Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Millar Elevator Service Company--Costs

File: B-284870.3

Date: August 3, 2000

Susan L. Schor, Esq., McManus, Schor, Asmar & Darden, for the protester.
Scarlett D. Grose, Esq., General Services Administration, Public Buildings Service, for the agency.
Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

General Accounting Office recommends that protester be reimbursed the costs of filing and pursuing its protest where the agency unduly delayed taking corrective action in response to the protest, which was clearly meritorious.

DECISION

Millar Elevator Service Company requests that we recommend that it be reimbursed the costs of filing and pursuing its protest challenging the award of a contract to Amtech Elevator Services under solicitation for offers (SFO) No. GS-03P-CDC-0006, issued by the General Services Administration (GSA) for elevator modernization and maintenance in the Moorhead Federal Building in Pittsburgh, Pennsylvania.

We recommend that GSA reimburse Millar its protest costs.

The SFO, issued on October 29, 1999, contemplated the award of a fixed-price contract based on a best value evaluation. The evaluation was to be based on six technical evaluation criteria listed in descending order of importance--design, maintenance and performance history, modernization experience and past performance, schedule, key personnel and staffing plan, and women owned business and small disadvantaged business participation in subcontracting--and on price, which was slightly less important than the technical criteria. With respect to past performance, offerors were required to submit a list of six comparable projects they had performed, including two in the Pittsburgh area.

After the agency evaluated the proposals, held discussions, and requested, received and evaluated two rounds of best and final offers, Millar received a score of 85 (out of 100 possible points) under the technical factors, and Amtech received a score of 91. Amtech's evaluated price was $5,877,919 and Millar's $5,742,203. Millar's evaluated price included $137,000 of sales tax added by GSA. The agency selected Amtech's proposal for award as representing the best value to the government.

On March 7, Millar protested to our Office, asserting, among other things, that in evaluating Amtech's past performance GSA did not consider that Amtech had failed to show that it had performed two projects in the Pittsburgh area, and that GSA improperly added sales tax to Millar's bid.

In its April 7 report, GSA acknowledged that it had improperly evaluated Amtech's proposal under the past performance criterion, and improperly had added sales tax to Millar's bid. GSA asserted, however, that these deficiencies had no effect on the award decision, and that Millar therefore was not prejudiced, since Amtech's score would have been reduced only slightly if the agency had considered Amtech's lack of past performance in the Pittsburgh area, and Millar's price advantage would be increased only from 2 percent to 4 percent if the sales tax were removed. In its comments on the report, submitted on April 18, Millar reiterated its complaints with respect to all issues, and also asserted that GSA's prejudice argument was based on mere speculation as to whether the award decision would change if the evaluation errors were corrected.

On May 1, at the request of the parties, the GAO attorney handling the protest conducted an "outcome prediction" alternative dispute resolution (ADR) conference by telephone.[1] During that conference, the GAO attorney informed the parties that she agreed that GSA had improperly evaluated Amtech's past performance, and improperly had added sales tax to Millar's price. She further informed the parties of her view that, given the close technical scores and Millar's lower price, it did not appear that there was a sufficient basis to conclude that the agency's errors in the technical and price evaluations had not prejudiced Millar. On May 9, GSA advised our Office that it had taken corrective action through issuance of an amendment to

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[1] In outcome prediction ADR, the GAO attorney handling a protest convenes the parties, at their request or at GAO's initiative, and informs the parties what the GAO attorney believes the likely outcome will be, and the reasons for that belief. A GAO attorney will engage in this form of ADR only if she or he has a high degree of confidence regarding the outcome. Where the party predicted to lose the protest takes action obviating the need for a written decision (either through the agency taking corrective action or the protester withdrawing the protest), our Office closes the case. Although the outcome prediction reflects the view of the GAO attorney, and generally that of a supervisor as well, it is not an opinion of our Office, and it does not bind our Office, should issuance of a written decision remain appropriate.

the solicitation. Accordingly, by decision dated May 11 (B-284870, B-284870.2), we dismissed Millar's protest as academic.

Millar now requests that we recommend reimbursement of its protest costs on the basis that the agency unduly delayed taking corrective action.

Where a procuring agency takes corrective action in response to a protest, our Office may recommend that the agency reimburse the protester its protest costs where, 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 protesters to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Pemco Aeroplex, Inc.--Recon. and Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 5. A protest is clearly meritorious when a reasonable agency inquiry into the protest allegations would show facts disclosing the absence of a defensible legal position. The Real Estate Ctr.--Costs, B-274081.7, Mar. 30, 1998, 98-1 CPD ¶ 105 at 3. As noted above, a GAO attorney will inform the parties through outcome prediction ADR that a protest is likely to be sustained only if she or he has a high degree of confidence regarding the outcome, so that the GAO attorney's willingness to do so is generally an indication that the protest is viewed as clearly meritorious.

With respect to the merits of the protest here, GSA conceded in its report that it improperly evaluated Amtech's past performance and improperly added sales tax to Millar's offer. Thus, the merit of these issues was evident. However, we will sustain a protest only where the protester demonstrates a reasonable possibility that it was prejudiced by the agency's improper actions, that is, that, but for the agency's actions, the protester would have had a substantial chance of receiving the award. See McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). Consequently, the relevant question here is whether there was clear merit to the protester's allegation that it was prejudiced by the agency's admitted errors.

While GSA asserts that correcting the evaluation deficiencies would not affect the award decision, this was in no way demonstrated by the record. To the contrary, the evaluation deficiencies affected both the technical and price evaluations, and since correcting the deficiencies would reduce Amtech's 6-point technical advantage and increase Millar's price advantage, necessitating a new price/technical tradeoff, we think Millar was in a position where it had a substantial chance for award. Accordingly, we conclude (as our attorney pointed out during the outcome prediction ADR) that the harm to Millar from the agency's admitted evaluation errors clearly met the standard for finding prejudice. Millar's allegation of prejudice was clearly meritorious, and this should have been evident to the agency since it recognized the merit of Millar's substantive complaint about evaluation of its proposal.

Regarding the other prong of our analysis, the question of the promptness of the agency's corrective action, we generally do not consider corrective action to be prompt where it is taken after the due date for the agency report. See CDIC, Inc.--Entitlement to Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 2. GSA did not propose corrective action until May 8, well after the agency had submitted its report and the protester had incurred the time and expense necessary to respond to that report. Under these circumstances, we do not consider the corrective action to have been prompt. Tri-Ark Indus., Inc.--Declaration of Entitlement, B-274450.2, Oct. 14, 1997, 97-2 CPD ¶ 101 at 4-5. Accordingly, we recommend that Millar be reimbursed its protest costs. Millar should submit its claim for such costs, detailing and certifying the time expended and costs incurred, directly to the agency within 60 days of receipt of this decision. Bid Protest Regulations, 4 C.F.R. § 21.8(f)(1) (2000).[2]

Robert P. Murphy
General Counsel

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[2] In its April 18 comments on the agency report, Millar raised supplemental, independent protest arguments--that offerors were not treated equally during the evaluation, and that two of the evaluators had a conflict of interest. Our recommendation that Millar be reimbursed its protest costs does not extend to these issues, since they were not the subject of the agency's corrective action.