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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Boston Harbor Development Partners, LLC--Costs

File: B-404614.5

Date: February 17, 2012

David S. Black, Esq., Robert C. MacKichan Jr., Esq., and Alexander B. Ginsberg, Esq., Holland & Knight LLP, for the requester.
Nancy E. O'Connell, Esq., General Services Administration, for the agency.
Paul N. Wengert, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester is not entitled to reimbursement of protest costs after agency took corrective action where protest was not clearly meritorious.

DECISION

Boston Harbor Development Partners, LLC (BHDP), of Boston, Massachusetts, 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 the award of a contract to Emerald Corporate Center, LLC (ECC), of Chelsea, Massachusetts, under solicitation for offers (SFO) No. 2818A for the design, construction, and leasing of a dedicated campus facility for the Federal Bureau of Investigation. We dismissed the protest as academic on November 22, 2011, based on GSA's statement that it was taking corrective action in the procurement. Boston Harbor Dev. Partners, LLC, B-404614.3, B-404614.4, Nov. 22, 2011.

We deny the request.

Our Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2011), provide that we may recommend that an agency pay protest costs where the agency decides to take corrective action in response to a 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. Our rule is intended to prevent inordinate delay in investigating the merits of a protest and taking corrective action once an error is evident, so that

a protester will not incur unnecessary effort and expense in pursuing its remedies before our Office. Professional Landscape Mgmt. Servs., Inc.--Costs, B-287728.2, Nov. 2, 2001, 2001 CPD ¶ 180 at 5.

BHDP filed an initial protest on October 6, 2011. Protest at 1. The protest argued that ECC's site did not meet a set of mandatory minimum requirements that were to be evaluated as "Phase I" of the procurement, that ECC's offer constituted a prohibited capital lease, that ECC had been allowed to make a late revision to its offer, that the GSA should have held discussions with BHDP, and that the GSA had misevaluated BHDP's offer. Protest at 13-17.

On November 10, the GSA submitted an agency report (subsequently revised, at our Office's request, to provide citations to the record), in response to the protest allegations. On November 21, BHDP filed comments which raised new protest issues. Our Office requested a supplemental agency report, and we expressed our view that a hearing would likely be necessary following the receipt of the supplemental agency report and supplemental comments. Fax from GAO to parties, Nov. 14, 2011, at 1.

On November 18, the GSA announced that it would take corrective action by reevaluating offers and "scrutiniz[ing] its price evaluations pursuant to OMB [Office of Management and Budget] Circular A-11." Letter from Counsel for GSA to GAO, Nov. 18, 2011, at 1.

In its request for costs, BHDP argues that its protest was clearly meritorious as demonstrated by the GSA's including a reevaluation of the Phase I proposals, and additional scrutiny of both offerors' compliance with OMB Circular No. A-10, as part of the corrective action. Request for Costs at 2. BHDP argues that these aspects of the corrective action tacitly acknowledged the merit of its protest and show that the GSA had no defensible position. Id.

We disagree. The mere fact that an agency decides to take corrective action does not necessarily establish that a statute or regulation has been violated. Sourceling, LLC--Protest & Costs, B-405907.2 et al., Jan. 27, 2012, 2012 CPD ¶ ___ at 6. Here, the record produced by the GSA provided some support for the agency's assertions that it had analyzed ECC's offer and had concluded that the offer complied with OMB Circular No. A-10. E.g., AR, Tab 1, Affidavit of GSA Director of Real Estate Acquisition, Nov. 4, 2011, at 1. Additionally, while we had questions and concerns regarding the adequacy of the agency's evaluation record, we had not concluded that BHDP's complaints of misevaluation were clearly meritorious. Rather, as noted above, our Office had expressed the view that a hearing would likely be necessary to more fully develop the protest record. Our consideration of a hearing reflected our view that additional development of the record was necessary to reach a decision regarding the merits of the protest. In short, at the time of the agency's corrective action, we viewed the protest as

presenting a close question and, therefore, it was not clearly meritorious. See Distributed Solutions, Inc.--Costs, B-403566.2, Feb. 14, 2011, 2011 CPD ¶ 41 at 4 (protest was not clearly meritorious where agency took corrective action while GAO was considering holding a hearing).

The request is denied.

Lynn H. Gibson
General Counsel