



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: MacroUSA Corporation--Costs

File: B-408444.2

Date: February 11, 2014

Susan Warshaw Ebner, Esq., Asmar, Schor & McKenna, PLLC, for the protester.
Kyle E. Chadwick, Esq., Department of the Army, for the agency.
Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation that protester be reimbursed costs associated with filing and pursuing protest is denied where record shows that agency took prompt corrective action before the deadline for submitting its agency report; protester's contention that agency's actions over several acquisitions reflect a pattern of impropriety is not supported by record.

DECISION

MacroUSA Corporation, of McClellan, California, requests that we recommend that it be reimbursed the costs of filing and pursuing its protest against the terms of request for proposals (RFP) No. HQ0682-13-R-0009, issued by the Joint Improvised Explosive Device Defeat Organization (JIEDDO), a component of the Department of Defense, to acquire lightweight robots equipped with a manipulator arm.

We deny the request.

MacroUSA has filed several protests in connection with various acquisitions conducted by JIEDDO. Its first protest concerned the issuance of a justification and approval (J&A) for a proposed sole-source award of a contract for robotic arms. We dismissed that protest as academic prior to the agency filing a report with our Office, after being advised by the agency that it had rescinded the J&A and did not intend to award a contract for that requirement. MacroUSA Corporation, B-407868, Dec. 19, 2012.

MacroUSA's second protest was filed against the terms of a competitive solicitation, RFP No. HQ0682-13-R-0006, issued to acquire a quantity of ultra lightweight recognizance systems. We dismissed MacroUSA's second protest as academic prior to the agency submitting a report to our Office, because the agency advised us that it had cancelled the solicitation. MacroUSA Corporation, B-408129, Apr. 19, 2013. In that dismissal, we specifically declined to recommend that MacroUSA be awarded the costs associated with filing and pursuing either of its first two protests.

MacroUSA subsequently filed two additional protests related to the award of two sole-source contracts. Those protests were fully developed and, in the wake of an alternative dispute resolution (ADR) procedure, the agency advised our Office that it would terminate the two contracts that had been awarded. The agency also advised our Office that it would reimburse MacroUSA the costs of filing and pursuing those protests. In light of the agency's actions, we dismissed those protests as academic as well. MacroUSA Corporation, B-408073, June 10, 2013.¹

Finally, MacroUSA filed a protest challenging the terms of RFP No. HQ0682-13-R-0009, another competitive solicitation to acquire lightweight robots equipped with a manipulator arm. Before the deadline for filing a report in that protest, the agency advised our Office that it intended to cancel that RFP. We dismissed that protest as academic as well. MacroUSA Corporation, B-408444, July 3, 2013.

In the instant request that we recommend it be reimbursed the costs associated with filing and pursuing its latest protest against the terms of RFP No. HQ0682-13-R-0009, MacroUSA essentially takes the position that all of the agency's actions in connection with all of the acquisitions against which it has filed protests should be considered in the aggregate. The protester maintains that the agency's actions demonstrate a continuing pattern of improper activity.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs 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 causing the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2013); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 5. Generally, where an agency takes corrective action by the due date of its report, we regard the action as prompt, and will not consider a request to recommend reimbursement of protest costs. A-Ability Med. Equip., Inc.--Costs, B-403256.3, Apr. 4, 2011, 2011 CPD ¶ 81 at 2. Here, the agency took corrective

¹ Those protests concerned the award of two contracts, Nos. W56HZV-13-C-0124 and W56HZV-13-C-0128, to iRobot Corporation and to Qinetiq-North America respectively.

action prior to the deadline for submitting its report by cancelling the underlying solicitation. Accordingly, there is no question that the agency's corrective action was prompt.

The protester essentially is asking us to infer a recurring pattern of improper agency action, and to create an exception to our existing rule regarding reimbursement in cases where an agency takes prompt corrective action. However, the protester's argument is based on its assumption that the series of corrective action decisions by the agency demonstrates an underlying pattern of impropriety. We do not share the protester's assumption.

MacroUSA filed five protests in our Office. The agency agreed, in the wake of an ADR procedure, that the two MacroUSA protests relating to the award of sole-source contracts were meritorious, and further agreed to reimburse MacroUSA the costs of filing and pursuing those protests. There is no basis for our Office to consider the agency's actions in these two cases as interrelated to the agency's actions in MacroUSA's other protests. In these two cases, MacroUSA challenged sole-source contracts awarded by the agency, prevailed after full development of the record, and obtained all of the relief to which it was entitled. MacroUSA has not explained, and it is not apparent to us, why it would be appropriate for our Office to consider these two cases--where the agency did not promptly take corrective action, the protests clearly were meritorious, and the protester was reimbursed the costs of filing and pursuing its protests--together with its remaining three cases where the agency's actions were fundamentally different.²

In response to MacroUSA's remaining three protests (concerning, respectively, the issuance and rescission of a sole-source J&A, as well as the issuance and cancellation of two competitive RFPs), the agency took prompt corrective action before the deadline for submission of the agency report. MacroUSA has not established, and the record otherwise does not show, that any of the three protests, in fact, clearly was meritorious.³ In this regard, as a prerequisite to our recommending that costs be reimbursed where a protest has been settled by corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious.⁴ Apptis Inc.--Costs, B-402146.3, Mar. 31, 2010,

² Beyond the fact that the agency serendipitously happened to be purchasing goods of a similar nature in all of MacroUSA's protests, there is no connection between these acquisitions.

³ Again, we already have specifically declined to recommend reimbursement of MacroUSA's protest costs in connection with the first two of these three protests.

⁴ The mere fact that an agency takes corrective action does not establish that the protest was clearly meritorious. Diligent Consulting, Inc.--Costs, B-299556.3, June 26, 2007, 2007 CPD ¶ 125 at 5.

2010 CPD ¶ 123 at 4. Without a basis to find those protests clearly meritorious, and in light of the promptness of the agency's corrective action, we have no ground to recommend reimbursement of MacroUSA's protest costs here. See Information Ventures, Inc.--Costs, B-294580.2, et al, Dec. 6, 2004.

The request is denied.

Susan A. Poling
General Counsel