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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Inland Power Group, Inc.--Costs

File: B-410470.2

Date: February 3, 2015

William E. Hughes, Esq., Whyte Hirschboeck Dudek S.C., for the requester.
Kevin J. Jerbi, Esq., Department of the Army, Corps of Engineers, for the agency.
Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protester is not entitled to reimbursement of protest costs after agency took corrective action where protest was not clearly meritorious.

DECISION

Inland Power Group, Inc., of Butler, Wisconsin, requests that our Office recommend that the Department of the Army, Corps of Engineers, pay the firm the reasonable costs of filing and pursuing its protest with respect to the terms of request for proposals (RFP) No. W912P6-14-R-0029, issued by the agency to provide and install a diesel engine generator, and options for two more units, at a Corps of Engineers site in Lockport, Illinois. RFP at 5-7.

We deny the request.

Our Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2014), provide that we may recommend that an agency pay protest costs where the agency decides to take corrective action in response to a protest. We will make such a recommendation, however, only where the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. CSL Birmingham Assocs.; IRS Partners-Birmingham--Entitlement to Costs, B-251931.4, B-251931.5, Aug. 29, 1994, 94-2 CPD ¶ 82 at 3. Our rule is intended to prevent inordinate delay in investigating the merits of a protest and taking corrective action once an error is evident, so that a protester will not incur unnecessary effort and expense in pursuing its remedies before our Office. Professional Landscape Mgmt. Servs., Inc.--Costs, B-287728.2, Nov. 2, 2001, 2001 CPD ¶ 180 at 5.

The Corps issued the RFP on September 22, 2014, seeking proposals to supply a commercial generator set, to be incorporated with other elements of the electrical system for Permanent Barrier I, which is part of the agency's Aquatic Nuisance Species Dispersal Barrier System. Agency Report (AR) at 1-2. Inland filed a protest of the terms of the RFP on September 25, arguing that the RFP did not allow sufficient time for offerors to prepare proposals, and that a requirement for a 3500 kW [kilowatt] generator overstated agency needs, thereby resulting in a de facto sole source procurement. Protest at 5-6. The Corps submitted an agency report on October 27, followed by a supplemental agency report on November 14, responding to the protest and to questions posed by our Office. Inland filed comments on November 3, and supplemental comments on November 19.

On December 9 and 11, the Corps submitted notices that it would cancel the RFP because changes in timing of the project and funding restrictions meant that the risks of procuring the generators separately from other elements of the electrical system were greater than the benefits. Dismissal Request at 1-2; Dismissal Request, exh. 1, Memorandum for Record from Corps Project Manager & Branch Chiefs, Dec. 1, 2014, at 2. Inland then filed this request for protest costs.

In its request, Inland argues that its protest was clearly meritorious as demonstrated by the decision to cancel the RFP, and the record before our Office. Request for Costs at 3. Inland argues that the Corps has conceded that the RFP was an unjustified sole source procurement, an overstatement of its needs, and an unjustifiably rushed procurement. Id. We disagree.

The fact that an agency decides to take corrective action in response to a protest does not necessarily establish that a statute or regulation has been violated. Sourceling, LLC--Protest & Costs, B-405907.2 et al., Jan. 27, 2012, 2012 CPD ¶ 58 at 6. The record produced by the Corps provided support for the agency's assertions that its minimum requirements were established based on the professional judgment of an independent engineer that a 3500 kW generator set was required. Among other things, the engineer explained that the nominal input for each of the two barrier array rectifiers was indicated to be a 4 MW [megawatts]. AR, appx. A, Standby Generator Sizing Calculation, at 3. The engineer made judgmental assumptions regarding the efficiency of the rectifiers and the power demand by auxiliary systems loads and power house loads, and then included a design margin of 7.5 percent. Id. Based on those factors, the engineer's calculations yielded a minimum generator capacity for each of the generators of 3.4 MW, 4.25 MVA [megavolt-amperes] at 0.8 pf [picofarads], which the engineer noted could be provided by the 3500 kW Caterpillar C175-20 generator set. Id.

We have carefully reviewed the record, including the Corps actions and statements, and find that they do not demonstrate that Inland's objection to the 3500 kW generator requirement was clearly meritorious, or that the Corps is changing that requirement. Additionally, the fact that the Corps received multiple offers weighs

against Inland's argument that the RFP provided insufficient time for offerors to prepare commercial item proposals.¹ In short, the record does not demonstrate that Inland's protest was clearly meritorious.

The request is denied.

Susan A. Poling
General Counsel

¹ While Inland argues that the lengthy process of fabricating the generator is relevant to the time needed to prepare its proposal, id., it fails to show a basis for this claim.