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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: First Federal Corporation--Costs

File: B-293373.2

Date: April 21, 2004

Richard J. Vacura, Esq., and Peter C. Sales, Esq., Morrison & Foerster, for the protester.

Seth Binstock, Esq., Social Security Administration, for the agency.

Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where agency took corrective action (amendment of solicitation and resolicitation) in response to protest challenging agency's relaxation of solicitation's geographical location requirement, GAO nevertheless will not recommend reimbursement of protest costs, since relaxation did not result in competitive prejudice to protester, and corrective action therefore was not in response to a clearly meritorious protest.

DECISION

First Federal Corporation requests that we recommend that it be reimbursed the costs of filing and pursuing its protest challenging the award of a contract to Independent Services Corp. (ISC) under request for quotations (RFQ) No. SSA-RFQ-03-0159, issued by the Social Security Administration (SSA) for storage of magnetic media.

We deny the request.

The solicitation, a small business set-aside, sought quotations for transportation and storage of magnetic media from SSA's National Computer Center (NCC). Quotations were to be evaluated on a "best value" basis, taking into consideration price, experience, past performance, and acceptability of the proposed facility. Among other requirements, the RFQ specified that a proposed facility shall be located not less than 25 miles, point-to-point, from the SSA complex in Woodlawn, Maryland. The minimum distance requirement was intended to provide adequate separation of geographic areas and subsequent protection from fire, flood, earthquakes, and other acts of nature. ISC and First Federal submitted quotations, both of which were

found acceptable under all factors, including the geographic location of their proposed facilities. The contracting officer concluded that the quotations were technically equal, and made award to ISC based on its significantly lower price. After the agency denied First Federal's agency-level protest, it filed a protest with our Office.

Among other issues, First Federal argued that the award was improper because a surveyor's report it obtained indicated that ISC's facility was less than 25 miles away from the NCC, and thus did not meet the geographical restriction in the RFQ. In its response to the protest, SSA explained that its evaluator used mapping software from the Internet to measure the point-to-point distance for each vendor. Because the NCC is a secure facility located in a heavily wooded area and is not physically located near its street address, the evaluator used the software's zoom feature to approximate the physical location of the NCC. Using this method, he reportedly determined that ISC's facility was at least 25 miles away and that the quotation was acceptable. However, he did not print out the results of his measurements.

After reviewing the agency's explanation, we requested that it re-run the ISC measurements and produce both a printout of that calculation, and a declaration from the evaluator recounting his methodology in the original and re-run measurements. SSA reportedly repeated the evaluator's measurement several times using the same methodology as before, but could not obtain a result showing ISC's facility to be at least 25 miles away from the NCC. According to SSA, it most often obtained a result of 24.4 miles. Reasoning that another half-mile of distance did not provide any additional security from acts of nature, SSA determined that the 25-mile requirement did not reflect its actual needs, and informed us that it intended to determine its true needs, then amend the specification and release a new solicitation. Based on this corrective action, we dismissed First Federal's protest as academic (B-293373, Jan. 30, 2004).

First Federal now requests that we recommend that it be reimbursed the reasonable costs of filing and pursuing its protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2004). In its view, the agency unduly delayed taking corrective action on a clearly meritorious protest.

Where a procuring agency takes corrective action in response to a protest, we may recommend that it reimburse the protester its protest costs 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, thereby causing a protester to expend unnecessary time and resources to make further use of the protest process 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. We consider a protest to be clearly meritorious when a reasonable agency inquiry into the protester's allegations would show that the agency lacked a defensible legal position, Georgia Power Co.; Savannah Elec. and Power Co.—Costs, B-289211.5, B-289211.6, May 2, 2002, 2002 CPD ¶ 81 at 5; that is, that the protest did does not involve a close

question. East Penn Mfg. Co., Inc.--Costs, B-291503.4, Apr. 10, 2003, 2003 CPD ¶ 83 at 3. The mere fact that an agency decided to take corrective action does not establish that a statute or regulation clearly has been violated. Id.

The protest here was not clearly meritorious. SSA asserts that, since the RFQ did not state how the point-to-point distances would be measured, and since the approximately one-half mile deviation is of no value in providing additional physical security, its calculation, though not precise, was reasonable. Agency Response at 2-3. In essence, the agency is arguing that the deviation in IST's point-to-point distance was immaterial.

Where a proposal deviates from a specification by a negligible amount, the agency may waive the requirement, so long as it did not prejudice other vendors. Gulf Copper Ship Repair, Inc., B-292431, Aug. 27, 2003, 2003 CPD ¶ 155 at 4 (deviation of 1 inch water depth specification properly waived by agency); Magnaflux Corp., B-211914, Dec. 20, 1983, 84-1 CPD ¶ 4 at 3-4 (agency permitted to waive deviation from specification which was minor and did not result in prejudice); Champion Road Mach. Int'l Corp., B-200678, July 13, 1981, 81-2 CPD ¶ 27 at 4 (deviation of two horsepower is minor and should have been waived by agency where price, quantity, quality, and delivery were not affected). In our view, since the approximately one-half mile deviation from the 25-mile requirement appears minor on its face and, according to SSA, did not diminish the purpose of the restriction, it could reasonably be viewed by SSA as negligible. The deviation therefore was waivable, so long as First Federal, the only other vendor in the competition, was not prejudiced. There is no evidence of competitive prejudice. In this regard, while First Federal asserts that the waiver gave ISC an "unfair competitive advantage," (Protest at 9), it does not show how it would have altered its proposal to improve its competitive standing had it been given an opportunity to respond to the relaxed requirement. See Copper Ship Repair, Inc., *supra*. For example, it does not assert that knowledge of the relaxation would have affected its price or the location of its proposed facility. Given the absence of any evidence of prejudice to First Federal, we conclude that the agency had a defensible legal position and, thus, that the protest was not clearly meritorious. It follows that there is no basis to recommend reimbursement of protest costs in this case.

The request for costs is denied.

Anthony H. Gamboa
General Counsel