



Decision

Matter of: Aircraft & Turbine Support Corporation--Costs

File: B-417145.2

Date: February 12, 2019

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participated in the preparation of the decision.

DIGEST

Request for recommendation to reimburse protest costs is denied where the agency did not unduly delay taking corrective action in the face of a clearly meritorious protest.

DECISION

Aircraft & Turbine Support Corporation (Aircraft & Turbine), of Fort Myers, Florida, requests that our Office recommend that the Department of Defense, Defense Logistics Agency (DLA) reimburse the firm the reasonable costs of filing and pursuing its protest challenging the terms of Solicitation No. SPRMM1-19-Q-HA14-0001, for turbine nozzles manufactured by General Electric Company (GE), identified by National Stock Number (NSN) 2835-01-373-1806.

We deny the request.

Aircraft & Turbine filed its protest on November 28, 2018, arguing that the solicitation was unduly restrictive of competition because it limited acceptable sources to GE (or its authorized distributors), and that the requirement should have been set aside for small business concerns. Protest at 5-6. On December 6, prior to the agency report due date, DLA informed the parties that it intended to take corrective action in response to the protest by cancelling the solicitation. Notice of Corrective Action.

On December 13, our Office dismissed the protest because DLA's corrective action rendered the protest academic. Aircraft & Turbine Support Corp., B-417145, Dec. 13, 2018 (unpublished decision).

Aircraft & Turbine now requests that our Office recommend it be reimbursed for its costs of filing and pursuing the protest, including attorneys' fees. Req. at 1. In this regard, Aircraft & Turbine raises two conflicting arguments. Aircraft & Turbine first concedes that the agency took corrective action before the agency report was filed, but nonetheless requests reimbursement for its costs because its protest grounds were clearly meritorious. Id. at 5-6. Aircraft & Turbine next argues that the agency unduly delayed taking action in response to a clearly meritorious protest because Aircraft & Turbine has "repeatedly raised the same procurement deficiency . . . to the same contracting department." Id. at 5. In support of this contention, Aircraft & Turbine alleges that "[t]o date, [Aircraft & Turbine] has filed one agency level protest and two GAO protests challenging the exact same language in . . . the [a]gency's [n]ozzle procurements." Id. at 6.

Under our Bid Protest Regulations, if an agency decides to take corrective action in response to a protest, our Office may recommend that the agency pay the protester the reasonable costs of filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees. 4 C.F.R. § 21.8(e). This does not mean that costs should be reimbursed in every case in which an agency decides to take corrective action; rather, a protester should be reimbursed its costs where an agency unduly delayed its decision to take corrective action in the face of a clearly meritorious protest. Knowlogy Corp.--Costs, B-416208.2, Aug. 13, 2018, 2018 CPD ¶ 281 at 3.

When an agency takes corrective action on or before the due date set for receipt of the agency report, our Office views such action as prompt and will not recommend the reimbursement of costs. Innovative Techs., Inc.--Costs, B-415810.3, Mar. 12, 2018, 2018 CPD ¶ 107 at 2. We see no reason to deviate from our standard here, notwithstanding that Aircraft & Turbine previously expressed similar concerns regarding a different solicitation. A protester's actions taken prior to filing its protest with our Office do not establish that an agency unduly delayed its decision to take corrective action in the face of a clearly meritorious protest. Id. Even if we were to assume that Aircraft & Turbine raised clearly meritorious protest grounds, DLA took prompt corrective action in response to Aircraft & Turbine's protest before submitting an agency report. Therefore, Aircraft & Turbine's request does not meet our standard for recommending reimbursement of protest costs and we agree with DLA that Aircraft & Turbine is not entitled to a recommendation that it be reimbursed its protest costs.

Aircraft & Turbine's alternate argument also does not provide a basis for recommending reimbursement of protest costs. We have previously concluded that where an agency fails to implement a promised corrective action, or implements a corrective action that fails to address a clearly meritorious issue raised in an initial protest, such that a protester is put to the expense of subsequently protesting the very same procurement deficiency, the agency's action has precluded the timely and economical resolution of the protest, and constitutes undue delay. Louisiana Clearwater, Inc.--Recon. and Costs, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209.

Here, Aircraft & Turbine concedes, and the record confirms, that it challenged two different solicitations for two different items with different NSNs. See Protest at 4 (“Although Solicitation Two [SPRMM1-19-Q-HA14-0001] was for a different, but similar GE Nozzle, it was almost identical to Solicitation One [SPRMM1-18-Q-WN34].”); Agency Response to Req. at 4 (“GAO Protest B-417056 involved NSN: 2835-01-373-1805 and GAO Protest B-417145 involved NSN: 2835-01-373-1806, which are two different items.”). These two separate protests were docketed, respectively, as B-417056 and B-417145 with our Office.

Aircraft & Turbine’s first protest, docketed as B-417056, was filed on October 26, 2018, and challenged Solicitation No. SPRMM1-18-Q-WN34. Req. at 3; Agency Response to Req. at 2; id. encl. 2, Aircraft & Turbine B-417056 Protest. That protest was dismissed as academic on November 9, based on the agency’s representation that it would cancel the solicitation. See Req. at 4; Agency Response to Req. at 2; id., encl. 4, Req. for Dismissal for GAO Protest B-417056; id., encl. 5, Aircraft & Turbine Support Corp., B-417056, Nov. 9, 2018 (unpublished decision).

Aircraft & Turbine filed its second protest with our Office, challenging the present solicitation (SPRMM1-19-Q-HA14-0001) on November 28. Again, even were we to assume that Aircraft & Turbine raised clearly meritorious protest grounds in the B-417056 protest, Aircraft & Turbine’s assertion that it should be reimbursed its protest costs because it was “forced” to repeatedly incur costs to file protests challenging the very same procurement deficiency is factually not supported by the record, because, these were two separate solicitations for different products. Clearly, these facts do not support the situation where an agency fails to implement the promised corrective action, or implements corrective action that fails to address a meritorious issue raised in the protest that prompted the corrective action, such that the protester is put to the expense of subsequently protesting the very same procurement deficiency in the same procurement. See Taylor Consultants, Inc.--Costs, B-400324.3, Feb. 2, 2009, 2009 CPD ¶ 37 at 3 (denying request for reimbursement where agency neither failed to implement the corrective action nor unduly delayed the corrective action, such that the protester was required to file a second protest of the same procurement); Waltron LLC--Costs, B-298232.2, Aug. 18, 2006, 2006 CPD ¶ 126 at 4 (denying request for reimbursement where agency took prompt corrective action in the face of multiple protests of solicitations for the same product).¹ Accordingly, Aircraft & Turbine’s request

¹ In any event, the present solicitation (SPRM1-19-Q-HA14-0001) was issued on October 30, ten days before the B-417056 protest was dismissed on November 9, based on the agency’s determination to take corrective action in regards to Solicitation No. SPRMM1-18-Q-WN34. Agency Response to Req. at 2; id., encl. 3, Solicitation No. SPRMM1 19 Q HA14 0001, at 1. Even if the two solicitations were for procurement of the same product--which they were not--we see no basis to regard the agency’s action as unduly delayed when the agency takes corrective action on or before the due date set for the receipt of the agency report. Waltron LLC--Costs, supra at 3.

does not meet our standard for recommending reimbursement of protest costs.² See Knowlogy Corp.--Costs, supra, at 3-4.

The request is denied.

Thomas H. Armstrong
General Counsel

² Aircraft & Turbine also requests that our Office recommend reimbursement of costs on the basis that “the [a]gency’s actions circumventing full and open competition are so egregious” “fl[ying] in the face of [the Competition in Contracting Act’s] full and open competition requirements and good faith in contracting requirements.” Req. at 7. In this regard, Aircraft & Turbine contends that the agency’s alleged “issu[ance of] a virtually identical sole-source procurement . . . after taking corrective action in response to a [previous] protest is unconscionable.” Id. Government officials are presumed to act in good faith, and a protester’s contention that procurement officials were motivated by bias or bad faith must be supported by convincing evidence. Career Innovations, LLC, B-404377.4, May 24, 2011, 2011 CPD ¶ 111 at 7-8. Here, to the extent that Aircraft & Turbine is suggesting that the agency has acted in bad faith, it has not provided in its request for reimbursement any evidence of bad faith on the part of the agency.