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**Comptroller General
of the United States**

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

Decision

Matter of: Alliant SB CTA, LLC--Costs

File: B-411842.5

Date: November 4, 2016

Joseph L. Fuller, Esq., Stephen M. Sorett, Esq., Nicole P. Moriarty, Esq., L. Elise Dieterich, Esq., and Brittney R. McClain, Esq., Kutak Rock LLP, for the protester. Scott F. McCleary, Esq., General Services Administration, Information Technology Service, for the agency.

Eric M. Ransom, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's request for a recommendation that it be reimbursed its costs for filing and pursuing its protest is denied where agency took prompt corrective action in response to supplemental protest, and the initial protest was not clearly meritorious.

DECISION

Alliant SB CTA, LLC (ASC), of Omaha, Nebraska, requests that we recommend that it be reimbursed the costs associated with filing and pursuing its protests against the decision of the General Services Administration (GSA), Information Technology Service, to exclude ASC from the competitive range under request for proposals (RFP) No. ID05140054, issued under the GSA's Alliant Small Business Government Wide Acquisition Contract, for information technology support for the Department of Agriculture's National Information Technology Center.

We deny the request.

BACKGROUND

The GSA issued the solicitation on December 19, 2014, seeking proposals for the performance of a single-award task order for one base year and four 1-year option periods, to provide a wide range of information technology support services to the National Information Technology Center. After evaluation of initial proposals, the agency rated the majority of initial proposals--including ASC's initial proposal--technically unacceptable. The agency then elected to establish a competitive range

consisting of two marginal-rated proposals and conduct discussions. ASC was advised that its proposal had been excluded from the competitive range on July 21, 2015.

ASC filed an initial protest with our Office on July 31, 2015. The protest challenged various aspects of the agency's technical evaluation and the decision to exclude ASC from the competitive range. After receipt of the agency report in response to the protest, ASC filed a supplemental protest challenging, in part, the sufficiency of the agency's internal evaluation procedures and the documentation of the agency's evaluation and competitive range determination. In response to the supplemental protest, and prior to the time set by our Office for the agency's supplemental agency report, the agency elected to take corrective action by including ASC in the competitive range. ASC then filed this request.

DISCUSSION

ASC requests that we recommend that the agency reimburse its costs of pursuing both its initial and supplemental protests. As discussed below, we conclude that reimbursement is not warranted in this case because the agency took prompt corrective action in response to the supplemental protest and because the initial protest arguments were not clearly meritorious.

Our Bid Protest Regulations, 4 C.F.R. § 21.8(e), provide that where an agency takes corrective action in response to a protest, our Office may recommend that the agency pay the protester its costs of filing and pursuing the protest. Information Ventures, Inc.--Costs, B-294580.2 et al., Dec. 6, 2004, 2004 CPD ¶ 244 at 2. However, our Regulations do not contemplate a recommendation for the reimbursement of protest costs in every case where an agency takes corrective action, but rather only where an agency unduly delays taking corrective action in the face of a clearly meritorious protest. Id. Thus, 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. Overlook Sys. Techs., Inc.--Costs, B-298099.3, Oct. 5, 2006, 2006 CPD ¶ 184 at 6. 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. Id. Additionally, we consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest, while we generally do not consider it to be prompt where it is taken after that date. AGFA HealthCare Corp.--Costs, B-400733.6, Apr. 22, 2009, 2009 CPD ¶ 90 at 3-4.

We first conclude that GSA's corrective action was prompt with regard to ASC's supplemental protest. As discussed above, the GSA's corrective action took place prior to the deadline set by our Office for the agency's supplemental agency report. Accordingly, because GSA did not unduly delay corrective action in response to the

supplemental protest, and because ASC was not required to expend unnecessary time or resources responding to a supplemental agency report, we view the corrective action as prompt. See AGFA HealthCare Corp.--Costs, supra.

With respect to the initial protest allegations, ASC contends that its initial protest identified multiple clearly meritorious issues concerning the agency's evaluation of its technical proposal.¹ We have reviewed the arguments cited by the protester in its request and conclude that none were clearly meritorious.

For example, ASC first cites its initial protest challenge of the agency's conclusion that its proposal was "riddled" with "grammatical errors, including sentence structure errors, spelling errors (including employee names), lack of acronym identification, inconsistent references and terminology, and punctuation errors. Initial Protest at 13. ASC argues that this and other evaluation conclusions demonstrate that the agency used unstated requirements or evaluation criteria and exaggerated minor issues in its evaluation of ASC's proposal.

The agency's response highlighted the RFP's cautions that "[c]larity and completeness of proposals are of the utmost importance," and that "proposals must be written in a practical, clear and concise manner." RFP at 6. The agency also directed our Office's attention to the RFP's requirement that "[e]ach proposal shall clearly demonstrate that the contractor understands the [performance work statement (PWS)]," and explained that the PWS included grammatical requirements for each RFP contract line item, which if not met would constitute "Acceptable Quality Level" violations during performance.² Agency Report, August 31, 2015, at 5.

Our Office considered the agency's initial evaluation approach, including the evaluation of grammatical issues, in a related protest concerning another firm's exclusion from the competitive range in this procurement. Federal Acquisition Services Alliant Joint Venture, B-411842.2, November 9, 2015, 2015 CPD ¶ 364. In that protest we examined the RFP criteria and concluded that the agency's consideration of grammatical issues in its evaluation of proposals was consistent with the RFP and not unreasonable. Id. at 5-6. Accordingly, we conclude that

¹ ASC's initial protest also presented allegations concerning the integrity of the procurement process. These allegations were ultimately the subject of a subsequent protest, which was dismissed by our Office. Alliant SB CTA, LLC, B-411842.7, September 26, 2016 (unpublished decision).

² The RFP evaluation criteria corresponding to these requirements provided that, "[t]he evaluation will be based on information pertaining to technical approach, and specifically focus on the breadth, depth and scope of the contractor's knowledge and understanding of the requirements." RFP at 11.

ASC's allegations concerning unstated requirements or evaluation criteria and exaggeration of minor issues in this area were not clearly meritorious.³

Next, with respect to ASC's initial arguments that the agency misread or ignored portions of ASC's proposal, or made factual errors in the evaluation, we also cannot conclude that these allegations were clearly meritorious. The agency report included as an attachment a point-by-point rebuttal of each of ASC's allegations of factual error, including several of the issues described above. Based on the record, we cannot conclude that the protester's allegations were so clearly meritorious as to reveal to the agency the absence of any defensible legal position.⁴

In sum, the challenges raised by ASC in its initial protest do not meet the high bar set by the clearly meritorious standard--i.e. not a close question--such that a reasonable agency inquiry into the allegations would reveal facts showing the absence of a defensible legal position. Since ASC's initial protest allegations were not clearly meritorious and the agency took prompt corrective action in response to ASC's supplemental protest, we cannot recommend that the agency reimburse ASC the costs of filing and pursuing its protest.

The request for a recommendation for reimbursement of protest costs is denied.

Susan A. Poling
General Counsel

³ ASC's request also cites its initial challenge to the agency's conclusion that its proposal represented a "status quo" approach. ASC was an incumbent contractor for the requirement. While the RFP was for a follow-on effort, the PWS was not the same as the incumbent effort. Accordingly, we see no error in the agency's conclusion that ASC's proposal to "continue its current function," represented a "status quo" approach. Agency Report, August 31, 2015, Attachment 1, at 18-19. We also cannot conclude that this conclusion was based on unstated criteria, where the RFP specifically provided for evaluation of the contractors' "understanding of the requirements." RFP at 11. As this protest allegation was not meritorious, reimbursement is not recommended.

⁴ For example, while some of the agency's evaluation of ASC's proposal may have been overbroad, the significant number of valid agency concerns about ASC's proposal may have nonetheless supported ASC's technically unacceptable rating and exclusion from the competitive range. See e.g. Federal Acquisition Services Alliant Joint Venture, supra, at 6 n.4 (agency's criticism of the protester's use of undefined acronyms was not supported by the record, however, other omissions, inconsistencies, and exceptions in the proposal supported the technically unacceptable rating).