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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Abhe & Svoboda, Inc.--Costs

File: B-412504.2

Date: April 1, 2016

Benjamin M. Petre, Esq., Faegre Baker Daniels LLP, for the protester.
Anna D. Ross, Esq., Department of the Army, Corps of Engineers, for the agency.
Robert T. Wu, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Request that our Office recommend the reimbursement of costs of filing and pursuing a protest is denied where the agency took corrective action prior to the due date for the agency report, and where the agency filed a colorable, but unsuccessful procedural challenge to the protest.

DECISION

Abhe & Svoboda, Inc. (ASI), of Jordan, Minnesota, requests that our Office recommend that the Department of the Army, Corps of Engineers, reimburse attorneys' fees and costs that the firm incurred in filing and pursuing a protest of the rejection of its proposal under request for proposals (RFP) No. W912DW-15-R-0002, for dam spillway gates lifecycle maintenance.

We deny the request.

BACKGROUND

The procurement at issue is for lifecycle maintenance services at the Chief Joseph Dam spillway, located on the Columbia River near Bridgeport, Washington. ASI submitted a proposal in response to the solicitation on February 26, 2015. Protest at 2. On September 11, ASI received a correspondence from the agency indicating that evaluations had been completed and the firm had been excluded from the competitive range. Id. at 2-3. On November 30, after receiving a debriefing, ASI filed a timely protest with our Office challenging the exclusion of its proposal from the competition. See generally id. In that protest, ASI raised various arguments challenging the reasonableness of the agency's evaluation and exclusion of its

proposal. As relevant here, the firm challenged the reasonableness of the agency's evaluation in light of the solicitation's page limitation on key personnel qualifications and its 10-year limitation on past performance information. Id. at 3, 5.

On December 4, the agency submitted a request for dismissal arguing that ASI's arguments constituted untimely challenges to the terms of the solicitation. Request for Dismissal at 4-6. Our Office denied the agency's request on December 14, noting "[w]hile the agency is likely correct that any challenge to the terms of the solicitation is untimely, the protest clearly challenges the reasonableness of the agency's evaluation, and thus is properly addressed on the merits." GAO E-mail to Parties, Dec. 14, 2015. On December 18, the agency informed our Office that "the contracting officer has determined that award was improperly made based on the government's disparate evaluation of proposals." Notice of Corrective Action, Dec. 18, 2015, at 1. The agency indicated that it would take corrective action by terminating for convenience the contract to the awardee, and that it might resolicit the requirement in the future, subject to the availability of funds. Id.

Our Office dismissed the protest as academic on December 22 without opposition from the protester. On January 6, ASI submitted the request for a recommendation of costs at issue here.

DISCUSSION

ASI asks our Office to recommend that the agency reimburse attorneys' fees and costs because, it contends, the agency's request for dismissal was "groundless and frivolous" and not filed in good faith. Request for Costs at 4; Protester's Response at 2-3. ASI argues that the agency's request for dismissal, which it asserts was filed one day after the protest was filed, was "apparently drafted as a matter of course, with no effort made to investigate the merits of the protest." Request for Costs at 4. Moreover, the protester asserts, "the Agency did not make a reasonable inquiry into ASI's allegations, but if it had, the Agency would have discovered an absence of a defensible legal position." Protester's Response at 3. The protester concludes that we should recommend reimbursement to redress the harm caused by the agency's conduct, in that responding to the agency's request resulted in increased costs to the protester. Request for Costs at 4.

The agency responds that ASI is "simply wrong" in its allegations. Agency Response at 2. The agency states that upon receiving the protest, it undertook a comprehensive review of the evaluation of ASI's technical proposal to confirm that it was correctly determined to be technically unacceptable. The agency also notes that, in its view, ASI's complaints about the RFP requirements were untimely. Id. The agency argues that a recommendation that it reimburse ASI's protest costs would not be appropriate because a contracting agency is permitted to vigorously assert procedural and substantive defenses in good faith without having to risk the assessment of costs. Id. (citing Livanta, LLC--Costs, B-404215.2, Apr. 5, 2011,

2011 CPD ¶ 82 at 2). Finally, with respect to the timing of the filing, which ASI emphasizes in its request for costs, the agency proffers that its request for dismissal was not submitted one day after the protest was filed, but was instead submitted on December 4, four days after ASI's protest was filed. Id.

Where a procuring agency takes corrective action in response to a protest, we may recommend that the agency reimburse the protester its protest costs where we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing a 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); Info. Ventures, Inc.--Costs, B-294580.2 et al., Dec. 6, 2004, 2004 CPD ¶ 244 at 2-3. However, as a general rule, so long as an agency takes corrective action by the due date of its protest report, we regard the action as prompt, and will not consider a request to recommend reimbursement of protest costs. CDIC, Inc.—Entitlement to Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52. An agency's pursuit of a reasonable procedural litigation strategy before our Office does not constitute undue delay in taking corrective action. Carlson Wagonlit Travel--Request for Declaration of Entitlement to Costs, B-266337.3 et al., July 3, 1996, 96-2 CPD ¶ 99 at 4; Livanta, LLC--Costs, supra, at 2.

ASI acknowledges that the agency took corrective action before the due date of its agency report, but nonetheless argues that we should recommend costs because of the agency's alleged conduct in this case. As stated, ASI argues that the agency's request for dismissal was groundless, frivolous, and not undertaken in good faith. These are serious allegations, which are not borne out by the record. As an initial matter, the request for dismissal was not filed one day after the protest was filed, as ASI claims, but was filed four days later, on December 4. Moreover, we do not agree that the agency's dismissal request was frivolous. The key question of whether a filing is frivolous is whether it was filed in bad faith. See Report to Congress on Bid Protests Involving Defense Procurements, B-401197, Apr. 9, 2009, 2009 CPD ¶ 101 at 11-12 (discussing the definition of frivolous in the context of protest filings). A determination by our Office that a filing is frivolous would require determining not only that it is without merit or procedurally defective, but also that the filing is so utterly without merit as to have been filed in bad faith. Id. at 12. We see no support for such a conclusion in this record.

The agency's request for dismissal argued two main points: that ASI was not an interested party because the firm's proposal was not technically acceptable, and that ASI complained that it could not insert the requisite information in its proposal because of the solicitation's page limitations. See generally Request for Dismissal. As we conveyed to the parties in denying the request, the agency was likely correct that any challenge to the terms of the solicitation was untimely, and these arguments were a major component of the protest. However, the protester did challenge the evaluation of its own proposal, which could have been properly addressed on the merits. Far from being frivolous, the agency's request for

dismissal was a colorable, but ultimately unsuccessful procedural challenge. Given this fact, and that the agency promptly took corrective action, we are provided no basis to grant the protester's request for costs.

The request is denied.

Susan A. Poling
General Counsel