



GAO

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: The Sandi-Sterling Consortium--Costs

File: B-296246.2

Date: September 20, 2005

J. P. Marinari for the protester.

Capt. Sunny S. Ahn, Department of the Army, for the agency.

Jacqueline Maeder, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where agency proposed corrective action before filing administrative report and protest grounds were not clearly meritorious, there is no basis for GAO to recommend reimbursement of costs of pursuing the protest.

DECISION

The Sandi-Sterling Consortium (SSC) requests that we recommend that it be reimbursed the reasonable costs of filing and pursuing its protest challenging the award of a contract to Meridian International Center under request for proposals (RFP) No. W914NS-05-R-0002, issued by the Department of the Army for the establishment of a Partnership in Healthcare Program in Iraq, designed to improve the Ministry of Health's ability to staff, train, and manage the overall healthcare system.

We deny the request.

The RFP, issued November 13, 2004, provided for the award of a 1-year contract, with a 6-month option, to the offeror whose proposal was determined to represent the "best value" to the government, considering price, past performance, and technical plan. After receiving four proposals, including SSC's and Meridian's, the agency made award to Meridian and notified offerors of the award by letter dated February 10, 2005. SSC challenged the award in an agency-level protest filed by e-mail on February 16, arguing, among other things, that the agency improperly failed to issue an amendment communicating to all offerors information that had been communicated to SSC, improperly permitted another offeror to revise its proposal after the due date for proposals, and improperly evaluated SSC's proposal.

The protest included a request for a debriefing. By letter dated April 7, the agency denied the protest in part and dismissed it in part. Thereafter, on April 18, SSC filed a protest in our Office, alleging that the specifications outlined in the solicitation were defective, that the directions regarding pricing were ambiguous, and that the agency improperly evaluated the protester's price and made an improper best-value determination. The protester also asserted that the agency failed to provide the debriefing it requested in its agency-level protest.

On May 16, prior to the May 19 due date for its administrative report in response to the protest, the agency submitted a dismissal request, arguing that concerns about alleged solicitation defects and pricing instructions were untimely, that a debriefing was not required, and that SSC's protest regarding the best-value determination was vague, and therefore did not state a valid basis of protest. By facsimile transmission on May 19, we notified the parties that the agency report requirement was suspended until further notice pending our consideration of the dismissal request. By letter the same day, SSC complained that the agency had denied it the right to discovery by denying SSC requested documents, suggesting that the protester seek documents under the Freedom of Information Act, and failing to provide SSC a debriefing. In its subsequent response to the dismissal request, filed on May 25, SSC generally argued that the agency too narrowly interpreted its protest, that the Army had a duty to disseminate information regarding the solicitation to all prospective offerors, and that its concern regarding the best-value determination was not too vague. SSC also reasserted that it had been denied its right to discovery. On June 2, we advised the parties that we would not dismiss the protest, and requested that an agency report, including relevant documents, be filed in our Office no later than June 10. Thereafter, by letter dated June 7, the Army notified our Office that it was taking corrective action. Specifically, the Army stated that it would terminate the award to Meridian, revise/clarify the evaluation criteria, and resolicit the requirement. We dismissed the protest as academic on June 13. SSC now requests that we recommend that it be reimbursed its protest costs.

Under our Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2005), we may recommend that a protester be reimbursed the costs of filing and pursuing a protest where the contracting agency decides to take corrective action in response to the protest. We will make such a recommendation, however, only where the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing a protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Information Ventures, Inc.–Costs, B-294567.2, Nov. 16, 2004, 2004 CPD ¶ 234 at 2. We will not recommend reimbursement of protest costs where, under the facts and circumstances of a given case, the agency has taken reasonably prompt corrective action. TRS Research and Transport Planning and Servs., Inc.–Costs, B-290122.2, July 25, 2002, 2002 CPD ¶ 126 at 2.

In general, if an agency takes corrective action in response to a protest by the due date for its report in response to the protest, we consider such action to be prompt

and will not recommend reimbursement of protest costs. Id.; HSQ Tech.--Costs, B-276050.2, June 25, 1997, 97-1 CPD ¶ 228 at 2. This is the case even where the report due date was extended; in such circumstances, although the corrective action may have been somewhat delayed relative to the original report date, we do not consider this to be an undue delay, since it did not result in the protester's being put to the time and expense of filing comments in response to the report. TRS Research and Transport Planning and Servs., Inc.--Costs, supra. Here, the agency proposed corrective action prior to the extended report due date, and neither its report nor the protester's comments were filed. Thus, SSC was not required to expend additional time or resources preparing report comments, and the purpose of section 21.8(e) of our Regulations has been served. Under these circumstances, we consider the corrective action to be prompt; it follows that there is no basis for recommending reimbursement of SSC's protest costs.

In any case, we cannot say that SSC's protest was clearly meritorious. We consider a protest to be clearly meritorious when the agency lacked a defensible legal position; that is, that the protest does not involve a close question. Information Ventures, Inc.--Costs, supra, at 2. The mere fact that an agency decided to take corrective action does not establish that a statute or regulation was violated. Id. Here, deciding the merits of SSC's protest would have required development of the protest record--including a complete agency report and the protester's comments on the report--and we would have had to conduct substantial further legal analysis. This being the case, we have no basis to find that SSC's protest was clearly meritorious. Career Quest, a division of Syllan Careers, Inc.--Costs, B-293435.5, Apr. 13, 2005, 2005 CPD ¶ 79 at 3.

The request that we recommend reimbursement of SSC's protest costs is denied.

Anthony H. Gamboa
General Counsel