



Decision

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Matter of: GOV Services, Inc.--Costs

File: B-414226.2

Date: June 26, 2017

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DIGEST

Protester's request for a recommendation that it be reimbursed its costs of filing and pursuing its protest is granted, where the record shows that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest.

DECISION

GOV Services, Inc., a small business, of Falls Church, Virginia, requests that we recommend that it be reimbursed the reasonable costs of filing and pursuing its protest of the award of a sole-source contract to Akima Support Operations (ASO), an Alaska Native Corporation, of Anchorage, Alaska, under purchase order No. HHSN263201700048P, issued by the Department of Health and Human Services, National Institutes of Health (NIH), for janitorial services at NIH campuses in Maryland. GOV Services argues that its protest was clearly meritorious and that the agency unduly delayed taking corrective action.

We grant the request.

BACKGROUND

This is the seventh challenge to a series of actions taken by the NIH related to the award of contracts for janitorial services at NIH campuses in Maryland.¹ Two contracts are relevant here: (1) the contract that is the subject of this protest, the sole-source contract awarded to ASO in November 2016 pursuant to the authority cited in Federal Acquisition Regulation (FAR) § 6.302-2; and (2) the contract awarded to the incumbent contractor, East West, Inc., in February 2015. The NIH contends that the sole-source award to ASO was necessary because the incumbent contractor “walked off the job.” Agency Report (AR), Tab 4, Contracting Officer’s Statement (COS), at 5.² We provide below a brief history of both contracts.

On February 2, 2015, the NIH awarded contract No. HHSN263201500012I for janitorial services to East West, Inc., a firm that is not a party to this protest (hereinafter “the incumbent”). *Id.* at 3. The procurement was conducted under the Small Business Administration’s (SBA) section 8(a) program.³ *Id.* at 2; AR, Tab 6, Request for Proposals (RFP) No. 263-2008-P(GG)-0238. The contract consisted of a base year, from February 2, 2015 through February 1, 2016, and four option years. AR, Tab 4, COS, at 3.

On December 1, 2015, towards the end of the base year, the agency decided not to exercise the option year under the contract and informed the incumbent of this decision on December 2. *Id.* at 4. In order to procure follow-on services, the NIH issued request for quotations (RFQ) No. 1062534 on January 30, 2016. *See East West, Inc., supra*, at 2. The RFQ was issued on an unrestricted basis through the General Services Administration’s (GSA) e-Buy system pursuant to the procedures of FAR subpart 8.4 and was limited to holders of GSA Federal Supply Schedule contracts. *Id.* The RFQ sought janitorial services for a period of performance of 1 year and 1 option year. *Id.*

On February 9, prior to the date for receipt of quotations, the incumbent filed a protest challenging the terms of the RFQ, which we docketed as B-412719. Specifically, the incumbent contended that the agency was prohibited from acquiring the requirement on an unrestricted basis because the agency had previously awarded the requirement through the SBA’s section 8(a) program. On February 25, the agency notified our Office of its intent to take corrective action. The NIH represented that, among other things, it

¹ We have issued two digested decisions in connection with these efforts. *GOV Services, Inc.*, B-414374, May 11, 2017, 2017 CPD ¶ 143; *East West, Inc.*, B-412719.2 *et al.*, June 21, 2016, 2016 CPD ¶ 170.

² References to the agency report refer to the report filed in connection with the protest docketed as B-414226.

³ At the time of contract award, however, the incumbent, as well as the other offerors in the competitive range, had graduated from the 8(a) program. AR, Tab 4, COS, at 3.

would contact the SBA regarding the procurement. On March 9, our Office dismissed the protest as academic.

On March 24, the incumbent filed a second protest, which we docketed as B-412719.2.⁴ In this second protest, the incumbent alleged that the agency had acted in bad faith by deliberately refusing to implement its corrective action. Despite the incumbent's allegations, the record in the protest reflected that the NIH had contacted the SBA on March 11--two days after our dismissal of the prior protest. East West, Inc., supra, at 3. Additionally, on March 22, the agency had offered the requirement to the SBA for competition within the 8(a) program. Id. In an undated letter, the SBA accepted the requirement. Id. Accordingly, on June 21, our Office denied the protest, finding that the agency acted promptly to implement its proposed corrective action. Id. at 6-7.

As a result of the above protests, the NIH extended the incumbent's contract for 6 months until July 30.⁵ AR, Tab 4, COS at 4. As of July 30, however, the NIH had not yet awarded a follow-on contract for the required services. In fact, as of this date, the NIH had not issued a solicitation to compete the requirement within the SBA's 8(a) program in accordance with the agency's March 22 representation to the SBA. East West, Inc., supra, at 3 (citing NIH Offer Letter to SBA, Mar. 22, 2016).⁶

The record reflects that, because the agency had no follow-on contract in place, the incumbent continued to perform janitorial services for the agency under what the agency characterizes as short-term "purchase order extensions."⁷ NIH Email to GAO, Jan. 30, 2017. For instance, at the time the NIH awarded the challenged sole-source contract to ASO in November 2016, the record shows that the incumbent was performing services for the agency in 15-day increments pursuant to successive letters issued by the NIH. Tab 7, NIH Letter, Oct. 31, 2016; Tab 8, NIH Letter, Nov. 14, 2016. In these letters, the agency recognized that the incumbent's contract had expired. Nevertheless, the letters notified the incumbent to continue to perform the "services

⁴ The incumbent filed two supplemental protests in connection with this protest, which were docketed as B-412719.3 and B-412719.4.

⁵ Presumably, this extension of services was executed pursuant to FAR clause 52.217-8 ("Option to Extend Services"). Although the agency did not include the incumbent's contract in the record or produce the modification extending the incumbent's contract, the agency produced the relevant solicitation, which provided that FAR clause 52.217-8 would be applicable to the contract. AR, Tab 6, RFP No. 263-2008-P(GG)-0238, at 23-24.

⁶ The NIH represented as recently as February 1, 2017, that it is still preparing to do so. GOV Services, Inc., supra, at 4 (quoting NIH Offer Letter to SBA, Feb. 1, 2017, at 1).

⁷ The incumbent confirms that its services were extended on a short-term basis, with the last extension ending on November 30, 2016. Affidavit of Incumbent Vice President, Dec. 20, 2016, at 2.

performed previously under contract HHSN2632015000121” for a period of “15 days.” Tab 7, NIH Letter, Oct. 31, 2016, at 1; Tab 8, NIH Letter, Nov. 14, 2016, at 1. The last letter from the agency requested performance through November 30, 2016.⁸ Tab 8, NIH Letter, Nov. 14, 2016, at 1.

The agency claims that, on November 25, the incumbent “walked off the job.” AR, Tab 4, COS, at 5. The contracting officer represents that the incumbent “was never notified nor directed by the NIH Contract Officer to stop performance and leave the premises.” Id. Accordingly, the agency states that it awarded a sole-source contract to ASO under FAR § 6.302-2. Id. at 6; Memorandum of Law (MOL), Jan. 19, 2017, at 2.

On December 16, in connection with another protest docketed as B-412719.6, the NIH announced for the first time that it had awarded this “emergency” sole-source contract to ASO and explained the basis for the sole-source award. NIH Req. for Dismissal (B-412719.6), Dec. 16, 2016, at 2; COS (B-412719.6), Dec. 16, 2016, at 1. On December 20, GOV Services filed a timely protest with our Office challenging the sole-source award to ASO.⁹ Supp. Protest (B-412719.6), Dec. 20, 2016, at 2. In its protest, the protester disputed the agency’s allegation that the incumbent had ceased to perform the services. Id. Rather, the protester claimed that the agency had created the emergency by forcing the incumbent off the job. Id. To support its claim, the protester submitted an affidavit from the incumbent’s Vice President and correspondence between the agency and the incumbent.

Of note, the protester submitted an email sent by the contracting officer’s technical representative (COTR) to the incumbent at 9:02 a.m. on November 25--the date the incumbent allegedly walked off the job--informing the incumbent to remove its equipment from the buildings because “[a]s of this morning, ASO will begin

⁸ The record is somewhat unclear as to the contractual authority pursuant to which the agency obtained services from July 30 through November 30. The agency contends the incumbent contract expired on February 1, 2016. NIH Email to GAO, Jan. 30, 2017. This contention, however, does not account for the 6-month extension. Rather, it appears to us that, if the agency extended the incumbent’s contract pursuant to FAR clause 52.217-8, the contract would have expired on July 30 at the conclusion of the 6-month extension of services. See FAR clause 52.217-8 (“[T]he total extension of performance hereunder shall not exceed 6 months.”). After July 30, however, because no solicitation was issued for janitorial services, it appears that the agency issued the short-term “purchase order extensions” to the incumbent on a sole-source basis from July 30 through November 30.

⁹ The protest was initially filed as a supplemental protest in connection with the protest docketed as B-412719.6. Because the supplemental protest challenged a different award, which was issued by the NIH under a different legal basis, our Office considered the supplemental protest to be a distinct and new protest and docketed it as B-414226.

performance.”¹⁰ Supp. Protest (B-412719.6), Encl. 3, COTR Email, Nov. 25, 2016, 9:02 a.m. The record reflects that the incumbent immediately requested clarification from the contracting officer because, as the incumbent pointed out in its email, the incumbent’s services were not due to end until November 30. Id., Encl. 3, Incumbent Email to CO, Nov. 25, 2016, 10:14 a.m. The record shows that the incumbent called and sent emails to the contracting officer on November 25, 28, 29 and 30 seeking permission to complete the work through the end of its current extension. Comments, Exh. 3, Emails to CO. The record reflects that the contracting officer never responded.

On December 23, the protester filed additional documents and arguments in support of its protest.¹¹ Amend. Protest (B-414226), Dec. 23, 2016. The protester argued that the agency failed to issue a justification and approval (J&A) for the sole-source award and that the agency failed to comply with the requirements of FAR § 6.302-2(c)(2), id. at 4,5, which provides that, when an agency uses other than competitive procedures based on unusual and compelling urgency, the agency “shall request offers from as many potential sources as is practicable under the circumstances.”

Additionally, in disputing the agency’s contentions that the sole-source contract was necessitated by the incumbent’s alleged cessation of work on November 25, the protester provided information showing that the contract may actually have been awarded on November 23, two days prior to the alleged “emergency.” Id. at 3-4, 5; id., Exhs. C & D, Award Summary from www.USAspending.gov. In addition to the information provided by the protester, the record also reflects that the purchase order is dated November 23. AR, Tab 1A, Purchase Order, at 1.

On January 23, 2017, the agency filed its agency report, which consisted of three documents: (1) a legal memorandum, (2) an undated contracting officer’s statement of facts, and (3) the first page of the purchase order issued to ASO. In its agency report, the NIH claimed that the “purchase order was not ordered or made until, and only because East-West walked off the job on November 25, 2016.” AR, Tab 4, COS, at 5. Additionally, the NIH represented that “there is no evidence . . . that Akima was contacted about award before November 25, despite that being the date on the purchase order.” MOL at 3. With respect to the date on the purchase order itself, the agency stated that the “system automatically enters the execution date on the date it is written.” Id.

¹⁰ The incumbent’s Vice President also contended that, when the incumbent’s employees arrived at the job site on November 25, employees of ASO were already present. Aff. of Incumbent Vice President, Dec. 20, 2016 at 2-3. The Vice President contended that the COTR had permitted ASO’s employees to move ASO’s equipment to the NIH campus early that morning and that ASO was ready to take over the work shortly after the email described above was sent. Id. at 3.

¹¹ This additional information and argument was timely filed in accordance with our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2).

Notably absent from the agency report was: (1) a contemporaneously executed J&A for the sole-source award, (2) any correspondence between the agency and the incumbent, and (3) any evidence to support the agency's assertion that the incumbent had walked off the job. Accordingly, on January 27, our Office requested that the agency provide, among other relevant documents, these three categories of documents.

On January 27 and 30, the agency provided additional documentation. The agency also indicated that no contemporaneous J&A existed. NIH Email to GAO, Jan. 30, 2017. Rather, the agency requested that we consider the contracting officer's statement, which was clarified to have been executed on January 23, to serve as both a contracting officer's statement and justification for the sole-source award. Id.

On February 2, GOV Services filed its comments on the agency report, contending that it was greatly concerned that the agency continued to put forth "objectively false positions as fact." Comments at 1.¹² In support of its prior claim that the incumbent did not walk off the job, the protester submitted a number of emails between the agency and the incumbent--emails that the agency did not produce despite our request that it produce "[c]orrespondence between the agency and the incumbent contractor." GAO Email, Jan. 27, 2017. We summarize these emails briefly below.

➤ First, as explained above, on Friday, November 25 at 9:02 a.m. (the day of the alleged walk off), the COTR informed the incumbent to remove its equipment from the buildings because "[a]s of this morning, ASO will begin performance." The COTR's email implies that this guidance was being provided at the direction of the contracting officer. Comments, Exh. 3, COTR Email, Nov. 25, 2016 ("I was informed by [the contracting officer] that the contract performance can begin for the NIH janitorial services. As of this morning, ASO will begin performance[.]").

➤ On November 25 at 10:14 a.m., the incumbent emailed the contracting officer to clarify whether it should cease performing services in accordance with the COTR's email, noting that its current extension of services was not due to end until November 30.

➤ On Monday, November 28 at 12:59 p.m., having received no response from the contracting officer, the incumbent sent another email to the contracting officer asking him to confirm whether the incumbent should "move out." The incumbent noted again that its extension continued through November 30 and, yet, the COTR "literally pushed" the incumbent "out of the campus." The incumbent expressly requested written notice from the contracting officer that it should abide by the COTR's move out instructions.

¹² Although the protester styled its comments as a combined comments and supplemental protest, we did not docket the filing as a supplemental protest because the so-called supplemental grounds merely expanded upon grounds already raised, namely challenges to the sole-source award.

➤ Later on November 28 at 3:01 p.m., the incumbent sent another email to the contracting officer stating that it intended to remain on the campus until it received official written instruction from the contracting officer to vacate. The incumbent informed the contracting officer that, on November 25, the COTR had locked the incumbent's office on the job site and prevented its employees from entering. Employees from ASO were also present, moving their equipment onto the job site. The incumbent also reminded the contracting officer of a similar event that had occurred on November 14, wherein the COTR had allegedly removed the incumbent's equipment and told the incumbent to "move out" that evening.¹³

➤ On Wednesday, November 30, the day that the incumbent's extension was due to expire, the incumbent sent a final email to the contracting officer noting that it had received no clarification from the contracting officer. The incumbent offered to remain on the contract beyond November 30.

➤ On November 30, the record reflects that the incumbent sent a lengthy email, with supporting attachments, to an NIH employee, whose position within the agency is unclear. The subject of the email states: "[East West]/NIH contract – Please help to provide clarification." The incumbent summarizes the events since November 25 and states that "nothing is making any sense[.]" Id. The incumbent asks: "Why [] are [there] two contractors on site[] and there is no official award?" Id. The incumbent represents that it "has asked for clarification multiple times, but the contracting office[r] [] neglects to clarify or respon[d] to our concerns regarding [the COTR's] action." Id. The incumbent further states that "[w]ithout any direction and clarification from [the contracting officer] and your office, [the incumbent] has no other explanation except to believe this incident is another personal conflict of interest and illegal action from [the COTR]." Id. The incumbent concludes by stating that it "strongly believe[s] the contracting officer has all the facts but refuses

¹³ The agency states that on or about November 15, 2016, the incumbent began moving equipment and the agency feared that the incumbent was walking off the job. AR, Tab 4, COS, at 5. The agency provides no documents to support its contentions. By contrast, the protester supplies numerous emails showing that on November 14, the incumbent informed the contracting officer that the COTR was asking it to remove its equipment. Comments, Attachs. 3-5, Correspondence with NIH. The incumbent asked for direction and stated that, if it did not hear from the contracting officer, it "will still continue to provide service until" the next day, which marked the end of its extension of services. Id., Attach. 3, Incumbent Email to CO, at 1. The incumbent noted that it would start removing equipment on November 15 at the conclusion of its extension. Id. The contracting officer responded by providing the incumbent with a letter requesting a 15-day extension of services. Id., Attach. 5, CO Email.

to act to stop this illegal action.” Id. There is no indication in the record that the recipient of this email responded.

Comments, Exhs. 3 & 4, Email Correspondence.

On February 10, the NIH advised our Office and the protester that it had “identified an error in the procurement process,” namely that its J&A “was not executed in full accordance with FAR Part 6.” NIH Notice, Feb. 10, 2017, at 1. Also, with respect to the procurement, the NIH stated that it would terminate the sole-source contract awarded to ASO on or about February 15, 2017, and award a new sole-source contract to ASO under the SBA’s section 8(a) program. Id. at 2. As a result, the NIH requested dismissal of GOV Services’ December 20 protest while the agency implemented its proposed corrective action. Id. The NIH requested that we limit any award of protest costs to this “meritorious ground.” Id.

On February 14, GOV Services opposed the agency’s request for dismissal. Relevant here, GOV Services challenged, among other things, the agency’s decision to award a second sole-source award to ASO. Protester’s Opp’n to Corrective Action, Feb. 14, 2017, at 1. On February 15, we docketed the protester’s challenge to the second sole-source award to ASO as B-414374.¹⁴

On February 21, based upon the agency’s notice of corrective action, we dismissed as academic GOV Services’ protest of the first sole-source award. GOV Services, Inc., B-414226, Feb. 21, 2017 (unpublished decision). This request followed.

DISCUSSION

GOV Services argues that its protest challenging the sole-source award to ASO was clearly meritorious and that the agency unduly delayed taking corrective action. The agency disputes the protester’s claim, arguing that GOV Services’ challenge to the agency’s sole-source award was not clearly meritorious, and contends that the agency had no basis for taking corrective action until the protester challenged the sufficiency of the J&A, which the agency claims was first raised in the protester’s comments.

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 causing the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Competition in

¹⁴ We subsequently denied the protester’s challenge to this award. GOV Services, Inc., B-414374, May 11, 2017, 2017 CPD ¶ 143. Accordingly, any costs associated with GOV Services’ challenge to the second sole-source award are not included in our recommendation here.

Contracting Act (CICA) of 1984, 31 U.S.C. § 3554(c)(1)(A); 4 C.F.R. § 21.8(e); East Coast Nuclear Pharmacy--Costs, B-412053.5, Aug. 31, 2016, 2016 CPD ¶ 249 at 3. 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. Best Value Tech., Inc.--Costs, B-412624.3, Feb. 6, 2017, 2017 CPD ¶ 50 at 3.

In its protest, GOV Services challenged the agency's award of a sole-source contract to ASO. For the reasons discussed below, we find GOV Services' protest allegations to be clearly meritorious. Moreover, we find that the agency unduly delayed taking corrective action in response to these clearly meritorious grounds. In this respect, GOV Services raised the relevant grounds in its filings on December 20 and 23. The NIH filed its report on January 23. On February 2, GOV Services filed its comments expanding on its initial grounds. On February 10, the agency notified our Office of its intent to take corrective action. As a result, we find that the agency's corrective action was unduly delayed.

Failure to Prepare the J&A

CICA requires that an agency obtain full and open competition in its procurements through the use of competitive procedures. 41 U.S.C. § 3301(a)(1). Exceptions to this general requirement are provided in statute and permit, among other enumerated exceptions, an agency to use other than competitive procedures in acquiring goods and services where the agency's requirement is of such an unusual and compelling urgency that the government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits. 41 U.S.C. § 3304(a)(2); eAlliant, LLC, B-407332.4, B-407332.7, Dec. 23, 2014, 2015 CPD ¶ 58 at 4.

When using noncompetitive procedures pursuant to 41 U.S.C. § 3304(a)(2), as here, agencies are required to execute a written J&A with sufficient facts and rationale to support the use of the cited authority. 41 U.S.C. §§ 3304(e)(1)(A), (f); FAR §§ 6.302-2(c)(1), (d)(3), 6.303, 6.304; eAlliant, LLC, supra, at 5. Our review of an agency's decision to conduct a noncompetitive procurement focuses on the adequacy of the rationale and conclusions set forth in the J&A; where the J&A sets forth a reasonable justification for the agency's actions, we will not object to the award. eAlliant, LLC, supra.

The protester first raised the lack of a properly executed J&A on December 23, 2016. Amend. Protest at 4. After receipt of the agency report, which, as noted above, contained a contracting officer's statement dated January 23, 2017--that the agency subsequently requested on January 30 that we consider as a combined contracting officer's statement and J&A--the protester expanded upon its challenge to the agency's failure to execute a J&A in accordance with the relevant FAR provisions. Comments at 5.

Despite the protester's express challenges to the sole-source award on December 20 and 23, it was not until February 10 that the agency conceded that its combined

contracting officer's statement and J&A "was not executed in full accordance with FAR Part 6," which was after the agency submitted its report (January 23), and after the protester submitted comments on the report (February 2). Agency Notice, Feb. 10, 2017, at 1. See also id. at 2 (referring to this ground as a "meritorious protest ground").

We agree that the J&A was not executed in accordance with the applicable FAR provisions.¹⁵ In addition, although the award to ASO was made in late November 2016, the combined contracting officer's statement and J&A was not executed until January 23, 2017--after the protest was filed and approximately 2 months after the award to ASO. The FAR provides that, when preparation and approval of a J&A would unreasonably delay an acquisition under the authority cited in FAR § 6.302-2, an agency is permitted to prepare and approve the J&A after the award has been made. FAR § 6.303-1(e). In such circumstances, however, the preparation and approval of a J&A must occur "within a reasonable time after contract award." Id.

Here, the agency does not contend that preparation and approval of the J&A would have unreasonably delayed the acquisition. Moreover, the agency does not contend, nor do we find under these circumstances, that the agency executed the J&A within a reasonable amount of time after contract award. For these reasons, we find this ground to be clearly meritorious.

As set forth above, our Office may only recommend reimbursement of protest costs if we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Best Value Tech., Inc.--Costs, supra, at 11. In its opposition to GOV Services' request for protest costs, the agency argues that it did not unduly delay in taking corrective action in the face of this protest ground. NIH Opp'n to Req. for Costs, Mar. 17, 2017, at 4-5, 7. Rather, it contends that it took corrective action within 8 days of the filing of the protester's comments, in which the agency claims the protester first challenged the J&A.¹⁶ Id. at 5. We disagree.

GOV Services' initial protest filing dated December 20 challenged the propriety of the agency's sole-source award and its second filing dated December 23 expressly challenged the J&A. As noted above, where a protest challenges the award of a sole-source contract, our review of an agency's decision to conduct a noncompetitive procurement focuses on the adequacy of the rationale and conclusions set forth in the J&A. eAlliant, LLC, supra. Accordingly, we find that had the agency conducted a

¹⁵ For example, the J&A did not list any sources that expressed in writing an interest in the procurement, as required by 41 U.S.C. § 3304(e)(2)(E) and FAR § 6.303-1(e)(10). The record reflects that GOV Services expressed interest in this requirement on November 16 and submitted a capability statement. Amend. Protest, Exh. A, Email and Capability Statement, Nov. 16, 2016.

¹⁶ Despite this argument, the NIH requests that we limit any award of protest costs to this ground. NIH Opp'n to Req. for Costs at 7; Agency Notice at 2.

reasonable inquiry into the initial protest allegation, it would have noted the absence of a J&A. For these reasons, we find the agency unduly delayed taking corrective action in response to a clearly meritorious protest ground.

Alleged Urgent and Compelling Basis

In addition to challenging the sufficiency of the J&A, GOV Services also challenged the agency's stated basis for awarding a sole-source contract pursuant to FAR § 6.302-2. GOV Services contended that the agency forced the incumbent off the job, thus deliberately creating its own "emergency." Amend. Protest at 5. The record before us supports GOV Services' contentions.¹⁷

The correspondence between the agency and the incumbent demonstrates that, on the morning of the alleged cessation of services, the agency instructed the incumbent to cease performance because ASO would now perform the services. The record further demonstrates that, subsequent to this instruction, the incumbent sought guidance on numerous occasions from the contracting officer and repeatedly demonstrated a willingness to continue to perform the required services.

By contrast, the record is completely devoid of any documentation that would support the agency's contention that the incumbent walked off the job. For instance, there is no correspondence from the agency asking where the incumbent's employees were the morning of the alleged walk out, why the incumbent had walked off the job, or directing that the incumbent return to work. There is no cure notice. We would expect some correspondence from the agency in the event that its contractor simply walked off the job.

The agency points to tab 5 of the agency report for documentation that would support its position that "there was confusion and urgency created on November 25, 2016 because

¹⁷ Even assuming for the sake of argument that the record supported the agency's claim of an alleged walk out on November 25, the incumbent's 15-day extension of services was due to expire on its own accord on November 30. Thus, any alleged walk out would have justified the need to award only a brief sole-source contract until the agency could implement its plan for a follow-on contract at the conclusion of the current 15-day extension. The record demonstrates, however, that the agency's "plan" for the continuation of services was to issue additional sole-source extensions to the incumbent. NIH Email to GAO, Jan. 30, 2017. As a result, the facts here present a troubling situation in which the agency issued a sole-source contract because it was unable to issue yet another sole-source contract to the incumbent--either because of agency action or the incumbent's refusal to continue to perform. Although we recognize that agency acquisition planning need not be entirely error-free, eAlliant, LLC, supra, it must, as with all actions taken by an agency, be reasonable. RBC Bearings Inc., B-401661, B-401661.2, Oct. 27, 2009, 2009 CPD ¶ 207 at 6. Here, we find that the agency's planning was unreasonable.

there was a walk-off[.]”¹⁸ NIH Email to GAO, Jan. 27, 2017. We find no support for the agency’s position in tab 5 of the agency’s report. Although the correspondence demonstrates confusion among agency personnel whose offices and work stations were not cleaned on November 25, there is nothing to support the agency’s contention that the incumbent walked off the job.

Additionally, at least one email produced by the agency supports the protester’s contention. This email is particularly troubling in light of the agency’s representations to our Office that the purchase order issued to ASO was not issued until November 25, the date that the incumbent allegedly walked off the job. As noted above, the purchase order itself is dated November 23. AR, Tab 1A, Purchase Order, at 1. The agency attempted to explain this date by claiming that the “system automatically enters the execution date on the date it is written.” MOL at 3. This explanation, however, would mean that the agency drafted the purchase order prior to the alleged cessation of services.

More concerning, however, is the agency’s representation that “there is no evidence . . . that Akima was contacted about award before November 25, despite that being the date on the purchase order.” *Id.* Despite this representation, an email produced in the agency report shows that the contracting officer personally sent a copy of the purchase order to ASO on November 23--two days prior to the alleged walk out. AR, Tab 2, Correspondence between NIH and ASO, at 27. Accordingly, the agency report directly contradicts the agency’s representations.

For these reasons, we find this protest ground to be clearly meritorious. Moreover, we find that the agency unduly delayed in taking corrective action in response to this ground.¹⁹

Request for GAO Hearing

Finally, the agency contends that we are precluded from granting GOV Services’ request for costs because our Office scheduled, but did not hold, a hearing in this matter. NIH Opp’n to Req. for Costs at 4, 5. We disagree. Although in many instances the scheduling of a hearing indicates that the record requires further development and/or presents a close question, see e.g., Northrop Grumman Sys. Corp.--Costs, B-412278.6, Feb. 7, 2017, 2017 CPD ¶ 68 at 4, the request for a hearing does not

¹⁸ The agency does not point to any particular document in this tab. Rather, the agency simply refers our Office to this tab for support for its argument.

¹⁹ The agency did not substantively address this protest ground in its opposition to the protester’s request for protest costs. Rather, as explained above, the agency argues primarily that the only meritorious ground involves the procedural deficiencies related to its J&A and contends that it promptly took corrective action when this ground was first raised.

definitively, or in all cases, demonstrate that the record presents a close question. Here, for example, as demonstrated above, the record was sufficiently developed for our Office to determine that the protest grounds were clearly meritorious. Our request for a hearing in this matter was to better understand the chronology of the incumbent's performance, which, although somewhat related to the issues raised, was not ultimately essential to our decision.²⁰

RECOMMENDATION

We recommend that GOV Services be reimbursed its reasonable costs incurred with respect to all issues pursued in the protest filed on December 20 (B-414226). GOV Service should file its claim for costs, detailing and certifying the time expended and costs incurred, with the agency within 60 days of receipt of this recommendation. 4 C.F.R. § 21.8(f)(1).

The request that GAO recommend reimbursement of protest costs is granted.

Susan A. Poling
General Counsel

²⁰ Our Office scheduled a hearing to gain additional background and detail regarding the authority pursuant to which the incumbent continued to perform services from July 30 through October 30. (The record was clear regarding the period from October 31 through November 30.) The agency took corrective action prior to the scheduled hearing.