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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: SDA Inc.--Costs

File: B-298216.2

Date: September 11, 2006

James H. Roberts, III, Esq. and Carrol H. Kinsey, Jr., Esq., Van Scoyoc Kelly PLLC, for the protester.

Marilyn M. Paik, Esq., General Services Administration, for the agency.

Paul N. Wengert, Esq., and Glenn G. Wolcott, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Reimbursement of the costs of filing and pursuing protest is not recommended where requester has not shown that agency's termination of awardee's lease constituted corrective action in response to a clearly meritorious protest.

DECISION

SDA Inc., a small business, requests that our Office recommend that the General Services Administration (GSA) pay the firm the reasonable costs of filing and pursuing its protest with respect to solicitation for offers (SFO) No. 3CA0140 for a build-to-suit 10-year lease of a federal courthouse and facilities for supporting law enforcement agencies in Bakersfield, California. We dismissed the protest as academic on May 30, 2006, on the basis of GSA's statement that it had terminated its lease with the awardee, Castle & Cooke California, Inc., and would cancel the SFO.¹

We deny the request.

SDA filed a protest with our Office in April 2006, expressly stating that its protest presented only a single issue: whether Castle & Cooke's offer should have been rejected for failing to comply with a particular SFO provision, frequently referred to in these proceedings as the "local amenities" provision. SDA Protest, Apr. 13, 2006,

¹ GSA used a bilateral no-cost termination because the lease agreement did not include a clause permitting termination for convenience of the government. GSA Response, exh. B, Supplemental Agreement Number One to Lease GS-09B-01777.

at 2-5; Decision on Agency-Level Protest, Apr. 12, 2006, at 5. Specifically, SDA's protest referred to section 1.3.B.1 of the SFO, which provided that, with respect to a site located "Outside of City Center," the proposed space "shall be located . . . 2) on an attractively-landscaped site containing one or more modern office buildings that are professional and prestigious in appearance with the surrounding development well-maintained and in consonance with a professional image." SFO at 6. SDA's protest maintained that Castle & Cooke was required to comply with this provision "at the time of offer." SDA Protest, Apr. 13, 2006, at 4. The agency defended against SDA's protest on the basis that SDA's interpretation of the SFO's "local amenities" provision was unreasonable. Specifically, the agency argued that the SFO, which called for a build-to-suit lease, clearly did not contemplate that an offeror's completion of contract performance--that is, construction of a modern office building along with attractive landscaping--would occur "at time of the offer" or, for that matter, prior to contract award. Agency Report, May 18, 2006, at 12.

On May 24, after GSA had filed its report and shortly before SDA filed comments responding to the agency report, GSA and the awardee executed a 3-page document terminating the lease. According to that "supplemental agreement," after award of the lease, significant community opposition to the courthouse arose such that "[the awardee's] performance of the obligations, including obtaining all necessary and discretionary approvals under the Lease will be substantially delayed," and the resulting increase in costs will "render[] its performance impracticable under these circumstances." GSA Response, exh. B, Supplemental Agreement Number One to Lease GS-09B-01777, at 1.

Our Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2006), provide we may recommend that an agency pay protest costs where the agency decides to take corrective action in response to the protest. We will make such a recommendation, however, 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. SDA argues that GSA unduly delayed in taking corrective action on what SDA contends was a clearly meritorious protest.

We consider a protest to be clearly meritorious when a reasonable agency inquiry into the protester's allegations would show that the agency lacked a defensible legal position. First Fed. Corp.--Costs, B-293373.2, Apr. 21, 2004, 2004 CPD ¶ 94 at 2. Here, we view the agency's assertion that the SFO, reasonably interpreted, did not contemplate that space proposed by offerors would meet the SFO's "local amenities" requirements at the time offers were submitted, to be a defensible legal position. Accordingly, we cannot conclude that SDA's protest, asserting that Castle & Cooke's

offer should have been rejected for failing to comply with the “local amenities” provision prior to award, was clearly meritorious.

SDA’s request for reimbursement of protest costs is denied.

Gary L. Kepplinger
General Counsel