



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

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

Decision

Matter of: Taylor Consultants, Inc.--Costs

File: B-400324.3

Date: February 2, 2009

Sean D. Forbes, Esq., and Bryant S. Banes, Esq., Neel Hooper & Banes, PC, for the protester.

Lt. Col. Steven P. Cullen, Department of the Army, for the agency.

Peter D. Verchinski, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation that agency reimburse protester its costs of filing and pursuing protests is denied where the agency did not unduly delay implementing promised corrective action and the record does not establish that the protest grounds were clearly meritorious.

DECISION

Taylor Consultants, Inc. of Fairfax, Virginia requests that we recommend that the Department of the Army reimburse the costs Taylor incurred in filing and pursuing the firm's two prior protests of the terms of request for proposals (RFP) No. W9133L-08-R-2016, issued by the Army seeking to issue a task order under a vendor's federal supply schedule (FSS) contract for services in support of the National Guard's Youth Development Program.

We deny the request.

In its first protest, Taylor raised four challenges to the terms of the RFP: that the RFP should be set aside for service-disabled veteran-owned small businesses (SDVOSB), that the RFP improperly bundled requirements, that the procurement was tainted by bias and a conflict of interest, and that the agency was improperly using the federal supply schedule. Prior to issuing a report in response to the protest, the agency informed our Office that it would amend the RFP to "accurately reflect the Government's requirements and the method by which proposals will be evaluated," and that before amending the solicitation, the agency "will review whether any portion of [the] requirement was improperly bundled and whether any

part of the entire requirement should be set aside pursuant to FAR [Federal Acquisition Regulation] Part 19 [Small Business Programs].” Army Memorandum, July 28, 2008, at 1. The Army also stated that, before making award, it would perform and document an organizational conflict of interest analysis. We dismissed Taylor’s first protest as academic, based upon this proposed corrective action.

The contracting officer (CO) subsequently concluded, as documented in two memoranda, that the RFP did not have to be set aside for SDVOSBs, that the RFP did not reflect an improper bundling, and that there was no improper bias or conflict of interest apparent.¹ The Army accordingly established a new closing date for the receipt of proposals. Taylor then filed a second protest, raising essentially the same protest grounds as its prior protest. In response and prior to submitting a report responding to the protest, the Army informed our Office that it would cancel the RFP, issue a new solicitation that was set aside for SDVOSB concerns, and solicit new proposals. We dismissed Taylor’s second protest as academic.

Taylor requests that we recommend that the Army reimburse the firm for the protest costs associated with its two prior protests because, in Taylor’s view, the Army did not implement the corrective action that the Army previously promised such that Taylor was required to protest again.²

¹ These determinations were based, in part, on the CO’s finding that the requirements being procured here differed from Taylor’s prior contract (which apparently had been set aside for SDVOSBs) such that a set-aside was not required; that this contract will “provide one point of contact for the 54 states, territories, and district program” such that it was not improperly bundled; and that a certain individual will be precluded from the procurement such that there will be not be even the appearance of bias or conflict of interest. CO’s Memorandum, Aug. 29, 2008, at 1; CO’s Memorandum, Sept. 1, 2008, at 1.

² The protester also asserts that the Army failed to remove the appearance of bias and a conflict of interest from this procurement. Specifically, Taylor argues that the Army did not properly investigate and mitigate another firm’s improper competitive advantage due to a personal relationship an employee of that firm has with an individual in the Army’s contracting office. Taylor contends that the Army’s plan to ensure that the individual in the Army’s contracting office has no involvement with the procurement is inadequate, and that the other firm must be excluded from the competition. We disagree. The Army’s decision to exclude the individual with the alleged personal conflict of interest from involvement with this procurement effectively removes the potential personal conflict of interest here. See generally *Visucom Prods. Inc.*, B-240847, Dec. 17, 1990, 90-2 CPD ¶ 494

(agency’s decision to exclude government official from evaluation panel to insure impartiality was reasonable). Given that the Army’s actions will avoid the personal conflict of interest, we find no reason to conclude that the agency is required to

(continued...)

Under the Competition in Contracting Act of 1984, our Office may recommend that protest costs be reimbursed where we find that an agency's action violated a procurement statute or regulation. 31 U.S.C. § 3554(c)(1) (2000). Where an agency takes corrective action in response to a protest, we may recommend that the protester recover the reasonable costs of filing and pursuing the protest, where we conclude that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. See 4 C.F.R. § 21.8(e) (2008); Georgia Power Co.; Savannah Elec. and Power Co.-Costs, B-289211.5, B-289211.6, May 2, 2002, 2002 CPD § 81 at 5. We have recognized 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; Pemco Aeroplex, Inc.-Recon. and Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 7-8. Thus, where an agency fails to implement the promised corrective action, or implements corrective action that fails to address a meritorious issue raised in the protest that prompted the corrective action, 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. Louisiana Clearwater, Inc.-Recon. and Costs, supra.

Here, however, we find that the agency promptly instituted its promised corrective action, and thus this is not a situation where the agency either failed to implement the corrective action, or unduly delayed the corrective action, such that the protester was required to file a second protest. In this regard, the Army, as promised, reviewed its determinations regarding the SDVOSB set-aside, bundling, and the conflict of interest, and subsequently documented this review. While the protester disagrees with the Army's conclusions, this does not demonstrate that the Army failed to implement its promised corrective action. Moreover, we find no basis in the record here to conclude that Taylor's protest grounds were clearly meritorious.³ A prerequisite to our recommendation that costs be reimbursed is that the protest must not only have been meritorious but must also have been clearly meritorious, i.e., not a close question. See New England Radiation Therapy Mgmt. Servs., Inc.-Costs, B-297397.3, Feb. 2, 2006, 2006 CPD ¶ 30 at 4 (reimbursement of protests costs not recommended after agency's corrective action where protest was not clearly meritorious). Here, further record develop would be required to determine whether the requirements had changed such that a set aside was not required (as maintained by the CO), whether the agency had reasonably decided to have "one point of

(...continued)

further mitigate the conflict of interest by excluding the other firm from the competition.

³ The agency contends that none of Taylor's protest grounds are meritorious.

contact” such that there was no improper bundling, and whether the agency had properly addressed the allegation of bias. In short, because we find that the agency did not unduly delay implementing its promised corrective action and that Taylor’s prior protest grounds were not clearly meritorious, we conclude that there is no basis for recommending reimbursement of Taylor’s protest costs.

The request is denied.

Gary L. Kepplinger
General Counsel