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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: A-Ability Medical Equipment, Inc.—Costs

File: B-403256.3

Date: April 4, 2011

Margaret M. Craig, Esq., and Ethan J. Loeb, Esq., Bricklemyer Smolker & Bolves, PA, for the protester.

Rebecca L. Tranthem, Esq., Department of Veterans Affairs, for the agency.

Kenneth Kilgour, Esq., and Edward T. Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation that agency reimburse costs for two protests, the second of which reasserted allegations from the prior protest, is denied where the agency did not unduly delay taking corrective action in response to the first protest and the second protest was rendered academic for reasons unrelated to the underlying protest allegations.

DECISION

A-Ability Medical Equipment, Inc., of Tampa, Florida, requests that it be reimbursed the costs of filing and pursuing protests of the award of a contract to Veterans Medical Supply, Inc., of Pinellas Park, Florida, by the Department of Veterans Affairs (VA) under solicitation No. VA-248-10-RP-0203 for durable medical equipment.

We deny the request.

On June 24, 2010, the VA awarded the contract at issue to Veterans Medical Supply. A-Ability protested, arguing that the awardee was neither a service disabled veteran-owned small business (SDVOSB)¹ nor capable of performing,² and that A-Ability was more technically qualified than the awardee, given the protester's superior certification, employee training, and past performance. Prior to the due date for the agency report, the agency informed our Office that it intended to take corrective action, to include, at a minimum, conducting a new evaluation and making a new award decision. Based on the agency's proposed corrective action, we dismissed the protest as academic. A-Ability Medical Equip., Inc., B-403256, Aug. 9, 2010.

Following corrective action, the agency again made award to Veterans Medical Supply. A-Ability protested, repeating the three allegations from its prior protest. Protest, Nov. 17, 2010 at 4. Prior to the due date for the agency report, the agency informed our Office that it intended to cancel the solicitation, clarify its requirements and evaluation criteria, and issue a new solicitation. Since the agency was canceling the solicitation, we dismissed the second protest as academic. A-Ability Medical Equip., Inc., B-403256.2, Dec. 6, 2010.

A-Ability requests that we recommend that the agency pay the protest costs associated with both protests, arguing that the VA's corrective action in response to the first protest failed to address a clearly meritorious protest allegation, and that the agency's failure to take appropriate corrective action required the protester to file a second protest.

Where a procuring agency takes corrective action in response to a protest, we may recommend that it 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. Taylor Consultants, Inc.--Costs, B-400324.3, Feb. 2, 2009, 2009 CPD ¶ 37 at 3. Generally, when an agency takes corrective action before the due date for its report, our Office regards such action as prompt and will not recommend reimbursement of costs. The Sandi-Sterling Consortium--Costs, B-296246.2, Sept. 20, 2005, 2005 CPD ¶ 173 at 2-3. We have recognized, however, that the mere promise of corrective action, without reasonably prompt implementation, has the obvious effect of circumventing the goal of the bid protest system for the

¹ This issue is not for our review; the authority to determine an awardee's SDVOSB eligibility is vested in the VA, not our Office. TEC/WEST-TEC JV, B-402573.3, July 30, 2010, 2010 CPD ¶ 174 at 2-3.

² The question of whether a company is capable of performing the contract is a matter of responsibility, which we generally will not consider. Bid Protest Regulations, 4 C.F.R. § 21.5(c) (2010); see Marinette Marine Corp., B-400697, et al., Jan. 12, 2009, 2009 CPD ¶ 16 at 23.

economic and expeditious resolution of bid protests. See Louisiana Clearwater, Inc.–Recon. and Costs, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209 at 6. Thus, where an agency fails to implement the promised corrective action, or implements corrective action that fails to address a clearly meritorious issue raised in an initial protest, such that the protester is put to the expense of subsequently protesting the very same procurement deficiency, the agency’s action has precluded the timely, economical resolution of the protest. Id.

Here, there is no basis to conclude that the agency has unduly delayed taking corrective action in response to a clearly meritorious protest. In response to the first protest filed by A-Ability, the agency promptly indicated that it would take corrective action. To the extent A-Ability maintains that its protest costs are justified because the agency has taken “corrective action” in response to A-Ability’s second protest, A-Ability’s argument is misplaced. A-Ability’s second protest was not rendered academic based on the agency’s representation that it would correct the same evaluation issues raised in A-Ability’s first protest. Rather, the protest was rendered academic for reasons not directly related to the protest issues raised by A-Ability—the agency’s decision to cancel and re-issue the solicitation in order to clarify its requirements and evaluation criteria. Since A-Ability’s second protest was rendered academic for reasons not directly related to the protest allegations, there was no corrective action; that is, there was no indication that the agency recognized the merits of the protest and was taking action to remedy the impropriety identified by the protester.³ See Digital Sys. Group, Inc.–Entitlement to Costs, B-257835.2, Apr. 3, 1995, 95-1 CPD ¶ 173. Accordingly, there is no basis for recommending the award of costs.

The request is denied.

Lynn H. Gibson
General Counsel

³ In addition, a recommendation for the award of protest costs is not appropriate because we are unable to conclude that the specific evaluation issues raised by A-Ability were clearly meritorious. In this regard, the evaluation issues raised by A-Ability concern the reasonableness of the agency’s judgments and, unlike the protest issues raised in Louisiana Clearwater, Inc.–Recon. and Costs, supra., they are not clearly meritorious on their face. Rather, we would need to further develop the record and conduct substantial further legal analysis to resolve the evaluation issues protested by A-Ability. Due to the agency’s cancellation of the solicitation this was not possible because the agency report, to include the evaluation record, and protester’s comments were not filed. See Information Ventures, Inc.–Costs, B-294567.2, Nov. 16, 2004, 2004 CPD ¶ 234.