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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Singleton Enterprises-GMT Mechanical, Joint Venture--Costs

File: B-310454.3

Date: March 27, 2008

Arthur Wayne Singleton and Gary Michael Thompson, for the protester.
Phillipa L. Anderson, Esq., Charlma Quarles, Esq., and Tracy Downing, Esq.,
Department of Veterans Affairs, for the agency.
Paul N. Wengert, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Protester's request that the Government Accountability Office recommend reimbursement of costs is denied where the agency did not file a report in response to a protest that was clearly meritorious, but instead, 2 days after the report was due, announced its intention to take corrective action; thus the corrective action was reasonably prompt, since the protester was not required to incur the costs of beginning to draft comments in answer to an agency report.

DECISION

Singleton Enterprises-GMT Mechanical, Joint Venture, requests that our Office recommend that the Department of Veterans Affairs (VA) reimburse Singleton's costs of filing and pursuing a protest, which our Office dismissed on the basis of corrective action proposed by the VA. Even though Singleton obtained corrective action in response to the protest, the firm asserts that it should be reimbursed its protest costs because an earlier protest raising the same issue in a similar situation was resolved in Singleton's favor, and therefore, in Singleton's view, this protest should not have been necessary.

We deny the request.

On September 5, 2007, the VA opened six bids submitted in response to invitation for bids (IFB) No. VA-249-07-IB-0085, for replacement of the roof on "Building One" at the VA Medical Center in Huntington, West Virginia. The IFB had been set aside for service-disabled veteran-owned small business concerns (SDVOSBCs).

When opened, the fixed-price bids were, in ascending order of price, as follows:

AGS Group	\$905,497
KAR Contracting	\$1,185,508
Whelan Properties	\$1,356,869
Singleton Enters.-GMT Mech., joint venture	\$1,549,147
Homeland Services	\$1,658,000
Homeland Security	\$2,000,000

The VA rejected the lowest bid because of a failure to meet a bonding requirement. The circumstances of the VA's rejection of the next-lowest bid are described in our decision in KAR Contracting, LLC, B-310454, B-310537, Dec. 19, 2007, 2007 CPD ¶ 226 at 7. The record does not include information on the rejection of the bid by Whelan Properties.

The VA then proceeded to consider Singleton's eligibility for award, given its status as a joint venture. On September 26, in response to a request from the contracting officer (CO), Singleton provided the VA a copy of its joint venture agreement. On December 31, the VA informed Singleton that its bid had been rejected because the joint venture agreement showed that the firm was not eligible to compete under the SDVOSBC set-aside in the IFB.

On January 10, 2008, Singleton filed a protest with our Office, complaining that the CO's rejection of Singleton's bid as non-responsive was improper, and arguing that the issue of the firm's eligibility for a SDVOSBC set-aside should have been referred to the Small Business Administration (SBA) for its review. On that same date, our Office issued a decision involving another procurement in which Singleton's joint venture agreement had also been rejected by the VA under an SDVOSBC set-aside. In our decision sustaining that protest, we concluded that the VA had failed to comply with its statutory obligation to refer the issue of Singleton's eligibility to the SBA. Singleton Enters.-GMT Mech., A Joint Venture, B-310552, Jan. 10, 2008, 2008 CPD ¶ 16 at 4.

Singleton's January 10 protest--the instant dispute--generated a requirement for the VA to submit an agency report by February 11. See 31 U.S.C. § 3553(b)(2)(A) (2000); Bid Protest Regulations, 4 C.F.R. § 21.3(c) (2007). On that date the VA did not file its report, although it subsequently indicated that it would respond by February 13. By letter dated February 13, the VA advised our Office that the agency was taking corrective action and would refer the question of the protester's eligibility for award to the SBA.

Because the VA did not advise our Office of the agency's intent to take corrective action until 2 days after the report due date, Singleton argues that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Thus,

the protester argues that our Office should recommend that the VA reimburse Singleton's costs of filing and pursuing the protest. The VA opposed this request.¹

Our Bid Protest Regulations, 4 C.F.R. § 21.8(e), provide that where an agency takes corrective action in response to a protest, we may recommend that the agency reimburse protest costs, including attorneys' fees; however, we will make such a recommendation only where the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. CSL Birmingham Assocs.; IRS Partners-Birmingham--Entitlement to Costs, B-251931.4, B-251931.5, Aug. 29, 1994, 94-2 CPD ¶ 82 at 3. As a general rule, when an agency takes corrective action by the due date of its protest report, we regard such action as prompt, and decline a request for recommendation of reimbursement of protest costs. Alaska Structures, Inc.--Costs, B-298156.2, July 17, 2006, 2006 CPD ¶ 109 at 4.

Here, Singleton argues that the need for corrective action under this IFB should have been apparent as early as November 30, 2007, when the SBA submitted a statement supporting Singleton's earlier protest. However, our decision sustaining Singleton's earlier protest (which, as noted, raised a similar issue, but involved a different solicitation), was only issued later--on January 10, 2008. Thus, on the day this protest was filed--also on January 10--there should have been no doubt on the part of the agency that Singleton's second protest raising the same issues present in the earlier VA procurement, presented a question our Office would view as clearly meritorious.

Since we conclude the protest was clearly meritorious, the only question remaining is whether the agency's corrective action (in the face of this clearly meritorious protest) was unduly delayed. In this regard, we note that the agency did not submit a report, and 2 days after the date that report was due, advised our Office of its intent to take corrective action. Since no report was tendered, the protester was not required to expend unnecessarily the costs of preparing comments in answer to that report. Cf. Control Corp.; Control Data Sys., Inc.--Protest & Entitlement to Costs, B-251224.2 et al., May 3, 1993, 93-1 CPD ¶ 353 at 7 (where delay in corrective action required protester to expend unnecessary effort in preparing comments on agency report, recommendation of reimbursement of protest costs was appropriate). Thus Singleton was in no worse a position than it would have been if the agency had taken

¹ The VA submission highlighted the fact that, in a decision dated February 20, the SBA Director for Government Contracting issued a decision concluding that Singleton was not an eligible SDVOSBC for purposes of the other solicitation because one of the joint venture partners was not controlled by a service-connected disabled veteran, and because the joint venture exceeded the number of solicitations on which a joint venture is allowed to compete as an SDVOSBC, under 13 C.F.R. § 121.103(h). VA Costs Opposition, exh. 1, SBA Decision, at 3-4. Singleton has appealed that decision to the SBA's Office of Hearings and Appeals.

corrective action by the report due date--which, as mentioned above, is the point at which we will generally determine that an agency has not acted promptly. Accordingly, we will not conclude that the VA failed to take prompt corrective action in the face of a clearly meritorious protest.

The request for costs is denied.

Gary L. Kepplinger
General Counsel