



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Johnson Controls World Services, Inc.--Costs

File: B-295529.4

Date: August 19, 2005

David R. Johnson, Esq., Amanda J. Kastello, Esq., and Amy R. Napier, Esq., Vinson & Elkins, for the protester.

Maj. Gregg A. Engler, Department of the Army, for the agency.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's request for a recommendation that it be reimbursed the costs of filing and pursuing its protest is granted where: (1) the issues raised in the initial protest filing clearly identified deficiencies in the agency's decision that it was more economical to provide base operations support services at Walter Reed Medical Center, in Washington, D.C., than to contract for those services; (2) the agency admits that it did not investigate the protester's detailed allegations; and (3) the agency withheld relevant protest documents until more than 70 days after the initial protest filing, when GAO convened a hearing. Under these circumstances, the record shows 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.

DECISION

Johnson Controls World Services, Inc. (JCWS) requests that we recommend that it be reimbursed the costs of filing and pursuing its protests of the Department of the Army's decision, made pursuant to Office of Management and Budget (OMB) Circular A-76, that it would be more economical to provide base operations support services in-house at the Walter Reed Medical Center in Washington, D.C., than to contract for those services under solicitation No. DADA10-03-R-0001.

We agree, and recommend that JCWS be reimbursed the reasonable costs of filing and pursuing its initial and supplemental protests, including those incurred in pursuing this request.

BACKGROUND

The facts regarding this procurement are largely set forth in our decision dismissing JCWS's protests, Johnson Controls World Servs., Inc., B-295529.2, B-295529.3, June 27, 2005, 2005 CPD ¶ 124; however, some of those facts, and others which are directly relevant to this decision, are set forth below.

After the Army announced its intent to conduct an A-76 cost comparison study for Walter Reed, and after it issued a solicitation in 2003 to potential private-sector offerors, the agency submitted its plan for performing these services in-house to the agency's Independent Review Official (IRO), in this case, the Army Audit Agency.¹ An agency's proposal for performing services in-house in an A-76 cost comparison study is called the Most Efficient Organization (MEO). IRO review is required to ensure that the MEO's plan for performance will comply with the solicitation's performance work statement. Supplemental Handbook at 12. In the event changes to the MEO are needed to meet the requirements of the performance work statement, those changes must be made before the IRO can certify that the MEO "reasonably establish[es] the Government's ability to perform the [performance work statement] within the resources provided by the MEO." *Id.* The IRO first certified the MEO proposal in April 2004. Hearing Transcript (Tr.) at 17, 84.

After certification of the MEO, and after the receipt of proposals from private-sector offerors, the agency issued an amendment to the solicitation—amendment 16, issued July 23, 2004—that made numerous changes to the performance work statement. In September 2004, the MEO was reopened so that changes could be made to reflect the changes in work incorporated by amendment 16. In the last days of September, shortly before the cost comparison was conducted, the MEO was again certified by the IRO. Tr. at 44-49, 51-54. On September 29, the date of the cost comparison, the MEO was compared to the offer submitted by JCWS, and the Army determined that in-house performance of these services would be less expensive than having them performed by contract awarded to JCWS. Tr. at 54.

After an administrative appeal, and after an earlier protest to our Office was rendered academic by agency corrective action, Johnson Controls World Servs., Inc., B-295529, Jan. 11, 2005, JCWS filed the initial protest that is the subject of this request for costs on March 30, 2005. In its initial protest, JCWS argued that the MEO failed to include all of the costs required for in-house performance of these services, and that, as a result, the IRO's certification of the MEO was unreasonable.

¹ As explained in our prior decision, this cost comparison study was performed under the version of OMB Circular A-76 in effect prior to the substantial revisions to the Circular dated May 29, 2003. As a result, the cost comparison here was governed by the detailed guidance set forth in the OMB Circular A-76 Revised Supplemental Handbook (Mar. 1996) (hereinafter, the "Supplemental Handbook").

Specifically, the protest contended that the MEO was not subjected to reasonable scrutiny, which allowed its shortcomings to be overlooked by the IRO when it certified the MEO. Initial Protest, Mar. 30, 2005, at 3. The protester also argued that if the IRO had met its obligations under the Supplemental Handbook, the MEO would have been adjusted upwards. *Id.* at 15.

After receipt of an agency report, and the protester's comments, our Office held a hearing in this matter on June 8-9. The hearing included witnesses from the Army Audit Agency, which, as indicated above, was serving as the Army's IRO. After the hearing, by letter dated June 15, the Army advised our Office that the IRO was withdrawing its certification of the MEO package submitted in this cost comparison study. As a result, the Army asked that the protest (there was no supplemental protest on June 15) be dismissed as academic.² On June 27, our Office agreed that the IRO's withdrawal of its certification of the MEO rendered the protests academic, and the protests were dismissed. One day later, JCWS filed this request for reimbursement of its protest costs.

DISCUSSION

JCWS asks for reimbursement of its protest costs on the grounds that the Army unduly delayed taking corrective action in the face of the company's clearly meritorious protest. The Army argues against reimbursement of protest costs because, in its view, the corrective action taken was not in response to the protest. Instead, the Army contends that its corrective action was taken in response to new evidence about apparent problems in the certification process that first came to light during the hearing. In addition, the Army argues that its response to this new evidence was prompt, not unduly delayed, and that the initial protest was not clearly meritorious.

Where 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. Georgia Power Co.; Savannah Elec. and Power Co.--Costs, B-289211.5, B-289211.6, May 2, 2002, 2002 CPD ¶ 81 at 5. 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.

² On June 16, JCWS supplemented its initial protest to include specific information learned during the hearing. Since this supplemental protest was filed the day after the agency requested dismissal, the dismissal request addressed only the initial protest. The IRO's decision to revoke its certification of the MEO rendered academic both the initial and supplemental protests.

Martin Elecs., Inc.--Costs, B-291732.2, Apr. 22, 2003, 2003 CPD ¶ 84 at 7. For a protest to be clearly meritorious, the issue involved must not be a close question. J.F. Taylor, Inc.--Entitlement to Costs, B-266039.3, July 5, 1996, 96-2 CPD ¶ 5 at 3. Rather, the record must establish that the agency prejudicially violated a procurement statute or regulation. Tri-Ark Indus., Inc.--Declaration of Entitlement, B-274450.2, Oct. 14, 1997, 97-2 CPD ¶ 101 at 3.

The initial protest filed by JCWS argued that the MEO did not contain sufficient staffing levels to meet the requirements of the performance work statement. In this regard, JCWS compared the staffing levels of its own proposal with some of the lower staffing levels identified in the MEO and argued that the MEO had used significantly lower cycle times for required tasks to build its staffing estimates. As a result, the protest argued that the IRO failed to ensure that the MEO contained sufficient staffing to accomplish the required tasks. In furtherance of this allegation, the protest requested that the agency provide copies of

[r]eports, memoranda, or decision documents reflecting or summarizing the IRO's findings on any aspect of the evaluation of the MEO, including, but not limited to, any documents reflecting the IRO's instructions and requests for information concerning the evaluators' recommendations or the bases thereof.

Initial Protest, Mar. 30, 2005, at 17.

The agency report in response to the JCWS protest was filed on May 2, 2005. Under our Bid Protest Regulations, 4 C.F.R. § 21.3(c) (2005), the Army was required to provide a response to the protester's document request at least 5 days prior to the filing of the report. Our regulation requires that the agency provide to the parties, and to GAO, a list of the documents which the agency intends to release to the protester, and a list of the documents the agency intends to withhold, together with the reasons for the proposed withholding. No such response was provided here.

One day after receipt of the agency report, the protester filed a supplemental request for documents, pursuant to 4 C.F.R. § 21.3(g), which renewed the request for many of the items identified in the initial request. After filings opposing the requests were received from the Army, our Office convened a conference call on May 10 to resolve the document dispute. During this call, our Office concluded that the Army was required to provide to the protester the documents related to the IRO's review of the MEO, as requested in the initial protest.³ The Army provided additional documents

³ As of this date, the only document in the record regarding the IRO's review of the MEO was a summary decision document on Army Audit Agency letterhead, dated September 28, 2004, less than three pages in length, recertifying the MEO after changes were made to address amendment 16 to the solicitation. Agency Report, Tab 32. This document contained no substantive analysis of the MEO.

related to the IRO's review on May 20. These documents gave the first glimpse into a debate between the Army Audit Agency (acting as IRO) and the MEO regarding the MEO's low staffing levels. Even these documents, however, were limited to exchanges prior to the first certification of the MEO in April 2004; these documents did not reflect exchanges between the Army Audit Agency and MEO prior to the recertification of the MEO dated September 28.⁴

Given the inadequacies of the record in this case, our Office convened a two-day hearing on June 8-9. On the first day, the parties and our Office had a roundtable discussion of the details of each of the protester's allegations; on the second day, analysts from the Army Audit Agency, and a representative of the contractor that prepared the MEO for the Army, testified about the exchanges that occurred during the IRO review process. Late in the evening on June 8--after the roundtable discussion, but before the receipt of testimony--the Army provided to JCWS and our Office an analysis of certain of the protester's specific challenges that acknowledged that certain of the challenges were accurate. For example, the analysis acknowledged that the protester was correct in its assertions that the MEO failed to include certain work that was added by amendment 16, and proposed insufficient staffing levels for trimming and edging the grounds of the Walter Reed campus. Army Audit Agency Analysis, June 8, 2005, at 4.

As part of this review of the protester's challenges--in fact, as part of the review of the trimming and edging example cited above--another problem with the MEO was noted. Specifically, the analysis advised:

Under **NO** circumstances should the original certified MEO proposal (frequency and cycle time) be altered once the private sector proposals are opened except for the situations allowed by policy such as OMB directive. BUT, this is exactly what took place and the IRO did not detect the unauthorized changes when the MEO proposal was certified in September 2004.

Id. at 4-5 (emphasis in original). In addition--and related to the observation quoted above--the Army provided for the first time numerous e-mails between Army Audit Agency analysts and other Army officials which reflected an internal debate among the Army Audit Agency, the MEO, the Army Command conducting the procurement, and Army leadership over the kind of changes an MEO is permitted to make in response to an amendment to the performance work statement after the private-sector proposal has been received in-house and is under review. These e-mails and other documents became Exhibit 1 during the June 9 hearing. Tr. at 40.

⁴ Given that the exchanges related to the IRO's initial certification are ultimately not dispositive here, we will not quote them. They are quoted at length, however, in the Protester's Comments, filed May 31, at pages 13-16 and 40-41.

On June 9, the Army Audit Agency analyst who prepared the analysis quoted above testified that when recertification by an IRO is necessary due to changes in the workload (as were made by amendment 16 here), the MEO is allowed to change only those parts of its submission related to changes in the amendment; this witness (and others), as well as the underlying documents provided immediately before the hearing, refer to this policy as the “No Tamper Rule.” *Id.* at 18, 20-21, 26, 42, 87-88, 93, 121-24, Hearing Exhibit 1. Due to concerns raised during the June 8 roundtable discussion, and highlighted in the June 8 analysis, the Army analyst also testified that he performed a second analysis later that evening—*i.e.*, the evening before his testimony. Specifically, he randomly sampled three pages from the MEO as certified in September, compared them to the same three pages from the MEO as certified in April, and checked to make sure that any changes from one to the other could be explained by the changes to the performance work statement found in amendment 16 to the solicitation. His small sample found changes that appeared, in his view, to violate the “No Tamper Rule.” *Id.* at 96-99. The analyst testified that, as a result of his sample, he thought the agency needed to perform a complete analysis of all the line items in the MEO to see if the selection decision would be overturned if unauthorized changes in the MEO were restored to their previously certified levels, and if all work added by amendment 16 was accurately reflected in the MEO. *Id.* at 99. On June 15, as stated above, the Army Audit Agency withdrew its certification of the MEO.

The Army’s opposition to JCWS’s request for protest costs is based on its view that the apparent violations of the “No Tamper Rule” found in the MEO by the Army Audit Agency analyst are “new evidence” not related to the protest issues here, and that the agency acted promptly once it learned of this new evidence. Specifically, the Army contends there was “no nexus” between JCWS’s protest issues and the concerns of the IRO about the “No Tamper Rule.” Army Opposition to Protester’s Request for Protest Costs, July 1, 2005, at 6. For the reasons below, we disagree.

While the Army correctly notes that the protester did not allege any violation of the “No Tamper Rule” in its initial protest filing,⁵ the protester here has always argued (dating from the agency-level administrative challenge) that the MEO is based on unrealistically low staffing levels to perform this work, and has argued that the unrealistic staffing levels are revealed by reviewing the very low cycle times used to calculate those staffing levels. These very low cycle times, as well as other changes to the MEO, led the Army’s analyst to undertake a review of the MEO shortly before the hearing convened by GAO. Specifically, the analyst testified that he became

⁵ The protester had no way to know of the agency’s internal debate over allowing the MEO to make changes in its staffing levels beyond the scope of the changes in amendment 16—*i.e.*, the protester had no way to know that any of the MEO’s low staffing levels may have been introduced in violation of the “No Tamper Rule.”

curious about the low cycle times—especially the very low cycle times for mowing and edging services identified by the protester—because they seemed lower than the cycle times he remembered from reviewing the MEO during the April 2004 certification review. Tr. at 91-95.

The Army's decision to withdraw its certification of the MEO was directly related to—and was triggered by—the very issues raised by the protester. The low cycle times used to calculate the MEO's lower staffing levels, and focused on by the protester in this case from day one, were precisely the evidence used by the Army Audit Agency analyst to reach his conclusion that the final MEO never received the scrutiny it should have received from the IRO. In our view, when the Army's IRO withdrew its certification of the MEO, the agency was effectively (albeit not explicitly) conceding that the IRO's certification that the MEO could perform the required work was either unreasonable, or resulted from a failure to meaningfully review the IRO, or both—as JCWS argued in its initial protest filing. Initial Protest, Mar. 30, 2005, at 3, 15. Given the intertwined nature of the protester's challenges to the staffing levels and the IRO's conclusion that it had not properly scrutinized the MEO as required, we conclude that the protest was clearly meritorious. See Professional Landscape Mgmt. Servs., Inc.—Costs, B-287728.2, Nov. 2, 2001, 2001 CPD ¶ 180 at 5-6.

We also think the Army's response to this protest cannot be considered prompt. For example, rather than conduct a review of the protester's specific allegations, the Army admits that

[i]n this case, Protester's substantive protest grounds were never fully investigated on the merits. Given that Protester's substantive protest grounds principally attacked the MEO's cycle times and staffing estimates in numerous different [performance work statement] paragraphs, only an extremely detailed investigation into each allegation would reveal whether the protest was a close call or not.

Army Opposition to Protester's Request for Protest Costs, July 1, 2005, at 6. The Army also repeatedly failed to produce the relevant documents related to its review that would have brought these matters to light earlier in the protest process. In fact, the materials related to the final certification of the MEO's proposal were not produced until the evening before the hearing, more than 70 days after this protest was filed.

As a final matter, we note that the Army also suggests that the protester may not have been prejudiced by the matters it identified in its protest. Specifically, the Army argues that “[g]iven that Protester needed to overcome a \$7.5 million difference in the cost comparison and that the merit of the protested cycle times was not reached, Protester cannot claim that its protest was clearly meritorious.” Army Opposition to Protester's Request for Protest Costs, July 1, 2005, at 6. A necessary premise for this contention is that the MEO still might ultimately prevail in the cost comparison against the protester's proposal once the MEO is revised and properly

certified. In our view, the ultimate outcome of this cost comparison is not relevant to the question of prejudice. The fact that the IRO had not properly reviewed the MEO, together with the fact that we do not yet know what changes to the MEO may be required, means that, regardless of the ultimate outcome, the protester was prejudiced here.⁶ See Creative Info. Tech., Inc., B-293073.10, Mar. 16, 2005, 2005 CPD ¶ 110 at 9.

The Army's failure to investigate the substantive grounds of this protest, its failure to produce documents when required, and its failure to take prompt corrective action in the face of a clearly meritorious protest, frustrated the intent of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (2000), amended by the Ronald W. Reagan National Defense Authorization Act for FY 2005, Pub. L. No. 108-375, Section 326, 118 Stat. 1811 (2004), by impeding the economic and expeditious resolution of this protest. LB&M Assocs., Inc.—Entitlement to Costs, B-256053.4, Oct. 12, 1994, 94-2 CPD ¶ 135 at 5. Accordingly, we recommend that the protester be reimbursed the reasonable costs of filing and pursuing its protests including the cost of pursuing this request, and including the cost of attorneys' fees. 4 C.F.R. § 21.8(d). The protester should submit its certified claim, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The request for a recommendation that the protester be reimbursed the reasonable costs of filing and pursuing its protest is granted.

Anthony H. Gamboa
General Counsel

⁶ In fact, there may never be a final cost comparison here. By letter dated August 17, JCWS provided our Office with an August 8 letter from the Army's Assistant Secretary for Installations and Environment advising that "the Army Audit Agency has determined that they are unable to reconstruct a basis for the MEO's competitive position to the extent that it could be certified. Accordingly, the Army will request approval to cancel the [cost comparison] study." Letter from JCWS to GAO, Aug. 17, 2005, at Attach. A.