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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Security Consultants Group, Inc.—Costs

File: B-293344.6

Date: November 4, 2004

Stephen M. Ryan, Esq., and Holly A. Roth, Esq., Manatt, Phelps & Phillips, for the protester.

Aaron T. Marshall, Esq., Department of Homeland Security, for the agency.

Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Government Accountability Office will not recommend reimbursement of protester's costs of submitting proposals and challenging solicitation terms where, prior to submission of agency report, agency took corrective action canceling the solicitations and reinstating protester's contract.
 2. Government Accountability Office recommends reimbursement of the costs of defending against agency's request for reconsideration where protester was required to incur additional expense in responding to request and record shows request, although ultimately withdrawn, failed to state a valid basis for reconsideration.
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DECISION

Security Consultants Group, Inc. (SCG) requests that our Office recommend reimbursement by the Department of Homeland Security (DHS) of SCG's costs of filing and pursuing various protests and of defending against a DHS request for reconsideration of our decision in Security Consultants Group, Inc., B-293344.2, Mar. 19, 2004, 2004 CPD ¶ 53.

We grant the request in part and deny it in part.

The task order—for security guard services in Oklahoma—was initially awarded to SCG, under request for proposals (RFP) No. GS-07P-03-FCD-0131, based on the agency's determination that its proposal represented the “best value” to the government. Southwestern Security Services, Inc. (SSSI) protested to our Office, challenging the evaluation of its proposal and the award decision; we ultimately

dismissed that protest for failure to state a valid basis of protest (B-293344, Dec. 2, 2003). In reviewing the contract record, the agency realized that the request for proposals had not disclosed the relative weights of the three technical factors. While this indicated to offerors that the factors would be equally weighted, see Maryland Office Relocators, B-291092, Nov. 12, 2002, 2002 CPD ¶ 198 at 5, the evaluation plan--and the actual evaluation--had assigned the past performance factor a weight of 60 percent, and the other factors 20 percent each. Although SSSI's protest had been dismissed, the agency decided to take corrective action by amending the RFP to set forth the factors' relative weights and providing the offerors an opportunity to revise their technical and price proposals. The agency subsequently modified the task order, effectively terminating SCG's contract.

In its protest, SCG asserted that the agency's corrective action was unwarranted because none of the offerors was prejudiced by the RFP's defect and that, since its contract price had been disclosed, it would be at an unfair competitive disadvantage in the reopened competition. While we found that the agency had correctly determined that there was a deficiency in the RFP, we concluded--based on the individual factor scores of the four top-scored offerors, including SCG--that none of the offerors was misled by the deficiency. Because the record did not establish a reasonable possibility of prejudice to any of the offerors, and given the compromise of SCG's competitive position by disclosure of its price, we held that there was no benefit to the procurement system that would justify reopening the competition. Accordingly, we sustained the protest and recommended reinstatement of SCG's contract.

Subsequently, DHS determined that there were ambiguities in its evaluation process and changes to its requirements that necessitated issuing a new solicitation. Thus, instead of reinstating SCG's task order contract in accordance with our recommendation, DHS issued three separate solicitations (GS-07P-04-FCD-0007, GS-07P-04-FCD-0008, and GS-07P-04-FCD-0009) covering the same security guard services encompassed by SCG's contract to obtain these services on an interim basis while it conducted the revised procurement. SCG submitted proposals for all three and protested the solicitations' terms. Prior to the due date for the agency's report, DHS took corrective action by canceling the new solicitations and modifying existing contracts with SCG and SSSI to meet its requirements. We dismissed the protests as academic. B-293921, B-293922, B-293923, May 6, 2004.

At the same time it protested the new solicitations, SCG also protested the agency's decision--of which it apparently became aware from the agency--not to follow our recommendation (B-293344.3). Shortly thereafter, both DHS and Coastal International Security, Inc., an intervenor in SCG's original protest, filed separate requests for reconsideration/modification of our decision sustaining SCG's protest (B-293344.4 and B-293344.5). While cast in terms of a request for reconsideration, Coastal essentially was protesting the original task order award to SCG, a matter we found it could and should have raised following the award to SCG or during the

course of SCG's protest. Accordingly, we denied Coastal's reconsideration request. B-293344.5, May 4, 2004.

DHS identified two grounds for reconsideration. The first concerned what DHS alleged was an impermissible contact it had with Coastal during the evaluation leading up to the original award to SCG. Specifically, Coastal's proposal had been the highest-rated for multiple requirements, but the contracting officer was concerned with Coastal's ability to handle the number of awards it might receive, and therefore asked Coastal to indicate which contract it would prefer to be awarded. Coastal chose another requirement, leaving SCG in line for award of the Oklahoma task order. DHS viewed this as an improper responsibility determination that rendered the award to SCG invalid, since DHS essentially had denied Coastal additional awards based on a determination that it could not perform all of the requirements. DHS's second ground for reconsideration was stated as follows: "The agency has new requirements relating to contractor staff qualifications that must be included in the statement of work for Oklahoma among other guard service areas." DHS Reconsideration Request at 2. DHS subsequently withdrew its request for reconsideration, DHS Letter, Apr. 28, 2004, which also led to our dismissal, as academic, of SCG's protest of the agency's failure to follow our recommendation. B-293344.3, May 6, 2004. SCG then filed this request for a recommendation that it be reimbursed the costs of all the foregoing protests and its defense against DHS's and Coastal's requests for reconsideration.¹

PROTEST COSTS

SCG requests reimbursement of the costs of submitting proposals in response to, and of protesting the terms of, the three new solicitations.

Where an agency decides to take corrective action in response to a protest, we may recommend that the agency pay protest costs, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2004). We will make such a recommendation only where the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. CSL Birmingham Assocs.; IRS Partners-Birmingham--Costs, B-251931.4, B-251931.5, Aug. 29, 1994, 94-2 CPD ¶ 82 at 3. As a general rule, so long as an agency takes corrective action by the due date for its protest report, we regard the action as prompt. CDIC, Inc.--Entitlement to Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52. Here, DHS canceled the solicitations in question and notified our Office of its intent to reinstate SCG's contract award prior to the due date for the

¹ Our Office informed the parties at an "outcome prediction" alternative dispute resolution conference that SCG's request for a recommendation that it be reimbursed its costs was likely to be granted with regard to defending against the agency's reconsideration request but denied as to the remaining actions. The parties were unable to reach an appropriate settlement in response.

agency's report. In view of this prompt corrective action, which obviated the need for SCG to incur additional costs, we have no basis for recommending reimbursement of costs. Id.

We also find no basis for recommending reimbursement of costs for SCG's independent protest challenging the agency's decision not to follow our recommendation (B-293344.3). In this regard, while DHS had taken steps that were inconsistent with following our recommendation, DHS had neither requested reconsideration nor notified our Office that it would not implement our recommendation at the time of SCG's protest. SCG's protest thus merely anticipated action that had not yet taken place and, as such, was premature and subject to dismissal. Parcel 47C LLC, B-286324, B-286324.2, Dec. 26, 2000, 2001 CPD ¶ 44 at 10 n.13; see Saturn Indus.--Recon., B-261954.4, July 19, 1996, 96-2 CPD ¶ 25 at 5. Moreover, since the agency canceled the replacement solicitations and withdrew its reconsideration request prior to the due date for the agency report, there was no basis for reimbursing the costs of these actions. CDIC, Inc.--Entitlement to Costs, supra.

COSTS OF DEFENDING AGAINST RECONSIDERATION REQUEST

SCG asks that it be reimbursed the costs of defending against DHS's request for reconsideration.² DHS responds that it should not be required to pay these costs because it filed the reconsideration request in good faith, and withdrew it when circumstances changed. Specifically, DHS explains that, subsequent to our decision sustaining SCG's protest, it reviewed its guard services statement of work with the intent of implementing changes; the reconsideration request was based on the findings of this review. However, DHS thereafter determined that the changes would not be implemented immediately and, on this basis, prior to the due date for its report, withdrew the request. DHS Response at 3.

We find that reimbursement is warranted. The promptness standard applicable to protests cannot be applied to the agency's request for reconsideration because the request itself caused the protester to expend unnecessary time and resources to obtain relief, a key consideration in our deciding whether reimbursement of a protester's costs is appropriate. See AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 5. It is reasonable for a firm whose protest has been sustained by our Office to feel compelled to respond to the agency's request for reconsideration. Here, the agency caused the protester to incur costs opposing a request for reconsideration that was devoid of merit. In this regard, parties filing

² SCG also requests reimbursement of its costs associated with defending against Coastal's reconsideration request. However, we will not recommend reimbursement of costs incurred in responding to a matter raised by a third party over which the agency had no control.

requests for reconsideration are required to submit a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered. Bid Protest Regulations, 4 C.F.R. § 21.14(a). DHS's reconsideration request did not meet this standard.

Specifically, DHS's first ground, concerning the agency's allegedly improper contact with Coastal, represented information the agency should and could have raised during the development of the original protest. We will not reconsider a decision based on information or arguments that could have been, but were not, raised during the initial protest. United Mondialpol Int'l S.r.l.; Department of State--Recon., B-251398.3, B-251398.4, May 21, 1996, 96-1 CPD ¶ 245 at 2. As to the second ground, the agency initially provided no supporting information, stating only that there were new requirements related to contractor staff requirements. When SCG challenged this basis, the agency added that the requirements related to training qualifications, with no further elaboration. Additional efforts to obtain information--a telephone conference initiated by our Office and written comments thereon--produced only limited additional specificity. Just prior to the due date for the agency's submission, DHS withdrew its request stating that "the factual basis for its request for reconsideration can no longer be supported. At this time, the agency is unable to articulate with detail the nature or timing of changes that will affect its statement of work for guard services." DHS Letter, Apr. 28, 2004.

Despite a number of opportunities, DHS never met its obligation to provide sufficient detail regarding the factual and legal bases for its reconsideration request. In fact, had it not been withdrawn, its request was subject to dismissal. In this regard, there was never any information submitted by the agency to establish the materiality of the proposed changes, nor was there an explanation as to why the agency was not aware of the need for these changes until after issuance of our decision sustaining SCG's protest. In our view, having just participated in a fully developed bid protest concerning the procurement, the agency should have been well aware of its requirements and any need to revise them. To the extent it was unsure of its needs, we fail to see how it reasonably could proceed with a request for reconsideration based on changed needs. As a result of the agency's inadequately supported reconsideration request, SCG was required to incur expenses that otherwise would not have been necessary.

The underlying purpose of the provisions in the Competition in Contracting Act (CICA) and our Regulations relating to the entitlement to bid protest costs is to relieve protesters of the financial burden of vindicating the public interest as defined by the Congress in the Act. Department of the Navy--Request for Recon. and for Modification of Remedy, B-246784, B-246784.4, Feb. 17, 1993, 93-1 CPD ¶ 147 at 6. Pursuant to this purpose, we recommend that SCG be reimbursed its costs, including reasonable attorneys' fees, of defending against DHS's reconsideration request. Where, as here, an agency liable for protest costs as a result of a sustained protest asks us to reconsider the finding on which that liability is based, the costs attendant

to the protester's response may be reimbursable. Department of the Navy--Modification of Remedy, B-284080.3, May 24, 2000, 2000 CPD ¶ 99 at 4; Pacific Northwest Bell Tel. Co., Mountain States Bell Tel. Co.--Claim for Costs, B-227850.3, June 6, 1988, 88-1 CPD ¶ 527 at 2. We also recommend that SCG be reimbursed its costs of filing and pursuing this request. SCG's certified claim for costs, detailing the time spent and the costs incurred, must be submitted to the agency within 60 days of receiving of our decision. 4 C.F.R. § 21.8(f)(1).

The request for a recommendation for reimbursement of costs is granted in part and denied in part.

Anthony H. Gamboa
General Counsel