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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Waltron LLC--Costs

File: B-298232.2

Date: August 18, 2006

Leigh T. Hansson, Esq., and Kurt D. Ferstl, Esq., Reed Smith LLP, for the protester. Benjamin G. Perkins, Esq., Defense Logistics Agency, for the agency. Nora K. Doolin, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester is not entitled to the cost of filing and pursuing its protests where the agency did not unduly delay implementing the promised corrective action.

DECISION

Waltron LLC requests that our Office recommend that it be reimbursed the costs of filing and pursuing its protests concerning request for quotations (RFQ) Nos. SP0406-05-R-4095, SP0400-06-T-6790, SP0400-06-T-9491, and SP0400-06-T-H400, issued by the Defense Logistics Agency (DLA), Defense Supply Center Richmond (DSCR), for a liquid cooling system corrosion inhibitor.

We deny the request.

Background

On September 30, 2005, DLA issued RFQ No. SP0406-05-R-4095 for liquid cooling system corrosion inhibitor packaged in 55 gallon drums and 5 gallon drums.¹ The solicitation listed Nalcool 2000, an inhibitor manufactured by NALFLEET, Inc., as the only approved product. Waltron filed a protest with our Office on October 19, arguing that the RFQ should also have included Waltron's inhibitor (AQ-701) as an approved product. On November 16, the agency provided notice that it was canceling the RFQ because it discovered, in reviewing the protest, that it had not given Waltron notice of its product's removal from the acquisition item description

¹ DLA is conducting this procurement on behalf of the Navy, the user activity.

(AID) as required by Federal Acquisition Regulation (FAR) § 9.207(b).² DSCR stated that it would delay issuance of a new solicitation for the item until it provided Waltron written notification with specific information about the basis for removal of its product from the AID. In view of the cancellation of the RFQ, we dismissed Waltron's protest as academic.

On December 16, DSCR issued solicitation No. SP0400-06-T-6790, again identifying Nalcool 2000 as the only approved product. Waltron protested to our Office on December 21, again objecting to the omission of its product from the AID in the RFQ, and arguing that DSCR had failed to implement the corrective action promised in response to its prior protest. At that time, Waltron had not yet received written notice as to why its product had been removed from the AID. On January 4, 2006, DSCR notified our Office that it was canceling the RFQ, explaining that it had been inadvertently issued by DSCR's automated procurement system before the required notice to Waltron had been sent. We then dismissed Waltron's second protest as academic.

On the same date our Office dismissed Waltron's second protest, January 4, Waltron received a letter from DSCR notifying it that its AQ-701 product had been removed from the AID for the inhibitor. The letter further detailed that in June 2004, the Navy had informed DLA that Waltron's product was chemically incompatible with the approved product the Navy was using and therefore was not acceptable. At the Navy's request, DSCR subsequently removed Waltron's product as a source of supply for the two sizes of the product (2 quarts and 55 gallons) used by the Navy.

With respect to the other two sizes of the product (1 quart and 5 gallons), the letter explained that in November 1987 Waltron's inhibitor was erroneously added to the AID as an approved product. According to DSCR, these two sizes of the product are used exclusively by the Air Force, which had accepted Waltron's product as an acceptable alternative to NALFLEET'S Nalcool 2000. DSCR concluded by informing Waltron that since the Air Force no longer requires these items, and since Waltron's product does not meet the Navy's requirements, Waltron's product has been removed from the AID. The letter included a separate section advising Waltron on the steps to become approved as a source of supply for the item.

On January 14, DSCR issued a third RFQ, No. SP0400-06-T-9491, for the same product called for in the previous two solicitations. On January 23, Waltron protested to our Office, objecting to the omission of its product from the AID in the RFQ and asserting that the corrective action promised by DSCR had not been implemented because the January 4 letter from DSCR provided no documentation in

² FAR § 9.207(b) requires an agency, after removal of a product or source, to promptly notify the affected parties, providing specific information about why the product or source no longer meets the qualification requirements.

support of its conclusion that Waltron's product is chemically incompatible with the approved product. On February 3, DSCR provided notice that it was canceling the RFQ because the Navy no longer had a need for the items. We subsequently dismissed Waltron's protest as academic.

On March 28, Waltron received a second letter from DSCR. The purpose of this letter was to inform Waltron of the testing protocol developed by the Navy for determining the compatibility of the inhibitors. It further stated that Navy could not mix incompatible chemicals in its systems and advised that alternative products would need to be tested to ensure compatibility. DSCR's letter then provided the guidelines for testing Waltron's product and listed a contact number for questions and/or to begin test initiation.

On April 5, DSCR issued RFQ No. SP0400-06-T-H400, for the same product. On April 21, Waltron protested to our Office, reiterating the grounds raised in its prior protests and arguing that the March 28 letter from DSCR lacked adequate justification for its decision to exclude Waltron's product. On May 24, DSCR filed its report responding to the protest, arguing that the Navy's decision to require compatibility testing is reasonable, that the solicitation complies with competition requirements, and that DSCR took the promised corrective action. On June 9, Waltron withdrew its protest and we closed our file on June 12.

Waltron now requests that our Office recommend that DSCR reimburse it for the costs of filing and pursuing its four previous protests. As explained below, we deny Waltron's request.

Discussion

Our Office may recommend that protest costs be reimbursed where we find that an agency's action violated a procurement statute or regulation. 31 U.S.C. § 3554(c)(1) (2000); 4 C.F.R. § 21.8(d) (2006). If an agency decides to take corrective action in response to a protest, our Office may recommend that the agency pay the protester its costs of filing and pursuing the protest. 4 C.F.R. § 21.8(e). However, we will recommend reimbursement only where the agency unduly delays taking corrective action in the face of a clearly meritorious protest. Birmingham Assocs.; IRS Partners-Birmingham--Entitlement to Costs, B-251931.4, B-251931.5, Aug. 29, 1994, 94-2 CPD ¶ 82 at 3. When an agency proposes corrective action, we consider it implicit that it will undertake a good faith effort to implement the corrective action and to address all issues raised by the protester that are meritorious. Louisiana Clearwater, Inc.--Recon. and Costs, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209 at 6. As a general rule, so long as an agency takes corrective action in response to a protest by the due date of its protest report, we regard such action as prompt and decline to consider favorably a request to recommend reimbursement of protest costs. Alaska Structures, Inc.--Costs, B-298156.2, July 17, 2006, 2006 CPD ¶ 109. We have recognized that the reimbursement of protest costs may be appropriate where an agency does not timely implement the promised corrective

action; the mere promise of action, without reasonably prompt implementation, has the obvious effect of circumventing the goal of the bid protest system of effecting the economic and expeditious resolution of bid protests. Louisiana Clearwater, Inc.- Recon. and Costs, supra.

Waltron argues that it should recover its costs because the agency's actions show a failure to timely implement the corrective action the agency promised in response to the initial protest--providing specific information about the basis for removal of its product from the AID. We disagree. On November 16, prior to the date set for filing the agency report, DSCR withdrew the RFQ and advised that it would take corrective action by notifying Waltron of the reasons its product was removed from the AID. DSCR implemented its corrective action as promised on January 4, the date Waltron received DSCR's notification letter. While DSCR did issue another RFQ just before sending its notification letter to Waltron, which was the basis of Waltron's second protest, the agency promptly withdrew that RFQ and reasonably explained that this issuance was due to an error with DSCR's automated procurement system. Since Waltron received the notice of its product's removal from the AID less than 2 months after the agency advised that it would take correction action, we see no basis to regard the agency's action as unduly delayed.

Waltron also argues that DSCR's corrective action, as implemented in the January 4 letter, was inadequate because it did not specifically inform Waltron why its product had been removed. Again, we disagree. DSCR's January 4 letter adequately explained the reason for removal--chemical incompatibility with the approved product. The letter further advised that since Waltron's product did not meet the Navy's requirements and had been removed from the AID, Waltron would have to become approved as a source of supply for the item to be placed back on the AID, which would require testing. The letter concluded with an explanation of the steps required for Waltron's product to become approved. In sum, the letter clearly constituted adequate, and timely, implementation of the corrective action promised in response to Waltron's protest.

The request for a recommendation that the agency reimburse Waltron's protest costs is denied.

Gary L. Kepplinger
General Counsel