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**Comptroller General
of the United States**

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

Decision

Matter of: JRS Staffing Services--Costs

File: B-410708.3

Date: November 9, 2015

Jacqueline R. Sims, for the protester.
Pawandeep K. Chatha, Esq., and William D. Robinson, Esq., Department of Justice, Bureau of Prisons, for the agency.
Young S. Lee, Esq., and Nora K. Adkins, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request that our Office recommend reimbursement of the reasonable costs of filing and pursuing a protest challenging the terms of a solicitation is denied where protest was not clearly meritorious.

DECISION

JRS Staffing Services, a small business, of Lawrenceville, Georgia, requests that our Office recommend that it be reimbursed the reasonable costs of filing and pursuing its protest challenging the terms of request for quotations (RFQ) No. RFQP01011400015, issued by the Department of Justice, Bureau of Prisons (BOP), for horticultural program instruction services at a Federal Prison Camp (FPC) located in Alderson, West Virginia.

We deny the request.

BACKGROUND

The solicitation was issued as a small business set-aside on September 19, 2014, under Federal Acquisition Regulation (FAR) part 12, Acquisition of Commercial Items, and part 13, Simplified Acquisition Procedures. The RFQ anticipated the award of an indefinite-delivery, fixed-price, requirements contract for a 1-year base period and four 1-year options to the vendor whose quotation offered the best value to the government based upon the evaluation of three factors: technical capability, past performance, and price. RFQ at 1-2, 5-6, 18.

JRS filed its protest with our Office on October 17, challenging various aspects of the solicitation. On November 13, the BOP took corrective action and amended the RFQ to address three of the issues raised by JRS in its protest (an alleged ambiguity related to treating vendors' responses as quotations or proposals; an alleged ambiguity relating to the evaluation of options; and the omission of a FAR clause relating to the non-displacement of qualified workers). Corrective Action Notice (Nov. 13, 2014) at 1-2. We dismissed these aspects of JRS's protest as academic.¹

Two protest issues remained after the agency's corrective action: (1) JRS's allegation of a solicitation ambiguity with regard to FAR clause 52.217-8, relating to the option to extend services,² and (2) JRS's allegation that the agency improperly incorporated three FAR clauses into the RFQ that were inconsistent with commercial practices, and that were included without conducting market research, as required by FAR §§ 12.301 and 12.302. The three FAR clauses were: 52.203-3, Gratuities; 52.228-5, Insurance-Work on a Government Installation; and 52.242-13, Bankruptcy.

In the agency report responding to the protest, the BOP argued that the contested clauses were properly included because the FAR requires the inclusion of these clauses for all acquisitions exceeding the simplified acquisition threshold (SAT), and provides no exception for commercial items.³ Agency Report (AR) (B-410708) at 4. Thus, the agency argued that it was not required to conduct market research (or obtain a waiver). Id. The agency also asserted that JRS had not provided specific evidence regarding how the clauses were inconsistent with commercial practices.⁴ Id. at 5.

¹ JRS is not requesting reimbursement of costs related to the three issues that were rendered academic by the agency's corrective action, which was taken less than 30 days after the protest was filed. JRS Request for Costs at 3.

² As explained below, JRS withdrew this issue after our Office conducted an alternative dispute resolution conference. JRS is not requesting reimbursement of costs related to this issue. JRS Request for Costs at 3.

³ The FAR provisions the agency contends require these clauses are: FAR § 3.202 (Gratuities), § 28.310 (Insurance--Work on a Government Installation), and § 42.903 (Bankruptcy). The agency represented that the RFQ being protested was valued above the SAT; JRS did not challenge the agency's representation.

⁴ In support of its arguments, the agency cited an earlier decision by our Office, in which we denied JRS's protest challenging inclusion of certain FAR clauses in a commercial item solicitation where the protester incorrectly assumed that the procurement would not exceed the SAT, and the protester did not establish that the clauses were inconsistent with commercial practices. Jacqueline R. Sims, dba JRS Staffing Servs., B-409613, B-409613.2, June 16, 2014, 2014 CPD ¶ 181 at 4.

On January 22, 2015, our Office conducted a litigation risk assessment alternative dispute resolution (ADR) conference call with the parties.⁵ In this regard, the GAO attorney advised the agency that its position contained significant risk. The GAO attorney explained that based on his reading of the FAR there was an exception to the requirement to provide the contested clauses in all procurements over the SAT if the procurement was for a commercial item. Specifically, the GAO attorney directed the parties to the language of FAR § 12.301(d) which states:

Notwithstanding prescriptions contained elsewhere in the FAR, when acquiring commercial items, contracting officers shall be required to use only those provisions and clauses prescribed in this part. The provisions and clauses prescribed in this part shall be revised, as necessary, to reflect the applicability of statutes and executive orders to the acquisition of commercial items.

The GAO attorney noted that, in his view, the language of FAR § 12.301 limits the application of the FAR's requirements for the incorporation of clauses in solicitations exceeding the SAT when conducting commercial item procurements. That is, prior to incorporating such clauses in commercial item procurements, an agency must first conduct market research in accordance with FAR § 12.302. Thus, in light of the protester's allegation that the inclusion of these three clauses was inconsistent with commercial practices, inconsistent with the requirements of FAR part 12, and not supported by agency market research, the GAO attorney advised that, in his view, the BOP was at risk of losing the protest if the matter went to a decision on the record.

The next day, on January 23, the BOP took corrective action with regard to the three contested clauses challenged as inconsistent with commercial practices. That same day, JRS withdrew its allegation with regard to the option to extend services clause (FAR clause 52.217-8). As a result, our Office dismissed JRS's challenge to the incorporation of the three FAR clauses.

⁵ Litigation risk ADR may be appropriate in situations where the record has been sufficiently developed to allow the GAO attorney to assess the validity of each side's arguments and provide feedback. While an assessment of litigation risk does not involve a prediction of the overall outcome, the GAO attorney will discuss the likely analysis of the case and will provide his or her assessment of the strengths and weaknesses of each side's position. With a better understanding of the GAO attorney's views of each side's arguments, the parties may be in a better position to reach a negotiated settlement, or to take other action (withdrawal of the protest or corrective action) that will resolve the protest without continuing to a final decision.

DISCUSSION

JRS argues that it should be reimbursed its reasonable costs of pursuing its protest because it raised a clearly meritorious issue on which the agency unduly delayed in taking corrective action.⁶ JRS contends that this issue was clearly meritorious because it was the subject of ADR; the protester contends that our Office frequently awards protest costs in such circumstances. Additionally, the protester alleges that the agency's corrective action with regard to this issue was unduly delayed because it took place after the submission of the agency report.

Under the Competition in Contracting Act of 1984 (CICA) our Office is authorized to recommend reimbursement of protest costs only where we find that an agency's actions violated a procurement statute or regulation. 31 U.S.C. § 3554(c)(1). Our Bid Protest Regulations further provide that where the contracting agency decides to take corrective action in response to a protest, we may recommend reimbursement of protest costs, including reasonable attorneys' fees. 4 C.F.R. § 21.8(e). Our Regulations do not contemplate a recommendation for reimbursement of protest costs in every case in which an agency takes corrective action; rather only where an agency unduly delays taking corrective action in the face of a clearly meritorious protest. Information Ventures, Inc.--Costs, B-294580.2 et al., Dec. 6, 2004, 2004 CPD ¶ 244 at 2. Thus, as a prerequisite to our recommending the reimbursement of costs 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, that is, not a close question. PADCO, Inc.--Costs, B-289096.3, May 3, 2002, 2002 CPD ¶ 135 at 3. 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. Yardney Technical Prods., Inc., B-297648.3, Mar. 28, 2006, 2006 CPD ¶ 65 at 4.

Here, based on the record presented, we cannot conclude that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. In response to the protester's request for costs, the agency explains that it did not take corrective action prior to submitting its agency report, because our Office in a prior decision, Jacqueline R. Sims, dba JRS Staffing Servs., supra, denied JRS's protest challenging similar issues. It also correctly points out that it immediately took corrective action the day after it was advised by the GAO attorney of its litigation

⁶ As mentioned above, JRS seeks reimbursement of costs only for its challenge to the agency's incorporation of the three clauses it alleged were inconsistent with commercial practices.

risk. We agree with the agency that its reading of our prior decision was not unreasonable, and therefore, provided the BOP with a defensible legal position.⁷

While the protester asserts that our Office frequently awards protest costs after conducting ADR with the parties to a protest, JRS also acknowledges that litigation risk assessment ADR is different from outcome prediction ADR. JRS Request for Costs at 5. Furthermore, our Regulations provide for the reimbursement of protest costs only where an agency unduly delays taking corrective action in the face of a clearly meritorious protest. Information Ventures, Inc.--Costs, supra. While there may be instances where our Office offers ADR to the parties after identifying a clearly meritorious protest issue, it does not follow that ADR is only offered when a protest is clearly meritorious. In this regard, the offer of ADR--especially ADR that is limited to an assessment of litigation risk, or negotiation assistance--does not automatically translate to the conclusion that the protester should be awarded costs. Instead the determination of whether to recommend the reimbursement of costs rests on the factual and legal posture of each individual protest, which must be analyzed on a case-by-case basis.

On this record and based on the facts presented here, we cannot conclude that the agency unduly delayed in taking corrective action, or that JRS's protest on this issue was clearly meritorious. Yardney Technical Prods., Inc., supra at 4 (the mere fact that an agency decides to take corrective action does not necessarily establish

⁷ JRS's primary assertion in the earlier case was that non-commercial clauses are only permitted in a FAR Part 12 procurement when the procurement is valued above the SAT; JRS argued that since its quotation would not exceed that threshold the clauses should be deleted. Jacqueline R. Sims, dba JRS Staffing Servs., supra, at 6. The agency disagreed, and argued that the procurement was valued above the SAT. Neither JRS, nor the agency, probed the flawed assumption in the argument-- i.e., that the clauses would ever be appropriate in a Part 12 procurement, regardless of its value. In answering the dispute, our Office found that the agency reasonably concluded that the procurement would be valued above the SAT. Our Office did not address--but nonetheless incorporated into its answer--the flawed assumption. Our earlier decision should not be read to stand for the proposition that the SAT is determinative of whether a clause should, or should not, be included in a Part 12 procurement. Instead, the threshold question for determining whether to include in a commercial item procurement clauses required elsewhere in the FAR is whether they are consistent with customary commercial practice. FAR 12.301. When the clauses are not consistent with customary commercial practice, they should not be included unless a waiver is approved in accordance with agency procedures. FAR 12.302(c).

the absence of a defensible legal position, or that a statute or regulation has clearly been violated).

The request that we recommend reimbursement of costs is denied.

Susan A. Poling
General Counsel