



GAO

Accountability * Integrity * Reliability

United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: KENROB & Associates, Inc.--Costs

File: B-291573.7

Date: April 25, 2003

Charles Bagley, IV, Esq., Bagley & Rhody, and James McAleese, Esq., McAleese & Associates, for the protester.

Raymond M. Saunders, Esq., Department of the Army, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation of reimbursement of protest costs is denied where agency's decision to take corrective action was not in response to clearly meritorious arguments raised by the protester.

DECISION

KENROB & Associates, Inc. requests that we recommend that it be reimbursed the costs of filing and pursuing its protest challenging the Missile Defense Agency's (MDA) issuance of a task order for automated information support services to Zen Technology Inc. under Zen's Federal Supply Schedule (FSS) contract. The order was issued pursuant to request for quotations (RFQ) No. HQ0006-02-Q-0012.

We deny the request.

On April 12, 2002, MDA furnished the RFQ in question to 10 small business FSS contractors.¹ The solicitation contemplated the issuance of a hybrid firm, fixed-price/time-and-materials task order for a base period of 1 year and three 1-year options. The fixed-price portion of the order (for which a monthly unit price was requested) was to cover core labor services supporting MDA's information technology operations, while the time-and-materials portion (for which a price for an

¹ The agency had pre-selected the 10 contractors as those best qualified to satisfy its needs based on their responses to a "sources sought" notice posted on the FedBizOpps website.

estimated 100,000 surge hours per year was requested) was to cover surge services labor to support unusual or unplanned activities.

The RFQ notified the contractors that the agency was conducting a streamlined competitive procurement, and that award would be made on a “best value” basis. The RFQ provided for the evaluation of quotations on the basis of five factors: personnel qualifications (which was considered the most important evaluation factor), corporate experience, staffing and management approach, corporate past performance, and price (the final four factors were of equal weight). The RFQ, as amended, set the due date for receipt of quotations as May 31.

[Deleted] quotations were received on May 31. The agency postponed evaluation of the quotations pending our Office’s resolution of a protest filed by the incumbent vendor, CMS Information Services, Inc.² On August 7, we denied CMS’s protest. CMS Info. Servs., Inc., B-290541, Aug. 7, 2002, 2002 CPD ¶ 132. On August 9, the agency contacted the vendors who had submitted quotations and requested that they either confirm or revise/update their quotations by August 22.

Upon receipt of the updated quotations, the agency commenced its evaluation. On October 8, the contracting officer determined that Zen’s quotation represented the best value to the government, and on or about October 9, the agency issued an order to Zen and notified the other vendors of Zen’s selection.

On October 17, KENROB filed a protest with our Office objecting to issuance of the order to Zen. On November 15, 3 days prior to the due date for submission of an agency report responding to the protest, the agency notified our Office that it would be taking corrective action. Specifically, the agency advised us that it intended to reevaluate the quotations that it had received and reconsider its best-value determination, and that in the event a quotation other than Zen’s was determined to represent the best value to the government, it would terminate Zen’s task order and issue a new task order to the vendor whose quotation represented the best value. Upon receipt of the agency’s letter, we dismissed KENROB’s protest as academic.

By letter dated December 20, MDA notified the vendors that it had completed its reevaluation and had determined that Zen was “still the awardee.” Agency Report, Tab D-16. By letter of the same date, the agency furnished each vendor with a “feedback briefing,”³ which summarized the weaknesses in, and explained the basis

² CMS complained that the RFQ improperly required vendors to self-certify as small businesses as of the date of quotation submission.

³ The agency explained in the letters that since the procurement had been conducted under Federal Acquisition Regulation Part 8, formal debriefings were not required, but that it had decided to furnish each vendor with a “feedback briefing.”

for the agency's determination that Zen's quotation represented a better value than, the particular vendor's quotation.⁴

On December 24, KENROB filed a second protest with our Office, complaining that Zen lacked the ability to acquire the staffing resources required for performance; that Zen did not have relevant corporate experience or past performance; that Zen's pricing did not offer the best value to the agency because KENROB's FSS contract offered similar services at lower unit prices; that Zen had furnished services to the MDA while the agency was performing its reevaluation; and that the agency's feedback briefing was "inaccurate in its statements as well as its analysis," and did not justify the award to Zen.

The agency addressed both KENROB's protest and a related protest filed by another unsuccessful vendor, Systems Engineering and Security, Inc. (SESI), in a consolidated report. The report showed that [deleted], and that the evaluators viewed the following aspects of KENROB's response [deleted]:

- [Deleted]

Concurrence Briefing for MDA/RM, Dec. 16, 2002.

⁴ The agency also informed each vendor of its technical ranking and of Zen's price.

The record included the following pricing analysis:

OFFEROR	TOTAL \$	TOTAL HRS. (Core+Surge)	Cost/Hour	% Diff. \$	% Diff. Hrs.
Zen	Labor [deleted] ODCs ⁵ [deleted] Surge [deleted] Total [deleted]	[deleted]	[deleted]		
[deleted]	Labor [deleted] ODCs [deleted] Surge [deleted] Total [deleted]	[deleted]	[deleted]	[deleted]	[deleted]
[deleted]	Labor [deleted] ODCs [deleted] Surge [deleted] Total [deleted]	[deleted]	[deleted]	[deleted]	[deleted]
[deleted]	Labor [deleted] ODCs [deleted] Surge [deleted] Total [deleted]	[deleted]	[deleted]	[deleted]	[deleted]
[deleted]	Labor [deleted] ODCs [deleted] Surge [deleted] Total [deleted]	[deleted]	[deleted]	[deleted]	[deleted]

Id.

The record also included a memorandum from the contracting officer explaining the basis for his source selection decision as follows:

[Deleted] Consequently, when considering the rate per hour (for the core hours plus the surge hours), [deleted]. Given the level of effort nature of the contract, I gave greater weight to the [deleted] in terms of the best value. Although the [deleted], their significant [deleted] and [deleted] rendered their offer not the best value for the government.

SES offered [deleted]. . . .

⁵ The RFP provided that the contractor would be reimbursed for other direct costs (ODC) in an amount not to exceed [deleted] per year. Accordingly, in performing the price evaluation, the agency added [deleted] to each vendor's price, representing [deleted] per year for the 4-year contract period.

[Deleted]. For the purposes of best value comparison, if the offers are [deleted] the price difference is [deleted].

I determined that it is in the Government's best interest to pay the [deleted] difference for Zen Technology for the following reasons: [deleted].

Memorandum for Record, Dec. 17, 2002.

On February 3, 10 days after its receipt of the agency report, KENROB filed a supplemental protest alleging that the agency had improperly penalized KENROB for [deleted] than Zen and other vendors; that the quotations of [deleted] were materially unbalanced; that Zen and other vendors had offered [deleted] for the surge services; and that the agency had improperly compared vendors' pricing on [deleted] in determining that Zen's quotation represented the best value to the government. On February 6, KENROB, which had requested and been granted a 3-day extension for the filing of its comments on the agency report, filed its comments, which in addition to elaborating on grounds of protest already raised, raised new untimely grounds of protest.⁶

On February 21, the agency filed a supplemental report responding to KENROB's supplemental protest and a supplemental protest filed by SESI. On February 26, our

⁶ An extension of the time period for filing comments does not waive the timeliness requirements pertaining to the filing of new grounds of protest. SDS Petroleum Prods., Inc., B-280430, Sept. 1, 1998, 98-2 CPD ¶ 59 at 3-4 n.3. Accordingly, the arguments raised for the first time by KENROB in its February 6 comments were untimely because they were not raised within 10 days of KENROB's receipt of the agency report, which put KENROB on notice of these arguments. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2003). Specifically, the following arguments were untimely: the agency improperly applied an undisclosed standard in evaluating vendors' proposed [deleted]; the vendors reasonably interpreted differently the number of labor categories that they could insert on their surge pricing schedules; and Zen did not intend to perform at least half of the work under the order with its own employees and thus is not a small business eligible for award. In addition, KENROB raised arguments in its February 6 comments that were untimely because the information on which they were based was furnished to the protester in its feedback briefing of December 20. For example, KENROB's argument that the evaluators improperly considered the number of [deleted] that it offered as a [deleted] under the personnel qualifications evaluation factor and its argument that the evaluators wrongly criticized [deleted] as unclear were untimely on this basis.

Office held a conference call concerning the scope of the agency's document production.⁷

On March 4, the agency notified our Office that it would be taking corrective action with regard to the KENROB and SESI protests. Specifically, the agency stated:

- a. The Government will re-open the technical evaluation of proposals submitted in response to the aforementioned solicitation with a particular focus on the adequacy of the skill mix offered for CLINs 0001 [core labor services] and 0002 [surge labor services].
- b. As a result of the re-examination of technical proposals, the Government may seek clarifications as necessary to assure a complete and balanced evaluation.
- c. At the conclusion of the technical evaluation the Government will reassess the reasonableness of prices offered and render a revised source selection decision if appropriate.

Letter from Director, Special Programs, International, Science & Technology, Mar. 4, 2003. After permitting the parties to comment on the sufficiency of the agency's proposed corrective action, we dismissed the protests of KENROB and SESI as academic by decision dated March 19.

By letter dated March 19, KENROB requested that, pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.8(e), we recommend that MDA reimburse 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 corrective action in the face of a clearly meritorious protest, thereby

⁷ During the call, we also asked the parties to comment on an issue that had come to our attention in the course of our review of the agency record. Specifically, the RFP called for vendors to complete a surge services support schedule on which they were to insert their "on-site labor categories and rates for specialists available to respond to surge requests . . . to accomplish tasks . . . in accordance with SOO [Statement of Objectives] paragraphs 17.0-19.0." RFQ at 19. [Deleted] surge services pricing schedule, however, contained a note stating: [Deleted] [Deleted], Agency Report, Tab C-2. We asked the parties to address this [deleted] between the scope of surge services contemplated under the RFP and the surge services [deleted] offered to provide.

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. A clearly meritorious protest is one that clearly would have been successful—that is, it must involve a matter over which we have jurisdiction and be filed by an interested party in a timely manner and otherwise comply with the requirements of our Bid Protest Regulations, and the record must establish that the agency prejudicially violated a procurement statute or regulation. Georgia Power Co.; Savannah Elec. and Power Co.–Costs, B-289211.5, B-289211.6, May 2, 2002, 2002 CPD ¶ 81 at 9.

The agency maintains that none of KENROB's protest allegations are clearly meritorious and that its decision to take corrective action was not prompted by any of KENROB's arguments. As explained below, based on our review of the record, we agree with the agency that none of KENROB's allegations are clearly meritorious; accordingly, we deny KENROB's request for a recommendation that the agency reimburse its protest costs.

As an initial matter, we note that while the RFQ here contemplated the issuance of a task order against an FSS contract, it solicited vendor responses that the agency intended to use as the basis for a detailed technical evaluation and price/technical trade-off. Where an agency elects to use such an approach, which is like the competition in a negotiated procurement, we review the agency's actions to ensure that the evaluation was reasonable and consistent with the terms of the solicitation. OSI Collection Servs., Inc.; C.B. Accounts, Inc., B-286597.3 et al., June 12, 2001, 2001 CPD ¶ 103 at 4.

Only one of the allegations raised by KENROB in its protests pertained to the technical evaluation of its own quotation, i.e., ground one of its February 3 supplemental protest, in which it argued as follows:

The Government has improperly penalized KENROB because it allegedly has provided [deleted]. The number of [deleted] was a principal evaluation factor used by the Government in the evaluation of both personnel qualification and staffing & management approach. The information in the Agency Report clearly indicates that the Government equated technical capability with [deleted]. The Government's evaluation runs contrary to the stated evaluation criteria.⁸

⁸ We do not regard the protester's generalized assertion in its initial protest that the feedback briefing was inaccurate as stating a basis for protest since no specific errors in the agency's evaluation are alleged.

In our view, this paragraph arguably raises two objections to the agency's evaluation of KENROB's quotation: that the agency improperly downgraded the quotation under two different evaluation factors for the same alleged weakness (i.e., [deleted]), and that the agency considered only [deleted] in evaluating technical capability. The first of these arguments is untimely since the information providing the basis for the argument was furnished to the protester in its feedback briefing of December 20, approximately a month and a half prior to the filing of its supplemental protest. Specifically, in its feedback briefing, the agency cited the following [deleted] in KENROB's quotation under the personnel qualifications and staffing and management approach factors, respectively:

- KENROB proposed [deleted] people for this effort. [Deleted].
- Initial [deleted] proposed is [deleted] to accomplish SOO tasks.

KENROB Feedback Briefing, Dec. 20, 2002. Further, to the extent that the protester is alleging that the agency considered only [deleted] in evaluating KENROB's technical capability, the record does not support the protester's position; rather, it shows that the agency also evaluated, and found [deleted], the protester's [deleted], and that the agency evaluated, and found [deleted] in, the protester's [deleted].⁹

We also find to be without merit KENROB's argument that all vendors other than itself offered unbalanced pricing/unrealistically low prices for the surge services. In particular, the record does not support KENROB's assertion that [deleted] prices were unbalanced or that its surge services prices were unrealistically low. The record demonstrates that [deleted] surge services price in fact represented [deleted], and that the disparity between [deleted].¹⁰ Moreover, [deleted].

⁹ For example, the agency cited the following [deleted] in KENROB's staffing and management approach:

--[deleted].

--[deleted].

In addition, the evaluators cited [deleted]. Supplemental Review and Evaluation of Offers, Concurrence Briefing for MDA/RM, Dec. 16, 2002.

¹⁰ In its comments on the agency report, the protester asserts that [deleted] proposed an average hourly rate of [deleted] for the core services and an average hourly rate of [deleted] for the surge services. It is unclear how the protester derived these figures, and we believe that they are incorrect. According to our computations, [deleted] average hourly rate for the core services was [deleted] and its average hourly rate for the surge services was [deleted], while KENROB's average hourly rate for the core
(continued...)

Finally, KENROB is not an interested party to object to the evaluation of Zen's quotation or to the agency's use of vendors' average hourly labor rates in its best value determination because [deleted] were we to sustain these arguments. A protester is not an interested party where it would not be in line for contract award (or order issuance) were its protest to be sustained. Lyudmila Franke; Maria Reznikova; Alexander Reznikov, B-275164 et al., Dec. 18, 1996, 96-2 CPD ¶ 231 at 6.

In sum, because KENROB's challenges to its own evaluation and to the prices proposed by other vendors are either untimely or without merit, and, as a result, KENROB is not an interested party to challenge the evaluation of Zen, we cannot conclude that any of the protest grounds raised by KENROB are clearly meritorious.¹¹ Georgia Power Co.; Savannah Elec. and Power Co.—Costs, supra. Accordingly, we have no basis upon which to recommend that KENROB recover its protest costs.

Anthony H. Gamboa
General Counsel

(...continued)

services was [deleted] and its average hourly rate for the surge services was [deleted].

¹¹ Regarding KENROB's complaint that Zen performed as a subcontractor to the incumbent under a bridge contract for services pending resolution of the protests, the contracting officer maintains—and the protester has failed to refute—that the decision by the incumbent to subcontract to Zen was a matter arranged between the two contracting parties and not at the election or direction of the government. Moreover, as we noted in our March 19 decision dismissing KENROB and SESI's protests as academic, Zen's performance as a subcontractor under the bridge contract did not violate the automatic stay provisions of the Competition in Contracting Act (CICA), 31 U.S.C. § 3553(c) and (d) (2000), since those provisions prohibit a contracting officer from authorizing performance on a protested contract while a GAO protest is pending (absent an urgency or best interest determination), but do not prohibit a contractor (or vendor) whose performance has been suspended from performing under a separate contract or order for interim services.