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Decision

Matter of: Cox & Associates CPAs--Costs

File: B-286753.3

Date: June 19, 2001

William E. Slade, Esq., Patton Boggs, for the protester.
Peter F. Pontzer, Esq., Department of Housing & Urban Development, for the agency.
Glenn G. Wolcott, Esq., and Michael R. Golden, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

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 the protests, which were clearly meritorious; corrective action was not taken until more than 3 months after the initial protest was filed and only after the GAO attorney handling the protest conducted "outcome prediction" alternative dispute resolution.

DECISION

Cox & Associates CPAs requests that we recommend that it be reimbursed the costs of filing and pursuing its protest challenging the issuance of an order to Deloitte & Touche under Deloitte's federal supply schedule (FSS) contract. The order was issued pursuant to a request for quotations (RFQ) issued by the Department of Housing and Urban Development (HUD) to perform contractor compliance review services related to HUD's management and marketing (M&M) contractors.

We recommend that HUD reimburse Cox its reasonable protest costs.

Pursuant to the National Housing Act, 12 U.S.C. § 1701 *et seq.*, HUD provides mortgage insurance for low and moderate income home buyers. In the event a borrower defaults, HUD pays off the insurance and takes title to the home. After HUD takes title to a home, the property is assigned to one of its M&M contractors, who becomes responsible for inspecting, maintaining, and selling the property; HUD retains ongoing responsibility to review the work performed by its M&M contractors. The protest for which Cox seeks to recover its costs challenged HUD's placement of an FSS task order to perform the necessary oversight of HUD's M&M contractors.

On August 10, 2000, HUD sent the RFQ at issue to five FSS contractors, including Cox and Deloitte. The RFQ provided that quotations must be submitted in two volumes (a technical volume and a price volume), identified various technical evaluation factors,¹ and stated that an order would be placed with the schedule contractor whose quotation was evaluated as providing the best value to the government.

In describing the technical information to be submitted, the RFQ specifically required that quotations “Identify the Project Team (Key Personnel) and demonstrate sufficient, qualified personnel and other resources, staffing time allocations, subcontracting arrangements, etc.” Agency Report, Tab 7, at 2. Similarly, under the heading “Evaluation Factors,” the RFQ required that quotations must “demonstrate clear lines of authority and accountabilities, staffing, physical resources and time schedules for specific tasks.” Agency Report, Tab 7, at 9.

On August 21, Cox and Deloitte submitted quotations responding to the RFQ and, at the agency’s request, each firm made an oral presentation on September 7. Cox’s quotation indicated an intent to perform the contract with the support of two subcontractors—PricewaterhouseCoopers (PwC) and Soza & Company, Ltd.—and provided specific information regarding staffing allocation as required by the RFQ. Deloitte’s quotation also contemplated contract performance using two subcontractors—Bert Smith & Company and Fry, Williams & Company; however, Deloitte’s submission did not provide information from which the agency could reasonably determine Deloitte’s intended staffing allocation and, also, did not identify the key personnel being proposed to fill certain key manager positions.

Following oral presentations, the quotations were evaluated against the three technical factors—management experience, conceptual approach and past performance. Deloitte’s quotation was evaluated as “exceptional” under each of the factors. Cox’s quotation was rated as “exceptional” with regard to management experience and past performance, but only “very good” with regard to conceptual approach. The basis for downgrading Cox’s quotation was the agency’s perception that Cox had not allocated a sufficiently large portion of contract performance to PwC, and that certain PwC staff were going to be involved on only a “part-time” basis.

Following the initial evaluation, the agency sought information from each vendor regarding various agency concerns. Although the primary basis for downgrading Cox’s proposal was the agency’s concern that PwC would not be sufficiently

¹ The RFQ provided that the technical portion of the quotations would be evaluated on the basis of management experience, conceptual approach, and past performance.

involved in contract performance, the agency did not identify this concern in any of the questions presented to Cox.

On September 12, both vendors submitted their final quotations and, thereafter, the agency performed a final evaluation. Consistent with the earlier evaluation, Deloitte's quotation was rated "exceptional" under all three factors; again, Cox's quotation was similarly rated "exceptional" under the management experience and past performance factors, but only "very good" with regard to conceptual approach. As in the previous evaluation, the primary discriminator between the two quotations was the agency's dissatisfaction with the projected amount of involvement by PwC. Although Deloitte's quoted price was slightly higher than Cox's, the agency concluded that Deloitte's quotation represented the best value to the government and issued the task order to Deloitte.²

Cox filed its initial protest on November 3 challenging, among other things, the agency's evaluation of its staffing allocation. On December 5, the agency submitted its report responding to Cox's protest, maintaining that the protest was without merit. Upon receipt of the evaluation record, Cox filed a supplemental protest on December 18, maintaining that Deloitte's quotation failed to provide the staff allocation information required by the RFQ and, similarly, that Deloitte's quotation failed to comply with the RFQ requirement to identify all key personnel. Cox noted that, in light of the limited information Deloitte provided, the agency could not have reached any reasonable conclusion regarding Deloitte's intended staffing allocation--the very issue for which Cox was downgraded. On January 12, 2001, the agency responded to Cox's supplemental protest, again asserting that all of Cox's protest allegations were without merit.

Upon review of the record, this Office conducted various telephone conference calls with counsel for the parties expressing concern regarding various issues, including the fact that Deloitte's quotation failed to identify all key personnel³ and did not appear to provide a reasonable basis for evaluating the staff allocation Deloitte intended to employ. On February 2, the GAO attorney handling the protest conducted a telephone conference with counsel for the parties during which the

² After determining that Deloitte's quotation was most advantageous to the government, the agency conducted further price negotiations with Deloitte. These negotiations resulted in an additional price reduction by Deloitte, which resulted in the task order being placed at a lower price than that quoted by Cox.

³ The agency's final evaluation report specifically noted that: "The [Deloitte] proposal did not name a key manager responsible for interfacing with each [of the four] HOCs [home ownership centers]." Agency Report, Tab 12, at 9.

attorney engaged in “outcome prediction” alternative dispute resolution, advising the parties that it was his view that Cox’s protests would be sustained.⁴

By letter dated February 5, HUD advised our Office that it intended to take corrective action, specifically stating:

[HUD] will take corrective action . . . [including] the following actions:

1. Allow both [Cox and Deloitte] to provide revised proposals that will address pricing and include all discounts, if any;
2. Allow Cox the opportunity to address its weaknesses in Conceptual Approach;
3. Allow Deloitte the opportunity to address staffing allocations; and
4. Allow Deloitte the opportunity to identify managers for the Home Ownership Centers (“HOCs”) and clarify its proposal as it relates to the HOCs.

Letter from HUD to GAO (Feb. 5, 2001).

Based on this statement of its proposed corrective action we dismissed the protest as academic. Cox & Assocs. CPAs, B-286753, B-286753.2, Feb. 5, 2001. Thereafter, Cox submitted this request that we recommend reimbursement of its protest costs.

Where a procuring agency takes corrective action in response to a protest, our Office may recommend that the agency reimburse the protester its protest costs where, based on the circumstances of the case, we determine that the agency unduly delayed taking correction action in the face of a clearly meritorious protest, thereby

⁴ In outcome prediction ADR, the GAO attorney handling a protest convenes the parties, at their request or at GAO's initiative, and informs the parties what the GAO attorney believes the likely outcome will be, and the reasons for that belief. A GAO attorney will engage in this form of ADR only if she or he has a high degree of confidence regarding the outcome. Where the party predicted to lose the protest takes action obviating the need for a written decision (either the agency taking corrective action or the protester withdrawing the protest), our Office closes the case. Although the outcome prediction reflects the view of the GAO attorney, and generally that of a supervisor as well, it is not an opinion of our Office, and it does not bind our Office, should issuance of a written decision remain appropriate.

causing a protester to expend unnecessary time and resources to make further use of the protest process and in order to obtain relief. Pemco Aeroplex, Inc.--Recon. and Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶102 at 5. A protest is clearly meritorious when a reasonable agency inquiry into the protest allegations would show facts disclosing the absence of a defensible legal position. The Real Estate Ctr.--Costs, B-274081.7, Mar. 30, 1998, 98-1 CPD ¶ 105 at 3. Regarding the promptness of an agency's corrective action, we generally do not consider corrective action to be prompt where it is taken after the due date for the agency report. See CDIC, Inc.--Entitlement to Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶52 at 2.

Here, Deloitte's failure to identify all key personnel and to provide staff allocation information, as required by the RFQ, resulted in the agency having no basis for reaching any reasonable conclusion regarding the actual staff allocation that Deloitte intended to employ. Nonetheless, the agency relied on this very type of information provided by Cox to distinguish between the two quotations, and concluded that, notwithstanding its higher price, Deloitte's quotation represented the better value to the government. On this record, Cox's protests were clearly meritorious and a reasonable agency inquiry into the protest allegations should have disclosed the absence of a defensible legal position.⁵

Regarding the promptness of the agency's corrective action, the agency submitted reports responding to both Cox's initial and supplemental protests, in each case asserting that the protest allegations were wholly without merit. Cox was required to submit comments rebutting each of the agency's reports on these protests. In short, although HUD ultimately took corrective action, it declined to do so until more than 3 months after the initial protest was filed. As noted above, we generally do not consider corrective action to be prompt where it is taken after the due date for submission of the agency report. CDIC, Inc.--Entitlement to Costs, supra.

In sum, on the basis of the record discussed above, we conclude that the agency failed to take reasonably prompt corrective action despite Cox's clearly meritorious protests. Accordingly, we recommend that Cox be reimbursed the reasonable costs

⁵ As noted above, the agency's own evaluation record expressly recognized Deloitte's failure to comply with the RFQ requirement regarding key personnel. The agency argues that Cox's protest should not be considered "clearly meritorious" because it raised various issues which related to FSS contracts--an area of federal procurement law which the agency maintains is "in flux," "not clear," "unsettled," and "not clearly established." Agency Motion Opposing Entitlement to Legal Fees, at 13-18. We disagree. As discussed above, the bases for determining that Cox's protest was clearly meritorious were not dependent upon issues unique to FSS contracts.

of filing and pursuing its protests. Cox should submit its claim for costs, detailing and certifying the time expended and costs incurred, directly to HUD within 60 days of receipt of this decision.

Anthony H. Gamboa
General Counsel