



Decision

Matter of: Re-Engineered Business Solutions, Inc.--Costs

File: B-404214.4

Date: July 14, 2011

Wayne A. Keup, Esq., for the protester.
Parag J. Rawal, Esq., U.S. Army Corps of Engineers, for the agency.
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GAO, participated in the preparation of the decision.

DIGEST

Request for reimbursement of protest costs is denied where the record does not establish that the protests were clearly meritorious.

DECISION

Re-Engineered Business Solutions, Inc. (RBS), of Frederick, Maryland, requests that our Office recommend that the U.S. Army Corps of Engineers reimburse its costs of filing and pursuing its protests of the award of a contract to EML/BMAR Joint Venture IV, LLC, of Franklin, Tennessee, under request for proposals (RFP) No. W912EE-10-R-0001 for the operation, maintenance, and repair of flood control facilities at various locations in Mississippi.

We deny the request.

BACKGROUND

The RFP, issued as a section 8(a) set-aside, provided for the award of a cost-plus-fixed-fee contract for the operation, maintenance, and repair of flood control facilities at Arkabutla, Sardis, Enid, and Grenada Lakes in Mississippi for a base year and four option years. Offerors were informed that award would be made on a best value basis, considering technical, past performance, and cost evaluation factors.

The Corps awarded the contract to EML/BMAR. After receiving a debriefing, RBS protested to our Office, arguing that the Corps departed from the evaluation scheme required by the RFP, conducted an improper cost/technical trade-off, conducted a

flawed cost realism analysis, and should have selected RBS's higher-priced offer because it received higher ratings under the technical capability and past performance evaluation factors than the awardee. Protest (B-404214.1) at 5-10. RBS also filed a supplemental protest arguing that the Corps improperly assigned it weaknesses for not providing cost information for small tools and providing an outdated letter of credit. Supp. Protest (B-404214.2) at 2-3. Ten days after the supplemental protest was filed and before the agency report was due, the Corps notified our Office that it would take corrective action by reevaluating proposals. We dismissed the protest as academic.

After reevaluating proposals, the Corps again awarded the contract to EML/BMAR, and RBS again protested the agency's evaluation of its proposal, basically raising the same arguments as it raised in its initial protest. See Protest (B-404214.3) at 6-14. Before the agency report was due, the Corps again notified our Office that it was taking corrective action. We dismissed the protest as academic.

DISCUSSION

RBS requests that our Office recommend that the agency reimburse its costs of filing and pursuing its protests. RBS argues that the Corps unduly delayed taking corrective action in the face of its clearly meritorious protest because the Corps' reevaluation was done "without regard to any protest contentions" and "repeated most of the mistakes seen in the first protest." RBS Request for Costs, Mar. 24, 2011, at 2. RBS cites our decision in Holiday Inn-Laurel--Protest and Request for Costs, B-270860.3, B-270860.4, May 20, 1996, 96-1 CPD ¶ 259, to support its request.¹

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs, including reasonable attorneys' fees, if, 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. 31 U.S.C. § 3554(c)(1)(A) (2006); Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2011); AAR Aircraft Servs.-Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 5. Thus, as a prerequisite to our recommending the reimbursement of costs where a protest has been settled by corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious, i.e., not a close question. Apptis Inc.-Costs, B-402146.3, Mar. 31, 2010, 2010 CPD ¶ 123 at 4. A protest is clearly meritorious where a reasonable agency inquiry into the protester's allegations would reveal facts showing the absence of a

¹ The facts in Holiday Inn-Laurel, supra, are inapposite. Unlike the circumstances in this case, the agency, in Holiday Inn-Laurel, twice took corrective action after filing its reports and, in one instance, only after our Office asked the agency to address specific concerns. Holiday Inn-Laurel, supra, at 4.

defensible legal position. Yardney Technical Prods., Inc.-Costs, B-297648.3, Mar. 28, 2006, 2006 CPD ¶ 65 at 4.

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 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, the agency promptly indicated that it would take corrective action. To the extent that the protester maintains that it is entitled to reimbursement of its costs for filing the second protest because the Corps failed to implement its promised corrective action, the record does not establish that RBS's protests were clearly meritorious. Even where a protester alleges that an agency failed to timely implement promised corrective action, our recommendation that an agency reimburse a protester its protest costs must be based upon a showing that a procurement statute or regulation has been violated. See A-Ability Med. Equip., Inc.-Costs, B-403256.3, Apr. 4, 2011, 2011 CPD ¶ 81 at 3 n.3. The mere fact that an agency decides to take corrective action does not establish that a statute or regulation clearly has been violated. Contract Int'l, Inc.-Costs, B-401871.3, Feb. 17, 2010, 2010 CPD ¶ 122 at 4.

The Corps took corrective action in response to the protests prior to submitting its reports, and thus we have not been provided with a record of the agency's evaluation and selection decision. Further record development would be necessary to determine whether any of RBS's protest grounds had merit. Although RBS assumes that its protests have merit based upon the fact that the agency took corrective action in the face of two similar protests, the mere fact that the Corps decided to take corrective action does not establish that the protests were clearly meritorious. See Contract Int'l, Inc.-Costs, *supra*, at 4; Alaska Structures, Inc.-Costs, B-298575.4, Jan. 22, 2007, 2007 CPD ¶ 15 at 8.

The request for entitlement to protest costs is denied.

Lynn H. Gibson
General Counsel