Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: York Building Services, Inc.; Olympus Building Services, Inc.--Costs

File: B-282887.10; B-282887.11

Date: August 29, 2000

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Kathy B. Cowley, Esq., and John A. Thompson, Esq., Department of the Navy, for the agency.
Paula A. Williams, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

General Accounting Office (GAO) recommends that protesters be reimbursed the reasonable costs of filing and pursuing their protests challenging the Navy's evaluation and selection process where the contracting agency unduly delayed taking corrective action in response to the protests, which were clearly meritorious; Navy took corrective action only after GAO conducted "outcome prediction" alternative dispute resolution based on various improprieties readily apparent in the evaluation documents.

DECISION

York Building Services, Inc. and Olympus Building Services, Inc. request that our Office recommend that they recover the costs, including attorneys' fees, incurred in filing and pursuing a series of protests challenging the award of a contract to Federal Services, Inc. under request for proposals (RFP) No. N00600-99-R-1335, issued by the Department of the Navy, Fleet and Industrial Supply Center Norfolk, for janitorial services to be provided at the Department of Agriculture's headquarters in Washington, D.C.

We recommend that the agency reimburse York and Olympus the reasonable costs of filing and pursuing their protests.

After learning of the award to Federal Services and receiving a debriefing, York filed its initial protest on January 28, 2000. York argued that the Navy improperly

evaluated proposals; failed to follow the RFP evaluation scheme; improperly applied an unstated evaluation factor, i.e., a mandatory minimum staffing level; misled the protester during discussions, resulting in York raising its price; and made an improper best value determination that Federal Services' proposal was most advantageous to the government. On February 4, York filed its first supplemental protest alleging, among other things, that the agency's price analysis and risk assessment of its own and Federal Services' proposal were intrinsically flawed because the Navy lacked the information necessary to reasonably determine whether either offeror's proposal complied with the unannounced minimum staffing requirement.

The Navy filed a consolidated agency report in response to York's initial and first supplemental protests, which denied the protest allegations and provided evaluation documents to support its position.[1] York then filed two additional supplemental protests asserting new allegations derived from these documents. Among other things, the firm alleged that Federal Services' proposal failed to meet the RFP requirements regarding key personnel; that the Navy's acceptance of Federal Services' noncompliant proposal was improper and prejudicial to York; and, that the Navy improperly failed to apply the weighted technical evaluation scheme when it evaluated York and Federal Services' revised proposals.[2] In its April 6 agency report on these supplemental protests, the Navy defended its evaluation of both offerors' technical and price proposals.

On February 4, Olympus filed an initial protest challenging the exclusion of its proposal from the competitive range and the subsequent award to Federal Services. Among other allegations, Olympus protested the evaluation of its proposal under three of the four evaluation factors and the agency's use of an undisclosed minimum staffing requirement. On March 1, the Navy requested that we dismiss Olympus's protest; the protester responded on March 6. We declined to dismiss Olympus's protest and the agency filed its report on the scheduled due date. Following receipt of Olympus's March 18 comments on the agency report, the Navy sought permission from our Office to respond to certain issues in those comments which it

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[1] For the record, we note that the Navy's request to file a consolidated agency report responsive to York's initial and first supplemental protests was granted and the due date was changed to March 8, 2000. However, the Navy delivered the consolidated agency report to York late--and in a piecemeal fashion--with delivery of the complete report accomplished only on March 14.

[2] In order to facilitate resolution of these supplemental protests within the timeframe for a decision on the initial protest, our Office on March 28 established a schedule for the submission of a supplemental agency report, the parties' comments thereto, a pre-hearing conference, a hearing, and the submission of post-hearing comments.

characterized as new bases of protest. Our Office granted the agency's request to file a supplemental agency report; that report was filed on March 28.

Thereafter, on April 11, our Office consolidated the protests filed by York and Olympus after granting Olympus's request to participate in the hearing scheduled for April 17 on the York protests so that Olympus could present its own evidence/arguments in support of certain issues raised in both firms' protests. On April 13, our Office convened a pre-hearing telephone conference with the parties to discuss the issues to be considered at the April 17 hearing, the witnesses who would testify, and other pre-hearing matters. As part of that telephone conference, the General Accounting Office (GAO) attorney engaged in "outcome prediction" alternative dispute resolution (ADR), in which she told the parties that it was her view that the protests were likely to be sustained, and explained the basis for her view.[3]

Specifically, the GAO attorney expressed her view that the evaluation and selection decision were clearly flawed. She addressed certain issues raised by each protester to illustrate the basis for her view. For instance, she advised that the record showed that the Navy had used an undisclosed minimum staffing requirement to determine, in large part, the acceptability of proposals under the most important evaluation factor--management approach. The GAO attorney expressed her view that the contemporary evaluation documents disclosed that the agency had mechanically applied this undisclosed minimum staffing requirement to both the York and Olympus proposals without considering the offerors' particular staffing approaches. She noted that the agency's actions in this regard were particularly prejudicial to Olympus, whose proposal was rated unacceptable for failing to meet the minimum staffing requirement and was excluded from the competitive range. With regard to York, the GAO attorney pointed out that the record showed that the agency had conducted prejudicially misleading discussions concerning the firm's staffing proposal, which led York to increase its proposed staffing and its price.

The GAO attorney also advised the parties that the contemporaneous evaluation documentation did not appear adequate and what did exist appeared to support the

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[3] In outcome prediction ADR, the GAO attorney handling a protest convenes the parties, at their request or at GAO's initiative, and informs the parties what the GAO attorney believes the likely outcome will be, and the reasons for that belief. A GAO attorney will engage in this form of ADR only if she or he has a high degree of confidence regarding the outcome. Where the party predicted to lose the protest takes action obviating the need for a written decision (either through the agency taking corrective action or the protester withdrawing the protest), our Office closes the case. Although the outcome prediction reflects the view of the GAO attorney, and generally that of a supervisor as well, it is not an opinion of our Office, and it does not bind our Office, should issuance of a written decision remain appropriate.

protesters' contentions. For example, the evaluation record indicated that the agency evaluated the parties' proposals in a disparate and unequal manner since, among other things, the resumes provided by Federal Services for its proposed key personnel failed to satisfy material solicitation requirements, but this firm's proposal was not downgraded or rejected as unacceptable. Thereafter, in a telephone conference on April 18, the Navy notified our Office that it intended to take corrective action and requested until April 28 to provide the specifics of the proposed corrective action.[4] By letter dated April 27, the Navy advised that it intended to amend the solicitation, to request revised proposals, to establish a competitive range, to conduct discussions, and to request best and final offers, if necessary. On May 1, we dismissed the protests, since the Navy's planned corrective action rendered them academic.

York and Olympus filed these requests for reimbursement of their protest costs, arguing that the Navy had unduly delayed taking corrective action in response to clearly meritorious protests. The Navy opposes payment of costs because, in its view, the agency initiated prompt corrective action after the ADR/pre-hearing conference. According to the agency, "This case involved two protesters who filed multiple protests over the course of four months that raised a plethora of issues." Had the "appropriate pleading schedule" been utilized by our Office, the Navy states that it "would have had until after the prehearing conference to analyze the supplemental protests and to file its responses." Agency's Response to Protesters' Applications for Attorneys' Fees at 5.

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 causing protesters 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 protest is clearly meritorious when a reasonable agency inquiry into the protest allegations would show facts disclosing the absence of a defensible legal position. The Real Estate Ctr.--Costs, B-274081.7, Mar. 30, 1998, 98-1 CPD ¶ 105 at 3. As noted above, a GAO attorney will inform the parties through outcome prediction ADR that a protest is likely to be sustained only if she or he has a high degree of confidence regarding the outcome, so that the GAO attorney's willingness to do so is generally an indication that the protest is viewed as clearly meritorious.

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[4] On April 20, Olympus filed additional grounds of protest based on information elicited during the April 13 telephone conference. Similarly, on April 24, York filed an additional basis of protest.

As indicated by our attorney in the outcome prediction ADR session, the protests here are clearly meritorious. For example, the protesters' contention that it was improper for the agency to evaluate proposals against an undisclosed minimum staffing level is clearly meritorious. Evaluation of proposals against undisclosed evaluation criteria is clearly improper, and that indisputably happened here. See 10 U.S.C. § 2305(b)(1) (1994); Federal Acquisition Regulation § 15.305(a). Moreover, this and the other violations of procurement statute and regulation plainly prejudiced the protesters, through the concrete ways our attorney explained in the ADR session.

Regarding the other prong of our analysis, the question of the promptness of the agency's corrective action under the circumstances, we review the record to determine whether the agency took appropriate and timely steps to investigate and resolve the impropriety. Chant Eng'g Co., Inc.--Request for Costs, B-274871.2, Aug. 25, 1997, 97-2 CPD ¶ 58 at 4. We generally do not consider corrective action to be prompt where it is taken after the due date for the agency report. CDIC, Inc.--Entitlement to Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 2. While the agency asserts that it acted with due promptness, this was not the case with respect to either protester.

Contrary to the agency's position, a prompt and reasonable agency inquiry would have disclosed the absence of a defensible legal position to the firms' allegations--raised in their initial protests--that the evaluation of proposals and the selection decision were improper. Because clearly meritorious challenges to the procurement were raised by the protesters in their initial protests in late January and early February, we find irrelevant the Navy contention's that the schedule set by our Office for late March and April submissions truncated the agency's time for analyzing the supplemental protests. The agency waited until after our Office conducted the combined ADR/pre-hearing conference in April before deciding to take corrective action. This delay frustrated the intent of CICA by impeding the economic and expeditious resolution of the protests. Browning-Ferris Indus. of Hawaii, Inc.--Costs, B-278051.2, Apr. 27, 1998, 98-1 CPD ¶ 122 at 6. The Navy did not propose corrective action until April 18, well after the agency had submitted its reports and the protesters had incurred the time and expense necessary to respond to those reports, as well as to prepare for the scheduled hearing. Under these circumstances, we do not consider the corrective action to have been prompt. Tri-Ark Indus., Inc.--Declaration of Entitlement, B-274450.2, Oct. 14, 1997, 97-2 CPD ¶ 101 at 4-5.

The Navy also argues that any reimbursement of costs should be limited to those incurred prior to April 18 when the agency verbally made known its intent to take corrective action.[5] Agency's Response to Protesters' Applications for Attorneys'

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[5] In addition, the agency opines that Olympus is not entitled to its costs associated with the filing of its supplemental protest because those issues were already before GAO and are unrelated to the agency's decision to take corrective action. Agency's (continued...)

Fees at 5-6. However, the agency did not file a written notice of its proposed corrective action containing the specifics of the corrective action until April 27, 10 days after its verbal notification of corrective action, and 14 days after the protesters learned the additional grounds of protest. The agency's verbal notice did not toll our timeliness requirements, and the agency's delay in filing its written notice effectively forced the protesters, if they wished to preserve their legal rights in the event the agency decided not to take corrective action, to file timely supplemental protests while they awaited the Navy's decision concerning corrective action. See 4 C.F.R. § 21.2(a)(2). Had the agency not delayed its written notice of corrective action, neither protester would have needed to file any further submissions.

Accordingly, we recommend that York and Olympus be reimbursed the reasonable costs of filing and pursuing their protests, including those incurred here, i.e., requesting a recommendation for costs. Cf. Department of the Navy--Modification of Remedy, B-284080.3, May 24, 2000, CPD ¶ __, at 4. York and Olympus should submit their claims for costs, detailing and certifying the time expended and costs incurred, directly to the Navy within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

Robert P. Murphy
General Counsel

(...continued)
Response to Protesters' Applications for Attorneys' Fees at 7. We disagree. Olympus's comments (which the agency refers to as a supplemental protest) were filed independent of York's protest (indeed, at the time, there were two separate protective orders in place). Indeed, it was the agency, not Olympus or our Office, that argued at the time that Olympus's comments raised issues not raised earlier, so that we fail to understand the basis for the agency's current contention that the comments merely restated issues already raised. Moreover, the agency has not explained the basis for its claim that the issues raised in Olympus's comments were unrelated to the corrective action decision.