



Decision

Matter of: ManTech Systems Engineering Corporation; TWD & Associates, Inc.

File: B-401542.6; B-401542.7

Date: December 22, 2009

Paul F. Khoury, Esq., Wiley Rein LLP, for ManTech Systems Engineering Corp; and Stuart W. Turner, Esq., Arnold & Porter LLP, for TWD Associates, Inc., protesters. Kristin L. Becker, Esq., Naval Sea Systems Command, for the agency. Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation that agency pay protesters' costs associated with filing and pursuing protests is granted insofar as those costs were incurred in connection with protesters' successful arguments, where agency took corrective action in response to Government Accountability Office's conduct of "outcome prediction" alternative dispute resolution procedure after record in case was fully developed.

DECISION

ManTech Systems Engineering Corporation and TWD & Associates, Inc. request that we recommend reimbursement of the costs associated with filing and pursuing their protests challenging the issuance of a task order to Alion Science and Technology Corporation under solicitation No. N00024-08-R-3219, issued by the Naval Sea Systems Command for program support services.

We recommend that the firms be reimbursed the costs of filing and pursuing their protests, consistent with our discussion below.

The agency originally issued a task order to Alion based on its conclusion that Alion's proposal offered the best overall value to the government considering cost and several non-cost evaluation criteria. ManTech and TWD challenged the award decision, alleging that the agency had miscalculated Alion's cost proposal, and also had miscalculated proposals under the non-cost criteria.

After developing the record, our Office conducted an "outcome prediction" alternative dispute resolution (ADR) procedure. In the course of that procedure, the

cognizant GAO attorney advised the agency of his view, based on the record, that the agency had misevaluated Alion's cost proposal. In this regard, the record showed that the awardee's proposed costs were significantly lower than the other offerors' costs, and that this difference reflected a significant difference between the level of effort proposed by Alion and the other offerors. The GAO attorney advised that this difference was problematic because the solicitation specified a level of effort, which the other offerors proposed to meet, while Alion proposed a significantly lower level of effort. In light of these considerations, the GAO attorney advised the agency that it should either amend the solicitation to more accurately reflect the required level of effort, or obtain revised proposals using the previously established level of effort, reevaluate the proposals, and make a new selection decision. Finally, the GAO attorney advised that the protesters' remaining allegations concerning the evaluation of proposals under the non-cost considerations would be rendered academic in the event that the agency took corrective action consistent with the recommendations outlined during the ADR procedure.

Thereafter, the agency advised us that it intended to take corrective action consistent with the outlined recommendations. Specifically, the agency advised that it intended to validate the government estimate and solicitation requirements, amend the solicitation if necessary, obtain and evaluate revised proposals, and make a new source selection decision.¹ In view of this proposed corrective action, we dismissed the protests as academic (B-401542 et al., Oct. 8, 2009). The protesters now request that we recommend reimbursement of the costs of filing and pursuing their protests, including reasonable attorneys' fees.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs, including reasonable attorneys' fees, if, 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. Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3554(c)(1)(A) (2006); Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2009); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. We generally consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest, but not where it is taken after that date. CDIC, Inc.--Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 2. A protest is clearly meritorious where a reasonable agency inquiry into the protest allegations would have shown facts disclosing the absence of a defensible

¹ In advising our Office of its proposed corrective action, the agency stated that the parties were attempting to negotiate a settlement of the case, and that the agency intended to implement its proposed corrective only if the parties failed to reach agreement within a reasonable period of time.

legal position. Core Tech Int'l Corp.--Costs, B-400047.2, Mar. 11, 2009, 2009 CPD ¶ 59 at 6.

Here, as noted, we found the record showed that the agency had misevaluated Alion's cost proposal in a manner that was prejudicial to the protesters, since Alion had deviated significantly from the proposed costs of the other offerors due to its significantly lower level of effort. Notwithstanding this clear evaluation error, the agency elected to defend its evaluation, which caused the protesters to incur the expense of continuing to pursue their protests. These are precisely the expenses our requirement for prompt agency action is intended to avoid. We therefore recommend that the protesters be reimbursed the costs associated with filing and pursuing their protests on this issue, including reasonable attorneys' fees.

As for the protest costs associated with the protesters' remaining arguments, we did not consider the merits of those arguments because, as the GAO attorney advised the parties during the ADR procedure, those assertions would be rendered academic by the agency's proposed corrective action. Since we find that those issues are not clearly meritorious on their face, and since we do not decide academic protests, Dyna-Air Eng'g Corp., B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132, there is no basis for us to recommend reimbursement of the protest costs related to their pursuit.

The requests are granted as detailed above.

Lynn H. Gibson
Acting General Counsel