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## Decision

**Matter of:** Office Depot, Inc.--Costs

**File:** B-408850.2

**Date:** February 25, 2014

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John G. Horan, Esq., and Luke W. Meier, Esq., McKenna Long & Aldridge LLP, for the requester.

Liana D. Henry, Esq., General Services Administration, for the agency.

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### DIGEST

Request for recommendation that agency reimburse protester for its protest costs is denied where protester's initial challenge to agency's price evaluation was not clearly meritorious, and agency took prompt corrective action in response to supplemental challenges to the price evaluation.

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### DECISION

Office Depot, Inc., of Delray Beach, Florida, requests that we recommend that the General Services Administration (GSA) reimburse its reasonable costs of filing and pursuing a protest challenging the establishment of a blanket purchase agreement (BPA) with LC Industries (LCI) of Durham, North Carolina, under request for quotations (RFQ) No. QS0A-RFQ-130001, for office products and supplies for various U.S. Marine Corps locations.

We deny the request.

The RFQ was issued on May 6, 2013 under Federal Acquisition Regulation (FAR) Subpart 8.4 to vendors holding contracts under GSA's Federal Supply Schedule (FSS) No. 75. The RFQ contemplated the establishment of a single BPA with the vendor whose quotation represented the best value to the government, considering non-price factors and price, with the former, when combined, of significantly greater importance than the latter. The non-price factors consisted of system interface capabilities (to be evaluated on a go/no go basis), and, in descending order of importance: supply chain system capability; breadth of product; past performance; corporate experience; and local and small business participation plan.

With regard to price, the RFQ instructed vendors to offer discounts from their schedule pricing, with additional tiered discounts based on cumulative sales volume.<sup>1</sup> The solicitation provided that the government would evaluate the price quotations by “calculating the proposed total unit discounted average pricing of items in a Market Basket of commonly purchased items determined to be available from all quoters, weighted by category of product offering based on estimates of projected sales volume in each category.” RFQ at 35. The RFQ further provided that in evaluating market basket pricing, the agency would use a weighted average of the discounts proposed for the three sales volume tiers, with more weight placed on the first and second tiers. Id.

Both LCI and the protester submitted quotations by the specified due date of June 12. A technical evaluation team assigned the quotations the following ratings:

FACTOR	LCI	Office Depot
System Interface Capabilities	Go	Go
Supply Chain System Capability	Outstanding	Satisfactory
Breadth of Product	Outstanding	Poor
Past Performance	Outstanding	Outstanding
Corporate Experience	Outstanding	Outstanding
Local/Small Business Participation Plan	Marginal/Satisfactory	Marginal/Satisfactory

Composite Quoters Technical Rating Report. The agency performed several market basket price analyses, which, as discussed in greater detail below, resulted in varying findings as to the percentage difference between the two vendors’ prices. The contracting officer concluded that LCI’s quotation represented the best value to the government, finding that LCI’s superiority under the non-price factors outweighed Office Depot’s price advantage. Best Value Determination, Aug. 28, 2013, at 15.

By letter of August 28, the contracting officer notified the protester that the agency had established a BPA with LCI. On August 30, in response to the protester’s request, GSA provided Office Depot with detailed feedback regarding the evaluation of its quotation and the basis for the agency’s source selection decision. Office Depot protested to our Office on September 6.

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<sup>1</sup> The volume tiers were sales of <\$10M, sales of \$10M-\$50M, and sales of >\$50M.

In its initial protest, Office Depot argued that the agency's evaluation of its quotation under the supply chain system capability, breadth of product line, and local/small business participation plan factors was unreasonable. The protester also argued that the agency had failed to accurately gauge the difference in price between the two proposals. In this connection, the protester pointed out that the feedback provided by the agency included a market basket analysis, which showed Office Depot's price advantage to be [deleted]% for sales under \$10M, [deleted]% for sales between \$10M and \$50M, and [deleted]% for a sales volume of over \$50M, yet in explaining the basis for the contracting officer's best value decision, the agency indicated that the protester's price advantage was [deleted]% for sales under \$10M, [deleted]% for sales between \$10M and \$50M, and [deleted]% for a sales volume of over \$50M.

In its October 25 report, the agency defended its technical evaluation and argued that while the contracting officer had misstated the price differential between the two proposals in her best value decision, the error had not prejudiced the protester. The agency explained in the foregoing connection that it had performed multiple market basket analyses, and that they had yielded differing results. An initial analysis based on a comparison of prices for 51 items offered by both vendors resulted in the first set of numbers cited by the protester above. A second analysis, which was based on a comparison of the vendors' prices for 179 items, showed a price differential of [deleted]%. A third analysis, involving a comparison of prices on 128 items, found that for the first volume tier (sales under \$10M), LCI's pricing was [deleted]% higher than Office Depot's; for the second volume tier (sales of \$10M-\$50M), LCI's pricing was [deleted]% higher; and for the third volume tier (sales over \$50M), LCI's prices were [deleted]% higher. The agency maintained that the contracting officer should have relied on the results of the second analysis, rather than the third, in her tradeoff decision, but argued that the decision was nonetheless valid given that the percentage difference in prices was lower in the second analysis than in the third.

On November 4, the protester filed its comments on the agency report. Among other things, Office Depot argued that the agency had understated the price differential between its proposal and LCI's as a result of the following errors:

- The RFQ provided for only commonly purchased items to be included in the market basket used for the price analysis, yet the agency included a number of rarely ordered items in the market basket.
- The RFQ provided that in evaluating market basket pricing, the agency would use a weighted average of the discounts proposed for the three sales volume tiers, with more weight placed on the first and second tiers, yet the agency's price evaluation documentation revealed that the agency had assigned 70% of the weight to the third tier.
- GSA's tier 1 price assessment erroneously compared LCI's BPA prices with Office Depot's GSA Schedule prices (which were higher than its BPA prices).

- In calculating LCI's pricing for tiers 2 and 3, the agency inadvertently omitted 17 items, and, as a result, compared Office Depot's total price for 179 items to LCI's total price for 162 items, thereby significantly understating Office Depot's price advantage.

Protester's Comments, Nov. 4, 2013, at 2.

Four days later, GSA notified our Office that it would be taking corrective action in response to the protest. Specifically, the agency advised us that it would terminate the existing BPA with LCI and reassess the documents in the agency record, after which it might take any of several steps, including amending the RFQ, requesting revised quotations, performing a new evaluation, and conducting a new best value analysis. According to the agency, its decision to take corrective action was driven by new allegations raised in the protester's comments, including Office Depot's assertions that GSA had strayed from the RFQ's stated methodology for weighting the tiered discounts by placing the greatest weight on tier 3 sales; GSA had made data entry errors in calculating vendor prices for the expanded market basket; and GSA had mistakenly compared LCI's BPA prices with Office Depot's GSA Schedule prices. After receiving notice that the agency would be terminating LCI's BPA, our Office dismissed Office Depot's protest as academic. Office Depot, Inc., B-408850, Nov. 12, 2013.

By letter of November 15, Office Depot asked our Office to recommend that GSA pay it the reasonable costs of filing and pursuing its protest. Office Depot argued that during the agency's investigation of its initial price evaluation challenge, GSA should have discovered the errors that ultimately led it to take corrective action. The protester maintained that these errors were "squarely within [its] original protest allegation that GSA had conducted an irrational price evaluation that understated Office Depot's true price advantage." Protester's Request for GAO Recommendation, Nov. 25, 2013, at 4.

GSA argued in response that the price evaluation challenge raised by Office Depot in its initial protest was distinct from the supplemental price evaluation challenges that led the agency to take corrective action, and that the originally raised issue was not clearly meritorious. The agency argued that it took prompt corrective action in response to the supplemental issues, and that, as a result, Office Depot should not be entitled to recover its costs.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of 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 the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2013); 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 protester’s allegations would reveal facts showing the absence of a defensible legal position. First Fed. Corp.--Costs, B-293373.2, Apr. 21, 2004, 2004 CPD ¶ 94 at 2. Where the clearly meritorious issues in response to which corrective action is taken are different from the issues initially raised, the promptness of the agency’s corrective action is measured from the date that the issues were first raised. Innovative Logistics Techniques, Inc.--Costs, B-289031.3, Feb. 4, 2002, 2002 CPD ¶ 34 at 4. Where, however, reasonable investigation of the protester’s initial claims should have led the agency to examine the clearly meritorious issues that ultimately result in the corrective action, the promptness of the agency’s corrective action is measured from the date of the initial protest, and, as a consequence, we will find corrective action to be unduly delayed where not taken by the due date for the initial agency report. Sysorex Fed., Inc.--Costs, B-310273.2, Mar. 27, 2008, 2008 CPD ¶ 104 at 5.

The agency does not dispute that the protester’s November 4 challenges to its price evaluation are clearly meritorious. The only issue in dispute is whether the protester’s November 4 objections to the price evaluation are different from, or encompassed within, its initial price evaluation challenge. In our view, the supplemental objections are different from the initial complaint. While the protester contends that it initially alleged that the price evaluation was irrational, and that its subsequent arguments are encompassed within that argument, the initial allegation was narrower--that is, the protester alleged that the agency had inaccurately identified the price differential between the two proposals as in the [deleted]% range, when documentation elsewhere in the record showed it to be in the range of [deleted]%. The agency provided a reasonable response to this argument, and thus we are not persuaded that the initial challenge was clearly meritorious. Moreover, we see no reason that the initial protest allegations should have led the agency to examine the supplemental issues that ultimately caused GSA to take corrective action. For that reason, the promptness of the agency’s corrective action is properly measured from the date that the protester filed its comments on the agency report, as opposed to the date on which it filed its initial protest.

The request for a recommendation that GSA reimburse Office Depot its protest costs is denied.

Susan A. Poling  
General Counsel