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**Comptroller General
of the United States**

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

Decision

Matter of: Triple Canopy, Inc.--Costs

File: B-310566.9; B-400437.4

Date: March 25, 2009

Sean P. Bamford, Esq., Kirkpatrick & Lockhart Preston Gates Ellis LLP, for the protester.

Maj. William J. Nelson, Department of the Army, for the agency.

Glenn G. Wolcott, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where agency took corrective action following submission of an agency report responding to the protests, request that Government Accountability Office recommend reimbursement of protest costs is denied where protest grounds, though potentially meritorious, were not clearly meritorious—that is, the protest allegations presented close questions regarding their merit.

DECISION

Triple Canopy, Inc. of Herndon, Virginia, requests that we recommend that it be reimbursed the costs of filing and pursuing two protests that challenged the Department of the Army's issuance of task orders to Sabre International Security for performance of security services at forward operating base (FOB) Prosperity and FOB Q-West in Iraq.

We deny the request.

In July 2008, the agency issued task order requests (TOR) to provide security services at FOB Prosperity and FOB Q-West, respectively.¹ Each TOR contained a manning table that listed various types of posts, various labor categories and

¹ The TORs were issued pursuant to a multiple award indefinite-delivery/indefinite-quantity contract known as the Theater-Wide Internal Security Services (TWISS) contract. Both Triple Canopy and Sabre hold TWISS contracts to provide security services at U.S. military installations throughout Iraq.

required manning levels, referred offerors to the labor categories/CLINs (contract line item numbers) that were contained in their TWISS contracts, and directed offerors to “furnish completed pricing for all CLINs based on attached CLIN structure.” Q-West TOR at 13; Prosperity TOR at 2. The TORs also provided that offerors could be required to provide additional personnel, beyond the levels in the manning tables, up to specified maximums. Finally, each TOR provided that award would be made on the basis of two factors: past performance and price.

Triple Canopy and Sabre each submitted proposals responding to the TORs prior to the applicable deadlines; thereafter, their proposals were evaluated. With regard to past performance, the contracting officer concluded that Triple Canopy and Sabre were essentially equal; accordingly, price became the determinative factor for source selection. Sabre’s proposed prices were lower than those of Triple Canopy under both TORs; accordingly, task orders to provide security services at FOB Prosperity and FOB Q-West were issued to Sabre.

In August 2008, Triple Canopy filed its initial protests challenging the agency’s two task orders. In its initial protests, Triple Canopy maintained that Sabre was not eligible to perform the task order requirements because it did not hold a U.S. facilities security clearance, and that the agency erred in evaluating Sabre’s and Triple Canopy’s past performance. Following the agency’s response to the initial protests, Triple Canopy filed supplemental protests, asserting that Sabre’s proposals failed to comply with the TORs’ requirements regarding personnel to fill certain labor categories.

On October 30 and November 13, we issued decisions rejecting all of the complaints contained in Triple Canopy’s initial protests. In those decisions, we referred to Triple Canopy’s supplemental protests, stating that we intended to separately address the issues raised therein.

On November 19, the agency filed its report responding to the supplemental protests. In responding to the protests, the agency acknowledged that there was ambiguity in the solicitation regarding the labor categories that offerors were required to fill. The agency further stated that, upon review, it was not entirely clear that either offeror had committed to provide personnel, beyond the levels specified in the manning tables, at the prices contained in their proposals.

In connection with Triple Canopy’s protests, this Office requested that counsel for the parties participate in a conference at GAO to discuss the various issues raised, stating that the conference was “to clarify certain matters regarding the manning/pricing issues,” E-mail from GAO to Parties’ Counsel, Oct. 20, 2008; the GAO attorney handling this matter subsequently conducted a second conference via telephone. During each conference, the GAO attorney sought clarification regarding the parties’ respective views and representations, and expressed some concern as to whether Sabre’s proposal, in fact, complied with the solicitation requirements.

Nonetheless, the GAO attorney declined to engage in “outcome prediction” alternative dispute resolution (ADR) regarding the supplemental protest issues.²

By letter dated December 3, 2008, the agency advised this Office that it intended to take corrective action, stating that it would reopen the solicitation and clarify certain matters, including clarification of matters regarding the required labor categories. The agency also advised that it would obtain a clear commitment from the offerors to provide personnel beyond the manning table levels at the prices reflected in their proposals. Based on the agency’s action, we dismissed the protests.

Following the agency’s corrective action, Triple Canopy submitted these requests for our recommendation that the agency reimburse Triple Canopy’s costs of filing and pursuing the supplemental protests. Triple Canopy asserts that the agency unduly delayed taking corrective action and that its supplemental protests were clearly meritorious. We disagree.

Under the Competition in Contracting Act of 1984 (CICA), our Office is authorized to recommend reimbursement of protest costs only where we find that an agency’s actions violated a procurement statute or regulation. 31 U.S.C. § 3554(c)(1) (2000). Our Bid Protest Regulations further provide that where the contracting agency decides to take corrective action in response to a protest, we may recommend reimbursement of protest costs, including reasonable attorneys’ fees. 4 C.F.R. § 21.8(e). Our Regulations do not contemplate a recommendation for reimbursement of protest costs in every case in which an agency takes corrective action, but rather only where an agency unduly delays taking corrective action in the face of a clearly meritorious protest. Information Ventures, Inc.–Costs, B-294580.2 et al., Dec. 6, 2004, 2004 CPD ¶ 244 at 2. 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, that is, not a close question. PADCO, Inc.–Costs, B-289096.3, May 3, 2002, 2002 CPD ¶ 135 at 3. A protest is clearly meritorious where a reasonable agency inquiry into the protester’s allegations would reveal facts showing the absence of a defensible legal position. Yardney Technical Prods., Inc., B-297648.3, Mar. 28, 2006, 2006 CPD ¶ 65 at 4. The mere fact that an agency decides to take corrective action does not necessarily establish the absence of a defensible legal position, nor that a statute or regulation has clearly been violated. Id.

² Pursuant to GAO’s Bid Protest Regulations, and our established practice, in “outcome prediction” ADR, the GAO attorney handling the case convenes all of the participating parties and advises them of what he or she believes the likely outcome will be, and the reasons for that belief. See 4 C.F.R. § 21.10 (e), (f) (2008); Pond Sec. Group Italia JV–Costs, B-400149.2, Mar. 19, 2009, 2009 CPD ¶ ____ at n.1.

Here, based on the record presented, along with the discussions conducted and clarifications provided during the two GAO conferences, we cannot conclude that the supplemental protests were clearly meritorious. Among other things, we agree that the solicitation was ambiguous regarding the personnel requirements to which offerors were required to commit. Further, in responding to the supplemental protests, the agency maintained, with some basis, that, even accepting the protester's interpretation of the solicitations' requirements, Sabre's proposals reflected an intent to comply with those requirements and that, even increasing Sabre's prices to reflect such intent, Sabre's proposed prices were still lower than those proposed by Triple Canopy; thus, the agency argued that there was no prejudice to Triple Canopy.

In determining whether to recommend cost reimbursement, we need not definitively resolve whether the protests were meritorious; rather, we must determine whether they were clearly meritorious—that is, that they did not present close questions for which there was no defensible legal position. Based on the record here, we reject Triple Canopy's assertion that its protests were clearly meritorious; rather, we acknowledge that, even resolving doubts in Triple Canopy's favor, the issues presented were, indeed, close questions.

The request that we recommend reimbursement of costs is denied.

Gary L. Kepplinger
General Counsel