



Decision

Matter of: The CFS Group, LLC--Costs

File: B-403539.3

Date: May 13, 2011

Thomas A. Coulter, Esq., LeClair Ryan PC, for the protester.
Capt. Mathew E. Dyson and Scott N. Flesch, Esq., Department of the Army, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation that protest costs be reimbursed where an agency took corrective action in response to the protest is denied where the record does not establish that the protest was clearly meritorious.

DECISION

The CFS Group, LLC requests that we recommend that it be reimbursed the costs of filing and pursuing its protests against the Department of the Army's cancellation of request for proposals (RFP) No. W911S0-10-R-0012, for refuse and recycle collection services, and against the exercise of an option under the predecessor contract for these services awarded to Mark Dunning Industries, Inc. (MDI).

We deny the request.

BACKGROUND

In May 2004, the Army awarded contract No. W91QF1-04-C-0007 to MDI for refuse and recycle collection services at Fort Lee, Virginia. These services required the contractor to furnish all labor, containers, materials, equipment, transportation, and supervision except where government furnished, to manage and perform all operations for the collection, recycling, and disposal of all solid waste from Fort Lee, including Fort Lee housing areas, Fort Lee ranges, and an off-post administrative building. The term of the contract was for a base year with 4 option years plus

incentive options for five additional 1-year incentive periods.¹ MCI's contract contained prices for all of the options and incentive options, which were evaluated in making the contract award.

In 2009, prior to the Army's exercise of the last of the four basic yearly options, several modifications were made to the contract, including an increase in pricing for the last basic option year because of changes in various economic factors, including Base Realignment and Closure (BRAC) and privatization of on-base housing. After exercising that option on September 30, the Army conducted two market surveys in 2009 in view of the fact that MDI had indicated that it expected its prices for the incentive option years to be increased because of the changed circumstances. CFS participated in these surveys. Based on the survey results, the Army concluded that it was not clear that it would be able to obtain fair and reasonable prices from MDI for the incentive year options so as to allow their exercise.² The Army therefore elected to solicit competitive proposals for the period covered by the incentive options included in MDI's contract, and on May 12, 2010, issued the RFP to acquire these services. The RFP was amended several times and a July 2 closing date for receipt of proposals was ultimately established.

Meanwhile, the Army commenced negotiations with MDI regarding the prices for the incentive option years. These negotiations resulted in modification No. P00070 to MDI's contract effective July 1, 2010. This modification revised the contract prices

¹ The clause in the contract pertaining to the incentive options stated:

If during the Base Year of performance the Contractor earns an annual "overall" performance rating of purple (very good) in the Past Performance Information Management System (PPIMS) they earn the eligibility of one additional option period. In addition, for every annual overall performance rating of purple (very good) in PPIMS they receive in Option Periods 1 through 4 they earn the eligibility of one additional award option period. The contractor has the potential to earn five additional one-year option periods. The actual exercise of an incentive option is subject to the requirements of [Federal Acquisition Regulation (FAR)] §17.207 (c) and (f).

Agency Report (AR), Tab 24, MDI Contract, § H.8 at 98.

² In accordance with the option clause, under FAR § 17.207(c), the contracting agency could exercise the incentive option only after determining that (1) funds are available; (2) the requirement covered by the option fulfills an existing government need; (3) the exercise of the option is the most advantageous method of fulfilling the government's need, price and other factors considered; (4) the option was synopsisized in accordance with Part 5 unless exempted; and (5) the contractor is not listed on the excluded parties list.

for the last basic option period and increased the prices for the incentive year options. Because the Army was able to reach an agreement for what it found were fair and reasonable prices for the incentive options, the agency canceled the RFP on June 30 prior to the receipt of proposals.

On August 9, CFS challenged the Army's cancellation of the RFP and the apparent decision by the agency to exercise the first of the incentive year options under MDI's contract. CFS argued that the Army canceled the solicitation solely to make a noncompetitive award to MDI without complying with applicable FAR provisions pertaining to the exercise of options; that the Army improperly exercised an unevaluated option; and that MDI had unequal access to information gained from the Army's market surveys.

On September 9, the Army submitted its agency report on the protest, arguing that the RFP was reasonably canceled because the agency was able to obtain fair and reasonable prices for the remaining term of MDI's contract. The agency also asserted that MDI did not have access to information obtained by the agency in its market surveys, nor was there any evidence that MDI gained access to this information. The agency further argued that the protest against the exercise of the first of the incentive options was either a question of contract administration or premature because the option had yet to be exercised, and thus was not subject to GAO review.

On September 20, CFS filed comments on the agency report, as well as a supplemental protest, in which it argued that modification P00070 went beyond the scope of MDI's contract; that the agency's actions before and after the solicitation evidenced bias in favor of MDI; that the RFP was not issued in good faith; and that the Army's exercise of the first incentive option under MDI's contract would result in an improper sole-source award to MDI.

On September 27, the Army exercised the first incentive option of the MDI contract by contract modification No. P00074.

On October 4, the Army submitted a report responding to the supplemental protest grounds, in which it explained that modification P00070 did not exceed the scope of MDI's contract because the requirements under the contract did not change and the modification only adjusted the prices of the option years. The agency also denied the allegations of bias and lack of good faith. CFS filed comments on the supplemental agency report disputing the agency's positions.

The due date for our Office to have issued a decision on CFS's protests was November 17. On November 10, the Army requested dismissal of the protest as academic because it was taking corrective action as follows:

[The agency] will prepare a new solicitation for full and open competition. The current contractor will continue servicing Fort Lee until a new award is made. As soon as the new award is made the current contract will be terminated for the convenience of the government. The issuance of the new solicitation and award of the new contract will be done with reasonable promptness.

Contracting Officer's Memorandum (Nov. 10, 2010).

DISCUSSION

Under the Competition in Contracting Act of 1984 (CICA), our Office may recommend that protest costs be reimbursed only where we find that an agency's action violated a procurement statute or regulation. 31 U.S.C. § 3554(c)(1) (2006). Our Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2010), provide that we may recommend that an agency pay the protester the reasonable costs of filing and pursuing the protest where the agency decides to take corrective action in response to the protest. This does not mean, however, that we will recommend that costs be reimbursed in every case in which an agency takes action that renders a protest academic; rather, we will recommend that a protester be reimbursed its costs only where the record established that (1) the agency action that rendered the protest academic was taken in response to the protest, see Takota Corp--Costs, B-299600.2, Sept. 18, 2007, 2007 CPD ¶ 171 at 3, and (2) the agency unduly delayed taking the action in the face of a clearly meritorious protest. Baine Clark--Costs, B-290675.3, Sept. 23, 2002, 2002 CPD ¶ 166 at 2. We consider a protest to be clearly meritorious when a reasonable agency inquiry into the protester's allegations would show that the agency lacked a defensible legal position, that is, they did not present close questions for which there was no defensible legal position. Triple Canopy, Inc.--Costs, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 3-4; SDA Inc.--Costs, B-298216.2, Sept. 11, 2006, 2006 CPD ¶ 133 at 2.

CFS argues that our Office should view its protest as clearly meritorious because the Army lacked a defensible legal position to the protest and unduly delayed taking corrective action until 93 days after CFS filed its protest. The Army responds that its decision to take corrective action was a business decision, not based on the merits of CFS's protest, and that it presented persuasive and dispositive defenses to all of CFS's allegations.

The record shows that the agency's corrective action here was in response to CFS's protest and was taken very late in the protest process. As to the merits of the protest, we believe that the agency's actions here, in negotiating revised option prices with the contractor prior to the exercise of an option while initiating a

competitive procurement for the same services, are subject to question. However, based on our review, we cannot conclude that CFS's protest was clearly meritorious.

The protest argument that may have the most merit involves the protester's assertion that the incentive option exercised was not an "evaluated" option in accordance with FAR § 17.207(f) and therefore cannot be exercised. That regulation states in pertinent part:

Before exercising an option, the contracting officer shall make a written determination for the contract file that exercise is in accordance with the terms of the option, the requirements of this section, and [FAR] Part 6. To satisfy requirements of Part 6 regarding full and open competition, the option must have been evaluated as part of the initial competition and be exercisable at an amount specified in or reasonably determinable from the terms of the basic contract.

FAR § 17.207(f). As noted, while the options included in MDI's contract were specifically evaluated at the time of award, shortly before the first of the incentive options were exercised the option prices were increased from those included in the contract as awarded. While not entirely clear from CFS's protest, we presume this is the basis for its argument that the option to be exercised was "unevaluated" and thus could not be exercised. See Major Contracting Servs, Inc., B-401472, Sept. 14, 2009, 2009 CPD ¶ 170 at 6, recon. denied, Department of the Army-Recon., B-401472.2, Dec. 7, 2009, 2009 CPD ¶ 250 (exercise of option to extend contract that was not evaluated as part of the initial competition amounts to a contract extension beyond the scope of the contract and therefore effectively constitutes a new procurement subject to the competition requirements of CICA).

We are unaware of any cases that specifically address the propriety of the agency's actions here. Nor do we decide here whether the exercise of the first incentive option violated any procurement statute or regulation. In this regard, it is clear that revised prices for the incentive options were not considered in the evaluation of the proposals for award and that these option prices were negotiated just before the first incentive option was exercised. On the other hand, the record demonstrates that these incentive options were evaluated, albeit at different prices, when the contract was awarded. Moreover, an agency has the authority to increase option prices pursuant to the Changes clause of the contract, and to exercise these options in appropriate circumstances, for example, where the work requirements have changed from the original contract, so long as the changes are within the scope of the

contract.³ See Bulova Techs., Inc., B-252660, July 15, 1993, 93-2 CPD ¶ 23 at 4-6 (options for which prices have been appropriately increased within the scope of the contract can be exercised in appropriate circumstances); Gulton Indus., Inc., Engineered Magnetics Div., B-203265, July 20, 1982, 82-2 CPD ¶ 59 at 10-13 (same). Under the circumstances, we cannot find that the protester's argument here was clearly meritorious inasmuch as this involves a close question for which the agency had a defensible legal position. See Triple Canopy, Inc.—Costs, *supra*.

As to the issuance and cancellation of the RFP, CFS argues that the Army's *ex-parte* negotiations with MDI, even though MDI was a prospective offeror under the RFP, were improper and thus the agency could not cancel the RFP. We have found no cases addressing the propriety of an agency renegotiating an option price with the contractor prior to its exercise where an RFP has already been issued for the option period but proposals have not yet been received. FAR § 17.207(d) specifically charges the contracting officer with the obligation to determine whether the exercise of the option is the most advantageous method of fulfilling the government's needs considering both price and other factors. While this regulation allows for the issuance of a solicitation to obtain offers that could be used to determine whether they produce a better price or more advantageous offer than available in the option, this regulation provides that this method should not be used if it is anticipated that the existing option is the best price available or that it is the more advantageous offer. FAR § 17.207(d)(1). Moreover, FAR § 17.207(d)(2) provides another acceptable basis to make a determination as to whether an option should be exercised as follows: “[a]n informal analysis of prices or an examination of the market indicates that the option price is better than prices available in the market or that the option is the more advantageous offer.” We have found a reasonable basis exists to cancel an RFP rather than to continue with a negotiated procurement where an agency discovers that it is more advantageous to exercise an option under an existing contract. See Astronautics Corp. of Am., B-222414.2, B-222415.2, Aug. 5, 1986, 86-2 CPD ¶ 147 at 2-3; *cf.* National Linen Serv., B-257112, B-257312, Aug. 31,

³ CFS argues that the modification went beyond the scope of MDI's contract because the option prices were substantially increased. In determining whether the modification triggers the competition requirements under CICA, we look to whether there is a material difference between the modified contract and the contract that was originally awarded. See DOR Biodefense Inc.; Emergent BioSolutions, B-296358.3, B-296358.4, Jan. 31, 2006, 2006 CPD ¶ 35 at 6. Here, the only material change to the originally awarded contract was the increased prices for the incentive option years. According to the Army, this increase became necessary because of changes in the various economic factors, including BRAC and privatization of on-base housing. The protester did not substantively challenge the agency's explanation. Where, as here, it is clear that the nature and purpose of the contract have not changed, even a substantial price increase alone does not establish that a modification is beyond the scope of the original contract. *Id.*

1994, 94-2 CPD ¶ 94 at 5 (cancellation of invitation for bids based on potential cost savings by obtaining laundry services under a proper modification to an existing contract). Thus, these protest allegations are not clearly meritorious.

Moreover, CFS has not shown that the exercise of the option was not the most advantageous method of fulfilling Government's need, price and other factors considered. See FAR § 17.207(c)(3). For example, CFS has not alleged that its offered price would be lower than the price contained in the incentive option contained in MDI's contract.

CFS's arguments about the possibility that MDI had knowledge of information in the market survey, which assisted it in its negotiations with the Army, and that the Army's actions were otherwise biased or in bad faith were not clearly meritorious. In this regard, the Army categorically denied these allegations, which appear to be based upon pure speculation, and has provided sworn statements from the affected contracting personnel to support this denial. Government officials are presumed to act in good faith, and a protester's claim that contracting officials were motivated by bias or bad faith must be supported by convincing proof; our Office will not attribute unfair or prejudicial motives to procurement officials on the basis of inference of supposition. Operation Support and Servs., B-299660.2, Sept. 24, 2007, 2007 CPD ¶ 182 at 3.

In sum, we find CFS's protest was not clearly meritorious and deny its request that we recommend reimbursement of its protest costs.

Lynn H. Gibson
General Counsel