**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Libby Corporation--Entitlement to Costs

File: B-258089.7

Date: December 13, 1995

Maureen T. Kelly, Esq., Lynda Troutman O'Sullivan, Esq., and Anne B. Perry, Esq., Fried, Frank, Harris, Shriver & Jacobson, for the protester.
Craig E. Hodge, Esq., and Brian Toland, Esq., Department of the Army, 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

Protester is not entitled to the costs of filing and pursuing its protest where agency did not unduly delay in taking corrective action on matters raised in supplemental protest. Agency's review of matters raised in original protests, in order to assure a comprehensive review, did not constitute corrective action.

DECISION

Libby Corporation requests that our Office declare the firm entitled to recover the reasonable costs of filing and pursuing its protest concerning request for proposals (RFP) No. DAAK01-94-R-0034, issued by the Department of the Army, for tactical quiet generators (TQG). The protest, filed January 23, 1995, and supplemented on February 2 and March 15, challenged the agency's evaluation, which led to the award of a contract to the Fermont Division of Dynamics Corporation of America (Fermont).

We find that the protester is not entitled to recover the costs of filing and pursuing its protest.

The solicitation contemplated award of a fixed-price requirements contract for supply of 5 through 60 kilowatt TQG sets. Proposals were to be evaluated on the basis of price, technical, and past performance factors. Price was most important, carrying twice the weight of technical and past performance which were of equal weight. Award was to be made to the offeror whose proposal represented the best overall value to the government. Nine offerors, including Libby and Fermont, submitted proposals by the July 11, 1994, closing date. The agency evaluated the proposals, conducted discussions, and obtained best and final offers from Libby and Fermont. Libby's proposal was rated "exceptional" under the technical factor and "low risk" under the past performance factor. Fermont's proposal was rated

"exceptional" and "medium low risk" at a price approximately $5 million lower than Libby's. The source selection authority (SSA) determined that Libby's slight technical and past performance advantages did not outweigh Fermont's lower price, and the agency awarded the contract to Fermont.

In its initial protest, filed January 23, 1995, Libby alleged that Fermont's past performance on a contract for different sized TQGs was deficient and that the agency had not considered that fact in its evaluation of the technical and past performance factors. Libby also alleged that Fermont's price was unreasonably low and that the combination of evaluation errors made the source selection decision unreasonable. After receiving a debriefing, Libby amended its protest on February 2, contending that the agency failed to consider alleged negative information discovered during a pre-award survey of Fermont's facility.

In its March 1 combined report, the agency contended that its selection of Fermont for award was proper because it had considered Fermont's past performance in its evaluation and source selection decision. The agency acknowledged that Fermont's performance of the other TQG contract was deficient and that performance under that contract had been halted. However, the agency explained that many of the performance difficulties were due to government specification problems. The agency also noted that Libby had a TQG contract that suffered from similar difficulties which had resulted in a 2-year production delay. Both contracts had called for production of TQGs based on performance specifications which the contractors and the government believed could be achieved through simple assembly of components. As performance progressed, it became clear that the specifications could not be met without research and development and/or relaxation of some requirements. Because Libby was ultimately successful in producing its generators, its proposal received a "low" risk rating; Fermont's received a "medium low" rating. The agency also maintained that its "exceptional" rating of Fermont's technical proposal was warranted, notwithstanding the awardee's lower proposed labor hours, in light of the data Fermont had submitted to support its approach. The agency also argued that nothing in Fermont's satisfactory pre-award survey would have had a negative impact on the technical evaluation.

On March 15, Libby filed a third protest raising new grounds based on its review of the evaluation documents. Libby argued that the agency's award determination was unreasonable because it had not considered the "true status" of Fermont's other TQG contract; had failed to evaluate the impact of Fermont's past performance on its technical capability; had been inconsistent in rating Fermont's proposal "exceptional" given the concerns expressed by some of the evaluators and the pre-award survey; had failed to evaluate the impact of Fermont's low labor hour proposal on Fermont's technical merit; and had improperly evaluated Fermont's proposed price. Libby also contended that Fermont's proposal failed to comply

with the required delivery schedule. On April 5, Libby submitted its comments on the agency report and additional documents furnished by the Army between March 14 and 28.

In its comments, Libby detailed various instances where the evaluation documents allegedly were inconsistent with and/or failed to take into account Fermont's past performance. After reviewing Libby's third protest and its comments, the Army determined that there was "some merit to the protest." On April 20, the due date for its agency report, the Army advised our Office that it was taking the corrective action of having Libby's and Fermont's submissions reevaluated. A memo attached to the Army's letter stated that the protester had highlighted parts of the evaluation process which had not been considered before. Specifically, the memo directed the evaluators to focus on seven areas: the proper role and consistent application of the other TQG contract in the past performance evaluation; whether the current procurement required "similar engineering effort" as suggested in the protester's comments; whether both offerors should be evaluated in past performance where the firms may have been partly responsible for failures experienced; a review of the standards and their application for determining contracts relevant to past performance; determining the importance of and role to be played by the offerors' history of high capacity contracts; a review of the pre-award surveys to determine consistency with the evaluation and to fully explain any conflicts; and a review of the government's independent estimate and consideration of any significant offeror variations from it. Thereupon, our Office dismissed the protests as academic. Subsequently, the protester requested that we declare it entitled to the costs of filing and pursuing its protests.

Pursuant to our Regulations, if the contracting agency decides to take corrective action in response to a clearly meritorious protest, we may declare the protester to be entitled to recover reasonable costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.6(e) (1995); KIME Enters., Inc.--Entitlement to Costs, B-241996.5, Dec. 9, 1991, 91-2 CPD ¶ 523. Our rationale for making such a declaration is our concern that some agencies take longer than necessary to initiate corrective action in the face of meritorious protests, thereby causing protesters to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. KIME Enters., Inc., supra. Whether to award costs is based on the circumstances of each case. We will not award protest costs in every case in which an agency takes corrective action. In this regard, we will not award costs where, based on the circumstances of the case, corrective action did not result from a clearly meritorious protest. ManTech Field Eng'g Corp.--Entitlement to Costs, B-246152.3, June 12, 1992, 92-1 CPD ¶ 514.

The Army concedes that the corrective action it took in obtaining a reevaluation of the Libby and Fermont proposals was in response to the protest grounds, but argues that it did not unduly delay in taking that corrective action. The Army

maintains that it was not until it received the protester's March 15 protest and comments on the agency report, specifically identifying aspects of the evaluation which were flawed, that it determined that its source selection decision appeared to be based on inadequate analysis and/or documentation by the evaluation team. By taking corrective action within 2 weeks of receiving Libby's report comments and on the due date for the agency report on the third protest, the Army maintains that it did not unduly delay taking corrective action. Libby argues that the corrective action was based on matters of which the agency was aware from the time of its first two protests.

Based on our review of the protest filings and the specific areas of reevaluation encompassed by the agency's corrective action, we agree with the Army that it did not unduly delay in responding to four areas which were first identified in Libby's third protest and its comments on the agency report: the review of how the agency determined which contracts were relevant to past performance; its consideration of the importance of offerors' history of high capacity contracts; the review of the government's independent estimate and consideration of any significant offeror variations from it; and consideration of whether the current effort required "similar engineering effort." It was not until Libby's third protest and comments, identifying the deficiencies in the evaluation documentation, that the agency determined that corrective action was warranted. We find that the agency did not unduly delay in taking corrective action on these matters.

It is true that, at the same time the agency had its evaluators consider the newly identified matters, it also had them review the other three matters which were apparent from the first two protests: proper review of Fermont's other TQG contract; the effect of partial contractor responsibility on past performance; and proper consideration of pre-award surveys in the evaluation. However, the agency has consistently maintained that it did not err with regard to these matters, and its decision to include them in the reevaluation, essentially in order to assure a comprehensive review, did not constitute corrective action.

The agency's position is supported by the results of the reevaluation. The evaluators found that none of the matters raised by Libby in its original protests had any effect on their award recommendation. Further, in a supplemental source selection decision, the SSA considered the findings of the reevaluation and concluded that the award to Fermont was fully justified.

For example, with regard to the failure to consider allegedly inconsistent findings between the pre-award survey and the evaluation, the agency found that there was no inconsistency. The negative items on the survey on which the protester relied were viewed by the agency as minor matters which did not contradict the agency's evaluation. With regard to the past performance review, the evaluators determined that some of Fermont's prior contracts that had originally been considered relevant

were not. They further considered Fermont's other TQG contract and concluded that it had a neutral effect on the past performance score since the agency shared responsibility for the performance difficulties. Overall, the evaluators concluded that Fermont's truly relevant contracts supported the original rating of "medium low risk." While the SSA determined that the past performance score should have been "medium to medium low," instead of "medium low," he states that this minor score change did not affect his selection decision. Finally, we note that after receiving the SSA's supplemental decision, Libby withdrew its renewed protest of the agency's decision to keep the award with Fermont.

Under the circumstances, we find no delay associated with the taking of any corrective action in this case and accordingly we deny the request for declaration of entitlement to costs.

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