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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: Basic Commerce and Industries, Inc.--Costs

File: B-401702.3

Date: February 22, 2010

Heather A. James, Esq., and J. Bradley Aaron, Esq., Whiteford, Taylor & Preston L.L.P., for the protester.

Stephen H.S. Tryon, Esq., Department of the Navy, for the agency.

Paul N. Wengert, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

GAO will recommend that agency reimburse protester for its costs of filing and pursuing a protest challenging the agency's cost realism analysis where the agency did not take corrective action in response to the protest until after submission of its agency report, and the protest was clearly meritorious.

DECISION

Basic Commerce and Industries, Inc. (BCI), of Moorestown, New Jersey, a small business,¹ requests that this Office recommend the reimbursement of BCI's costs of filing and pursuing a protest challenging the issuance of a task order to McKean Defense Group-Information Technology, LLC, of Philadelphia, Pennsylvania, by the Department of the Navy under task order solicitation No. N00024-08-R-3331 for computer network support services. The Navy held a competition for the task order among small businesses holding Seaport-e contracts. BCI argued in its protest that the Navy had miscalculated both BCI and McKean, and had failed to perform a reasonable cost realism analysis of McKean. The Navy subsequently took corrective action in response to the protest.

¹ The Navy states that BCI is no longer a small business. Our description of a protester as a small business here is based simply on the protester's representation; the jurisdiction to determine the size status of a particular business rests with the Small Business Administration. See 4 C.F.R. § 21.5(b)(1) (2009).

We grant the request.

BACKGROUND

The Navy issued the solicitation on November 17, 2008, seeking task order proposals to provide the required support services on a cost-plus-fixed-fee basis. The solicitation provided for issuance of the task order to the vendor whose quotation provided the best value based on evaluation of four factors: technical competence/understanding, personnel, past performance, and evaluated cost. Solicitation at 32. The Navy received task order proposals from six vendors, including both McKean and the incumbent vendor, BCI. On July 22, 2009, the Navy selected McKean to receive the task order, at an evaluated cost of \$33,772,942. BCI requested a debriefing, which the Navy provided on July 24. On August 3, BCI filed its protest with our Office.

BCI's protest raised three main arguments. First, BCI argued that its own task order proposal was improperly downgraded to "technically acceptable" based on an incorrect evaluation of the qualifications of BCI's personnel. Second, BCI argued that McKean should have been downgraded for offering unsatisfactory personnel while allegedly intending a "bait-and-switch" by hiring BCI's incumbent staff upon receipt of the task order. Third, BCI argued that the Navy failed to conduct a proper cost realism analysis because McKean's evaluated cost did not reflect the much higher salaries of the former BCI employees that McKean was using in performance.

The Navy filed its report responding to the protest allegations on September 3. In its agency report, the Navy argued that it had reasonably evaluated both firms' proposals, and that McKean's hiring of BCI personnel after award was necessitated by BCI's attempt to obstruct the transition to McKean.² Agency Report (AR) at 4. With respect to the cost realism analysis, the Navy explained that its evaluator could not obtain audited rates for McKean, and therefore the cost realism analysis consisted of comparing McKean's proposed rates to the rates charged by BCI as the incumbent. *Id.* at 7.

In its comments on the agency report, BCI focused on its challenge to the cost realism analysis. BCI argued that the record showed that the evaluators had raised substantial questions about whether McKean could perform at the rates it had proposed, and that the Navy never addressed those concerns before selecting McKean. Protester's Comments at 3.

² BCI generally disputes the Navy's allegations, and argues that they are beyond our Office's jurisdiction. We note them here because the Navy's allegations provide the foundation for a viable rebuttal of BCI's bait-and-switch claim. Other than noting that the Navy had a viable defense, we find it unnecessary to resolve this issue on its merits.

After receiving the protester's comments on the agency report, our Office convened a conference call with counsel for all parties, to schedule a hearing. We explained that the purpose of the hearing was to examine the Navy's cost realism analysis.

On October 9, the Navy announced that it would take corrective action by reopening discussions, and requesting and evaluating revised quotations, which would include a new cost realism analysis.³ Our Office dismissed BCI's protest as academic based on the corrective action.

BCI now requests that our Office recommend that the Navy reimburse the costs of filing and pursuing the protest, and argues that the Navy unduly delayed taking corrective action in response to a clearly meritorious protest. More specifically, BCI again argues that each of the technical evaluators raised concerns that McKean's proposed costs were too low and would increase the risk of unsatisfactory performance; BCI also argues that the Navy should have recognized that it had no valid defense of the cost realism analysis when it prepared the agency report. BCI Costs Request at 3.

The Navy responded that it was not motivated to take corrective action by any of the issues raised in BCI's protest, but rather by a flaw that "had nothing to do with the complaints made by BCI, even with knowledge of the facts presented in the agency report documentation." Navy Response at 3.⁴ The Navy describes the flaw that motivated the corrective action as a "methodology mistake" in the cost realism analysis, which it argues thereby distinguished the motive for corrective action from BCI's grounds of protest. *Id.* The Navy argues that BCI's arguments were not meritorious, and that the Navy independently discovered that it had erred in the method of comparing McKean's rates to the rates being charged by BCI as incumbent. According to the Navy, it was this improper methodology that "led to an improper and unfair lowering of the assessed cost" of McKean's quotation, and upon recognizing it, the Navy took corrective action. *Id.* at 2.

DISCUSSION

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs, including reasonable attorneys' fees, if, 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

³ Additional consideration of the scope of the corrective action is included in our decision denying McKean's subsequent protest challenging the corrective action. McKean Def. Group--Info. Tech., LLC, B-401702.2, Jan. 11, 2010, 2010 CPD ¶ ____.

⁴ The Navy has not disputed that the timing of the corrective action would be considered unduly delayed because it occurred after the Navy's agency report. Navy Response at 2.

causing the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3554(c)(1)(A) (2006); Bid Protest Regulations, 4 C.F.R. § 21.8(e). A protest is clearly meritorious where a reasonable agency inquiry into the protest allegations would have shown facts disclosing the absence of a defensible legal position. While we consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest, we generally do not consider it to be prompt where it is taken after that date. Alsalam Aircraft Co.--Costs, B-401298.3, Nov. 5, 2009, 2009 CPD ¶ 208 at 3.

Ordinarily, we would not regard a protest as clearly meritorious where resolution of the protest required further record development, such as a hearing, to complete and clarify the record. However, when corrective action is taken by an agency after a hearing has been scheduled, we may still conclude that the protest is clearly meritorious, where, as here, that conclusion is otherwise established by the record. Eagle Home Med. Corp.--Costs, B- 299821.3, Feb. 4, 2008, 2008 CPD ¶ 41 at 4 n.4.

In our view, BCI's protest challenging the adequacy of the Navy's cost realism analysis was clearly meritorious on the record provided to our Office with the agency report. In short, the record lacked support for the Navy's conclusion that McKean could perform as it had proposed for the costs provided. Indeed, as BCI pointed out in its comments on the agency report, the evaluators' expressed concerns about the realism of McKean's rates remained unresolved when the Navy selected McKean for award. Based on our review, we are not persuaded that there is any meaningful difference between the Navy's explanation of an error in the "methodology" of the cost realism analysis, and BCI's challenge.

As a general rule, we recommend that a successful protester be reimbursed protest costs with respect to all issues pursued, not merely those upon which it prevails. Nevertheless, in appropriate cases, we have limited our recommendation for the award of protest costs where a part of those costs is allocable to an unsuccessful protest issue that is so clearly severable from the successful issues that it essentially constitutes a separate protest. In determining whether protest issues are so clearly severable as to essentially constitute separate protests, we consider, among other things, the extent to which the issues are interrelated or intertwined—*i.e.*, whether the successful and unsuccessful arguments share a common set of facts, are based on related legal theories, or are otherwise not readily severable. Core Tech Int'l Corp.--Costs, B-400047.2, Mar. 11, 2009, 2009 CPD ¶ 59 at 8. We view BCI's challenges to the non-cost evaluation (which it has not shown were clearly meritorious) as severable from the challenge to the cost realism analysis because the questions involved distinct aspects of the record, and were not intertwined factually or legally.

RECOMMENDATION

We recommend that the Navy reimburse BCI's costs of filing and pursuing its protest with respect to its cost realism challenge, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester's certified claim for costs, detailing the time spent and the cost incurred, must be submitted to the agency within 60 days after receiving this decision.

The request is granted.

Lynn H. Gibson
Acting General Counsel