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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: DevTech Systems, Inc.

File: B-284860.4

Date: August 23, 2002

John E. Jensen, Esq., Shaw Pittman, for the protester.
Stephanie L. Buser, Esq., U.S. Agency for International Development, for the agency.
John L. Formica, Esq., and James Spangenberg, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Request for a recommendation for the reimbursement of reasonable costs of filing and pursuing a protest is timely filed where the request was filed within 15 days of the protester being advised of the corrective action on which GAO's subsequent dismissal of the protest as academic was based.

DECISION

DevTech Systems, Inc. requests that we recommend that it be reimbursed the costs of filing and pursuing its protest challenging the award of contracts to the Academy for Educational Development (AED) and Creative Associates International, Inc., (CAI) under request for proposals (RFP) No. M/OP-99-644, issued by the U.S. Agency for International Development (USAID), for advisory and technical assistance services.

We recommend that USAID reimburse DevTech for its protest costs.

This request for reimbursement of costs follows a long history of repeated protests and corrective actions by USAID. Initially issued in 1999, the RFP provided for the award of multiple indefinite delivery, indefinite quantity contracts for a 3-year period. The successful contractors under the RFP will be required to provide USAID with short-term advisory and technical assistance in the areas of education, training, telecommunication/information technologies and related human development. The RFP stated that the awards would be made to the offerors submitting the proposals representing the best overall value to the government, with technical merit being considered more than twice as important as price. The RFP listed the following

technical evaluation criteria: understanding of the scope of work; corporate capability; management structure; and past performance.

The agency included four proposals, including those submitted by DevTech, AED and CAI, in the competitive range. The agency forwarded written discussion questions to each of the competitive range offerors, and requested, received and evaluated revised proposals. Based on this evaluation, the agency determined that the proposals submitted by AED and CAI represented the best value to the government, and on February 17, 2000, awarded contracts to those firms.

After requesting and receiving a debriefing, on March 7 DevTech protested the awards, contending that the agency had failed to conduct meaningful discussions with it, that the agency's evaluation of its proposal was unreasonable, and that the selection of the proposals submitted by AED and CAI for award was unreasonable. DevTech specifically argued that the agency had failed to inform it during discussions of a perceived weakness or deficiency in its past performance, which caused DevTech's proposal to receive a relatively low rating under the past performance criterion.

In response to the protest, the agency took corrective action by "conven[ing] an evaluation panel whose function will be to carry out a fresh technical evaluation of the proposals of those four companies originally in the competitive range." The agency argued that its proposed corrective action rendered the protest academic, given that "a new round will take place and, of course, a new award pattern may take place at the completion of that round." Agency Report/Corrective Action Letter (Apr. 5, 2000) at 1-2. We agreed, and dismissed DevTech's protest as academic on April 12, 2000.¹

A new technical review panel reevaluated the original and revised proposals of the competitive range offerors. The new panel members were "advised to obtain all new past performance feedback and were not given access to the comments collected or created by the original technical panel." Agency Report (Oct. 20, 2000) at 6; Tab U, Negotiation Memorandum (Aug. 8, 2000), at 2. The panel chose not to conduct discussions. The panel assigned DevTech's proposal a technical score significantly lower than that received in the prior evaluation. Based on this reevaluation, the agency again determined that AED's and CAI's proposals represented the best value to the government, and authorized commencement of the contracts previously awarded to those firms.

¹ The record reflects that USAID reimbursed DevTech (without a decision from our Office) for the costs of filing and pursuing this protest. Agency Response to DevTech's Request for Costs (Mar. 22, 2002) at 4 n.2.

On September 26, DevTech filed another protest, primarily arguing that it did not receive meaningful discussions on the weaknesses and deficiencies identified by the new panel for the first time during the reevaluation that formed the basis for DevTech's proposal's significantly lower score, including under the past performance criterion. We agreed, sustained the protest, and recommended that the agency reopen and conduct appropriate discussions with all competitive range offerors, request revised proposals, and make a new source selection decision.² DevTech Sys., Inc., B-284860.2, Dec. 20, 2000, 2001 CPD ¶ 11.

The agency conducted written discussions with the competitive range offerors. AED, CAI, and DevTech submitted revised proposals by April 23, 2001. DevTech's proposal received a still lower score. The agency again determined that the proposals of AED and CAI represented the best value to the government, and again authorized commencement of performance under the contracts previously awarded to those firms.

On December 10, 2001, DevTech filed another timely protest with our Office, this time arguing that the agency's evaluation of its proposal under the past performance factor was unreasonable. Specifically, DevTech argued that the agency erred in performing its past performance evaluation, in that the agency failed to obtain and consider accurate information concerning DevTech's performance of a contract for USAID regarding the Tertiary Education Linkages Project (hereinafter the TELP contract), which was DevTech's most relevant past performance reference.

On February 26, 2002, after the submission of the agency's report, protester's comments, agency's supplemental report, and the protester's supplemental comments, our Office held a hearing in order to elicit further information regarding the agency's evaluation of DevTech's past performance. After the testimony was concluded, the GAO attorney assigned to the protest, who conducted the hearing, informed the parties that, in his view, the record evidenced that numerous prejudicial mistakes were made during the agency's evaluation of DevTech's past performance regarding the TELP contract, and accordingly, that the likely outcome of the protest was that it would be sustained. Hearing Transcript (Tr.) at 237. In this regard, the GAO attorney explained that, based upon his review of the record and testimony elicited at the hearing, it appeared that the responsible USAID personnel failed to reasonably provide the evaluator with the complete package of materials bearing on DevTech's performance of the TELP contract, even though those materials had been obtained and considered in previous evaluations of DevTech's proposal under the past performance criterion. Tr. at 229-31. The GAO attorney added that it appeared that the agency failed to act in a reasonable and prudent

² The record reflects that USAID also reimbursed DevTech for the costs of filing and pursuing this protest. Agency Response to DevTech's Request for Costs (Mar. 22, 2002) at 4 n.2.

manner in its attempt to obtain information bearing on DevTech's performance on the TELP contract, and that the information that the agency did consider in this regard was either inaccurate, misunderstood, or otherwise flawed to such an extent that it could not serve as the basis of a fair and reasonable evaluation of DevTech's past performance.³ Tr. at 229, 233-36.

On March 4, shortly after filing its post-hearing comments, the agency informed our Office and the protester that it would take corrective action with regard to DevTech's protest, explained generally how it would implement the corrective action proposed, and requested that our Office dismiss the protest "as moot." Agency's Initial Corrective Action Letter (Mar. 4, 2002) at 2. The protester responded to the agency's proposed corrective action and dismissal request that same day, arguing that its protest should not be dismissed as academic because "the proposed corrective action is far too narrow." In this regard, the protester noted that the agency was not proposing to replace the source selection official as part of the corrective action. Protester's Response to Agency's Initial Corrective Action Letter (Mar. 4, 2002) at 1-2.

In order to better understand the parties' respective positions regarding the agency's proposed corrective action and its effect on the protest, the GAO attorney conducted a conference call with the parties on March 6. During that conference call, the respective positions of the parties were discussed, and the agency agreed to expand the scope of its proposed corrective action to include appointing a new source selection official. The protester's expectation of its reimbursement for its protest costs was also discussed during this conference call. The parties as well as the GAO attorney recall that agency counsel conceded that based upon the views expressed by the GAO attorney, and the late date of the corrective action, DevTech would be entitled to reimbursement for its protest costs. Agency Response to DevTech's Request for Costs (Mar. 21, 2002) at 1; Agency Response to DevTech's Request for Costs (Mar. 22, 2002) at 4; Protester's Submission (Mar. 25, 2002). Although agency

³ The GAO attorney's post-hearing comments were intended as, and were akin to, an "outcome prediction" alternative dispute resolution (ADR) conference. In outcome prediction ADR, the GAO attorney handling the protest informs the parties what the GAO attorney believes the likely outcome will be, and the reasons for that belief. A GAO attorney will engage in this form of ADR only if she or he has a high degree of confidence regarding the outcome, and the willingness to predict that a protest will be sustained is an indication that the protest is viewed as clearly meritorious. Inter-Con Sec. Sys., Inc.; CASS, a Joint Venture--Costs, B-284534.7, B-284534.8, Mar. 4, 2001, 2001 CPD ¶ 54 at 3. Where, as here, the party predicted to lose the protest takes action obviating the need for a written decision, our Office closes the case. Although outcome prediction reflects the views of the GAO attorney, and generally (as in this case) that of a supervisor as well, it is not an opinion of our Office, and does not bind our Office, should issuance of a written decision remain appropriate.

counsel insists that she added during this conversation that the agency would pay DevTech's protest costs only if GAO recommended that in a written decision, neither DevTech's counsel nor the GAO attorney recall this reservation being raised.⁴ Agency Response to Protester's Request for a Recommendation for Reimbursement (Apr. 11, 2002), attach., Declaration of the USAID Attorney, at 3-4; Protester's Submission Regarding its Request for a Recommendation for Reimbursement (Apr. 19, 2002) at 3; Protester's Submission (Apr. 19, 2002) at 4. The agency confirmed in writing its proposed corrective action as amended later that same day (March 6), without any statement with regard to DevTech's entitlement to costs, and our Office dismissed the protest as academic on March 7.

On March 21, DevTech submitted to our Office a letter stating that it understood that based upon its "telephone conversations regarding the corrective action in this case that there is no disagreement from USAID regarding DevTech's entitlement to recovery of the cost of filing and pursuing [its] protest." The protester added that "[i]f GAO deems it necessary that DevTech formally requests a ruling from GAO on the issue of entitlement to protest costs, DevTech respectfully requests that this letter serve as that request." Protester's Request for a Recommendation for Reimbursement (Mar. 21, 2002) at 1.

Later that same day, the agency responded by arguing that DevTech's "letter . . . to the extent it purports to be a request for protest costs, is untimely filed." Agency Response to Protester's Request for a Recommendation for Reimbursement (Mar. 21, 2002), at 1-2. In support of this position, the agency pointed to our Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2002), which provide in part as follows:

The protester shall file any request that GAO recommend that costs be paid within 15 days after being advised that the contracting agency has decided to take corrective action.

That is, USAID asserts that DevTech's March 21 submission was untimely filed more than 15 days after March 4, the date of the agency's first corrective action letter.

In light of the agency's apparent decision not to reimburse DevTech for the costs of filing and pursuing its protest, our Office considered DevTech's letter of March 21 as a request for a recommendation for the reimbursement of those costs. The agency was informed of this by notice dated March 25, and told that it could respond to DevTech's request pursuant to 4 C.F.R. § 21.8(e).

⁴ To the extent that USAID believes that it is authorized to pay protest costs only where our Office issues a written decision recommending payment, USAID is mistaken. Inter-Con Sec. Sys., Inc.; CASS, a Joint Venture—Costs, *supra*, at 4.

In its response, the agency argued only that DevTech's filing with our Office on March 21 constituted an untimely request for reimbursement. The agency also stated that it "acknowledges that due to the timing of its corrective action, the GAO would almost certainly have granted a timely request by the protester for the Agency to pay its protest costs." Agency Response to Request for Recommendation for Reimbursement (Apr. 11, 2002) at 7.

When a procuring agency takes corrective action in response to a protest, our Office may recommend that the agency reimburse the protester its 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. A protest is clearly meritorious when a reasonable agency inquiry into the protest allegations would show facts disclosing the absence of a defensible legal position. Inter-Con Security Sys., Inc.; CASS, a Joint Venture--Costs, supra, at 3.

As indicated, given the timing of USAID's corrective action and the fact that the corrective action was in response to what amounted to outcome prediction ADR, there is no dispute that DevTech's protest was clearly meritorious and that the agency unduly delayed taking corrective action. Id. The only question here is whether the protester's request for a recommendation for reimbursement was filed "within 15 days after being advised that the contracting agency has decided to take corrective action," as called for under 4 C.F.R. § 21.8(e).

We agree with the protester that its request for a recommendation for reimbursement of its protest costs was timely filed with our Office. Specifically, it was not until March 6 that the agency, after receiving and considering the protester's objections to the corrective action as initially proposed, and participating in a conference call during which the adequacy of the corrective action was discussed, broadened the scope of its proposed corrective action to that which formed the basis of our dismissal of the protest. Moreover, it was not until March 7 that our Office, after receiving written confirmation from the agency regarding its proposed corrective action as broadened in scope, dismissed the protest as academic. While the agency asserts that March 4, when it initially proposed corrective action, should be controlling for measuring when DevTech was required to file its request for costs under 4 C.F.R. § 21.8(e), we note that this proposed corrective action was considered inadequate by the protester, was expanded upon by the agency, and did not serve as the basis for our dismissal of the protest as academic. Thus, we not consider March 4 to be the appropriate date of when the protester was "advised that the contracting agency had decided to take corrective action," but consider the appropriate date to be either March 6, when the agency finalized its proposed corrective action, or March 7, when our Office dismissed the protest based on the

promised corrective action.⁵ See Moon Eng'g Co., Inc.--Costs, B-247053.6, Aug. 27, 1992, 92-2 CPD ¶ 129 (deadline for filing request for costs measured from when the agency finalized proposed corrective action after conferences between the parties). Since DevTech's request was filed within 15 days of either March 6 or 7, we consider it to be timely.

Accordingly, we recommend that that DevTech be reimbursed for the costs of filing and pursuing its protest, including those incurred here for requesting a recommendation for costs. Inter-Con Sec. Sys., Inc.; CASS, a Joint Venture--Costs, supra, at 4. The protester should file its certified claim for costs with USAID within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

Anthony H. Gamboa
General Counsel

⁵ We need not decide whether the phrase in our Bid Protest Regulation providing that a request for reimbursement must be filed "within 15 days after being advised that the contracting agency has decided to take corrective action" refers to being advised by the contracting agency or our Office, given that under either interpretation, DevTech's request for reimbursement is timely filed.