



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Baxter Healthcare Corporation--Entitlement to Costs

File: B-259811.3

Date: October 16, 1995

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DIGEST

1. Protester is not entitled to the costs of filing and pursuing its initial protest--that the contracting agency's technical evaluation was flawed because it erroneously determined that the firm's demonstration failed to show that it met a solicitation requirement--where the record does not show that this allegation was clearly meritorious.
2. Protester is not entitled to the costs of filing and pursuing its supplemental protest that the agency improperly evaluated both its and the awardee's proposals with respect to a solicitation requirement, and relaxed that requirement solely for the awardee, where the record shows that while the agency's corrective action was taken at least in part in response to the protest, the corrective action, taken 8 working days after the issue was first squarely put in dispute, was not unduly delayed.

DECISION

Baxter Healthcare Corporation requests that we declare it entitled to reimbursement of the costs of filing and pursuing its protests against the award of a contract to Owens & Minor, Inc. under request for proposals (RFP) No. 120-93-R-0587, issued by the Defense Logistics Agency, Defense Personnel Support Center (DPSC), for the provision of medical and surgical supplies in connection with DPSC's Prime Vendor Program. Baxter contends that the agency unduly delayed taking corrective action in response to its protests.

We conclude that Baxter is not entitled to recover the costs of filing and pursuing its protests.

The solicitation contemplated award of a fixed-price requirements contract to a prime vendor to supply medical/surgical items to medical treatment facilities in Texas, Oklahoma, and New Mexico. The revised statement of work required offerors to possess an on-line electronic order entry/electronic data interchange (EOE/EDI) system which, among other things, listed the delivered price for each product.¹ Offerors were also required to implement ANSI X12 standards for EDI for various business documents.² One of the six technical evaluation factors to be utilized in this best value procurement was the offered EOE/EDI system.

Several offerors submitted proposals which were evaluated, discussions were held, and Baxter was eventually asked to demonstrate its EOE/EDI system to the agency. After the evaluation of best and final offers (BAFO), the sole difference between the technical ratings of Baxter and Owens³ came under the EOE/EDI factor: Baxter was rated unacceptable, and Owens was rated highly acceptable. Baxter was rated unacceptable because its demonstration failed to show that its system listed the delivered price for each product, and because aspects of its system were not working under another contract. The contracting officer stated that the unacceptable rating under this factor rendered Baxter's entire proposal unacceptable, and recommended that the firm not be considered for award, despite the fact that its proposed price was significantly lower than that of Owens. The source selection authority (SSA) agreed and declined to consider Baxter for award. The contract was awarded to Owens on December 2, 1994, and, after its debriefing, Baxter filed its initial protest on December 22. Because this protest was not filed within 10 days of contract award, Owens was permitted to begin performance of the contract. See 31 U.S.C. § 3553(d)(1) (1988); 4 C.F.R. § 21.4(b) (1995).

In its initial protest, Baxter argued that DPSC erroneously determined that the demonstration failed to show that its EOE/EDI system displayed the delivered price. In accordance with 4 C.F.R. § 21.3(c), DPSC submitted its report to our Office 25 working days from receipt of Baxter's protest, on January 31, 1995. DPSC contended that it had a "reasonable basis" for concluding that Baxter's system did

¹The delivered price is comprised of the base distribution and pricing agreement price, the vendor's distribution fee, and a DPSC cost recovery factor.

²The ANSI X12 system provides a standard method of electronic data interchange.

³The proposals of the remaining offerors are not at issue here.

not meet the delivered price requirement, and, in support of its position, submitted affidavits to that effect from each of the agency personnel present at Baxter's demonstration.⁴

On February 15, Baxter filed a timely supplemental protest concerning the solicitation's ANSI X12 requirement, specifically alleging that DPSC improperly evaluated both its and the awardee's proposals with regard to this requirement, and improperly relaxed the requirement solely for Owens.

On February 17, Baxter timely filed its comments on the initial agency report, reasserting its allegation that the demonstration showed that Baxter's system displayed the delivered price. For the first time, Baxter provided affidavits from the two employees who conducted the demonstration, in which both said they had confirmed that the price displayed was the delivered price. Baxter also stated that DPSC had never informed it that the demonstration was unsuccessful.

On March 24, the agency filed its report on the supplemental protest. Among other things, DPSC cast Baxter's argument in terms of the interpretation of the ANSI X12 requirement, and rejected the protester's general reliance upon various Department of Defense and Presidential directives concerning electronic commerce. DPSC also set forth its interpretation of the requirement and, based on that interpretation, expressly rejected each of Baxter's supplemental protest allegations.

On March 28, our Office informed the parties that a hearing would be required to resolve the factual discrepancies as to whether Baxter's demonstration showed that its system displayed the delivered price, as well as other issues concerning DPSC's consideration of Baxter's performance in another region. Pursuant to 4 C.F.R. § 21.5(h), the parties were instructed to file consolidated comments on both the agency's supplemental report and the hearing, and a hearing was tentatively scheduled for April 19.

On April 12, 75 working days after the initial protest was filed, DPSC notified our Office that it intended to take corrective action. DPSC stated that meaningful discussions were not held with Baxter regarding the delivered price issue, and that, while it had evaluated proposals in accordance with its ANSI X12 requirements, the solicitation did not clearly define those requirements. DPSC stated that it would reopen the competitive range; amend the solicitation to clarify its requirements with respect to ANSI X12 implementation, as well as any other areas requiring

⁴The agency did not formally document the results of this demonstration. Thus, the only documentation provided pursuant to Baxter's document request, informal notes of one of DPSC's observers, did not address whether Baxter's system displayed the delivered price.

clarification; seek revised proposals; conduct discussions; and request second BAFOs. After evaluating the new BAFOs, the agency stated it would make a new source selection decision. We dismissed the protests as academic on April 18.⁵

Baxter contends that it is entitled to recover the costs of filing and pursuing both protests. The protester argues that DPSC's notice of corrective action acknowledged the merits of its initial protest by finding that meaningful discussions were not held regarding the delivered price issue. Baxter also argues that DPSC acknowledged deficiencies in the solicitation with respect to the ANSI X12 requirement. Finally, Baxter asserts that DPSC's corrective action was unduly delayed, as it was not taken until nearly 4 months after the initial protest was filed, and long after the protester filed its comments on the initial agency report.

DPSC asks that we deny Baxter's request because the protests were not clearly meritorious. As to the initial protest, DPSC asserts that while it conceded in its notice of corrective action that meaningful discussions were not conducted on the delivered price issue, the record in fact "would have supported a legal decision" that it conducted meaningful discussions. DPSC also states that it was prepared to present evidence at the hearing to show that Baxter failed to address the delivered price issue at the demonstration. As to the supplemental protest, DPSC asserts that which of the parties' competing interpretations of the ANSI X12 requirement was correct was a close question. DPSC implicitly asserts that its corrective action was not unduly delayed.

Under the Competition in Contracting Act of 1984 (CICA), our Office may find an entitlement to costs only where we find that an agency's action violated a procurement statute or regulation. 31 U.S.C. § 3554(c)(1). Our Bid Protest Regulations provide that a protester may be entitled to reimbursement of its costs of filing and pursuing a protest where the contracting agency decides to take corrective action in response to a protest. 4 C.F.R. § 21.6(e). This does not mean that costs are due in every case in which an agency takes corrective action; rather, we may find an entitlement to costs only where an agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Oklahoma Indian Corp.--Claim for Costs, 70 Comp. Gen. 558 (1991), 91-1 CPD ¶ 558. Thus, as a prerequisite to entitlement to costs where a protest has been settled by corrective action, not only must the protest have been meritorious, but it also must have been

⁵Baxter subsequently protested the amended terms of the solicitation as to the agency's ANSI X12 requirements. That protest was denied. Baxter Healthcare Corp., B-259811.4, Sept. 28, 1995, 95-2 CPD ¶ ____.

clearly meritorious, *i.e.*, not a close question. GVC Cos.--Entitlement to Costs, B-254670.4, May 3, 1994, 94-1 CPD ¶ 292; ManTech Field Eng'g Corp.--Recon., B-246152.5, Dec. 17, 1992, 92-2 CPD ¶ 422. The mere fact that an agency takes corrective action does not establish that a statute or regulation had been clearly violated, *id.*; a protest is clearly meritorious when a reasonable agency inquiry into the protester's allegations would show facts disclosing the absence of a defensible legal position. Tucson Mobilephone, Inc.--Request for Entitlement, 73 Comp. Gen. 71 (1994), 94-1 CPD ¶ 12; Carl Zeiss, Inc.--Entitlement to Costs, B-247207.2, Oct. 23, 1992, 92-2 CPD ¶ 274.

The record in this matter does not show that Baxter's initial protest allegation--that DPSC erroneously determined that the demonstration failed to show that its EOE/EDI system displayed the delivered price--was clearly meritorious. At most, the record shows that it was not certain whether Baxter's EOE/EDI system displayed the delivered price.

In the source selection decision, the SSA, who was present at the demonstration, unequivocally stated that Baxter "failed to demonstrate that its [system] contained the delivered price." The SSA's affidavit, prepared in response to the protest, is less certain, as he states that the demonstration "did not satisfy [his] concerns"; he was not "thoroughly" convinced that the requirement had been met; and Baxter could not "clearly" state that the price shown was the delivered price. The SSA also states that "the question" was asked at the meeting, and that Baxter responded with "I don't know," but does not identify the question eliciting this response. A deputy program manager's affidavit suggests that the question asked had nothing to do with this protest allegation.⁶ DPSC's response to Baxter's protest did not clearly refute Baxter's allegation; however, nothing in the record clearly supported the protester's allegation.

In its comments, for the first time, Baxter produced affidavits from those employees present at the demonstration. These employees specifically stated that Baxter's EOE/EDI system had demonstrated the delivered price, and otherwise contradicted DPSC's affidavits. Because the affidavits provided by DPSC and Baxter were irreconcilable, our Office determined that a hearing was necessary to resolve the matter of whether Baxter had demonstrated that its EOE/EDI system displayed the delivered price, but the agency's corrective action in this matter obviated the need

⁶This deputy program manager attested that Baxter's system displayed a price, but when DPSC questioned Baxter "on the composition of this price," no one knew the answer to the question. He continued, "[t]he inability to answer the question straightforward left me with the perception that the price on the screen was not the delivered price." The composition of the delivered price was a related, but separate, solicitation requirement.

for that hearing. Thus, the record is left with competing and irreconcilable affidavits as to the issue at hand, and there is no support for the conclusion that this allegation was clearly meritorious.

We disagree with Baxter that DPSC acknowledged the merits of its protest by stating, in its notice of corrective action, that "meaningful discussions were not held regarding the delivered price issue." We think the most this statement acknowledges is that, based upon Baxter's affidavits, the agency was not certain whether or not Baxter's system displayed the delivered price, and that it decided, on the basis of these affidavits, that it should have conducted discussions with Baxter on this issue. Moreover, it is not at all clear that the protest would have been sustained. In his source selection statement, the SSA states that even if Baxter's proposal had been considered acceptable and included for consideration, his award decision would not have changed because Owens' offer included various advantages not found in Baxter's offer. The record is not clear as to whether Baxter's attacks on these advantages would have been successful.

Since we do not believe that Baxter's initial protest allegation was clearly meritorious, we need not reach the question of whether the agency's corrective action was unduly delayed.

As for the supplemental protest, Baxter specifically alleged that DPSC improperly failed to give Baxter credit for meeting the ANSI X12 requirement; improperly credited Owens with meeting the requirement; and improperly relaxed the requirement solely for Owens. Throughout the protest, Baxter referenced various executive branch directives concerning electronic commerce policy, but did not directly challenge the agency's interpretation of the requirement. In its supplemental report, along with rejecting Baxter's specific allegations, DPSC cast Baxter's argument in terms of the interpretation of the requirement and rejected not only its general reliance upon these policy directives, but its specific statements regarding such things as which types of systems met the requirement. DPSC also set forth, in some detail, its interpretation of the requirement. While no comments were filed, in Baxter's March 31 request to address the interpretation issue at the hearing, the protester, for the first time, explicitly set forth its interpretation of the requirement. In addition to generally relying on these directives, Baxter stated that "the purpose of this requirement is to implement a universal commercial ordering system by enabling end users to have the capability to send and receive all required documents in the ANSI X12 format."

While the protest record itself does not make it readily apparent which interpretation is correct, DPSC's notice of corrective action clearly acknowledged that the solicitation did not clearly define the ANSI X12 requirement. Considering that DPSC's supplemental report explicitly reviewed the requirement and examined both its and Baxter's interpretations, and in light of Baxter's subsequent expression

of its interpretation, we conclude that the corrective action was taken at least in part in response to Baxter's protest. DPSC itself states that post-report communications, discussed below, helped to "expose the weaknesses" of its position with respect to the ANSI X12 issues.

That being said, however, we do not believe that DPSC's corrective action in response to the supplemental protest was unduly delayed. DPSC correctly points out that the protest did not specifically set forth Baxter's interpretation of the requirement, but rather generally referred to the policy directives. Further, DPSC asserts that post-report communications associated with the hearing helped to expose the weaknesses in its position. We agree. In particular, Baxter's March 31 communication, discussed above, was the first time that the protester clearly expressed its interpretation, and the first time the issue was clearly disputed. Since our review of the record confirms the agency's position that it defended the protest until it perceived that the ANSI X12 issues posed a certain risk, and since the interpretational dispute was not squarely drawn until March 31, 8 working days prior to the corrective action, we do not believe that DPSC's corrective action here was unduly delayed. See Atlas Powder Int'l, Ltd.--Recon., B-254408.6, Sept. 28, 1994, 94-2 CPD ¶ 126. We add that Baxter was not put to the expense of preparing and filing comments in response to the supplemental agency report.

The request for a declaration of entitlement to costs is denied.

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