



## Decision

**Matter of:** Distributed Solutions, Inc.--Costs

**File:** B-403566.2

**Date:** February 14, 2011

---

Thomas A. Coulter, Esq., LeClair Ryan PC, for the protester.  
Dennis Adelson, Esq., Department of Labor, for the agency.  
Cherie J. Owen, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel,  
GAO, participated in the preparation of the decision.

---

### DIGEST

Protester is not entitled to reimbursement of protest costs after agency took corrective action where protest was not clearly meritorious.

---

### DECISION

Distributed Solutions, Inc. of Reston, Virginia, requests that we recommend that the firm be reimbursed the costs of filing and pursuing its protest of the terms of solicitation No. DOL110RQ21021, issued by the Department of Labor (DOL) for an acquisition management system.

We deny the request.

On November 23, 2009, the agency issued a request for information (RFI) seeking market feedback from potential sources to determine whether there were vendors capable of offering a product to satisfy DOL's general need for a new electronic procurement system. Agency Report (AR) at 2. Based on vendor responses to the RFI, DOL substantially modified its requirements and issued the solicitation on July 16, 2010, seeking an acquisition management system consisting of software and associated deliverables from vendors holding a current Federal Supply Schedule (FSS) contract with the General Services Administration (GSA) under Schedule 70. Contracting Officer's Statement at 1.

The RFQ specified nine broad categories of goods and services to be provided relating to the acquisition management system: (1) hardware; (2) software; (3) hosting services; (4) rollout/production/implementation; (5) training; (6) operations and maintenance; (7) project management and systems development

life cycle support; (8) other<sup>1</sup>; and (9) disaster recovery (optional). RFQ at 2-6. The RFQ did not specify under which special item numbers (SINs) it intended to procure the products and services, but stated that only authorized GSA schedule holders with the applicable SINs were authorized to submit quotes. RFQ at 2.

The agency subsequently issued four amendments to the solicitation. With regard to amendment 1, the agency states that the RFQ initially referred to both commercial-off-the-shelf (COTS) and government-off-the-shelf (GOTS) products. Contracting Officer's Statement at 1. However, DOL states that after issuing the RFQ, the agency realized that a commercial software system would not meet DOL's needs, so it issued amendment 1 in which all COTS references were changed to GOTS. Contracting Officer's Statement at 1.

Amendment 1 also added a redaction requirement. RFQ amend. 1, at 73. Specifically, the RFQ provided that quoters were to provide a redacted version of their technical proposals, and that redacted technical proposals "**shall not contain ANY** identifiable information which would allow the technical evaluation team to deduce the quoter's identity." Id. (emphasis in original). Thus, redacted proposals were required to be free of identifiers such as the vendor's name, the word "incumbent" or any variation thereof, or any other information that would identify the vendor. Id.

The protester raised numerous challenges to the terms of the RFQ. The protester argued that the solicitation was ambiguous as to whether the agency wanted a COTS product or a GOTS product. Comments at 2. The protester also contended that the use of the FSS program was improper for the procurement of GOTS products. Protest at 13. Distributed Solutions also argued that the solicitation sought products and services that were outside the scope of vendor contracts "based on the RFQ's applicable FSS SIN's, namely pre-delivery software development and customization." Comments at 3. The protester also challenged the solicitation's redaction requirement, arguing that it was ambiguous and that it prevented an incumbent from describing any strength or best value discriminator.<sup>2</sup> Comments at 10-13.

---

<sup>1</sup> The "other category" included only one line item: travel expenses for training to locations outside of Washington, DC. RFQ at 5.

<sup>2</sup> The protester also asserted numerous other arguments, including the following allegations: the solicitation wrongly presumed ownership of COTS products without proper payment, in contravention of the FSS; the solicitation failed to clearly identify the intellectual property rights that the agency was seeking; the solicitation failed to adequately describe the current system and requirements; and the solicitation prevented vendors from providing a reasonable price. Comments at 7-9.

After receipt of the agency report and comments, GAO allowed the agency to submit additional briefing to respond to the protester's comments, and allowed the protester to respond to the agency's supplemental brief. Because the record remained unclear, GAO then requested that GSA provide comments on the issues presented in the protest. Our Office also advised the parties, in an e-mail dated October 14, 2010, that a hearing in this case was likely necessary because the record was unclear regarding the agency's decision to use the FSS to procure its requirements. GAO stated that the hearing, if necessary, would be held on October 28 and 29. We requested that the agency further explain its position in response to interrogatories sent by our Office to the parties on October 12. The date set for the parties' responses to the interrogatories was October 18. On October 18, the agency advised our Office that it was taking corrective action. We dismissed the protest on October 29.

Distributed Solutions requests that we recommend that it be reimbursed the reasonable costs of filing and pursuing its protest, including reasonable attorneys' fees. The protester contends that it is entitled to the reimbursement of its costs because its protest was clearly meritorious and the corrective action was taken after the agency filed its agency report. Request for Reimbursement at 5-7.

Under the Competition in Contracting Act of 1984, our Office may recommend that protest costs be reimbursed only where we find that an agency's action violated a procurement statute or regulation. 31 U.S.C. § 3554(c)(1) (2010). Our Bid Protest Regulations provide that where the contracting agency decides to take corrective action in response to a protest, we may recommend that the protester be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(e) (2010). This does not mean that costs should be reimbursed in every case in which an agency decides to take corrective action; rather, a protester should be reimbursed its costs where an agency unduly delayed its decision to take corrective action in the face of a clearly meritorious protest. Griner's-A-One Pipeline Servs., Inc.--Costs, B-255078.3, July 22, 1994, 94-2 CPD ¶ 41 at 5. Thus, as a prerequisite to our recommending that costs be reimbursed 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. J.F. Taylor, Inc.--Costs, B-266039.3, July 5, 1996, 96-2 CPD ¶ 5 at 3; Baxter Healthcare Corp.--Costs, B-259811.3, Oct. 16, 1995, 95-2 CPD ¶ 174 at 4-5; GVC Cos.--Costs, B-254670.4, May 3, 1994, 94-1 CPD ¶ 292 at 3. A protest is "clearly meritorious" when a reasonable agency inquiry into the protester's allegations would show facts disclosing the absence of a defensible legal position. Department of the Army--Recon., B-270860.5, July 18, 1996, 96-2 CPD ¶ 23 at 3. The mere fact that an agency decides to take corrective action does not establish that a statute or regulation clearly has been violated. Spar Applied Sys.--Costs, B-276030.2, Sept. 12, 1997, 97-2 CPD ¶ 70 at 5.

Here, we conclude that it is not appropriate to recommend that Distributed Solutions recover its protest costs because, even if the corrective action was in response to the protester's original protest, as it alleges, that protest was not clearly meritorious. Whether the protest was meritorious was not apparent from the record, which is why GAO requested comments from GSA and informed the parties that a hearing was likely needed to complete and clarify the record. Since the ultimate resolution of this matter required substantial further development as indicated, in part, by our Office's request that GSA provide comments, that the agency respond to our interrogatories, and our consideration of a hearing to more fully develop the protest record regarding the issues, the protest, in our view, presented a close question, and therefore was not clearly meritorious. See Alaska Structures, Inc.--Costs, B-298575.4, Jan. 22, 2007, 2007 CPD ¶ 15 at 6 (protest was not clearly meritorious where resolution of the protest required further record development such as a hearing to complete and clarify the record); New England Radiation Therapy Mgmt. Serv., Inc.--Costs, B-297397.3, Feb. 2, 2006, 2006 CPD ¶ 30 at 4; LENS, JV--Costs, B-295952.4, Dec. 12, 2005, 2005 CPD ¶ 9 at 5. The fact that Distributed Solutions asserts that the agency's corrective action, filed after submission of the agency report, was in response to its original protest does not entitle it to its costs where, as here, that protest was not clearly meritorious. See East Penn Mfg. Co., Inc.--Costs, B-291503.4, Apr. 10, 2003, 2003 CPD ¶ 83 at 2-3; J.F. Taylor, Inc.--Costs, B-266039.3, July 5, 1996, 96-2 CPD ¶ 5 at 3.

The request is denied.

Lynn H. Gibson  
General Counsel