**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Tidewater Marine, Inc.--Request for Costs

File: B-270602.3

Date: August 21, 1996

William J. Spriggs, Esq., Spriggs & Hollingsworth, for the protester.
Robert M. Elwell, Esq., Department of the Navy, for the agency.
Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

General Accounting Office will not recommend that protester recover costs of filing and pursuing its protest where the record shows that corrective action was taken 8 calendar days after the key issue was squarely put in dispute, and therefore was not unduly delayed.

DECISION

Tidewater Marine, Inc. requests that we recommend that it be reimbursed the costs of filing and pursuing its protest challenging the terms of request for proposals (RFP) No. N62387-96-R-1303, issued by the Department of the Navy, Military Sealift Command (MSC), for tugboat towing and related harbor services to support various live fire naval exercises in Mayport, Florida. Tidewater maintains that because the protest was "clearly meritorious and the [agency] took significant corrective action," our Office should recommend the award of all protest costs, including attorneys' fees and consultant fees, pursuant to 4 C.F.R. § 21.8(e) (1996), which provides that "[i]f the contracting agency decides to take corrective action in response to a protest" our Office may recommend the reimbursement of such expenses by the contracting agency.

We deny the request.

The challenged RFP (which was issued on October 27, 1995) permitted offerors to submit their proposals using either of two standard proposal packets, referred to as TUGWORK or TUGTIME. The principal difference between these proposal formats is the pricing method. Whereas the TUGWORK proposal format requires offerors to propose three hourly rates for performing the required tugboat services, and to include all charges and fuel expenses in each of the proposed hourly rates, the TUGTIME proposal requires offerors to propose three daily rates, and provides that

the contractor will be separately reimbursed for all port charges and fuel expenses incurred during performance.

On November 27--30 minutes prior to the closing time for receipt of initial proposals--Tidewater filed its first protest at this Office, challenging numerous terms in the RFP as defective. On November 28, MSC contacted the protester's counsel to pursue settlement negotiations; on November 29, pursuant to the prior day's telephone discussions, MSC issued a letter to the protester's counsel advising Tidewater that "the agency desires to discuss a compromise with a view towards securing withdrawal of the protest," and requesting a "list of specific remedial measures" from the protester to accomplish this goal.

On December 1, because it did not receive any response to its request for a list of suggested remedies from the protester, MSC filed a motion at this Office requesting dismissal of Tidewater's protest under 4 C.F.R. § 21.1(f) of our Bid Protest Regulations, which requires protests to state legally sufficient grounds of protest. On December 7, Tidewater responded to the request for dismissal with a statement of general opposition to the dismissal request, and a list of "SUGGESTIONS TO REMEDY SOLICITATION DEFECTS."

We concluded that Tidewater's protest did in fact articulate legally sufficient grounds of protest. In light of the protester's proffered list of suggested remedies, and the agency's stated desire to accommodate the protester's concerns and negotiate a settlement, we placed the case on an accelerated resolution schedule, see 4 C.F.R. § 21.10(e), and by means of a December 8 telephone conference, urged the parties to pursue settlement negotiations, and to apprise our Office of any progress within 2 weeks.

As a result of these negotiations, the parties settled all protest grounds except for Tidewater's challenge to the solicitation's TUGTIME fuel consumption rate provision. As noted above, under the TUGTIME proposal, fuel consumption was to be a separately reimbursable expense and was not to be included in offerors' proposed fixed daily rates. However, in their proposals, offerors nonetheless were required to provide a fuel consumption rate figure, from which the agency could calculate an evaluated price to project the contractor's actual costs of contract performance and determine whether, in addition to the proposed daily rate prices, that contractor was offering the lowest-priced proposal. In this regard, the solicitation contemplated contract award to the lowest-priced, technically acceptable offeror.

By letter dated January 4, 1996, Tidewater reiterated its challenge to the fuel consumption rate provision. First, Tidewater contended that the RFP was unclear as to how the fuel consumption rate would be factored in the agency's price evaluation. Next, Tidewater challenged the fuel consumption rate provision as

defective because the agency did not provide for a realism analysis of this figure. Without a realism evaluation, Tidewater maintained, offerors were free to deliberately understate their actual fuel consumption rate in order to receive a lower evaluated price, and then recoup the actual fuel consumption expense as a cost reimbursable item during contract performance.

On January 31, MSC provided an agency report responding to Tidewater's challenge to the TUGTIME fuel consumption rate provision. First, MSC contended that the pricing evaluation criteria--including those for the fuel consumption rate--were easily deduced from the face of the RFP. The agency explained that MSC would use a price evaluation formula which would multiply the number of expected tugboat service hours per contract period by each offeror's proposed fuel consumption rate; this sum--which would yield the total quantity of fuel consumed in barrels per contract period--would then be multiplied by the current market price for a barrel of fuel to arrive at an evaluated fuel consumption price. The agency's explanation further showed that each element of the pricing formula--with the exception of the current market price for a barrel of fuel--was evident in the RFP.

MSC also argued that given the inclusion in the RFP of a warranty clause--which required offerors to warrant all proposed performance characteristics, including the proposed fuel consumption rate--the potential problems with price manipulation cited by the protester would not arise. Although the RFP theoretically permitted the agency to continue with contract performance in the event that an awardee had misrepresented a proposed performance characteristic, MSC nonetheless maintained that it would require the successful awardee to honor its proposed fuel consumption rate, and that under operation of the warranty provision, the agency did not intend to reimburse a contractor for any fuel consumption costs that exceeded the rate offered in its proposal.

In its February 14 comments on the agency report, Tidewater argued that the ability of the agency to enforce the warranty certification post-award in no way protected the integrity of the competition during the proposal evaluation stage. Tidewater asserted that absent the incorporation of a provision providing for the evaluation of the proposed fuel consumption rates for realism, the competitive integrity of the procurement was not assured. That is, offerors who prepared their pricing proposals in good faith could be underbid by unscrupulous offerors, who gamed the competitive system by submitting an underestimated fuel consumption rate.

On March 4, this Office conducted a telephone conference with all parties. Based on our research--which was provided to all parties to focus the discussion, and which had not otherwise been reviewed by the parties in the course of developing the protest record--this Office asked the parties to read the cited precedents, and consider further settlement negotiations. On March 12, MSC issued an amendment which incorporated a provision indicating that fuel costs and consumption rates

would be evaluated for realism, and further providing that fuel consumption in excess of an offeror's proposed fuel consumption rates would not be reimbursed. On March 13, as a result of this amendment, Tidewater withdrew its protest. That same day, Tidewater filed this request for costs.

DISCUSSION

Under the Competition in Contracting Act of 1984 (CICA), our Office may recommend recovery of costs where we find that an agency's action violated a procurement statute or regulation. 31 U.S.C. § 3554(c)(1) (1994). Additionally, as noted above, our Bid Protest Regulations provide that we may recommend that a protester recover its costs of filing and pursuing a protest where the contracting agency decides to take corrective action in response to a protest. 4 C.F.R. § 21.8(e). This does not mean, however, that costs are due in every case in which an agency takes corrective action; rather, we will recommend payment of costs only where an agency unduly delays taking corrective action in the face of a clearly meritorious protest. Baxter Healthcare Corp.--Entitlement to Costs, B-259811.3, Oct. 16, 1995, 95-2 CPD ¶ 174.

As a preliminary matter, we disagree with MSC's contention that Tidewater's protest of the fuel consumption rate provision was not clearly meritorious. Without the modifications made by amendment No. 0004--which provided that each proposed fuel consumption rate would be evaluated for realism and that the agency would not reimburse, under any circumstances, fuel costs incurred in excess of an offeror's proposed fuel consumption rate--we think the RFP left the door open to potential pricing abuses. Simply stated, without a mechanism to alert offerors that unrealistic fuel consumption rate estimates would be rejected, offerors were free, under the unamended solicitation, to quote an unrealistically low fuel consumption rate in their proposals, and recoup the actual fuel consumption costs post-award, without penalty. In this regard, we have long recognized that a cost realism analysis must be performed on all cost reimbursable elements of a proposal since an offeror's estimated costs may not provide valid indications of the final and actual allowable costs that the government is required to pay. CACI, Inc.--Fed., 64 Comp. Gen. 71 (1984), 84-2 CPD ¶ 542.

Notwithstanding our conclusion that Tidewater's protest was meritorious, we nevertheless conclude that the agency's corrective action does not warrant payment of protest costs. As stated above, it is not our intention to recommend award of protest costs in every case in which the agency takes corrective action in response to a protest. Rather, we will recommend award of such costs where, based on the circumstances of the case, we find that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Instrumentation Lab. Co.--Entitlement to Costs, B-246819.2, June 15, 1992, 92-1 CPD ¶ 517. In deciding whether an agency's corrective action was so delayed as to warrant recovery of

costs, the determination of the appropriate date from which the promptness is measured is critical. Holiday Inn-Laurel--Entitlement to Costs, B-265646.4, Nov. 20, 1995, 95-2 CPD ¶ 233.

Here, there is no question that MSC acted promptly. First, 1 day after Tidewater filed its protest at this Office, the agency immediately contacted the protester in order to obtain clarification and a better understanding of the protester's objections, and negotiate a settlement. Next, the agency specifically requested a list of suggested remedies from the protester and readily agreed to engage in settlement negotiations with Tidewater. Although the parties were not able to resolve the protester's concerns regarding the fuel consumption rate and related pricing evaluation,[1] the agency readily agreed to produce its report on an accelerated schedule, and set forth cogent arguments and relevant precedent for why it believed its position on the solicitation's fuel consumption rate provision was legally defensible.

During the telephone conference on March 4, this Office for the first time focused the parties on an applicable line of case precedent, and at that point, we believe the interpretational dispute surrounding the challenged provision was first squarely drawn. Once the agency understood the legal flaw in its solicitation, it diligently worked with the protester to arrive at an amendment that satisfied the protester's concerns, and remedied the defects in the challenged RFP.

Under these circumstances, we do not believe that MSC's corrective action was unduly delayed. Rather, the agency's diligent pursuit and resolution of the protest issues, its good faith, and its execution of a corrective amendment within 8 calendar days from when the key protest issue was squarely drawn displays exactly the type of prompt corrective action which we seek in bid protest resolution, and which it is not our intent to penalize. See Baxter Healthcare Corp.--Entitlement to Costs, supra (corrective action taken 8 working days after the issue was first squarely put in dispute was not unduly delayed). A contrary view would provide little incentive for

[1]We see no basis to recommend awarding costs with regard to the other issues raised in the initial protest which were resolved by issuance of amendment No. 0002. Any delay in issuing the amendment was the result of the agency's diligent pursuit of negotiations with Tidewater, which included providing Tidewater the opportunity to review and edit the amendment.

agencies to provide timely corrective action or settlement negotiations if they were to incur the same costs in settling a protest as they would going through the entire bid protest resolution process and losing on the merits of our final decision. See Instrumentation Lab. Co.--Entitlement to Costs, supra.

The request is denied.

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