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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Dellew Corporation

File: B-410159.4

Date: February 26, 2016

Adam K. Lasky, Esq., Oles Morrison Rinker & Baker LLP, for the protester.
Wade L. Brown, Esq., U.S. Army Materiel Command, for the agency.
Mary G. Curcio, Esq., and David A. Ashen, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Where protest filed with the Government Accountability Office is denied and protester then files a protest on the same basis at the U.S. Court of Federal Claims in response to which agency takes corrective action, protester may not recover protest costs for the protest that was initially filed at GAO.

DECISION

Dellew Corporation requests that we recommend that the Department of the Army reimburse Dellew for the costs it incurred in filing and pursuing its protest challenging the Army's award of a task order to Tech Systems, Inc. (TSI), under basic ordering agreement (BOA) request for proposals (RFP) No. W52P1J-13-R-0038, for logistics support services.

We dismiss the request for costs.

The solicitation provided for the task order to be issued on a best-value basis considering the following evaluation factors: technical (evaluated on an acceptable/unacceptable basis), past performance, and cost/price. When the agency subsequently issued the task order to TSI, Dellew, on November 24, 2014, filed a protest with our Office, during the course of which it argued, among assertions, that the agency failed to perform an adequate cost-realism analysis of TSI's proposal. We denied that protest on February 27, 2015. Dellew Corporation, B-410159.2, B-410159.3, Feb. 27, 2015, 2015 CPD ¶ __.

On March 11, Dellew filed a protest at the U.S. Court of Federal Claims (COFC) again arguing that the agency failed to perform an adequate cost-realism analysis of

TSI's proposal. The agency took corrective action in response to that protest and, following a reevaluation of proposals, and a new best-value determination, again selected TSI for award. On July 30, Dellew filed a second protest at the COFC, again raising essentially the same grounds it raised in the GAO protest and the first COFC protest. As part of the administrative record in that proceeding the Army provided Dellew with certain documents that it had not provided during the GAO protest.¹ Following oral argument, the Army again decided to take corrective action. In this regard, the protester asserts, and the agency does not deny, that during oral argument, the Court informed the Army that it would likely sustain the second COFC protest. Request at 21. According to the agency it took corrective action as a result of the discussion at oral argument and changes in its requirements. Agency Report (AR) at 4. Following the agency's decision to take corrective action and the Court's dismissal of Dellew's protest as a result, Dellew submitted its request to our Office that we recommend that the Army reimburse Dellew for the costs of filing and pursuing the protest that had been filed with our Office and denied.

Dellew asserts that we should recommend the reimbursement of the cost of pursuing its protest with our Office because the agency took corrective action in response to the same protest argument raised by Dellew at both the Court and our Office.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs, including reasonable attorneys' 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. 4 C.F.R. § 21.8(e); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. Our bid protest jurisdiction, however, is limited by the Competition in Contracting Act to written objections to a solicitation, proposed award, or award of a contract filed with our Office. 31 U.S.C. §§ 3551(1), 3552. The provisions in our Bid Protest Regulations providing for the possibility of a recommendation that protest costs be reimbursed where an agency takes corrective action in response to a protest with our Office are intended to ensure fair treatment of protesters who make substantial investments of time and resources to pursue clearly meritorious protests in this forum. See Innovative Logistics Techniques, Inc.--Costs, B-289031.3, Feb. 4, 2002, 2002 CPD ¶ 34 at 5 (fact that protester earlier raised defect with the agency is of no significance to our determination whether the agency took prompt action after the protester filed its protest with our Office).

¹ The Army reports that it only located this document when it was preparing the administrative record for the Court proceedings. The Army acknowledges that the document should have been provided to Dellew during the GAO protest proceedings. Agency Report at 10.

Here, a recommendation of costs is not warranted where the agency did not take corrective action in response to the protest filed with our Office. The fact that the agency later took corrective action in response to the protest filed before the COFC, which raised the same issues that were raised before our Office, does not change that result. Accordingly, there is no basis for us to recommend that the Army reimburse Dellew for the costs of filing its protest before our Office.

The request is dismissed.

Susan A. Poling
General Counsel