Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Locus Systems, Inc.--Request for Declaration of Entitlement to Costs--Request for Reconsideration

File: B-241441.7

Date: July 13, 1992

Ross Dembling, Esq., Kurz, Koch, Doland & Dembling, for the protester.
Curtis Wilburn, Jr., Department of Agriculture, for the agency.
Stephen J. Gary, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration of decision finding requester not entitled to protest costs is denied where requester has failed to show that the prior decision, which found that the agency had taken prompt corrective action in connection with the protest, contained any legal or factual errors.

DECISION

Locus Systems, Inc. (LSI) requests that our Office reconsider our decision denying its request for a declaration of entitlement to the costs of filing and pursuing its protest in connection with request for proposals (RFP) No. 45-3K06-90, issued by the United States Department of Agriculture (USDA) to provide document indexing services.

We deny the request.

The solicitation was issued as a total small business set-aside in August 1990. In February 1991, after holding discussions, USDA requested best and final offers (BAFO) from LSI, Information Ventures, Inc. (IVI), and two other offerors. Based primarily on LSI's proposed price of $175,158, compared to IVI's price of $261,752, the agency selected LSI for award. By letter dated February 27, as required in a small business set-aside, USDA provided unsuccessful offerors notice of the prospective award to LSI. This letter improperly disclosed LSI's proposed price (although the price shown actually was lower than LSI's price). Prior to making an award, however, USDA found that

LSI's proposal reflected an ambiguity in the solicitation, and could not be accepted as submitted. The agency then issued a clarifying amendment and called for a second round of BAFOs. In that round, based largely on IVI's significantly reduced price ($201,128), the agency awarded the contract to IVI.

On June 10, LSI protested the award to our Office after learning for the first time that USDA's February letter (which was not sent to LSI) had disclosed LSI's price to the other offerors. LSI argued that the price disclosure rendered the award invalid. The agency investigated and, in a Finding and Determination signed by the head of the contracting activity on August 2 (1 day after the agency's report on the protest was due in our Office), concluded that the inadvertent disclosure of LSI's low price had given IVI an improper competitive advantage. At the same time, USDA advised our Office that it was taking the corrective action of terminating IVI's contract in order to recompete the requirement. We then dismissed LSI's protest as academic. Subsequently, on August 19, LSI filed a request for declaration of entitlement to protest costs. We denied the request in Locus Sys., Inc.--Request for Declaration of Entitlement to Costs, 71 Comp. Gen. 243 (1992), 92-1 CPD ¶ 177, on the basis of our finding that the agency had taken prompt corrective action.

LSI now asserts that we incorrectly determined that USDA's corrective action was prompt. Relying on statements in the agency's August 2 Finding and Determination, the protester asserts that two contracting officers were aware of the price disclosure as early as February 27, when one of them signed the preaward notice letter and the other reviewed it. Corrective action was not taken, however, until August 2. According to LSI, this delay of 5 months after knowledge of the disclosure constituted undue delay.

The exact timing of the agency's discovery of the price disclosure is irrelevant. The issue before us was not whether agency officials were aware of the disclosure, but whether the agency took prompt corrective action once it realized that the disclosure was improper. We specifically concluded in our prior decision that 5 months from the time of the improper disclosure was not an unreasonable amount of time for resolving these matters, under the circumstances of the case. As we explained at length in our prior decision, the history of this procurement was marked by numerous challenges. LSI's protest against the award to IVI, which raised a number of issues, was the third filed with our Office; subsequent to our dismissing it, two more were filed. (These protests challenged USDA's termination of

IVI's contract and were denied in Information Ventures, Inc., B-241441.4; B-241441.6, Dec. 27, 1991, 91-2 CPD ¶ 583.) These were among the factors that we found justified the 5-month delay.

Our decision also rested on our finding that a number of the issues involved in LSI's challenge were relatively complex. LSI argues that we improperly concluded that complex issues were involved because (1) USDA had not itself raised that argument, and (2) the agency ultimately concluded that clear violations had occurred. Regarding the first argument, it is not necessary for an agency to assert a particular argument for our Office to reach a conclusion based on the record. Secondly, the fact that an agency ultimately determines that there were improprieties in the procurement process, and that specific corrective action should be taken, has no bearing on the complexity of the issues or the amount of time required to reach those conclusions. Thus, this argument is without merit.

LSI takes issue with the statement in our decision that USDA's disclosure of LSI's price was inadvertent, noting that the August 2 Finding and Determination actually characterized the disclosure as being due to "administrative error and oversight." This, according to LSI, "compels a far different characterization" than the one in our decision. This distinction is irrelevant; under either characterization, it is uncontroverted that the price disclosure was unintentional, and that the agency subsequently acknowledged its mistake. Had we adopted the characterization preferred by LSI, our finding that the 5-month delay was justifiable would not have changed.

The request for reconsideration is denied.

for James F. Hinchman
General Counsel