



Decision

Matter of: AGFA HealthCare Corporation--Costs

File: B-400733.6

Date: April 22, 2009

Albert Krachman, Esq., Blank Rome LLP, for the protester.
Timothy Haight, Esq., Department of Veterans Affairs, for the agency.
Eric M. Ransom, Esq., and Christine S. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Where agency took corrective action following several supplemental protests, request that Government Accountability Office recommend reimbursement of costs is denied where the initial protest grounds were not clearly meritorious, and corrective action was not unduly delayed in response to supplemental issues raised by the protester after receipt of the agency report.

DECISION

AGFA HealthCare Corporation of Ridgefield Park, New Jersey, requests that our Office recommend that it be reimbursed the costs of filing and pursuing its protest against the award of a contract to Philips Healthcare of Andover, Massachusetts, under request for proposals (RFP) No. VA-260-08-RP-0167, issued by the Department of Veterans Affairs for an enterprise-wide Picture Archiving and Communications System (PACS).

We deny the request.

The agency issued the RFP on August 6, 2008, for the acquisition of a PACS for one of the agency's regional health systems. Seven offerors responded to the RFP, including AGFA and Philips. Based on the technical evaluation, Philips' proposal was determined to be the highest-rated, and also was the lowest-priced. The award was made to Philips on October 10. AGFA received a debriefing on October 20, and filed its protest on October 27. On October 30, AGFA filed a supplement to its initial protest, which raised several additional issues.

The agency filed its report on the protest on December 3. After reviewing the documents and information contained in the agency's report, AGFA filed two further supplemental protests on December 15 and 22. Our Office then set a briefing schedule for the supplemental protests that required the agency's response by January 5, 2009. Rather than filing a response, the agency took corrective action on the protest on January 5.¹

AGFA asserts in its request that it should be reimbursed the costs of filing and pursuing its protest because, by October 30, the VA was on notice of significant issues related to the pricing in Philips' proposal and its compliance with the RFP scope of work (SOW), but failed to take corrective action until January 5. Specifically, AGFA alleges that, from its protests, the VA should have known that Philips' proposal failed to comply with certain Integrating Healthcare Enterprise (IHE) standards in the SOW, shifted certain costs to the agency in its price proposal, and failed to commit to specific staffing requirements.

Our Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2008), provide that where an agency takes 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. Information Ventures, Inc.--Costs, B-294580.2 et al., Dec. 6, 2004, 2004 CPD ¶ 244 at 2. However, our Regulations do not contemplate a recommendation for the reimbursement of protest costs in every case where an agency takes corrective action, but rather only where an agency unduly delays taking corrective action in the face of a clearly meritorious protest. Id. Thus, as a prerequisite to our recommending the reimbursement of costs where a protest has been resolved by corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious. Overlook Sys. Techs., Inc.--Costs, B-298099.3, Oct. 5, 2006, 2006 CPD ¶ 184 at 6. A protest is "clearly meritorious" where a reasonable agency inquiry into the protester's allegations would reveal facts showing the absence of a defensible legal position. Id.

AGFA first asserts that it should be reimbursed its costs based on the allegation in its initial protest that Philips' proposal was technically unacceptable due to its failure to "comply with multiple mandatory technical requirements set forth in the RFP" related to IHE standards. AGFA contends that this issue was clearly meritorious, and that the agency unduly delayed taking corrective action.

While we agree that Philips' proposal's alleged failure to address certain IHE standards was a serious issue, we do not agree that the issue was so clearly

¹ The agency initially stated that it would cancel the award to Philips and issue a new, amended solicitation. By letter dated January 8, the agency revised its position, stating that it would cancel the award and reevaluate proposals, rather than issue a new solicitation.

meritorious as to reveal the absence of any defensible legal position. The “mandatory [IHE] technical requirements” referenced in AGFA’s initial protest were elements within the technical requirements section of the SOW. Of the four “IHE requirements” referenced, two were SOW provisions stating only that the proposed PACS “should” offer certain features; the remaining two provisions, while utilizing the word “shall,” did not use the word directly in reference to IHE standards.² Given the imprecise language used in the SOW provisions referenced by AGFA, we conclude that the issue raised by AGFA was not clearly meritorious and does not provide a basis for reimbursement of AGFA’s protest costs.³

AGFA next argues that it should be reimbursed for its costs based on the allegation in its first supplemental protest that Philips improperly offered zero prices for certain line items or that its price proposal was otherwise incomplete. These allegations were dismissed by our Office on November 12, for failure to state a sufficient factual basis. The allegations themselves demonstrated that AGFA had no knowledge of Philips’ price proposal at the time the protest was filed, and were grounded entirely in speculation based on the prices of various elements of AGFA’s own price proposal. As they were dismissed by our Office, these issues were not clearly meritorious and do not provide a basis for reimbursement.

Finally, AGFA argues that it should be reimbursed for its costs on the basis of its allegations that Philips’ proposal did not commit to certain staffing requirements, failed to propose a fixed price, and was materially unbalanced. We disagree. These allegations were contained in AGFA’s second supplemental protest, which was filed on December 15, after the agency report. According to our Office’s scheduling order for the two supplemental protests filed by AGFA after receipt of the agency report, these issues were to be addressed by the agency by January 5. As the agency advised that it had decided to take corrective action on January 5, the agency did not unduly delay corrective action with respect to AGFA’s second supplemental protest.⁴ As a

² The first of the provisions stated that “the workstation shall provide tools allowing the user to position and orient multiple instances of text and graphics . . . for image annotation and save as DICOM Presentation State Display as described by the IHE profile for consistent presentation of images,” RFP § B.3.2.1.8, while the second stated that “the vendor shall be supportive of the developing IHE Technical Framework with respect to integration profiles and Actors” RFP § B.3.4.3.

³ We need not determine whether the agency’s defenses to AGFA’s allegations would have been successful. The existence of any defensible legal position or close question is sufficient, as in this case, to show that the issue was not “clearly meritorious” so as to warrant reimbursement of protest costs. See Triple Canopy, Inc.--Costs, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 4.

⁴ AGFA also requests reimbursement for its costs associated with responding to an argument made in the agency report indicating that, contrary to the information

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general rule, so long as an agency takes corrective action by the due date of its protest report, as was the case here, we regard the action as prompt, and will not consider a request to recommend reimbursement of protest costs. See CDIC, Inc.--Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52. Accordingly, these issues do not provide a basis for recommending reimbursement of AGFA's protest costs.

The request is denied.

Gary L. Kepplinger
General Counsel

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AGFA had received at its debriefing, a third offeror--not AGFA--was ranked second after Philips. AGFA's protest on this issue was raised as a part of its post-agency report supplemental protests. As discussed above, because the agency did not unduly delay taking corrective action in response to AGFA's supplemental protests, reimbursement of costs related to issues in those protests is not warranted.