



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: The Real Estate Center--Costs

File: B-274081.7

Date: March 30, 1998

Lynn Hawkins Patton, Esq., Ott & Purdy, for the protester.

Jane S. Converse, Esq., Department of Veterans Affairs, for the agency.

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DIGEST

General Accounting Office recommends that protester be reimbursed the costs of filing and pursuing its protest where the agency unduly delayed taking corrective action in response to clearly meritorious protest.

DECISION

The Real Estate Center (REC) requests that our Office recommend that it be reimbursed the costs of filing and pursuing its protest challenging the evaluation of its application to become a designated management broker for the Department of Veterans Affairs (VA). REC's application was submitted in response to a November 7, 1996, letter invitation for the submission of applications.

We recommend that the agency reimburse REC its protest costs.

PROTEST BACKGROUND

On November 15, 1996, REC protested that the terms of VA's November 7 letter soliciting applications for management broker services violated the requirements of the Competition in Contracting Act of 1984 (CICA) and the Federal Acquisition Regulation (FAR). In denying that protest, our Office found that CICA and the FAR did not apply to VA's acquisition of management broker services, and that the appropriate standard of review for such acquisitions was whether or not the agency acted reasonably in conducting them; under that standard, we found that the terms of the letter solicitation were reasonable. The Real Estate Ctr., B-274081.4, Feb. 24, 1997, 97-1 CPD ¶ 85 at 2-4. During the pendency of that protest, VA selected three brokers from the group of 12 that had submitted applications and, on January 31, 1997, REC was notified of the selections and informed that its application had not been approved.

REC protested the selection decision on February 10 and, following a debriefing, supplemented its protest on February 18. The protest raised essentially five allegations: (1) the selections were unreasonable because the VA had failed to adequately document its bases for the approval or disapproval of broker applications; (2) the rejection of REC's application was the result of unfair and biased treatment which represented retaliation for protests filed by REC and constituted its de facto debarment; (3) while the FAR might not technically apply to VA's acquisition of broker services, the principles of the FAR should serve as a guide to determine the fairness of the selection process; (4) the selection decisions were not based on the stated evaluation criteria insofar as the initially identified per-property price schedule for management services was different from the price schedule actually established for the successful applicants; and (5) the limitation of approvals to three applicants was improper in light of VA's previously stated intention to include as many brokers as were determined qualified to meet the agency's requirements.

On March 3, the agency requested that we dismiss the protest and the protester responded by letter dated March 10. We declined to dismiss the protest and the agency filed its report on the March 12 due date. With respect to the first allegation raised by REC, the report contained no narrative concerning the adequacy of the evaluation and selection documentation but did include portions of some existing documentation. On March 14, REC objected to VA's alleged failure to produce or identify relevant documents and restated its earlier request for documentation related to the evaluation and selection processes. In response, VA provided REC certain additional documents on March 21.

Our Office conducted a telephone conference on March 26 to settle remaining document request issues, at which time VA represented that it had provided REC with all documents relied upon by the agency to evaluate applications and make the selection decisions. April 4 was established as the due date for the protester's comments.

REC filed comments on April 4, which, inter alia, reiterated the initial allegations that the evaluation of its proposal and the selection decision were not adequately documented. The comments also pointed out that the evaluation documentation did not support the scores of the successful applicants.

On May 12, VA requested summary dismissal of the protest as academic because the agency planned to take corrective action by conducting a reevaluation of REC's application using individuals other than those who performed the original evaluation.¹ While indicating that it did not believe that the protester had

¹On August 5, our Office was informed that the VA had approved REC's management broker application on July 30 as a result of the reevaluation effort.

established agency bias or de facto debarment, VA stated that it took corrective action because "the record does not contain sufficient information for the Comptroller General to determine that VA's conduct was reasonable." We dismissed the protest on May 14 because the agency's decision to have a different panel reevaluate the protester's application rendered the protest academic.

REQUEST FOR COSTS AND RESPONSE

On May 14, REC filed this request for costs, pointing out that the corrective action was proposed "one week before a decision on the merits [was] due" and arguing that "VA has delayed taking corrective action in response to a clearly meritorious protest thereby causing REC to incur significant expense." The agency responded that reimbursement of costs was not warranted here because the protest was not clearly meritorious. In addition, VA argues it did not unduly delay in taking corrective action because the commencement time for measuring whether such a delay occurred should be either April 4, when the record closed, or May 8, when the VA official taking corrective action learned of a new VA management broker "pilot" program. In the latter regard, and notwithstanding the agency's first explanation as to why it took corrective action, VA later suggested that its corrective action was somehow linked to the pilot program.

ANALYSIS AND RECOMMENDATION

If an agency unduly delays in taking corrective action in the face of a clearly meritorious protest we may recommend that the protester be reimbursed for the reasonable costs of filing and pursuing its protest. Bid Protest Regulations, 4 C.F.R. § 21.8(e) (1997); Oklahoma Indian Corp.--Claim for Costs, 70 Comp. Gen. 558, 559 (1991), 91-1 CPD ¶ 558 at 2.

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.--Entitlement to Costs, B-266039.3, July 5, 1996, 96-2 CPD ¶ 5 at 3; Baxter Healthcare Corp.--Entitlement to Costs, B-259811.3, Oct. 16, 1995, 95-2 CPD ¶ 174 at 4-5. 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; Tucson Mobilephone, Inc.--Entitlement, 73 Comp. Gen. 71, 73 (1994), 94-1 CPD ¶ 12 at 4.

In our view, a reasonable agency inquiry would have disclosed the absence of a defensible legal position disputing REC's allegation that the evaluation record was devoid of reliable documentation supporting a decision to downgrade the protester (and consequently reject its application). The clearest example of VA's failure to provide any reasonable basis for its evaluation of REC's proposal is in the area of

past performance, under which the protester received a score of zero (out of 10) with no comments on the evaluation scoring sheet. The record otherwise indicates that, for more than 4 years prior to the evaluation, REC (and its predecessor-in-interest) had managed approximately 2,000 VA properties and, 6 months prior to the evaluation, was rated "excellent" by the agency. On November 19--1 month before the scoring--an evaluator for the protested procurement wrote to REC indicating that the protester "strives to be professional in their management efforts" and noting that any recent deficiencies reported (and disputed) in its performance were "exceptions" rather than the "norm." In short, the assignment of a score of zero under past performance lacks any reasonable basis in the record. Similarly, REC received a zero (out of 10) under a category designed to evaluate the broker's staff. The only explanation in the record, standing in contrast to VA statements that REC's two principals had knowledge and experience, is the notation that the firm was "resistant to change."

These examples, and other contradictions in the record, as well as the lack of any comparative information concerning the relative differences between applicants, make clear that the record did not provide a sufficient basis for VA's determination not to select REC. In short, the agency's position regarding the adequacy of its evaluation and the selection of applicants was not legally defensible. Accordingly, the protest was clearly meritorious.

In considering whether the agency unduly delayed in taking corrective action, we review the record to determine whether the agency took appropriate and timely steps to investigate and resolve the impropriety. David Weisberg--Entitlement of Costs, 71 Comp. Gen. 498, 501 (1992), 92-2 CPD ¶ 91 at 3-4. Here, the issue of an insufficient evaluation record was raised in the protester's initial filings. The agency's investigation should have begun at that point and a determination that the record was insufficient to support REC's evaluation should have been reached as soon as the evaluation documents were reviewed in assembling the agency report. Instead, a report largely ignoring the issue was filed and the agency's corrective action was not taken until 2 months later--only 1 week before the statutory deadline for a decision. Under these circumstances, the agency's delay was not justified and the corrective action was not promptly taken. LB&M Assocs., Inc.--Entitlement to Costs, B-256053.4, Oct. 12, 1994, 94-2 CPD ¶ 135 at 5.

The agency asserts that the timeliness of its corrective action should be measured from the time the record closed after REC's comments were filed on April 4 and claims that it "undertook corrective action because . . . VA was not permitted to submit additional information after that point." However, a review of the record shows, and the agency does not dispute, that VA made no attempt to have the record reopened with respect to the issue of an adequately documented evaluation record. More importantly, the agency represented on March 26 that no further information bearing on the evaluation and selection existed and stated on May 12 that corrective action was taken because the record was insufficient for our Office

to determine that the VA's conduct was reasonable. Accordingly, we see no basis for the agency's argument that April 4 should be used to measure promptness. Also, with respect to the argument that the promptness of the corrective action should be measured from the time in May that cognizant agency personnel learned of a new broker "pilot" program, there is nothing in the record to indicate that the pilot program is logically linked to VA's reevaluation of REC's application, the corrective action which VA agreed to take.

For these reasons, we conclude that the agency's failure to take prompt corrective action was unreasonable and impeded the economic and expeditious resolution of this protest. See LB&M Assocs., Inc.--Entitlement for Costs, supra, at 5. Accordingly, we recommend that VA reimburse REC for its protest costs.² REC should submit its claim for costs, detailing and certifying the time expended and costs incurred, directly to the agency within 60 days of receipt of this decision. Bid Protest Regulations, 4 C.F.R. § 21.8(f)(1).

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²In reaching our conclusion, we have focused on the protest ground alleging that the record was not sufficient to support the agency's selection determination, which we view as the gravamen of the protest. As a general rule, we consider a prevailing protester entitled to costs incurred with respect to all issues pursued, not merely those upon which it prevails. Omni Analysis; Department of the Navy--Recon., 68 Comp. Gen. 559, 562 (1989), 89-2 CPD ¶ 73 at 3-4. Where a protester prevails on one of a number of related grounds of protest, the allocation of cost between winning and losing issues is generally unwarranted, and costs are not limited to the effort spent on the issue upon which the protester prevails. See Data Based Decisions, Inc.--Claim for Cost, 69 Comp. Gen. 122, 125 (1989), 89-2 CPD ¶ 538 at 4. Nevertheless, we will limit a successful protester's recovery of protest costs when a part of the costs is allocable to a losing protest issue that is so clearly severable as to constitute a separate protest. Price Waterhouse--Claim for Costs, B-254492.3, July 20, 1995, 95-2 CPD ¶ 38 at 3. Here, we conclude (and the parties have not argued otherwise) that the issues raised are intertwined parts of REC's basic objection that broker applications were misevaluated. Under these circumstances, and considering the agency's agreement to substitute new individuals as part of the reevaluation process, we see no reason why REC's recovery of protest costs should be limited to a particular issue.