Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: J. A. Jones Management Services, Inc.--Costs

File: B-284909.4

Date: July 31, 2000

William A. Roberts III, Esq., William Lieth, Esq., Kevin J. Maynard, Esq., and Eric W. Leonard, Esq., Wiley, Rein & Fielding, for the protester.
Sharon A. Jenks, Esq., Department of the Air Force, for the agency.
Paul E. Jordan, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

General Accounting Office declines to recommend that protester be reimbursed its protest costs where agency promptly took corrective action in response to a supplemental protest that, for the first time, identified alleged flaws in the past performance evaluation which the corrective action was designed to remedy.

DECISION

J. A. Jones Management Services, Inc. requests that we recommend that it be reimbursed the costs of filing and pursuing its protest challenging the award of a contract to Raytheon Technical Services Co. under solicitation No. F64605-99-R-0013, issued by the Department of the Air Force for base operating services at Johnston Atoll Air Force Base.

We deny the request.

The underlying solicitation, issued in July 1999, sought proposals to provide base operating support services for the Johnston Atoll base, which is used for demilitarization of certain chemical weapons. The solicitation contemplated the award of an indefinite-quantity, fixed-price contract with award fee, for a period of up to 7 years, including a 6-month base period and all options. Proposals were to be evaluated on the basis of past performance, technical, and price factors. The past performance and technical factors, when combined, were significantly more important than price. Award was to be made to the offeror whose proposal represented the best overall value to the government.

Four offerors, including J. A. Jones and Raytheon, submitted proposals. After evaluating the proposals and conducting discussions, the Air Force obtained best and final offers (BAFO) from all offerors. J. A. Jones's proposal was rated "very good" under the past performance factor and "low risk" under all the technical sub-factors. Raytheon's proposal was rated "exceptional" under the past performance factor and "low risk" under the technical sub-factors. While the protester's price was lower than Raytheon's price, the source selection authority (SSA) made a tradeoff determination that Raytheon's outstanding past performance outweighed the associated price premium.

In its initial protest, filed March 14, 2000, J. A. Jones alleged only that the award decision lacked a rational basis for the determination that Raytheon's superior past performance warranted the payment of a significant price premium, since the Air Force had also concluded that there was little doubt that J. A. Jones could successfully perform. Protest at 2, 10, 12. In its April 7 agency report, the Air Force included the 18-page source selection decision, but did not include the offerors' proposals or their evaluations. The protester objected to this limited release of documents and requested the proposals and evaluations. At the request of our Office, the Air Force provided the past performance proposals and evaluations to J. A. Jones on April 12. After reviewing these documents, the protester filed a supplemental protest on April 17.

The supplemental protest for the first time questioned the propriety of the past performance evaluation itself, alleging that it was conducted in an irrational and clearly unequal manner, thus calling into question the underlying basis for the award determination. Specifically, the protester alleged that the agency failed to relate Raytheon's evaluated strengths to the specific requirements of the contract and ignored Raytheon's identified weaknesses, and that the SSA had not been apprised of certain strengths associated with J. A. Jones's proposal. Upon review of the allegations raised in the supplemental protest, the Air Force took corrective action on May 4 by agreeing to re-evaluate the extant past performance information and to make a new best-value determination based on the re-evaluation. Because of this corrective action, our Office dismissed the initial and supplemental protests as academic.[1] Thereupon, the protester filed this request that we recommend that it be reimbursed the costs of filing and pursuing its protest.

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[1] Subsequent to J. A. Jones's filing of this request for costs, the Air Force appointed a new business risk assessment group and re-evaluated both offerors' proposals in the area of past performance based on existing information. At the conclusion of the re-evaluation, the agency made a new best value determination and again selected Raytheon's proposal for award. After receiving notice of this award and a debriefing, J. A. Jones filed a new protest with our Office, B-284909.5, which we are now considering.

Pursuant to our Bid Protest Regulations, when an agency takes corrective action prior to our issuing a decision on the merits, we may recommend that the protester recover the reasonable costs of filing and pursuing the protest. 4 C.F.R. § 21.8(e) (2000). This imposition of costs is not intended as an award to prevailing protesters or as a penalty to the agency, but rather is designed to encourage agencies to take prompt action to correct apparent defects in competitive procurements. Wall Colmonoy Corp.--Entitlement to Costs, B-257183.3, Nov. 16, 1994, 94-2 CPD ¶ 189 at 2. Thus, where corrective action is taken in response to a protest, we will recommend that a protester be reimbursed its costs only 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. Id.

Here, J. A. Jones argues that it is entitled to costs because the agency unreasonably delayed in investigating the issues raised in its initial protest. Instead, in the protester's view, the Air Force filed an agency report which was inaccurate and incomplete because it "knowingly reiterated the erroneous results of the past performance evaluation reported to the SSA." Protester's Comments at 4. We do not believe the protester's criticism of the agency report is warranted. In particular, based on the issues actually raised in the protest initially filed by J. A. Jones, we do not believe that the Air Force acted unreasonably by responding to that protest, rather than taking corrective action at that time. Likewise, since its corrective action was based on new grounds of protest first raised in the supplemental protest, the Air Force did not unduly delay taking corrective action.

Where, as here, a protester raises different protest grounds in multiple submissions to our Office, the filing of the initial protest establishes the appropriate date for determining the promptness of the agency's subsequent corrective action only where there is a nexus between the protest grounds set forth at that time and the corrective action. GVC Cos.--Entitlement to Costs, B-254670.4, May 3, 1994, 94-1 CPD ¶ 292 at 5. The promptness of the agency's corrective action is not measured from the protester's initial protest where the initial protest did not identify the issue on which corrective action is based. Henkels & McCoy, Inc., B-250875 et al., Feb. 24, 1993, 93-1 CPD ¶ 174 at 4. Here, the initial protest challenged the reasonableness of the SSA's tradeoff determination, but did not challenge the propriety or basis for Raytheon's evaluated superior past performance. It was not until it reviewed the underlying evaluations that J. A. Jones protested the propriety of the offerors' past performance ratings. We recognize that J. A. Jones may not have been able to protest the ratings until it saw the evaluation documentation. The fact remains, however, that once J. A. Jones did challenge the underlying evaluation, the Air Force promptly determined that the evaluation documentation was insufficient and then took corrective action on May 4, 17 days after the supplemental protest was filed, and well before the

agency report was due. In our view, the agency took prompt corrective action in the circumstances presented here.[2]

Our conclusion is not changed by the protester's argument that the agency should have reviewed the underlying evaluation in response to the initial protest and, thus, should have discovered the evaluation errors sooner. While the filing of a protest should trigger an agency's review of the procurement, we believe, as explained above, that the promptness of the agency's corrective action cannot reasonably be measured from the time of the initial protest, if, as here, that protest did not raise the issue that eventually led to the corrective action. The mere existence of an error which an agency arguably should discover when one protest is filed does not mean that the agency has unduly delayed by not taking corrective action until after the alleged error is actually identified in a later protest.

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

Robert P. Murphy
General Counsel

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[2] 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 a request to recommend reimbursement of protest costs. CDIC, Inc.,--Entitlement to Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 2.