positive decision after COC review, therefore we cannot work your COC referral as a Certificate of Competency Case.” SBA Letter to Waterfront (Nov. 12, 2010).

On November 23, Waterfront again protested to our Office. This protest alleged that the DOL failed to “effectuate” its promised corrective action because the SBA refused to consider Waterfront for a COC. Waterfront also reasserted the protest grounds from its first two protests alleging that the DOL improperly determined Waterfront’s proposal to be nonresponsive and unreasonably evaluated its proposal under the technical, past performance, and price factors.

In response to this protest, the DOL submitted an agency report responding to Waterfront’s allegations. Eight days later the DOL notified our office that it intended to take corrective action in response to a protest filed by another offeror.² This proposed corrective action included making changes to the solicitation’s evaluation criteria, and reevaluating the offerors’ proposals. On January 6, 2010, our Office dismissed Waterfront’s protest because the DOL’s proposed corrective action rendered Waterfront’s protest academic.

¹ The agency also conceded that Waterfront had provided adequate pricing information with its proposal and in a later evaluation properly evaluated Waterfront’s price proposal.

² The protester disputes the agency’s claim that its corrective action was not in response to Waterfront’s protest.

Waterfront now seeks reimbursement of its protest costs, including attorneys' fees, in connection with all three protests. Our Office may recommend reimbursement of protest costs if we sustain a protest, or where the agency unduly delays taking corrective action in the face of a clearly meritorious protest. 4 C.F.R. § 21.8(d), (e) (2010). This does not mean that costs should be reimbursed in every case where an agency decides to take corrective action; rather, we will recommend reimbursement only where an agency unduly delayed its decision to take corrective action in the face of a clearly meritorious protest. J.F. Taylor, Inc.--Costs, B-266039.3, July 5, 1996, 96-2 CPD ¶ 5 at 3. We consider a protest to be clearly meritorious only when a reasonable agency inquiry into the protest's allegations would show that the agency lacked a defensible legal position, that is, the protest does not involve a close question. Information Ventures, Inc.--Costs, B-294567.2, Nov. 16, 2004, 2004 CPD ¶ 234 at 2.

Here, the DOL did not unduly delay taking corrective action on Waterfront's first two protests, inasmuch as the corrective action was taken prior to submission of the agency reports on those protests. When an agency takes corrective action before the date set for receipt of the agency report, our Office generally will not recommend the reimbursement of costs, even where the protest is clearly meritorious. QuanTech, Inc.--Costs, B-278380.3, June 17, 1998, 98-1 CPD ¶ 165 at 2-3.

With regard to Waterfront's final protest, the DOL took corrective action 8 days after it submitted its report on December 23. However, we find no reason to believe that any of the grounds asserted in Waterfront's final protest were "clearly" meritorious--i.e., that the protest's allegations would show that the agency lacked a defensible legal position. See Information Ventures, Inc.--Costs, *supra*.

Based on our review of the record, we have no basis to find that Waterfront's allegations regarding Waterfront's technical and price evaluation were "clearly meritorious." While we agree with Waterfront that the record is unclear as to whether its past performance evaluation was properly evaluated, this contention is not "clearly meritorious" because the record demonstrates that Waterfront would not be prejudiced by any error by the DOL in the past performance evaluation, given that [REDACTED].

With regard to Waterfront's allegations concerning the DOL's assertedly ineffectual corrective action, the DOL took the promised corrective action by forwarding the matter to the SBA for a COC determination. While the SBA chose not to accept Waterfront for a possible COC because it was advised that Waterfront was not next

in line for award, DOL took the corrective action that it promised.³ To the extent that Waterfront contends that DOL's actions prevented the SBA from considering the COC, there is no indication that the DOL provided anything to the SBA that was misleading or inaccurate. See Joa Quin Mfg. Corp., B-255298, Feb. 23, 1994, 94-1 CPD ¶ 140 at 5-6. Indeed, the information provided accurately showed that Waterfront's proposal was not otherwise in line for award. As indicated above, Waterfront has not shown that its protest of the evaluation of its proposal was clearly meritorious.

Accordingly, the protester's request that we recommend reimbursement of its protest costs is denied.

Lynn H. Gibson
Acting General Counsel

³ We requested the SBA's views on Waterfront's protest. The SBA opined that "it appears that SBA should have accepted the COC referral" because Waterfront's rejection was based on a failure to meet a definitive responsibility criterion. SBA Letter (Jan. 4, 2010) at 4.