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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: J&J/BMAR Joint Venture, LLP--Costs

File: B-290316.7

Date: July 22, 2003

Joan K. Fiorino, Esq., and John C. Dulske, Esq., Dulske & Fiorino, for the protester. Capt. Charles K. Bucknor, and Raymond Saunders, Esq., Department of the Army, 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

Protester's request for a recommendation that it be reimbursed the cost of filing an earlier protest challenging a cost comparison under Office of Management and Budget Circular A-76 is denied where the agency did not unduly delay implementing the promised corrective action that caused our Office to dismiss the protest as academic.

DECISION

J&J/BMAR Joint Venture, LLP requests that our Office recommend that the Department of the Army reimburse the firm the reasonable costs of filing and pursuing its protest with respect to solicitation No. DAKF23-01-R-0201. This solicitation provided for a cost comparison pursuant to Office of Management and Budget Circular A-76 to determine whether to retain in-house or contract out performance of Public Works Business Center service at Fort Campbell, Kentucky. We dismissed the protest as academic on October 9, 2002 based on the Army's advice that it was taking corrective action in the procurement. J&J/BMAR contends that it should be reimbursed its protest costs because the Army has not timely implemented the promised corrective action.

We deny the request.

The Army initially decided to retain in-house the Public Works Business Center service at Fort Campbell after a cost comparison between J&J/BMAR and the government's most efficient organization (MEO). On September 5, 2002, subsequent to a decision on its administrative appeal, J&J/BMAR protested to our Office,

challenging the agency's conduct of the cost comparison. Prior to the filing of the agency's report on the protest, the Army decided to take corrective action, which rendered the protest academic. Specifically, the Army stated that it would set aside the cost comparison that was being protested, that it would reconvene the source selection evaluation board (SSEB) and source selection advisory council (SSAC) and appoint a new source selection authority (SSA), that the SSEB would evaluate whether the technical performance plan (TPP) implementing the MEO satisfied the performance work statement (PWS) (and if it did not, the SSEB would take steps to ensure that the TPP satisfied the PWS), that the TPP (once it satisfied the PWS) would be compared to the protester's "best value" offer to ensure that the TPP offered the level and quality reflected in the protester's proposal, and that the agency would perform a new cost comparison. On October 9, we dismissed the protest as academic.

J&J/BMAR argues that it should be reimbursed for its costs of filing and pursuing the protest because the agency has unreasonably delayed implementing the promised corrective action that caused us to dismiss as academic J&J/BMAR's allegedly clearly meritorious protest.

Our Office may recommend that a protester be reimbursed the costs of filing and pursuing a protest where the contracting agency decides to take corrective action in response to the protest. 4 C.F.R. § 21.8(e) (2003). Such recommendations are generally based upon a concern that an agency has taken longer than necessary to initiate corrective action in the face of a clearly meritorious protest, thereby causing protesters to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. AAR Aircraft Servs.–Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 5. We will also award protest costs in certain circumstances where an agency unduly delays the implementation of promised corrective action that led to the dismissal of an earlier protest. See Commercial Energies, Inc.–Recon. and Declaration of Entitlement to Costs, B-243718.2, Dec. 3, 1991, 91-2 CPD ¶ 499 at 6. We view the award of protest costs in such cases as appropriate because a protest is not truly resolved until the agency implements the promised corrective action that caused us to dismiss the protest. Id.

Here, we find that the Army has not unduly delayed implementing its promised corrective action. In this regard, the agency states that it reconvened the SSEB on November 1, 2002. The SSEB reevaluated the management team's TPP, which resulted in further discussions with the management team and revisions to the TPP. Between November 2002, and May 2003, the Army evaluated the TPP revisions, conducted further discussions with the TPP, reconvened the SSAC, and provided briefings to the SSA regarding the TPP.¹ The Army argues that it has made

¹ The agency, however, has not yet performed a comparative assessment of the TPP and J&J/BMAR's best value offer, which the agency informed us it expects to do in (continued...)

reasonable progress towards implementing the promised corrective action, particularly given the “complexity of the A-76 process” and interruptions occasioned by the recent conflict in Iraq. In this regard, the agency states that Fort Campbell is home to the 101st Airborne (Air Assault) Division, which was mobilized and deployed to Iraq, and that both the SSA and members of the SSAC (including the SSAC chair) were also deployed to Iraq.

This case is unlike that in Commercial Energies, Inc. and its progeny, where we recommended that an agency reimburse the protester for its protest costs because the agency, without adequate and reasonable explanation, delayed implementing the promised corrective action that had caused us to dismiss the protest as academic. See Commercial Energies, Inc., supra (5-month delay without implementation of corrective action and without explanation); see also Pemco Aeroplex, Inc.—Recon. and Costs, B-275587.5, B-275587.6, Oct. 14, 1998, 97-2 CPD ¶ 102 (4-month delay in promised revision of solicitation without a meaningful explanation for the delay). Here, the Army took steps within 1 month of the date of the dismissal of the protest to implement its promised corrective action, and the record reflects the agency’s continued steps towards conducting a new cost comparison. Moreover, we recognize that the conflict and deployment of military forces in Iraq posed difficulties that slowed the implementation of the agency’s corrective action. In sum, we find that the Army has not unduly and unreasonably delayed the implementation of the corrective action that caused us to dismiss J&J/BMAR’s original protest as academic.² At the same time, since it has been 9 months since we dismissed the protest, we expect that the agency will expedite its implementation of the promised corrective action.

The request is denied.

Anthony H. Gamboa
General Counsel

(...continued)

July 2003, and the Army states that it expects to make a new cost comparison decision in August.

² Because we find that the agency had not unduly delayed implementing its promised corrective action, we do not address J&J/BMAR’s argument that its protest was clearly meritorious.