



Decision

Matter of: Livanta, LLC-Costs

File: B-404215.2

Date: April 5, 2011

Jonathan T. Williams, Esq., Kelly E. Buroker, Esq., and Devon E. Hewitt, Esq., PilieroMazza PLLC, for the protester.
Christine Simpson, Esq., Centers for Medicare and Medicaid Services, for the agency.
Kenneth Kilgour, Esq., and Edward T. Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request that GAO recommend the reimbursement of costs of filing and pursuing a protest is denied where the agency took corrective action prior to the due date for the agency report, even though it produced relevant documents prior to that date.

DECISION

Livanta, LLC, of Annapolis Junction, Maryland, requests that we recommend that the firm be reimbursed the costs of filing and pursuing its protest of the award of a contract under request for proposals (RFP) No. RFP-CMS-2010-0036, issued by the Centers for Medicare and Medicaid Services (CMS) for a payment error rate measurement contract.

We deny the request.

Livanta filed its protest on October 12, 2010, and the due date for the agency report was November 12. The protest included the following three allegations: (1) the agency improperly evaluated the technical proposals, Protest at 12-18; (2) the agency's price evaluation was flawed, Protest at 18-19; and (3) the awardee had an unmitigable organizational conflict of interest. Protest at 7-12. Less than 2 weeks later, on October 25, the agency filed a request for partial summary dismissal, which was promptly granted. On November 1, the agency submitted an advance document production consisting of relevant documents pertaining to the remaining protest issues. No contracting officer's statement or legal memorandum responding to the protester's arguments or defending the agency's actions were provided at that time.

On November 3, based on a review of the early documents provided by the agency, Livanta requested an immediate outcome prediction alternative dispute resolution (ADR) teleconference, and the GAO attorney conducted an ADR teleconference the following day. During the ADR teleconference, the GAO attorney questioned whether the agency had properly evaluated the awardee's compliance with certain requirements of the RFP and advised the agency of the specific documents it would need to provide in the agency report in order to avoid a sustain of the protest. On November 9, 3 days before the due date for the agency report, CMS advised our Office that it would take corrective action to resolve the protest. We dismissed the protest as academic and Livanta filed its request for entitlement to its protest costs, arguing that the agency unduly delayed taking corrective action in response to a clearly meritorious protest. Request at 1.

Under the Competition in Contracting Act of 1984, our Office may recommend that protest costs be reimbursed only where we find that an agency's action violated a procurement statute or regulation. 31 U.S.C. § 3554(c)(1) (2010). 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) (2010). This does not mean that costs should be reimbursed in every case in which an agency decides to take corrective action; rather, a protester should be reimbursed its costs where an agency unduly delayed its decision to take corrective action in the face of a clearly meritorious protest. Griner's-A-One Pipeline Servs., Inc.—Costs, B-255078.3, July 22, 1994, 94-2 CPD ¶ 41 at 5.

The protester recognizes that, as a general matter, when an agency takes corrective action before the due date set for receipt of the agency report, our Office views such action as prompt and will not recommend the reimbursement of costs, even where the protest is clearly meritorious. The Sandi-Sterling Consortium—Costs, B-296246.2, Sept. 20, 2005, 2005 CPD ¶ 173 at 2-3. Livanta argues, however, that this general rule should not apply here given the agency's active defense of the protest, which included the filing of a request for partial dismissal and the early submission of documents, which caused Livanta to incur significant costs that would have been unnecessary if the agency "had promptly and reasonably investigated the matter." Request at 2.

With regard to the agency's dismissal request, an agency's pursuit of a reasonable procedural litigation strategy before our Office does not constitute undue delay in taking corrective action. Carlson Wagonlit Travel—Request for Declaration of Entitlement to Costs, B-266337.3 *et al.*, July 3, 1996, 96-2 CPD ¶ 99 at 4. A contracting agency, in defending protests filed with our Office, should be permitted to vigorously assert procedural and substantive defenses in good faith without having to risk the assessment of costs. *Id.* This is especially true where, as here, our Office granted the agency's motion for partial dismissal. *See id.* There is simply no basis to assert that the agency's good faith, successful efforts to narrow the scope of

the protest should result in a recommendation that it pay the protester's costs, where the agency took corrective action prior to the due date for the agency report.

Moreover, we conclude that the agency's corrective action was prompt, notwithstanding the fact that the agency produced relevant documents in advance of the agency report due date, and thereby may have caused the protester to expend the time and expense in reviewing these documents. Early document production, which is something agencies provide voluntarily, facilitates the efficient resolution of protests since it allows for the early resolution of issues concerning the scope of the agency's document production in response to the protest and because it can lead to the identification of supplemental protest issues early in the protest process, thereby affording protesters and our Office greater flexibility in resolving such issues.¹ Given these considerations, it would not be appropriate to penalize agencies, by subjecting them to the payment of protest costs, solely for utilizing this highly useful, but voluntary process. Thus, we find the agency's corrective action—initiated prior to the due date for the agency report—to have been prompt and to not warrant payment of protest costs.

The request is denied.

Lynn H. Gibson
General Counsel

¹ Pursuant to our Bid Protest Regulations, our Office will, to the maximum extent practicable, resolve timely supplemental protest issues within the time limit established for decision on the initial protest. 4 C.F.R. § 21.9(c).