



GAO

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: AdaRose Inc.--Protest and Costs

File: B-299091.2

Date: January 14, 2008

George Holt for the protester.

Vera Meza, Esq., Department of the Army, for the agency.

Eric M. Ransom, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of this decision.

DIGEST

1. Protest seeking reinstatement of an earlier protest because, in the protester's view, the agency has unduly delayed taking the corrective action promised in response to the earlier protest is dismissed since any dispute about the selection decision that was the subject of the earlier protest has been rendered academic because that selection decision has been set aside by the agency as part of the corrective action.

2. Recommendation that protester be reimbursed the costs of filing an initial protest challenging the agency's evaluation of its proposal and the costs of filing a subsequent protest challenging the agency's delay in implementing the proposed corrective action that was the basis of the dismissal of the earlier protest is not warranted where the agency has not unduly delayed implementation of the proposed corrective action.

DECISION

AdaRose Inc. requests that our Office reinstate and sustain its earlier protest of a decision by the Department of the Army Joint Armaments Contracting Center not to award AdaRose a contract under request for proposals (RFP) No. W15QKN-05-R-0229, for armaments software engineering center support. We dismissed that protest as academic based on the agency's stated intention, after review of the protest, to set aside the source selection decision and take further corrective action consisting of amending the solicitation, soliciting revised proposals, and reevaluating those proposals. In addition, AdaRose requests that our Office recommend that the agency reimburse AdaRose for losses allegedly suffered as a result of the agency's unduly prolonging the implementation of corrective action, and for other reasons.

We dismiss AdaRose's request that we reinstate its earlier protest and we deny AdaRose's request for reimbursement of costs.¹

BACKGROUND

The agency issued RFP No. W13QKN-05-R-0229 on August 4, 2005, for an indefinite-delivery/indefinite-quantity (ID/IQ) contract for software engineering, infrastructure, technologies, and equipment support requirements. The RFP was the first time that ten functional areas representing various weapons system and infrastructure support requirements would be combined into one solicitation. Agency Report (AR), Tab 1, Contracting Officer's Statement of Facts, at 1.

The agency's acquisition strategy was to make awards to at least two qualifying companies in each of the ten functional areas. Id. Individual task orders would then be competed between the contractors in each functional area in accordance with fair opportunity competition requirements. Id. at 1-2. The contract resulting from the RFP was intended to replace a number of separate ID/IQ contracts due to end in fiscal years 2007 and 2008. Id. at 2.

The agency received proposals from seven offerors, including AdaRose, by the September 7, 2005 closing date of the solicitation. Id. Discussions were conducted with all offerors, and all offerors submitted final proposal revisions by April 20, 2006. On July 26, the contracting officer eliminated AdaRose's proposal from consideration, finding that AdaRose's acceptable ratings in past performance, cost realism, and small disadvantaged business participation did not compensate for its high proposal risk evaluations. AR, Tab 12, Memorandum of Source Selection Decision, at 9, 12. AdaRose was notified that it was not selected for award on September 21 and received a requested debriefing on October 5.

AdaRose filed its original protest with our Office on November 1, 2006, alleging among numerous grounds of protest that the rejection of its proposal was inconsistent with the published evaluation criteria, that the agency incorrectly rated AdaRose's past performance as neutral, and that the agency failed to reveal the

¹ AdaRose requests that we recommend that the agency provide AdaRose with monetary compensation for loss of revenue and loss of reputation, as well as punitive damages for the agency's non-compliance with federal procurement statutes. However, there is no legal basis that would permit recovery of anticipated profits or similar monetary damages, even if a firm submitting a protest has been wrongfully denied a contract. See Adrian Supply Co.--Recon., B-225440, B-225440.2, Mar. 30, 1987, 87-1 CPD ¶ 357 at 4. We therefore limit our discussion in the decision to the reimbursement of AdaRose's protest costs. See Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2007).

seriousness of identified weaknesses during discussions. After reviewing the protest, the contracting officer determined that it was in the best interest of the government to take corrective action, consisting of overturning the source selection decision, amending the RFP, and requesting revised proposals from the offerors, followed by a reevaluation. On that basis, we dismissed the protest on November 29.

Within a month after our Office dismissed the protest, the contracting officer began to detail deficiencies in the original solicitation and draft amendments. AR, Tab 1, Contracting Officer's Statement of Facts, at 3. More than 12 months later, however, the Army's proposed corrective action has yet to be completed, and the amended solicitation was issued only recently on December 10, 2007.

In January 2007, AdaRose contacted the agency to determine the status of the corrective action and was informed that the agency hoped to issue the revised RFP in February 2007. Protest at 1. On October 15, 2007, AdaRose filed this protest with our Office, requesting that we reinstate and sustain its previous protest and award it monetary remuneration for losses and costs.

ANALYSIS

As a preliminary matter, we do not reinstate protests. A protest, like the one here, that was once academic is not "revived" by subsequent agency action. Instead, the subsequent action gives rise to a new basis for protest, even if some of the issues raised by the subsequent action are the same as the issues raised in the earlier protest. See Pemco Aeroplex, Inc.--Recon. and Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 4-5. With respect to the specific request here, on November 17, 2006, the contracting officer set aside the source selection decision that gave rise to the protest. Thus the source selection decision no longer exists, and any dispute about that decision or its basis has been rendered academic by the contracting officer's determination.² The protester's request that we reinstate its previous protest is therefore dismissed. Lackland 21st Century Servs. Consol.--Protest and Costs, B-285938.6, July 13, 2001, 2001 CPD ¶ 124 at 4.

² A substantial portion of AdaRose's current protest is concerned with maintaining challenges related to the original evaluation of proposals, discussions, and the now-overturned source selection decision. Specifically, AdaRose remains very concerned that its proposal was incorrectly labeled as "high risk" in the source selection decision and that the source selection decision document was never amended to reflect the correct "moderate risk" proposal rating. Because the source selection decision was overturned in the contracting officer's determination of November 17, 2006, this issue was rendered academic, and remains academic for the purposes of this and any future protest of the agency's subsequent actions.

With respect to costs, 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. Bid Protest Regulations, 4 C.F.R. § 21.8(e). 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. QuanTech, Inc.—Costs, B-278380.3, June 17, 1998, 98-1 CPD ¶ 165 at 2. Such a basis for the award of costs does not exist in this protest, since the agency initiated corrective action promptly (*i.e.*, prior to the agency report due date) in response to the initial protest. See Veda Inc.—Entitlement to Costs, B-265809.2, July 19, 1996, 96-2 CPD ¶ 27 at 2 (generally, we consider agency corrective action prompt where it is proposed before the agency's administrative report is due). However, we may also recommend recovery of protest costs where an agency unduly delays the implementation of the promised corrective action that led to the dismissal of the earlier protest. See Pemco Aeroplex Inc.—Recon. and Costs, *supra*. We view the recovery 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.

AdaRose's claim that the Army has unduly delayed implementing corrective action is based on the length of time that has elapsed since the dismissal of its protest, the agency's alleged failure to maintain contact with AdaRose, and AdaRose's view that the agency, through its deliberate inaction, has demonstrated that it has no intention of ever allowing AdaRose the opportunity to obtain work with the requiring activity. The agency maintains that it has no intention of denying AdaRose the opportunity to obtain work, and that since the dismissal of the protest, it has in good faith taken numerous significant steps to implement the proposed corrective action as outlined in the contracting officer's determination of November 17, 2006. The agency claims that despite such ongoing good faith actions, the procurement has been delayed by several events including the recurring significant illness of a senior level technical reviewer, a major increase in overall workload caused by the current war efforts, and the necessary prioritization of contracting actions more immediately related to warfighter support needs.

Our Office has previously found that an agency unduly delays corrective action where the agency allows continued performance of improperly awarded contracts, or fails to justify or explain lengthy delays. Commercial Energies, Inc.—Recon. and Declaration of Entitlement to Costs, B-243718.2, Dec. 3, 1991, 91-2 CPD ¶ 499 at 5-6; see also Pemco Aeroplex Inc.—Recon. and Costs, *supra*. However, our Office has also found that months-long delays do not by themselves constitute an undue delay where an agency reasonably justifies or explains those delays. For instance, in J&J/BMAR Joint Venture, LLP—Costs, B-290316.7, July 22, 2003, 2003 CPD ¶ 129 at 3, we found that a 9-month delay in the implementation of corrective action was not an undue delay in view of the agency's prompt initiation of implementation and continued steps toward completing implementation, and in recognition of the

complexity of the procurement and the difficulties caused by the deployment of forces in Iraq.

We conclude that the situation in this protest is similar to that in J&J/BMAR. The agency here began to implement the proposed corrective action promptly, with the contracting officer proposing amendments to the solicitation within weeks after the dismissal of the protest. The agency has also continued to make incremental steps toward the implementation of corrective action, and has explained that the unusual delay in the process is attributable to the recurring significant illness of a key member of the technical team, and by the increased workload and changes in acquisition priorities caused by the current war efforts. In addition, we recognize the inherent difficulty in correcting a flawed solicitation that implements a new acquisition strategy and combines multiple requirements for the first time. In sum, we find that the agency has not unduly or unreasonably delayed implementation of the corrective action that was the basis for dismissal of AdaRose's original protest as academic. At the same time, since it has been over 12 months since we dismissed the protest, we expect that the agency will now undertake all efforts to expedite its implementation of the proposed corrective action.

The request is dismissed in part and denied in part.

Gary L. Kepplinger
General Counsel