

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: A1 Procurement JVD--Costs

File: B-404800.2; B-404800.3

Date: August 24, 2011

Derrick Storms, Esq., Storms and Associates, PA, for the protester.
Maj. Christine C. Fontenelle, Department of the Army, for the agency.
Katherine I. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Reimbursement of costs of filing and pursuing protest is recommended where reasonable agency inquiry into initial protest allegations would have revealed that the protest was clearly meritorious because there were admitted inconsistencies in the agency's evaluation of the protester's past performance and the agency did not take corrective action until after the protester filed comments on the agency report.
2. Request for reimbursement of costs for filing and pursuing a protest asserting that the agency unduly delayed implementation of promised corrective action is denied, where the agency took reasonably prompt steps to implement its promised corrective action.

DECISION

A1 Procurement JVD (A1), a joint venture of A1 Procurement LLC and Satellite Janitorial Company, Inc., of Miami, Florida, requests that our Office recommend the reimbursement of A1's costs of filing and pursuing a protest challenging the award of a contract to HamHed LLC, of New Albany, Indiana, by the Department of the Army under request for quotations (RFQ) No. W911SA-11-T-0059. A1 also requests that we recommend the reimbursement of its costs of filing and pursuing a subsequent protest, in which it argued that the Department of the Army did not timely implement its proposed corrective action.

We recommend that the agency reimburse A1's costs of filing and pursuing its protest challenging the evaluation of its proposal. We deny the protester's request that we recommend reimbursement of the costs of A1's protest that the agency unduly delayed implementing its promised corrective action.

BACKGROUND

The agency issued the RFQ on December 23, 2010, for the acquisition of custodial services. The two evaluation factors listed in the RFQ were price and past performance, with past performance being more important than price. Thirteen quotations were received by the closing date.

A1 submitted the lowest-priced quotation. The quotation included past performance documentation for Satellite whose past performance was rated exceptional. No past performance documentation was submitted for A1 Procurement LLC, whose past performance therefore received a neutral rating. The contracting officer reviewed A1's joint venture agreement, which stated that A1 Procurement LLC would receive 51 percent of the net profit and that Satellite would receive 49 percent, and determined that Satellite was the "minor partner" in the joint venture and that on balance A1's past performance rating was satisfactory. The agency made award to HamHed LLC, which submitted a higher price and received an exceptional past performance rating.

A1 protested that the agency improperly evaluated its past performance by failing to properly consider Satellite's past performance. In its report responding to the protest, the agency stated that its review of A1's Joint Venture Agreement indicated that A1 Procurement LLC would perform 51 percent of the work and that Satellite would perform 49 percent. In the report, the contracting officer stated that A1 received an overall satisfactory rating for past performance due to the "division of the joint venture." Contracting Officer's Statement at 2.

A1's comments on the agency report argued that the agency failed to reasonably consider Satellite's exceptional past performance. In this regard, the protester noted that A1's Joint Venture Agreement, on which the agency relied in the past performance evaluation, clearly stated that while A1 Procurement LLC would receive 51 percent of the net profits from the contract, A1 Procurement LLC would only perform managerial services under the contract and that Satellite would perform all of the contract requirements. A1 therefore argued that its past performance rating was based upon the agency's misunderstanding of its Joint Venture Agreement.

Our Office requested that the agency respond to the protester's comments in a supplemental filing. Instead of filing a supplemental report, the agency stated that it would take the corrective action of reevaluating the offerors' past performance information, which would "include a closer examination of the past performance information supplied in consideration of the A1 Procurement JVD partnering agreement." Agency Corrective Action Letter (Mar. 28, 2011). On March 30, we dismissed A1's protest as academic based on the agency's promised corrective action. A1 then filed a request that its protest costs be reimbursed.

AGENCY FAILURE TO TAKE PROMPT CORRECTIVE ACTION

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs, including reasonable attorneys' fees, if, 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 the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Bid Protest Regulation, 4 C.F.R. § 21.8(e) (2011); AAR Aircraft Servs.-Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. A protest is clearly meritorious where a reasonable agency inquiry into the protest allegations would have shown facts disclosing the absence of a defensible legal position. AVIATE L.L.C., B-275058.6, B-275058.7, Apr. 14, 1997, 97-1 CPD ¶ 162 at 16. With respect to 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. See Chant Eng'g Co., Inc.-Costs, B-274871.2, Aug. 25, 1997, 97-2 CPD ¶ 58 at 4; Carl Zeiss, Inc.-Costs, B-247207.2, Oct. 23, 1992, 92-2 CPD ¶ 274 at 4. While we consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest, we generally do not consider it to be prompt where it is taken after that date. Basic Commerce and Indus., Inc.-Costs, B-401702.3, Feb. 22, 2010, 2010 CPD ¶ 258 at 4.

A1 asserts that reimbursement of its protest costs is warranted here because the issue raised in its protest concerning the evaluation of its past performance was clearly meritorious, but the agency failed to take corrective action until after the protester had responded to the agency report. The protester asserts that a reasonable investigation by the Army of its evaluation of A1's past performance, when the initial protest was filed, would have led it to conclude that the agency had improperly evaluated A1's past performance.

The Army denies that it unduly delayed taking corrective action in the face of clearly meritorious protest grounds. The agency states that it took corrective action "[b]ased on A1's comments" in order to "address the issues raised regarding the evaluation of past performance." Agency Report on Request at 2. The agency claims that A1's initial protest ground--that the agency failed to consider the past performance of A1's joint venture partner's past performance--was different from the arguments that A1 raised in its comments--that the contracting officer unreasonably concluded that A1 Procurement LLC would perform 51 percent of the work and that Satellite would perform 49 percent of the work. Id. at 4.

We agree with A1 that its initial challenge to the evaluation, including the claim that Satellite's past performance was not reasonably considered, was both clearly raised and clearly meritorious. As indicated above, the record showed that the agency's past performance evaluation was unreasonable because it was based upon a misreading of the joint venture agreement, which stated that Satellite would be actually performing the contract work. Therefore, we agree with A1's contention

that a reasonable investigation by the Army of its evaluation of A1's past performance, when the initial protest was filed, would have led it to conclude that the agency had improperly evaluated A1's past performance and that it was a clearly meritorious protest. See Sysorex Fed., Inc.--Costs, B-310273.2, Mar. 27, 2008, 2008 CPD ¶ 104 at 5. Thus, by failing to take corrective action before submitting an agency report to rebut the initial protest, the Army unduly delayed corrective action in the face of a clearly meritorious protest. Accordingly, we recommend that the Army reimburse A1 for the reasonable costs of filing and pursuing its protest.

AGENCY FAILURE TO PROMPTLY IMPLEMENT CORRECTIVE ACTION

As indicated, on March 30, we dismissed A1's protest as academic based on the agency's promised corrective action. On June 13, A1 protested that the Army had not timely implemented its proposed corrective action. On or about June 20, the agency completed the corrective action, but A1 was not selected for award.¹ A1 now requests that it be reimbursed the costs of filing and pursuing this second protest.

We have recognized that the reimbursement of protest costs may be appropriate where an agency does not timely implement the promised corrective action that led to the dismissal of an earlier protest. See AdaRose Inc.--Protest and Costs, B-299091.2, Jan. 14, 2008, 2008 CPD ¶ 18 at 4; Louisiana Clearwater, Inc.--Recon. And Costs, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209 at 6; Commercial Energies, Inc.--Recon. And Declaration of Entitlement to Costs, B-243718.2, Dec. 3, 1991, 91-2 CPD ¶ 499 at 6. Our Office has also found that delays of many months do not by themselves constitute an undue delay where an agency reasonably justifies or explains those delays. See, e.g., J&J/BMAR Joint Venture, LLP--Costs, B-290316.7, July 22, 2003, 2003 CPD ¶ 129 at 3 (9-month delay in the implementation of corrective action was not an undue delay under the circumstances).

The agency states that following the dismissal of A1's protest on March 30, the agency gathered all of the necessary past performance documentation. According to the agency, the past performance evaluation of all 13 proposals was completed by April 22, and forwarded to the contracting officer's legal adviser for review. Several revisions were made to the source selection documentation by June 13. On that same date, A1 filed this protest concerning the corrective action. On June 17, the contracting officer determined that the results of the reevaluation of proposals would be released on or about June 20.

The agency's actions do not constitute undue delay in implementing its promised corrective action. It is clear from the record that following dismissal of A1's protest the agency immediately took steps to implement its promised corrective action, and

¹ A1 has protested the results of this corrective action. This protest will be the subject of a future decision of our Office.

that it made reasonable progress towards that goal “considering that the Agency had to reevaluate thirteen proposals.” Agency Report at 4. Accordingly, we deny A1’s request for its costs for filing and pursuing its protest concerning the agency’s delay in taking corrective action.

RECOMMENDATION

We recommend that the Army reimburse A1 for the reasonable costs of filing and pursuing its protest of the evaluation of its proposal. A1 should submit its claim for costs, detailing and certifying the time expended and costs incurred, directly to the Army within 60 days of receipt of this decision.

Lynn H. Gibson
General Counsel