



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Kingdomware Technologies--Costs

File: B-406228.2

Date: May 10, 2012

LaTonya Barton, Kingdomware Technologies, for the protester.
Natica C. Neely, Esq., and Dennis Foley, Esq., Department of Veterans Affairs, for the agency.
Jacqueline Maeder, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester is not entitled to reimbursement of protest costs after agency took corrective action where protest was not clearly meritorious.

DECISION

Kingdomware Technologies, Inc., of Waldorf, Maryland, a service-disabled veteran-owned small business (SDVOSB) concern, requests that we recommend that it be reimbursed the costs of filing and pursuing its protest challenging the Department of Veterans Affairs' (VA) issuance of a purchase order (No. 679-C25041) to LiveProcess Corporation, of Verona, New Jersey, under LiveProcess' General Services Administration Federal Supply Schedule contract.

We deny the request.

Kingdomware challenged the issuance (on November 28, 2011) of the purchase order, arguing that the VA failed to comply with the requirements of the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127-8128 (2006) (the VA Act), and its implementing regulations to determine whether the procurement should be set aside for SDVOSB (or veteran-owned small business (VOSB)) concerns. In response, the VA filed its agency report, explaining that the VA Act did not apply to the protested purchase order because this was not a new contracting opportunity, but rather an exercise of an option under an existing 2010 purchase order issued to LiveProcess. AR at 2.

In its comments on the agency report, however, the protester asserted that information concerning the 2010 purchase order posted in the Federal Procurement Data System (FDPS) by the VA did not support VA's position that the order included a 1-year option. Protester Comments at 2. Because the record remained unclear after receipt of the agency report and comments, GAO requested that the agency submit a copy of the 2010 solicitation and purchase order, as well as documentation demonstrating that the asserted option had been evaluated at the time of issuance of the 2010 order.

The agency informed us that while the contract specialist acted properly in exercising an option, nevertheless, because of personnel retirements, the agency was unable to locate the procurement file and it could not provide a copy of the solicitation for the 2010 order. In response, we advised the agency that because it could not provide supporting documentation, we were unable to determine whether the prior solicitation included an option for which the agency had requested and evaluated prices at the time of issuance of the 2010 order. The VA then advised us that it would take corrective action. Specifically, the agency stated that it would conduct a new procurement in accordance with the Federal Acquisition Regulation and terminate the current 2011 order for the convenience of the government. Because the actions by the VA rendered the protest academic, we dismissed the protest. (B-406228, February 28, 2012).

Kingdomware now requests that our Office recommend that the agency reimburse the protester's costs of filing and pursuing its protest.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest 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, thereby causing the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2011); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. Thus, as a prerequisite to our recommending that costs be reimbursed where a protest has been settled by corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious, *i.e.*, not a close question. Apptis Inc.--Costs, B-402146.3, Mar. 31, 2010, 2010 CPD ¶ 123 at 4. 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. First Fed. Corp.--Costs, B-293373.2, Apr. 21, 2004, 2004 CPD ¶ 94 at 2.

Here, we conclude that it is not appropriate to recommend that Kingdomware recover its protest costs because, even if we determined that the agency's corrective action was not prompt, the protest was not clearly meritorious. Whether the protest was meritorious was not apparent from the record, which is why GAO

requested additional information and documentation from the VA. In this regard, the record included both documents consistent with the agency's position that the order as awarded in 2010 included an option which was exercised in 2011, and documents indicating that the original order either never included such an option or that the option had been deleted at some point. Since the ultimate resolution of this matter required substantial further development as indicated, in part, by our Office's request for additional information, the protest, in our view, presented a close question, and therefore was not clearly meritorious. See Alaska Structures, Inc.-- Costs, B-298575.4, Jan. 22, 2007, 2007 CPD ¶ 15 at 6.

Accordingly, the request is denied.

Lynn H. Gibson
General Counsel