



Decision

Matter of: Walker Development & Trading Group, Inc.--Costs

File: B-414258.3

Date: June 8, 2017

Terrance Walker, Walker Development & Trading Group, Inc., for the protester.
Jennifer L. Hedge, Esq, Department of Veterans Affairs, for the agency.
Joshua R. Gillerman, Esq., and Tania Calhoun, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation that protest costs be reimbursed is denied where protest was not clearly meritorious even though agency took corrective action.

DECISION

Walker Development & Trading Group, Inc., a small business of Reno, Nevada, requests that we recommend it be reimbursed the reasonable costs of filing and pursuing its protest of the terms of request for quotations (RFQ) No. VA69D-17-Q-0262, issued by the Department of Veterans Affairs (VA) for cardiac arrhythmia monitoring services. We dismissed the protest after the agency advised our Office that it was cancelling the solicitation. Walker argues its protest was clearly meritorious and the agency unduly delayed taking corrective action.

We deny the request.

BACKGROUND

The RFQ was issued on December 30, 2016, on an unrestricted basis. RFQ at 1. It contemplated award of a fixed-price, indefinite-quantity, indefinite-delivery (IDIQ) contract for cardiac arrhythmia monitoring services for several Veterans Integrated Service Network (VISN) 12 medical facilities. RFQ at 4.

On January 2, 2017, Walker filed its initial protest arguing that the agency, pursuant to Federal Acquisition Regulation (FAR) § 19.502-2(b), should have set the requirement

aside for small business.¹ Protest at 2-3. Walker asserted that, had the agency conducted adequate market research, it would have identified at least two responsible small business concerns capable of satisfying the requirements for cardiac monitoring services. Walker identified itself, as well as two other specific small business concerns, as capable of satisfying the RFQ's requirements. Protest at 2.

The agency filed its report on January 31. The contracting officer (CO) stated that, after performing market research, she did not have a reasonable expectation that two or more capable small businesses would submit offers, and that these offers would be at a fair price. Contracting Officer's Statement (COS) for B-414258.1, at 3. The CO subsequently posted a sources sought notice and a request for information (RFI) and received four responses. Id. Only two of the firms that responded were small businesses, one of which was Walker.

The CO reviewed the capability statements of Walker and the other small firm that submitted a response. COS for B-414258.1, at 3-4. The CO noted that Walker's response failed to include any of the information required by the sources sought notice or the RFI on its ability to provide cardiac arrhythmia monitoring services. Id. In fact, Walker only provided a brochure advertising another firm's product. Id. As for the other small business, the CO noted that it had performed poorly on a previous contract, which indicated it was incapable of performing the volume of work required by the instant RFQ. Id. Accordingly, the CO concluded that she did not have a reasonable expectation of receiving responses from two or more capable small business and that an unrestricted solicitation was in the best interest of the VA. Id.

On February 10, Walker submitted its comments on the agency report. In its comments, Walker identified a third firm, in addition to the two identified in its protest, that was potentially capable of satisfying the requirements of the RFQ. Comments for B-414258.1 at 2, 7. After our review of the agency's report and the protester's comments, we asked the agency to file a supplemental report. In particular, we requested additional information on two potentially capable small businesses, the one raised by Walker in its comments and one identified by our review of the agency's market research. We also asked the Small Business Administration (SBA) to file comments on the propriety of the VA's decision to procure this requirement on an unrestricted basis. Id. The supplemental report was due on March 1.

On February 28, before filing the supplemental agency report, the VA advised our Office that it intended to take corrective action by "cancelling the solicitation, reviewing market research and re-examining the set-aside determination." Agency Notice of Corrective

¹ Under FAR § 19.502-2(b), a procurement with an anticipated dollar value of more than \$150,000 must be set aside for exclusive small business participation when there is a reasonable expectation that offers will be received from at least two responsible small business concerns, and award will be made at a fair market price. See also 13 C.F.R. § 125.2(f)(2).

Action for B-414258.1, Feb. 28, 2017, at 1. The VA further advised that following these actions, it “may determine that a different set-aside determination is warranted.” Id. Based on the notice of corrective action, we dismissed the protest as academic. This request followed.

DISCUSSION

Walker argues that its protest was clearly meritorious and the agency unduly delayed taking corrective action. Request for Costs at 2. We note at the outset that when a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs, including reasonable attorney’s 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. Competition in Contracting Act of 1984, 31 U.S.C. § 3554(c)(1)(A); Bid Protest Regulations, 4 C.F.R. § 21.8(e); East Coast Nuclear Pharmacy--Costs, B-41205.3, Aug. 31, 2016, 2016 CPD ¶ 249 at 3. As a prerequisite to our recommending the reimbursement of costs where a protest has been resolved by corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious. AGFA Healthcare Corp.--Costs, B-400733.6, April 22, 2009, 2009 CPD ¶ 90 at 2. 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. Chase Supply, Inc.--Costs, B-411849.3, May 17, 2016, 2016 CPD ¶ 134 at 5.

We find that reimbursement is not appropriate in this case since, even if we agreed with Walker that the agency’s corrective action was not prompt, the protest was not clearly meritorious. As explained above, reaching a decision on the protest required further development, which is why our Office requested supplemental information from the VA. Following this further development of the record, we would have had to conduct further analysis of the parties’ positions. Because the ultimate resolution of the protest required further development, in our view, the protest presented a close question, and therefore was not clearly meritorious. Systems Research and Applications Corp.--Costs, B-406775.3, Apr. 10, 2013, 2013 CPD ¶ 99 at 5; Yardney Technical Prods., Inc.--Costs, B-297648.3, Mar. 28, 2006, 2006 CPD ¶ 65 at 4. Accordingly, we decline to recommend reimbursement of Walker’s protest costs.

The request is denied.

Susan A. Poling
General Counsel