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Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: CSL Birmingham Associates; IRS Partners-Birmingham--Entitlement to Costs

File: B-251931.4; B-251931.5

Date: August 29, 1994

Neil I. Levy, Esq., Kilpatrick & Cody, for CSL Birmingham Associates, and Timothy H. Power, Esq., for IRS Partners-Birmingham, the protesters.
Emily C. Hewitt, Esq., and Amy J. Brown, Esq., General Services Administration, for the agency.
Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protesters are not entitled to the costs of filing and pursuing their protests even though the agency did not take corrective action for more than 3 months after the initial protest was filed where the specific allegations in that protest were demonstrated to be without factual basis, and the agency took corrective action within 6 weeks of the first filing of any specific protest grounds that could be viewed as having relevance to the corrective action.

DECISION

CSL Birmingham Associates and IRS Partners-Birmingham request that our Office declare them entitled, pursuant to 4 C.F.R. § 21.6(e) (1994), to recover the costs of filing and pursuing their protests concerning solicitation for offers (SFO) No. MAL 92645, issued by the General Services Administration (GSA) for leased space for the Internal Revenue Service office in Birmingham, Alabama.

We deny the requests.

The SFO, issued on December 18, 1992, set forth various technical factors and price as evaluation criteria. The agency evaluated the offers received and conducted

discussions with the offerors. Best and final offers (BAFOs) were due on October 8, 1993. IRS Partners and CSL were among the offerors submitting BAFOs.

On November 5, IRS Partners filed a protest with our Office alleging that GSA had failed to notify IRS Partners that the agency had accepted a competing firm's offer. In the alternative, IRS Partners asserted that GSA was improperly conducting discussions with the proposed awardee after receipt of BAFOs. The protester also stated that it believed that "GSA [had not] properly and fairly evaluated the offers submitted by IRS Partners and others in accordance with the evaluation criteria stated in the solicitation." The only explanation or support which was supplied for the latter allegation was the protester's assertion that "its BAFO provided the government with the greatest value of all offers received."

On December 20, GSA submitted its report to our Office, in which, while conceding that it had identified a proposed awardee, the agency denied that an award had been approved or that post-BAFO discussions had been conducted with any offeror. The agency also stated that it had evaluated offers fairly and in accordance with the solicitation criteria.

On January 3, 1994, IRS Partners set forth a number of new protest grounds in its comments on the agency report. Specifically, it alleged that GSA had acted improperly by: modifying the source selection plan after initial offers were received, accepting a BAFO from the proposed awardee by facsimile transmission, failing to provide narrative to explain the point scores assigned to the offers, modifying the evaluation scheme without amending the SFO, and not disclosing all evaluation subfactors.

Based on a review of the same agency report, CSL filed its own protest on January 5. That protest asserted that the proposed awardee's offer was "nonresponsive" for failure to satisfy SFO requirements, that the agency had improperly assigned excessive weight to at least two evaluation criteria, that the SFO failed to identify significant evaluation subfactors, and that the ratings assigned to CSL's and the proposed awardee's offers lacked a reasonable basis.

On February 15, in lieu of filing a report on the protest issues raised by the two protesters during the first week of January, GSA advised our Office that it was taking corrective action which rendered the protests academic. Specifically, the agency stated that it intended to amend the SFO by clarifying the evaluation criteria and then to

request revised offers. GSA denied that the corrective action was being taken in response to the protests, and asserted instead that the action was the result of a routine pre-award clearance review. In light of the corrective action, our Office dismissed the protests as academic on February 18. Both protesters now request that we find them entitled to the costs of filing and pursuing their protests.

Where an agency takes corrective action prior to our issuing a decision on the merits, we may declare the protester entitled to recover the reasonable costs of filing and pursuing the protest. 4 C.F.R. § 21.6(e). We will find a protester so entitled, however, only where the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Oklahoma Indian Corp.--Claim for Costs, 70 Comp. Gen. 558 (1991), 91-1 CPD ¶ 558. A protester is not entitled to costs where, under the facts and circumstances of a given case, the agency has taken reasonably prompt corrective action. Id.

In deciding whether an agency's corrective action was so delayed as to warrant the award of costs, the determination of the appropriate date from which the promptness of the corrective action is measured is critical. See, e.g., Crown Eng'g--Entitlement to Costs, B-251584.2, May 24, 1993, 93-1 CPD ¶ 403. Here, both CSL and IRS Partners argue that the relevant date is IRS Partners' November 5 protest.

As to CSL's entitlement to costs, November 5 is an irrelevant date, since CSL did not file its protest until January 5. In the context of a protest filed on that latter date, where GSA needed to review the SFO in coordination with the Internal Revenue Service (the prospective tenant), we do not find that the corrective action taken on February 15, the time that its report was due, constituted undue delay. See Propulsion Controls Eng'g--Entitlement to Costs, B-244619.2, Mar. 25, 1992, 92-1 CPD ¶ 306. Accordingly, there is no basis to conclude that CSL is entitled to recover its protest costs, even if we assume, for purposes of this analysis, that CSL's challenges to the procurement were clearly meritorious.

While IRS Partners filed a protest on November 5, that protest set forth different issues from those raised in the January 3 filing. Where a protester raises different protest grounds in multiple submissions to our Office, the filing of the initial protest establishes the appropriate date for determining the promptness of an agency's subsequent corrective action only where there is a nexus between the protest grounds set forth at that time and the

corrective action. See GVC Cos.--Entitlement to Costs, B-254670.4, May 3, 1994, 94-1 CPD ¶ 292. Here, IRS Partners' November protest grounds were not clearly related to the later corrective action; nor were they clearly meritorious, also a prerequisite for determining that the agency unduly delayed taking corrective action. Specifically, there was no factual basis for either of the two primary allegations in the November protest: that GSA had conducted post-BAFO discussions (indeed, IRS Partners subsequently abandoned this protest ground), and that the agency had improperly failed to advise unsuccessful offerors that another offer had been accepted (in fact, no offer had been accepted). These allegations, in addition to lacking merit, were wholly unrelated to the later corrective action.

The only issue in IRS Partners' November protest whose merit could be seen as in any way relevant to the agency's corrective action was the general assertion that "GSA [had not] properly and fairly evaluated the offers submitted by IRS Partners and others in accordance with the evaluation criteria stated in the solicitation." Prior to January 3, however, IRS Partners had provided no support or explanation for that conclusory statement, and the record provides no indication that this broad allegation in the November protest was clearly meritorious. Such merit was not established by the mere fact that GSA determined to revise the evaluation criteria in the SFO. See Akal Sec., Inc., B-244386, Oct. 16, 1991, 91-2 CPD ¶ 336. In our view, therefore, there was nothing in IRS Partners' November 5 protest that would justify using that date to measure whether GSA unduly delayed taking corrective action in the face of a clearly meritorious protest.

The relevant date for measuring the promptness of GSA's response to IRS Partners' protest was thus January 3, when that firm's comments raised the specific challenges identified above concerning the evaluation of offers. As with CSL's January 5 protest, however, we conclude that GSA's February 15 notification of corrective action did not constitute undue delay in the face of the issues raised by IRS Partners on January 3 (again assuming, arguendo, that those issues were clearly meritorious).[1]

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[1]As noted above, GSA argues that its decision to revise the SFO was unrelated to the protests and that costs should therefore not be paid, presumably even if the agency were found to have unduly delayed taking corrective action. While the corrective action entailed a revision of the SFO evaluation criteria and the protests focused primarily on other issues, we have found entitlement where the corrective

(continued...)

The requests for a declaration of entitlement to costs are denied.

/s/ Ronald Berger
for Robert P. Murphy
Acting General Counsel

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[1](...continued)
action responds "at least in part" to protests. David Weisberg--Entitlement to Costs, 71 Comp. Gen. 498 (1992), 92-2 CPD ¶ 91. Because we find that there was no undue delay here, we need not decide whether the corrective action was taken, at least in part, in response to the protests.