Comptroller General
of the United States

Washington, D.C. 20548

5351710

Decision

Matter of: LB&M Associates, Inc.--Entitlement to Costs

File: B-256053.4

Date: October 12, 1994

Paralee White, Esq., Cohen & White, for the protester.
John R. McCaw, Esq., and A. L. Haizlip, Esq., Federal Aviation Administration, for the agency.
Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester is entitled to reimbursement of reasonable costs of filing and pursuing protests where the agency did not undertake an adequate investigation of the validity of the protest grounds until more than 5 months after the protester filed the initial protest, which directly raised the issue that led to the agency taking corrective action.

DECISION

LB&M Associates, Inc. requests that our Office declare it entitled to reimbursement of the reasonable costs of filing and pursuing three protests challenging the award of a contract to Galaxy Scientific Corporation under request for proposals (RFP) No. DTFA02-93-R-00021, issued by the Federal Aviation Administration (FAA) for technical support services.

We find that the protester is entitled to the reasonable costs of filing and pursuing its protests, including attorneys' fees.

The RFP, issued on April 13, 1993, called for the award of a time and materials contract for a base year with 4 option years. Proposals were to include a detailed staffing plan describing the personnel to be assigned to fill each of the 14 labor categories. The RFP listed estimated annual hours for each labor category and required offerors to propose an hourly rate for each category. The proposed rates were to include direct and indirect labor, indirect material, overhead, general and administrative costs, and profit.

The project manager position, the most important single position, was not one of the labor categories for which a rate was to be proposed; instead, the RFP stated that the

"project manager is considered to be an overhead cost." Although the RFP did not include an estimate of annual hours for that position, the FAA expected the project manager's services on a full-time basis.

Galaxy and LB&M were among the offerors submitting proposals. Galaxy's proposal included a separate labor category for a "program manager" (as opposed to the project manager called out in the RFP), and an hourly rate that would be a direct-charge for his services, which Galaxy estimated would be needed 600 hours per year.

The FAA raised a number of subjects with Galaxy during discussions, which that company claims lasted less than 15 minutes. In those discussions, the agency apparently did not question the basis of Galaxy's adding the program manager labor position; instead, the FAA told the company that doing so was acceptable, but could increase Galaxy's proposed price, thus jeopardizing its chances of success. Nonetheless, Galaxy retained the program manager position in its best and final offer (BAFO).

Because Galaxy's proposed BAFO price was significantly lower than LB&M's, while its technical rating was slightly higher, the agency selected Galaxy for award on December 9, 1993.

In its first protest, filed on December 17, LB&M alleged that the agency could not have conducted an adequate cost analysis because Galaxy's proposed price was unrealistically low, and that it was improper to allow Galaxy to add a program manager position. Upon review of the agency report, LB&M filed two supplemental protests in February 1994, raising other grounds related primarily to Galaxy's pricing structure.

In response to the protests, the FAA contended that it was not required to perform a cost analysis because there had been adequate competition. The agency also argued that this contract did not expose the government to the risk arising from a cost reimbursement contract because the rates for each labor category were fixed. The agency stated that it understood that Galaxy's program manager was a part-time supervisory position, separate and apart from the full-time project manager position.

Because of apparent inconsistencies in the agency's position, we asked the FAA to clarify a number of points related to the evaluation of the pricing structure in Galaxy's proposal, including the agency's reasons for finding acceptable Galaxy's proposed use of a program manager and for finding acceptable the estimate that this individual would work only 600 hours a year on the contract.

The FAA responded that it would pay Galaxy for each hour of the program manager's time devoted to the contract, but that it intended to closely monitor that person's work to avoid excessive hours. The agency stated that Galaxy's use of both a project manager and a program manager hurt Galaxy's competitive position in the price evaluation, since the program manager's 600 hours were added to Galaxy's proposed price, which the agency believed included overhead covering a full-time project manager.

LB&M's reply argued that the FAA erred in claiming that Galaxy was offering the agency two managers, and pointed out that, in fact, Galaxy's proposal identified the same individual, by name, both as program manager and project manager. According to LB&M, it appeared that Galaxy's program manager was a replacement for, not an addition to, the project manager called out in the RFP. LB&M contended that Galaxy had not treated the program/project manager as an overhead cost (as required by the RFP) and that its overall proposed price thus included only 600 hours of the manager's time, not full time plus 600 hours (the program manager's 600 hours and the project manager's full-time work), as the agency had assumed. In that case, obtaining Galaxy's manager's services on a full-time basis, which the agency expects to need, could entail direct charges well over three times the amount that Galaxy's proposal estimated.

Our Office then conducted a telephone conference with the parties to clarify the positions of the agency and Galaxy. During that conference, the agency conceded that Galaxy had named the same person for both positions in its BAFO, but argued that Galaxy had also provided an organization chart listing the name of a different individual to fill one of the positions.

Several days after the conference, the FAA advised our Office that "after analyzing data and information disclosed to [the FAA] in the GAO telephone conference," the agency had concluded that it was in the best interest of the government and the offerors to "immediately and thoroughly re-examine the underlying procurement in its entirety." In response to our Office's request that the FAA identify the recently disclosed "data and information" on which it was relying, the agency stated that it was referring to Galaxy's intent to use one person, whose time would be a direct charge to the agency, for the program/project manager position. Because the agency advised that it had decided to terminate Galaxy's contract, our Office dismissed the protests as academic.

LB&M contends that it is entitled to recover the costs of filing and pursuing its protests, including reasonable

attorneys' fees, under section 21.6(e) of our Bid Protest Regulations, 4 C.F.R. § 21.6(e) (1994). Under that provision, we may declare a protester entitled to costs, including reasonable attorneys' fees, 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. Oklahoma Indian Corp.--Claim for Costs, 70 Comp. Gen. 558 (1991), 91-1 CPD ¶ 558.

The FAA asserts that award of costs is unwarranted because its corrective action was not taken in response to a protest but rather in response to the discovery of new information justifying termination of Galaxy's contract. The agency argues that it took prompt corrective action after its "independent re-examination of the underlying procurement" disclosed deficiencies in Galaxy's proposal. The agency contends that LB&M's protest was not clearly meritorious, since the FAA had made "direct inquiries" of Galaxy during the course of the protests and had been assured that "the FAA's understanding and interpretation of the RFP and Galaxy's proposal [were] also Galaxy's understanding and interpretation."

In its initial protest and throughout the ensuing multiple filings, LB&M argued that the agency had improperly permitted Galaxy to add a program manager as a direct-charge position and had not considered the impact of that addition on Galaxy's price. While the agency claims that the corrective action was based on the FAA's independent reexamination of the procurement, that "re-examination" was not only a direct result of the protests, but also focused on the specific issues raised by the protests. We therefore reject the agency's argument that the corrective action was not taken in response to the protests.

In deciding whether the corrective action was prompt under the circumstances, we review the record to determine whether the agency took appropriate and timely steps to investigate and resolve the impropriety. David Weisberg--Entitlement to Costs, 71 Comp. Gen. 498 (1992), 92-2 CPD ¶ 91. Here, the FAA had an obligation to promptly and adequately investigate the validity of the protester's position that Galaxy's addition of a program manager position was improper. While the agency insists that it did raise this matter with Galaxy immediately after the initial protest was filed and was told that Galaxy and the agency shared the same "understanding and interpretation of the RFP," that inquiry was without effect. The only relevant information, which LB&M brought to the agency's attention, was apparent on the face of Galaxy's proposal: Galaxy had proposed the same named individual as both project manager and program manager. Once the agency considered the implications of that fact, it took corrective action within days--but more than 5 months

elapsed between the filing of the protest and the agency's conceding that Galaxy's direct-charge program manager was the very same person as the project manager.[1] Because the initial protest challenged the propriety of Galaxy's separate program manager position and the key evidence supporting that protest ground was apparent from the face of Galaxy's proposal, the agency's delay was not justified. See Tucson Mobilephone, Inc.--Entitlement to Costs, 73 Comp. Gen. 71 (1994), 94-1 CPD ¶ 12.

LB&M's protest of the award to Galaxy was clearly meritorious. As LB&M argued throughout, the agency's permitting Galaxy to add an extra labor category to the direct-charge items had given that company an unfair advantage over LB&M. From the initial protest filing, LB&M challenged the specific line item in Galaxy's proposal that eventually caused the agency to conclude that Galaxy's proposal, as submitted, was unacceptable. The defect presented by that line item was evident from the plain language of Galaxy's proposal. Accordingly, the unacceptability of that proposal and the merit of the protester's argument that award to Galaxy was improper should have been readily apparent to the agency. In short, neither legally nor factually was this a close case.

The agency's failure to take prompt corrective action frustrated the intent of the Competition in Contracting Act of 1984, 31 U.S.C. § 3551 et seq. (1988), by impeding the economic and expeditious resolution of these protests. See David Weisberg--Entitlement to Costs, supra. Accordingly, we find that LB&M is entitled to recover the costs of filing and pursuing the protests, including reasonable attorneys' fees.[2] LB&M should submit its claim for costs, detailing

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[1]Although during the telephone conference, the agency appeared to defend the acceptability of using the same person as both program manager and project manager, the agency apparently realized afterward that Galaxy's proposal may have substantially understated its actual probable cost to the government.

[2]The agency requests that, if our Office determines that LB&M is entitled to its protest costs, entitlement should be limited to costs associated with the program manager issue and exclude costs incurred pursuing other protest issues. We do limit the recovery of protest costs where the issues on which the protester prevailed are clearly severable from those on which the protester was unsuccessful. See, e.g., Komatsu Dresser Co., 71 Comp. Gen. 260 (1992), 92-1 CPD ¶ 202. In this case, however, there were no clearly severable issues; the protest grounds all concerned the

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and certifying the time expended and costs incurred, directly to the agency within 60 working days of receipt of this decision. 4 C.F.R. § 21.6(f)(1).

Robert P. Murphy
for Comptroller General
of the United States

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[2](...continued)
impropriety of the pricing structure in Galaxy's proposal, and the specific allegations were essentially components of the challenge to that pricing structure. Under these circumstances, we decline to limit the finding of entitlement to costs related to one component of that challenge.