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**Comptroller General
of the United States**

**United States Government Accountability Office
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Decision

Matter of: A-P-T Research, Inc.—Costs

File: B-298352.3

Date: September 28, 2006

Stephen H. Hall, Esq., and Angela Holt, Esq., Lanier Ford Shaver & Payne P.C., for the protester.

Steven W. Feldman, Esq., Department of the Army, for the agency.

John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision

DIGEST

Reimbursement of the costs of filing and pursuing a protest is not recommended where the agency took corrective action but had reasons unrelated to the protest for taking the corrective action as well as a defensible legal position based upon its argument that the protester was not prejudiced by any errors the agency may have made in its evaluation of the protester's proposal, and the protest was thus not clearly meritorious.

DECISION

A-P-T Research, Inc. (APT) requests that we recommend that it be reimbursed the costs of filing and pursuing its protest of the award of a contract to Integrated Systems Analysts, Inc. (ISA), under request for proposals (RFP) No. W912DY-06-R-0003, issued by the U.S. Army Corps of Engineers, for explosives systems safety engineering and analysis support.

We deny the request.

The RFP provided for the award of one or more indefinite-delivery, indefinite-quantity contracts for a base period of 1 year with four 1-year options. Offerors were informed that award would be made on a best-value basis, considering the following evaluation factors: corporate experience, scenario responses, key personnel, past performance, small business subcontracting plan, and cost/price. The solicitation advised offerors that the corporate experience, scenario responses, and key personnel factors were equal in importance, with the past performance factor being slightly less important, and the small business subcontracting plan factor being "less important than the other factors." The solicitation further provided that in

determining which proposal or proposals represented the best value, the non-cost/price factors would be considered significantly more important than cost/price. RFP at 60-61.

The agency received three proposals by the due date, with APT submitting two proposals and ISA the other proposal. The proposals were evaluated, and the agency awarded a contract to ISA.

APT protested the award to our Office on May 24, 2006, arguing that the agency's evaluation of its proposal was unreasonable. The protester argued that the agency's evaluation of its proposal as "unsatisfactory" under the small business subcontracting plan factor on the basis that APT had not submitted a subcontracting plan was improper because as a small business APT was not required to submit such a plan. Protest at 10-16; see Federal Acquisition Regulation (FAR) § 52.219-9. The protester explained that contrary to the agency's view, APT did in fact qualify as a small business for this procurement under the North American Industrial Classification System (NAICS) code assigned to this acquisition because the services to be provided were related to military and aerospace equipment and military weapons.¹ The protester also argued that the agency's evaluation of proposals evidenced bias as the result of the involvement of an agency contracting officer representative--a former ISA employee--in the acquisition process. Protest at 16.

On May 30, the agency requested that our Office dismiss APT's protest with regard to the protester's contention that its proposal was improperly evaluated under the small business subcontracting plan factor. The agency, citing to our Bid Protest Regulations, argued that our Office did not have jurisdiction to consider this aspect of the protest, which the agency characterized as a "challenge to the RFP's NAICS Code designation."² Agency Request for Summary Dismissal at 4. The agency's request for summary dismissal also provided that the agency, during the conduct of the procurement, had contacted the local SBA office and requested that SBA determine "whether [APT] should be considered a large business" under the RFP's NAICS code, or whether the "size standard for engineering services on military and aerospace equipment and military weapons should apply to this acquisition, making [APT] a small business for this requirement." Id. at 3, encl. 11. The agency included

¹ NAICS code 541330, Engineering Services, assigned to the RFP "had a corresponding size standard of \$4 million, with three exceptions." One of the exceptions was for "Engineering Services for Military and Aerospace Equipment and Military Weapons," with that exception having a corresponding size standard of \$23 million. Small Business Administration (SBA) Submission, June 22, 2006, at 1.

² Specifically, our Bid Protest Regulations provide that "challenges of the selected standard industrial classification may be reviewed solely by the Small Business Administration." 4 C.F.R. § 21.5(b)(1) (2006).

here a response from the local SBA office stating that it would not render a decision as requested, but that if the facts as related by the contracting officer in the contracting officer's letter to SBA were correct, SBA "would support" the contracting officer's view that the military use exception was not applicable to the acquisition, and APT thus was not a small business for purposes of this acquisition. Id., encl. 12.

On June 5, the protester responded to the agency's request for summary dismissal, arguing that contrary to the agency's assertion, it was not challenging the NAICS code included in the RFP, but rather, whether "the contract relates to 'engineering services on military and aerospace equipment and military weapons.'" Protester's Response to Agency's Request for Summary Dismissal at 4. Our Office informed the parties that it would not summarily dismiss the protest, and that it had contacted SBA to seek that agency's views as to APT's protest regarding the NAICS code issue. Our Office also suggested that the agency's report, due to our Office on June 19, be suspended pending SBA's submission of its views on June 22. At that time, the agency informed our Office and the protester that the agency, during the conduct of the procurement, had performed an alternate evaluation and source selection, wherein it considered APT to be a small business, and that under the alternate evaluation and source selection, APT's proposal was not selected for award. The agency stated that it would argue in its report that because of this, APT was not prejudiced by any error the agency may have made regarding its determination that APT was other than a small business for the purposes of this procurement. Because of this agency representation, our Office did not suspend the agency's report.

The agency filed its report on June 19, which responded in detail to the arguments raised by APT in its protest. The report also stated, consistent with the agency's previous representation, that "before the source selection decision [the agency] prepared an alternative evaluation of APT, with the assumption that APT was a small business concern." Agency Report (AR) at 19. The agency noted here that "[c]haracterizing APT as a small business for purposes of [the small business subcontracting plan factor] does not improve APT's competitive standing with respect to ISA on the non-price factors." AR at 20. The agency added that APT's proposal was evaluated as being higher-priced than ISA's proposal, and thus concluded that ISA's higher-rated, lower-priced proposal was properly selected for award regardless of whether the agency's determination regarding APT's size status for this procurement was correct.

SBA submitted its views to our Office and the parties on June 22. SBA asserted that "SBA has conclusive authority to determine whether APT is small for purposes of [this] procurement," and that SBA "will issue a formal size determination shortly." SBA concluded by requesting that our Office "dismiss this portion of APT's protest." SBA Submission, June 22, 2006, at 4.

On July 6, our Office and the parties received a decision from SBA finding "APT small" for the purposes of this acquisition. SBA Size Determination Memorandum

No. 3-2006-67, July 3, 2006. Also on July 6, APT filed a supplemental protest with our Office, based upon documents included with the agency report, arguing, among other things, that the record evidenced unequal treatment of APT and ISA and bias with regard to the evaluation of proposals under the small business subcontracting plan factor, and that the agency's evaluation of proposals under the key personnel factor was unreasonable.

On July 7, the agency informed our Office and the protester that it had "decided to take corrective action in the above protest." The agency stated here that "[t]he reasons for the corrective action are factually and legally distinct from APT's protest issues, and were not prompted by APT's filings." The agency explained that it had determined that it needed to amend the RFP and conduct discussions with APT and ISA. Given the agency's representations, and its assurances that "[t]he award to ISA [would] continue to be held in abeyance as the [agency] goes through this process of amending the RFP and conducting discussions," our Office dismissed the protest.³ See Agency Corrective Action Letter, July 7, 2006.

APT requests that we recommend that it be reimbursed the reasonable costs of filing and pursuing its protests, including reasonable attorneys' fees. APT contends that its "protest grounds were 'clearly meritorious' as evidenced by SBA's decision that it properly qualified as a small business under the solicitation at issue." APT's Request for Reimbursement at 4.

The agency responds by pointing to numerous sections and subsections of the RFP that the agency has determined require amendment, and numerous aspects of ISA's and APT's proposals that "made award on initial proposals inappropriate." Agency Response to Request for Reimbursement at 2-4. For example, in addition to areas of ISA's proposal that require attention, the agency notes that APT's proposal, among other things, "failed to comply with the Service Contract wage determinations for four labor categories," "had inconsistent sets of indirect rates," "had some unrealistically low labor rates," and applied APT's general and administrative rate "incorrectly."⁴ *Id.* at 3-4. The agency also argues that it "had a strong defense that likely could have prevailed at GAO regarding APT's protest" regarding the evaluation of its proposal under the small business subcontracting plan factor. *Id.* at 10. In this regard, the agency explains that it "had prepared a contemporaneous, alternative evaluation for APT on the ground that APT was a small business," and that "[e]ven

³ The due date for APT's comments on the agency report had been extended by our Office to July 10, and as the result of our dismissal of APT's protest, the protester did not file comments.

⁴ The protester does not substantively respond to the agency's assertions regarding the deficient aspects of APT's proposal.

under the alternative scenario, APT did not become the most advantageous proposal as compared with ISA.” Id. at 10-11.

Under the Competition in Contracting Act of 1984, our Office may recommend that protest costs be reimbursed only where we find that an agency’s action violated a procurement statute or regulation. 31 U.S.C. § 3554(c)(1) (2000). Our Bid Protest Regulations provide that where the contracting agency decides to take corrective action in response to a protest, we may recommend that the protester be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys’ fees. 4 C.F.R. § 21.8(e). This does not mean that costs should be reimbursed in every case in which an agency decides to take corrective action; rather, a protester should be reimbursed its costs where an agency unduly delayed its decision to take corrective action in the face of a clearly meritorious protest. Griner’s-A-One Pipeline Servs., Inc.–Entitlement to Costs, B-255078.3, July 22, 1994, 94-2 CPD ¶ 41 at 5. Thus, as a prerequisite to our recommending that costs be reimbursed where a protest has been settled by corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious, *i.e.*, not a close question. J.F. Taylor, Inc.–Entitlement to Costs, B-266039.3, July 5, 1996, 96-2 CPD ¶ 5 at 3; Baxter Healthcare Corp.–Entitlement to Costs, B-259811.3, Oct. 16, 1995, 95-2 CPD ¶ 174 at 4-5; GVC Cos.–Entitlement to Costs, B-254670.4, May 3, 1994, 94-1 CPD ¶ 292 at 3. A protest is “clearly meritorious” when a reasonable agency inquiry into the protester’s allegations would show facts disclosing the absence of a defensible legal position. Department of the Army–Recon., B-270860.5, July 18, 1996, 96-2 CPD ¶ 23 at 3. The mere fact that an agency decides to take corrective action does not establish that a statute or regulation clearly has been violated. Spar Applied Sys.–Declaration of Entitlement, B-276030.2, Sept. 12, 1997, 97-2 CPD ¶ 70 at 5.

Here, we find that APT’s protest was not clearly meritorious and that it would not be appropriate to recommend that APT recover its protest costs. As noted above, the agency has pointed out a variety of flaws in the solicitation and in the proposals of both APT and ISA that would not allow for award without further discussions and amending the RFP. While APT expresses skepticism regarding the legitimacy of these agency concerns, it has not shown they are invalid.

Moreover, as noted above, the agency argued that APT was not prejudiced by any error the agency made or may have made with regard to its determination that APT was not a small business for the purposes of this acquisition because it had determined that even if APT were considered a small business, the results of the alternative evaluation would not change the agency’s award decision. Although the protester contends that “the whole ‘alternative evaluation’ is a red herring,” the record evidences that the agency did in fact contemporaneously conduct an alternative evaluation and considered the results of this alternative evaluation on the source selection. Given SBA’s July 3 decision that APT should be considered a small business for the purposes of this procurement, the resolution of this protest would have required our Office to determine whether the alternative evaluation and

conclusion that it had no effect on the ultimate source selection were reasonably based. Those questions, that is, the reasonableness of the alternative evaluation and the determination that it had no effect on the ultimate source selection, remain unanswered, and as indicated by GAO during the conduct of the protest, may have required a hearing to explore. Accordingly, we cannot conclude under the circumstances here that the agency lacked a defensible legal position, such that APT's protest was clearly meritorious. Although APT may well be correct that the agency would not have taken corrective action absent the filing of APT's protest, that does not entitle APT to its costs where, as here, the protest was not clearly meritorious. New England Radiation Therapy Mgmt. Servs., Inc.-Costs, B-297397.3, Feb. 2, 2006, 2006 CPD ¶ 30 at 4.

The request for a recommendation that costs be reimbursed is denied.

Gary L. Kepplinger
General Counsel