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Comptroller General
of the United States

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Decision

Matter of: Cox & Associates CPAs, PC

File: B-287272.2; B-287272.3

Date: June 7, 2001

William E. Slade, Esq., T. Michael Guiffre, Esq., and Rodney A. Grandon, Esq., Patton Boggs, for the protester.

James J. McCullough, Esq., and Steven A. Alerding, Esq., Fried, Frank, Harris, Shriver & Jacobson, for Science Applications International Corporation, the intervenor.

Capt. Stephen Edward See, John D. Inazu, Esq., and Gregory E. Petkoff, Esq., Department of the Air Force, for the agency.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging an agency's corrective action in response to a General Accounting Office protest is denied where the corrective action--the cancellation of a defective request for quotations that sought competition among Federal Supply Schedule vendors for highly complex and costly services and the conduct of a new, full and open negotiated competition for the services--is not shown to be unreasonable.

2. General Accounting Office will not recommend that protester be reimbursed protest costs where the agency promptly took corrective action in response to a protest prior to the date for filing the agency report.

DECISION

Cox & Associates CPAs, PC protests the cancellation of request for quotations (RFQ) No. F01600-01-Q-6001, issued by the Department of the Air Force, soliciting competition among Federal Supply Schedule (FSS) vendors for the acquisition of budget information systems services. The Air Force's decision to cancel the RFQ was the result of corrective action taken in response to Cox's earlier protest (B-287272) objecting to the award of an order under the RFQ to Science Applications International Corporation (SAIC) under that firm's FSS contract. Cox also requests that we recommend that Cox be reimbursed the costs of filing and pursuing that earlier protest.

We deny the protest and request for entitlement to costs.

The Air Force requested quotations from 13 FSS vendors, including Cox and SAIC, to perform budget information support services for the agency's Office of Financial Management and Budget for a base year with 4 option years. Vendors were informed that the agency would "select the best overall offer, based upon an integrated assessment of Mission Capability, Past Performance, Proposal Risk, and Cost/Price," and that "[t]his was a best value source selection conducted in accordance with Air Force Federal Acquisition Regulations." RFQ, attach. A, ¶ 9. The RFQ did not, however, state the relative weights of the evaluation criteria or further describe the evaluation criteria. Prior to the receipt of quotations, Cox states that it asked the Air Force if there was an incumbent contractor for this work and was informed that there was not. Declaration of Cox's President (Feb. 12, 2001) at 2.

The Air Force determined that SAIC's higher-priced quote reflected the best overall value and awarded an order to SAIC under that firm's FSS contract.¹ The Air Force notified Cox on January 25 of the award to SAIC, and Cox requested a debriefing on January 30. A debriefing was provided to Cox on January 31, and Cox protested the award to SAIC to our Office on February 12.

Cox complained that the Air Force downgraded its quote because Cox did not provide a transition plan, but the RFQ did not request a transition plan and Cox had been informed that there was no incumbent contractor or contract. In addition, Cox complained that the Air Force unreasonably evaluated the firm's past performance.

On March 7, prior to the date for submission of its report, the Air Force informed us that it would take corrective action in response to the protest. Specifically, the Air Force stated that the RFQ evaluation criteria "were not sufficiently detailed" and as a result, the Air Force planned to resolicit the requirement as a full and open competition under a negotiated procurement pursuant to Federal Acquisition Regulation (FAR) part 15. The Air Force stated that conducting a new competition could take a year and that during this time it would continue to receive the services from SAIC under the order issued to that firm's FSS contract. Based on the foregoing, we dismissed Cox's first protest.

Cox objects to the Air Force's corrective action, arguing that the agency should not cancel the RFQ and conduct a new competition for this requirement, but should amend the RFQ and obtain new quotes from the original FSS vendors. Cox also objects to SAIC's continued performance of these services, complaining that this will provide SAIC (which was not the incumbent contractor) with an unfair competitive

¹ The Air Force states that the total amount of the award to SAIC, including options, is \$40,858,546. Contracting Officer's Statement at 1.

advantage in the future competition. Cox also requested that we recommend that it be reimbursed its protest costs because the Air Force's acknowledgment that its RFQ was "insufficiently detailed" demonstrates that Cox's first protest was clearly meritorious.

The Air Force responds that cancellation (rather than amendment to cure the admitted defects) of the RFQ is appropriate because, given the "magnitude of this acquisition," FSS procedures are not appropriate to satisfy this requirement. Agency's Legal Memorandum at 7. In this regard, the agency states that total value of this acquisition, which is estimated to exceed \$40 million, is substantially higher than the maximum order threshold for the relevant FSS schedule (FSS schedule 872, Auditing and Financial Management Services has a maximum order threshold of \$500,000). Contracting Officer's Statement at 2. In addition, the Air Force expressed concern that FSS procedures, which are more informal than the negotiated acquisition procedures of FAR part 15, may not provide the best method of acquiring these "highly technical and specialized financial management services."² Agency's Legal Memorandum at 7. Also, the Air Force believes that the use of FSS procedures may have prevented "large volume," experienced service providers from competing for this requirement. *Id.* In sum, the Air Force believes that the use of FSS procedures in this case have resulted in the agency not receiving these services at the best value.

Cox does not disagree with the Air Force's characterization of these services as highly technical and specialized, but asserts that the services could nevertheless be appropriately acquired under FSS procedures. *See* Protester's Comments at 7. In this regard, Cox notes that the agency is permitted to exceed the maximum order threshold in obtaining these services under the FSS program. *See* FAR § 8.404(b)(3). These arguments do not show, however, that the Air Force unreasonably determined that FSS procedures are not the best method to acquire these services. Procuring agencies are given broad discretion in determining how best to satisfy their needs, and we will therefore object to an agency's determination in this regard only if it is shown to be unreasonable. *AT&T Corp., B-270841 et al.*, May 1, 1996, 96-1 CPD ¶ 237 at 6-7. Given the scope and complexity of the services being acquired, we are unable to say that the agency acted unreasonably in concluding that more formal acquisition procedures should be used to ensure that the Air Force receives best value in obtaining these services.

With respect to Cox's complaint as to SAIC's continued performance of the task order until the completion of the new competition, the agency states that this is necessary to satisfy its program needs and notes that Cox's first protest did not trigger the stay provisions of the Competition in Contracting Act of 1984, 31 U.S.C.

² The Air Force is not a mandatory user of this schedule.

§ 3553(d)(3)(A). Agency's Legal Memorandum at 5. Cox does not dispute the agency's continuing need to have these services performed, but argues that SAIC's order should be terminated because the order was issued as the result of an admittedly flawed procurement. Protester's Comments at 2.

We agree that the now canceled RFQ was defective. For that reason, we are unable to say that either SAIC or Cox would be entitled to an award under the solicitation. Nevertheless, it is not disputed that the Air Force needs to obtain continued performance of these services. Ordinarily, in circumstances such as are presented here where there is a need for continuing services, our recommendation provides for the agency to continue performance of an award made, even under a defective solicitation, pending the outcome of a new competition. See, e.g., Technical Support Servs., Inc., B-279665, B-279665.2, July 8, 1998, 98-2 CPD ¶ 26 at 6. With respect to Cox's concern that SAIC may obtain an incumbent's advantage as a result of performance of the delivery order, we would expect the agency to take reasonable precautions to ensure that SAIC does not unduly benefit from its performance of the order; to the extent that Cox is challenging the terms of a yet to be issued solicitation or the conduct of a future procurement, speculation about future events does not form a valid basis of protest.

Cox also requests that we find it entitled to the reimbursement of its costs of filing and pursuing the protest, which resulted in the agency's corrective action. We decline to do so.

Pursuant to our Bid Protest Regulations, when an agency takes corrective action prior to our issuing a decision on the merits, we may recommend that the protester recover the reasonable costs of filing and pursuing the protest. 4 C.F.R. § 21.8(e) (2001). This imposition of costs is not intended as an award to prevailing protesters or as a penalty to the agency, but rather is designed to encourage agencies to take prompt action to correct apparent defects in competitive procurements. Wall Colmonoy Corp.--Entitlement to Costs, B-257183.3, Nov. 16, 1994, 94-2 CPD ¶ 189 at 2. Thus, where corrective action is taken in response to a protest, we will recommend that a protester be reimbursed its costs only where, 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. Id.

In general, if an agency takes corrective action in response to a protest by the due date of its protest report, we consider such action to be prompt and will not recommend reimbursement of protest costs. See HSQ Tech.--Request for Costs, B-276050.2, June 25, 1997, 97-1 CPD ¶ 228 at 2. Such was the case here--the Air Force offered to take corrective action before the report due date. Because the agency offered to take corrective action rather than filing an agency report, the protester was not put to the time and expense of filing comments in response to such a report. Thus, the purpose of section 21.8(e) of our Regulations--to encourage agencies to take corrective action in response to meritorious protests before

protesters have expended additional unnecessary time and resources pursuing their claims--was served here. We recognize that Cox objects that the promised corrective action (the conduct of a new, negotiated competition) could take more than a year, but this fact does not demonstrate that the agency has not acted promptly in settling this dispute. Moreover, there is no indication that the agency will not act as expeditiously as possible in conducting this new procurement.

The protest and request for entitlement to costs are denied.

Anthony H. Gamboa
General Counsel