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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: East Penn Manufacturing Company, Inc.—Costs

File: B-291503.4

Date: April 10, 2003

John S. Pachter, Esq., and Jonathan D. Shaffer, Esq., Smith Pachter McWhorter & Allen, for the protester.

Linwood I. Rodgers, Esq., Defense Logistics Agency, for the agency.

Katherine I. Riback, Esq., Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation for reimbursement of costs for filing and pursuing protest is denied, even though the agency decided to take corrective action in response to the protest, where the record does not establish that protest was clearly meritorious.

DECISION

East Penn Manufacturing Company, Inc. 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. SPO430-02-R-4198, issued by the Defense Logistics Agency, Defense Supply Center Richmond, for batteries.

We deny the request.

The RFP provided for the award of one or more indefinite-quantity contracts for delivery of lead-acid, dry charged batteries to depot stock locations and for Direct Vendor Delivery (DVD). Offerors were to provide separate pricing for DVD and depot delivery.

East Penn had numerous dialogues with the agency regarding solicitation provisions that East Penn believed to be ambiguous or unduly restrictive of competition. Although some issues were resolved to East Penn's satisfaction, others were not, and East Penn filed a protest (B-291503) with our Office on October 8, 2002. On November 4, prior to submission of a report on the protest, the agency issued

amendment No. 3 revising the evaluation scheme. We dismissed East Penn's protest as academic on November 15.

East Penn then protested the terms of amendment No. 3, complaining that the amendment did not resolve the protester's concerns with the RFP's quantity estimates and delivery terms and that the amendment failed to disclose critical information necessary for East Penn to submit a competitive offer. After submission of the agency's report and protester's comments, we decided that a hearing was necessary to complete the record in this protest. On January 31, 2003, a pre-hearing conference was conducted to identify the hearing issues. As part of the pre-hearing conference, the GAO attorney provided "negotiation assistance" alternate dispute resolution (ADR) to facilitate the possible resolution of any, or all, of the issues.¹ Further negotiation assistance ADR was conducted on February 5. As a result of the ADR discussions, the agency provided additional information to all offerors that apparently addressed East Penn's concerns, and the parties resolved the protest issues to their mutual satisfaction. No hearing was held, and East Penn's protest was dismissed by our Office as academic on February 11.

East Penn requests that we recommend that it be reimbursed the reasonable cost of filing and pursuing its protests, including reasonable attorneys' fees. Specifically, East Penn contends that "[g]iven GAO's determination to conduct a hearing and ADR conference and the agency's subsequent determination to take corrective action, East Penn's protest was clearly meritorious." Protester's Request for Recommendation of Entitlement, Feb. 14, 2003, at 3.

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) (2000). 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) (2003). This does not mean that costs should be reimbursed in every case in which an agency decides to take corrective action; rather, a protest 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.--Entitlement to Costs, B-255078.3, July 22, 1994, 94-2 CPD ¶ 41. Thus, as a prerequisite to our recommending that costs be reimbursed where a protest has

¹ In "negotiation assistance" ADR, the GAO attorney acts as a facilitator to provide assistance to the parties in an effort to resolve protest issues. This ADR technique is unlike "outcome prediction" ADR where, based upon established precedent and the facts of a particular case, the GAO can conclude with a high degree of certainty that one party is likely to prevail. See Daniel I. Gordon and John L. Formica, "Alternative Dispute Resolution at GAO: An Update," Fed. Contr. Rep. (BNA), Nov. 7, 2000.

been settled by corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious, *i.e.*, not a close question. J.F. Taylor, Inc.--Entitlement to Costs, B-266039.3, July 5, 1996, 96-2 CPD ¶5 at 3; Baxter Healthcare Corp.--Entitlement to Costs, B-259811.3, Oct. 16, 1995, 95-2 CPE ¶174 at 4-5; GVC Cos.--Entitlement to Costs, B-254670.4, May 3, 1994, 94-1 CPD ¶ 292 at 3. 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. Department of the Army--Recon., B-270860.5, July 18, 1996, 96-2 CPD ¶ 23 at 3. The mere fact that an agency decides to take corrective action does not establish that a statute or regulation clearly has been violated. Spar Applied Sys.--Declaration of Entitlement, B-276030.2, Sept. 12, 1997, 97-2 CPD ¶ 70 at 5.

Here, we conclude that it is not appropriate to recommend that East Penn recover its protest costs because East Penn’s protest was not clearly meritorious. East Penn contended that the RFP evaluation terms regarding the quantity estimates and delivery terms were ambiguous and unduly restrictive of competition, in that they favored the incumbent firm that possessed this information. The agency maintained, however, that it provided all of the information concerning the quantity estimates and the delivery terms that it could, and that any ambiguity concerning these terms that remains is a matter of business risk, the imposition of which is legally permissible, and with which firms are expected to exercise business judgment in preparing their proposals.

Which party’s position is correct is not readily apparent from the record and, in fact, resolving this dispute would have required substantial further case development, which is why we scheduled a hearing to complete and clarify the protest record. Furthermore, the fact that negotiation assistance ADR was conducted in this case does not demonstrate that East Penn’s protest was clearly meritorious, as the protester apparently believes. See ATA Def. Indus., Inc.--Costs, B-282511.6, Mar. 14, 2000, 2000 CPD ¶ 49 at 4. In negotiation assistance ADR, the GAO attorney acts as a facilitator to assist the parties in resolving their dispute; this, however, does not indicate the likely outcome of the protest, unlike outcome prediction ADR, where the parties are informed as to which party will likely prevail in the protest. In sum, the record does not establish that East Penn’s protest was clearly meritorious.

The request for a recommendation that costs be reimbursed is denied.

Anthony H. Gamboa
General Counsel