



GAO

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Siemens Healthcare Diagnostics, Inc.--Costs

File: B-413774.3

Date: April 7, 2017

Robert S. Metzger, Esq., Jeffery M. Chiow, Esq., and Lucas T. Hanback, Esq., Rogers Joseph O'Donnell, PC, for the protester.
Tracy Downing, Esq., Department of Veterans Affairs, for the agency.
Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request by protester that Government Accountability Office recommend reimbursement of the costs of filing and pursuing its protest is granted where record shows that agency unduly delayed taking corrective action in response to a protest that clearly was meritorious.

DECISION

Siemens Healthcare Diagnostics, Inc., of Norwood, Massachusetts, requests that we recommend it be reimbursed the costs associated with filing and pursuing a bid protest challenging the issuance of two blanket purchase agreements (BPAs) to Beckman Coulter, Inc., of Brea, California, under request for quotations (RFQ) No. VA256-15-Q-1084, issued by the Department of Veterans Affairs (VA) for chemical testing services. Siemens argues that the agency unduly delayed taking corrective action in response to its clearly meritorious protest.

We grant the request.

After being advised of the agency's issuance of the BPAs to Beckman Coulter, Siemens filed a protest in our Office alleging that the agency had misevaluated proposals, engaged in misleading and unequal discussions and made an unreasonable source selection decision. Our Office docketed the protest and sent out routine development letters that established October 24, 2016, as the date for submission of the agency report. On October 19, counsel for the agency requested an extension of the deadline for submitting the agency report from October 24, to

October 28. In response to that request, our Office established a deadline of October 26.¹

On October 26, the agency submitted a legal memorandum and a copy of the RFQ, but did not provide any exhibits to its report, advising instead that it would submit them separately on compact disc sent via overnight mail. On October 28, agency counsel advised that he would not be able to provide the exhibits by that means, and instead advised that the exhibits would be provided using a secure file transfer system. The agency report exhibits were filed on October 28, but they were not logically arranged or presented in an intelligible manner. In light of the circumstances, the GAO attorney responsible for the case advised agency counsel that he should submit a new version of the agency report that was logically arranged and understandable by November 1.

On October 31, the agency submitted some--but not all--of the agency report exhibits. On November 1, the agency filed the remaining exhibits. On November 2, counsel for the protester requested additional documents, which were provided by the agency on November 3.²

On November 7, the protester filed a supplemental protest raising additional allegations concerning the propriety of the agency's evaluation of quotations and making additional allegations concerning the adequacy of the agency's discussions with the protester.³ Our Office established a deadline of November 18 for submission of an agency report responding to the supplemental protest. On November 16, counsel for the agency requested an extension for submission of the agency's supplemental report until November 28. We denied the agency's request for an extension and requested that the agency provide its supplemental report by November 18.

On November 18, the agency advised our Office and the parties that it would be taking corrective action in connection with the protest. In its corrective action notice, the agency argued at some length that Siemens should not be reimbursed the costs

¹ Although our Office tries to accommodate requests to extend deadlines, with a 100-day statutory timeframe, we have a very limited ability to do so. Our timeframes for the development of the record are set out in 4 C.F.R. § 21.3.

² Also on November 3, counsel for the agency advised the parties and our Office that he would be on leave and unavailable until November 14. Counsel for the agency did not provide an alternate point of contact for the agency.

³ On November 10, the protester filed its comments responding to the original agency report.

of filing and pursuing its protest because, according to the agency, its corrective action was taken promptly in response to the supplemental protest. In advancing that argument, the agency did not identify which of the supplemental protest allegations it viewed as meritorious.

In response to the agency's notice, the protester filed an objection to the agency's request for dismissal of the protest. Among other things, Siemens requested that it be reimbursed the costs of filing and pursuing its protest, stating, in part:

The Agency's corrective action email, sent on the date that it was due to respond to Siemens' Supplemental Protest, failed to reveal the reason it will take corrective action. Nor did the Agency accept any responsibility for the multiple errors identified in Siemens' Protest, Supplemental Protest and Comments. Instead, despite delaying the process well beyond GAO's typical schedule, the Agency devoted paragraphs of its corrective action email to quoting GAO decisions that involved prompt corrective action. This is a transparent attempt to preempt Siemens' recovery of its protest costs. The Agency made only conditional promises to "amend the Solicitation as necessary, request proposals, and conduct discussions (if necessary)" (emphasis in original) - which amount to no more than a hedged promise to take another look. Where there are obvious prejudicial evaluation errors, as here, and the Agency's actions in response to the protest were suspect, GAO should not accept VA's conditional promise of corrective action.

E-mail from protester's counsel to GAO and the parties, November 22, 2016.

After considering the protester's objection our Office dismissed the protest as academic. B-413774, B-413774.2, Nov. 29, 2016 (unpublished decision). By letter dated December 8, Siemens submitted its current request that our Office recommend that it be reimbursed the costs of filing and pursuing its protest. Siemens maintains that it should be reimbursed both the costs associated with filing its protest and supplemental protest.

The agency argues that Siemens' initial protest did not include clearly meritorious allegations that should have led it to take corrective action. According to VA, it took prompt corrective action in response to Siemen's supplemental protest.⁴

⁴ The agency also suggests that our Office already has denied Siemens' request for costs in our earlier decision dismissing the underlying protest as academic. We made no finding in connection with--and in fact, did not even discuss--Siemens' request that our Office recommend that it be reimbursed the costs associated with filing and pursuing its protest in our prior decision.

When a procuring agency takes corrective action in response to a protest, our Office may recommend under 4 C.F.R. § 21.8(e) that the agency reimburse the protester its reasonable 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 protesters to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Pemco Aeroplex, Inc.--Recon. & Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 5. A protest clearly is meritorious when a reasonable agency inquiry into the protest allegations would show facts disclosing the absence of a defensible legal position. The Real Estate Ctr.--Costs, B-274081.7, Mar. 30, 1998, 98-1 CPD ¶ 105 at 3.

For purposes of determining whether to recommend reimbursement of protest costs, we generally consider all issues concerning the evaluation of proposals to be intertwined--and thus not severable--and therefore generally will recommend reimbursement of the costs associated with both successful and unsuccessful challenges to an evaluation. Coulson Aviation (USA) Inc.; 10 Tanker Air Carrier, LLC--Costs, B-406920.6, B-406920.7, Aug. 22, 2013, 2013 CPD ¶ 197 at 5. While we have, in appropriate cases, limited the award of protest costs to successful protesters where a portion of their costs is allocable to a protest issue that is so clearly severable as essentially to constitute a separate protest, see, e.g., BAE Tech. Servs., Inc., B-296699.3, Aug. 11, 2006, 2006 CPD ¶ 122 at 3, limiting recovery of protest costs in all cases to only those issues on which the protester prevailed would be inconsistent with the broad, remedial congressional purpose behind the cost reimbursement provisions of the Competition in Contracting Act. Fluor Energy Tech. Servs., LLC--Costs, B-411466.3, June 7, 2016, 2016 CPD ¶ 160 at 3;

Here, the record shows that Siemens' initial protest included an evaluation allegation that clearly was meritorious. Specifically, the record shows that Siemens' quotation included three different optional responses to the solicitation. Agency Report (AR), exh. 15, Siemens Technical Quotation. Siemens' original protest alleged that the agency improperly had evaluated only one of the three options, and had failed to evaluate the other two, both of which were lower in price than the option that was evaluated. Siemens Original Protest at 8.

The agency's report confirmed this allegation. The agency evaluators did, in fact, fail to evaluate the other two options. In this connection, the agency's technical evaluation report regarding this question stated in its entirety as follows: "While Siemens submitted three different equipment options for consideration, the team determined option 3 to be the most advantageous. Of the three submitted, option 3 was the only option evaluated." AR, exh. 20, Technical Evaluation Report, at 7 (emphasis added).

There is nothing in the contemporaneous record that explains why the evaluators determined the first two options less advantageous in comparison to the third option, or why they did not evaluate all three options. As such, this allegation clearly was meritorious, given that agencies may not properly fail to evaluate alternate options or proposals when they are permitted under the RFQ and are submitted. Pierce-Phelps, Inc., B-238520.2, Apr. 19, 1991, 91-1 CPD ¶ 385 passim, aff'd., Techniarts Engineering; Dept. of the Navy--Recon., B-238520.3, B-238520.4, June 27, 1991, 91-1 CPD ¶ 608. Moreover, even if, as the agency suggests, it actually evaluated the other two options proposed by Siemens and found them technically unacceptable, there is no explanation regarding why the agency did not provide Siemens discussions about the other two options in light of the fact that it conducted discussions during the acquisition. See id.

In its legal memorandum responding to the protest, counsel for the agency presented an extensive statement regarding why the first two options were unacceptable or less advantageous. Agency Legal Memorandum at 10-13. However, this statement is not supported by the contemporaneous record, and was made in the heat of the adversarial process; as such, we accord it little weight. Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15.

As the discussion above demonstrates, the record shows that Siemens' original protest clearly was meritorious, and a reasonable inquiry into the protest allegations would have shown facts disclosing the absence of a legally defensible position. In light of this conclusion, the agency unduly delayed taking corrective action in response to the protest, waiting instead to take its corrective action until the deadline for submitting its report responding to Siemens' supplemental protest. The agency's actions thus forced Siemens to incur protest costs (i.e., prepare comments and a supplemental protest filing) that it would not otherwise have incurred had the agency taken prompt corrective action. Pemco Aeroplex, Inc.--Recon. & Costs, supra, at 5.

In light of the foregoing, we recommend that the agency reimburse Siemens the costs, including reasonable attorneys' fees, associated with filing and pursuing both its initial protest, as well as its supplemental protest. The protester should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The request is granted.

Susan A. Poling
General Counsel