



Decision

Matter of: KNAPP Logistics Automation, Inc.--Protest and Costs

File: B-404887.2; B-404887.3

Date: July 27, 2011

Benjamin H. Sawyer, Esq., Sutherland Asbill & Brennan LLP, for the protester.
Maura C. Brown, Esq., Department of Veterans Affairs, for the agency.
Jonathan L. Kang, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the agency's corrective action in response to an earlier protest is denied where the agency had a reasonable basis to cancel the solicitation, rather than awarding the contract to the protester.
 2. Request for reimbursement of costs for filing and pursuing an earlier protest is denied where the agency took prompt corrective action in response to the supplemental protest raising the meritorious ground.
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DECISION

KNAPP Logistics Automation, Inc., of Kennesaw, Georgia, protests the corrective action undertaken by the Department of Veterans Affairs (VA) in response to KNAPP's protest of the award of a contract to R/X Automation Solutions, Inc. (R/X), of Longmont, Colorado, under request for proposals (RFP) No. VA-797M-10-RP-0227 for a tablet capsule automation (TCA) system. KNAPP also requests that our Office recommend that VA reimburse the protester's costs of filing and pursuing its earlier protest concerning this procurement.

We deny the protest and the request for costs.

BACKGROUND

The solicitation was issued on September 17, 2010, and sought proposals to replace VA's TCA system in North Charleston, South Carolina. The agency awarded the contract to R/X on March 3, 2011.

On March 14, 2011, KNAPP filed a protest with our Office challenging the award to R/X. The protester raised six primary arguments: (1) the agency failed to meaningfully KNAPP's lower-proposed price, as compared to R/X's price; (2) the agency unreasonably evaluated KNAPP's past performance; (3) the agency did not provide KNAPP an opportunity for meaningful discussions; (4) the agency applied unstated evaluation criteria in its evaluation of KNAPP's proposal; (5) the agency failed to provide an adequate debriefing; and (6) the awardee was not properly licensed to do business in South Carolina, where the contract would be performed. Protest at 3-7.

In its report on the protest, VA responded to KNAPP's arguments, and requested that our Office deny all of the arguments raised in the protest. On April 25, KNAPP filed timely comments on the agency report. In its comments, the protester responded to some, but not all of the agency's responses to the initial protest arguments. As relevant here, the protester also raised a new protest ground, that R/X's proposal improperly took exception to the solicitation by providing a conditional offer that permitted the awardee to "repudiate the awarded contract without prejudice" in the event that the agency did not agree after award to a modification of the payment terms. Protester's Comments (B-404887.1) at 1-2 (quoting Agency Report, exh. 9, R/X Response to Information Request, Question No. 2).

On May 3, prior to submitting a supplemental report responsive to the protest, VA advised our Office that it would take corrective action in response to the protest, based on the following determination:

Upon review of the record, VA has determined that corrective action is necessary. VA has determined that it will cancel the award to [R/X] and that a new solicitation for the [TCA] system . . . will be issued in the near future.

Agency Notice of Corrective Action, May 3, 2011, at 1.

Based on the agency's notice, we dismissed the protest as academic. Following our dismissal of the protest, KNAPP filed this protest challenging the corrective action, and requesting that our Office recommend that VA reimburse its costs of pursuing its initial protest.

CHALLENGE TO CORRECTIVE ACTION

First, KNAPP argues that VA should not have cancelled the solicitation, and should have instead awarded it the contract as the lowest-priced, technically acceptable offeror. Protest (B-404887.2) at 1-2. For the reasons discussed below, we conclude that the agency's corrective action was reasonable.

Contracting officers in negotiated procurements have broad discretion to take corrective action where the agency determines that such action is necessary to ensure a fair and impartial competition. Domain Name Alliance Registry, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 8. As a general matter, the details of corrective action taken in response to a protest are within the sound discretion and judgment of the contracting agency. Rockwell Elec. Commerce Corp., B-286201.6, Aug. 30, 2001, 2001 CPD ¶ 162 at 4. We generally will not object to the specific corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. Networks Elec. Corp., B-290666.3, Sept. 30, 2002, 2002 CPD ¶ 173 at 3.

As discussed above, the agency stated that it would take corrective action by canceling the award to R/X and issuing a new solicitation. In response to the instant protest and request for costs, VA has provided additional information concerning its rationale for opting to cancel and resolicit. First, the agency concluded that R/X's proposal had improperly taken exception to the solicitation with regard to the payment terms. Agency Response to Request for Costs, June 3, 2011, at 3. For this reason, the agency contends that it properly took corrective action and terminated R/X's contract. Id. at 4. Second, the agency states that it concluded that cancellation of the solicitation was necessary because the agency intends to add additional requirements to the TCA system. Agency Response to Protest B-404887.2, May 26, 2011, at 2; Agency Response to Protest B-404887.2, June 15, 2011, at 1-2. In this regard, VA states that the agency currently uses a manual mail packaging system, and it intends to add the following additional requirements to the TCA procurement:

The new solicitation will encompass a fully automated packaging system that conveys completed prescription bottles directly from dispensing automation, prints, folds and inserts requisite patient literature and the prescription bottle into a pouch that meets the requirements of the [U.S.] Postal System for prescription mailing.

Agency Response to Protest B-404887.2, June 15, 2011, at 1.

In a negotiated procurement such as this one, a contracting agency has broad discretion in deciding whether to cancel a solicitation, and need only establish a reasonable basis for doing so. Applied Resources, Inc., B-400144.7, B-400144.8, July 31, 2009, 2009 CPD ¶ 161 at 2. A reasonable basis to cancel exists when, for example, an agency determines that a solicitation does not accurately reflect its needs, or where there is a material increase in the services needed to satisfy the agency's requirements; in such cases, cancellation of the solicitation and issuance of a revised solicitation is appropriate. Logistics Solutions Group, Inc., B-294604.7, B-294604.8, July 28, 2005, 2005 CPD ¶ 141 at 3.

Here, we think that VA's basis for canceling the solicitation was reasonable.¹ In this regard, the corrective action addressed the protest argument that award to R/X was improper. Furthermore, the corrective action was based on the agency's determination that new requirements will require the agency to issue a revised solicitation and obtain new proposals, which precludes award to KNAPP based on its existing proposal. On this record, we conclude that VA's corrective action was reasonable.

REQUEST FOR DETERMINATION OF ENTITLEMENT

Next, KNAPP requests that our Office recommend that it be reimbursed the costs of filing and pursuing its initial protest (B-404887.1). For the reasons discussed below, we find no basis to recommend reimbursement.

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. 31 U.S.C. § 3554(c)(1)(A) (2006); Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2011); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. The mere fact that an agency decides to take corrective action does not also establish that a statute or regulation clearly has been violated. Id. 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, i.e., 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. Additionally, while we consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest, we generally do not consider it to be prompt where it is taken after that date. AGFA HealthCare Corp.--Costs, B-400733.6, Apr. 22, 2009, 2009 CPD ¶ 90 at 3-4.

Here, KNAPP argues that reimbursement is warranted because its protest identified a clearly meritorious protest argument--that R/X's proposal improperly took exception to the payment terms of the solicitation. As discussed above, however, this argument was first raised in the protester's comments on the agency report, based on documents that were provided to the protester in that report. Rather than

¹ KNAPP suggests that the agency's reason for taking canceling the solicitation is not clear, in light of the two separate bases. We see nothing inconsistent with having two independent bases for canceling the solicitation.

provide a supplemental report addressing this matter, VA took corrective action. As the agency acknowledges, the corrective action was based in part on KNAPP's argument that R/X's proposal had improperly taken exception to the terms of the solicitation. Agency Response to Request for Costs, June 3, 2011, at 3.

We also find that the corrective action was prompt. As our Office has held, an agency's corrective action is prompt when it is taken in response to a supplemental protest argument prior to providing the agency's response to that newly-raised argument. See Apptis Inc.-Costs, B-402146.3, Mar. 31, 2010, 2010 CPD ¶ 123 at 4. On this record, we conclude that there is no basis to recommend reimbursement of the protester's costs.

The protest and request for costs are denied.

Lynn H. Gibson
General Counsel