



Decision

Matter of: Split Rock, Inc.--Costs

File: B-404892.2

Date: June 25, 2012

Milo F. Speranzo for the protester.

JoAnn W. Melesky, Esq., Department of Defense, Defense Information Systems Agency, for the agency.

Peter D. Verchinski, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reimbursement of protest costs is denied where record fails to establish that the agency unduly delayed taking corrective action in the face of clearly meritorious protest.

DECISION

Split Rock, Inc. (SRI), of Pittsburgh, Pennsylvania, a service-disabled veteran-owned small business (SDVOSB), requests that we recommend that the agency reimburse its costs associated with the firm's protest of the terms of request for proposals (RFP) No. HC1028-11-R-2015, issued by the Defense Information Systems Agency (DISA) for security information manager engineering support services. SRI complained that the RFP, which was issued as a small business set-aside, should have been set aside for SDVOSBs. After receipt of the protester's comments, DISA took corrective action and we dismissed the protest as academic.

We deny the request.

BACKGROUND

DISA issued the RFP as a small business set-aside on March 4, 2011. Prior to issuing the solicitation, the agency conducted market research from which it found that there were two or more small businesses that could perform the services. On March 16, SRI protested to our Office, arguing that the RFP should have been set aside for SDVOSBs. On April 15, DISA provided its report in response to the protest, in which the agency argued (among other things) that it acted appropriately in setting aside

the RFP for small businesses. That same day, the Small Business Administration (SBA) submitted its views on the protest. SBA stated, citing (among other things) our decision in DAV Prime, Inc., B-311420, May 1, 2008, 2008 CPD ¶ 90, that, given the discretion provided the procuring agency, the agency was not required to conduct market research to determine whether there were two or more SDVSOBs that could perform the requirements.¹

SRI submitted its comments on the agency's report and SBA's views, arguing that the agency was required to consider whether the requirements could be performed by SDVOSBs. DISA responded that it was not required to consider whether to set the RFP aside for SDVOSBs. Among other things, DISA stated that its market research was limited to "ascertaining if two or more small businesses exist that could perform these services . . . [the agency official] did not focus on any more restrictive small business categor[ies] such as SDVO SBC [service-disabled veteran-owned small business concern] or HUBZone [historically underutilized business zone]." See Agency's Response to Protester's Comments, Apr. 28, 2011, at 5.

In reviewing the record and the parties' arguments, the GAO attorney noted that SRI's, DISA's, and SBA's arguments were all based upon an out-of-date version of SBA's regulations. Specifically, prior to February 4, 2011, one month before the RFP was issued, SBA's regulations permitted a contracting officer to consider whether to set aside or make a sole source award (if the sole source award is permitted by statute or regulation) under the 8(a) Business Development (BD), HUBZone, or SDVO SBC programs before setting aside the requirement as a small business set-aside. After February 4, 2011, this regulation required a contractor officer to consider whether to set-aside or make a sole source award under these programs (including the Woman Owned Small Business (WOSB) program) before setting aside a requirement for small businesses.² See 13 C.F.R. § 125.19(b) (2012).

¹ In DAV Prime, Inc., we clarified a number of our prior decisions in this area. We found that, while there was no requirement that an agency consider setting aside a procurement for SDVOSB concerns prior to proceeding with a small business set-aside, if the agency performs an SDVOSB set-aside analysis, the conclusions the agency draws from that analysis must be reasonable.

² In pertinent part, the current regulation provides:

after conducting market research, the contracting officer shall first consider a set-aside or sole source award (if the sole source award is permitted by statute or regulation) under the 8(a) BD, HUBZone, SDVO SBC or WOSB programs before setting aside the requirement as a small business set-aside. There is no order of precedence among the 8(a) BD, HUBZone, SDVO SBC or WOSB programs. The contracting officer must document the contract file with the

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On May 19, we asked the SBA to review its position in light of SBA's current regulation. On May 25, SBA responded, noting that its earlier statements had erroneously relied upon regulations that were out-of-date and that the GAO decisions, to which SBA cited, were interpreting SBA's old regulations. SBA stated that its current regulations (specifically 13 C.F.R. § 125.19(b)(2)(i)) require contracting officers to consider set asides for, as relevant here, SDVOSBs. Given that DISA admitted that it had not considered whether the RFP should be set aside under these other small business programs prior to setting aside the RFP for small businesses, SBA concluded that DISA had violated SBA's regulations.

The next day, on May 26, DISA informed our Office that it would take corrective action in response to SBA's views by conducting proper market research and making the appropriate set-aside determination. We dismissed SRI's protest as academic on May 27. SRI requests that we recommend that the agency reimburse the firm its costs associated with filing and pursuing the protest.

DISCUSSION

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs 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) (2012); 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. J.F. Taylor, Inc.--Entitlement to Costs, B-266039.3, July 5, 1996, 96-2 CPD ¶ 5 at 3; Baxter Healthcare Corp.--Entitlement to Costs, B-259811.3, Oct. 16, 1995, 95-2 CPD ¶ 174 at 4-5; GVC Cos.--Entitlement to Costs, B-254670.4, May 3, 1994, 94-1 CPD ¶ 292 at 3. 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. Overlook Sys. Techs., Inc.--Costs, B-298099.3, Oct. 5, 2006, 2006 CPD ¶ 184 at 6. The mere fact that an agency decides to take corrective action does not also establish that a statute or regulation clearly has been violated. Id.

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rationale used to support the specific set-aside, including the type and extent of market research conducted.

13 C.F.R. § 125.19(b)(2)(i).

SRI asserts that reimbursement of its protest costs is warranted because the agency unduly delayed taking corrective action in response to its initial protest, which raised issues that were clearly meritorious. In this regard, SRI cites SBA's May 25 legal opinion, which recommended that GAO sustain SRI's protest.

DISA responds that it did not unduly delay taking corrective action and that SRI's protest was not clearly meritorious because, at the time the RFP was released, the Federal Acquisition Regulation (FAR) had not yet implemented the changes made in the SBA's regulations, and thus the agency's actions were consistent with the FAR.

We conclude that reimbursement is not appropriate in this case. As an initial matter, we note that SRI's protest did not argue that the agency had acted improperly under the SBA's new regulation; rather, SRI itself relied upon the SBA's out-of-date regulation and a prior decision from our Office applying the old regulation. Significantly, we have not as yet decided any protest under SBA's current regulations, and therefore this protest presented an issue of first impression. In this regard, we note that the agency acted promptly after receiving SBA's interpretation of its new regulation. Under these circumstances, we cannot say DISA unduly delayed taking corrective action in the face of a clearly meritorious protest.

The request is denied.

Lynn H. Gibson
General Counsel