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**Comptroller General
of the United States**

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

Decision

Matter of: LGS Innovations LLC

File: B-405932.3

Date: April 26, 2012

Thomas L. McGovern III, Esq., Andrew C. Ertley, Esq., and C. Peter Dungan, Esq., Hogan Lovells US LLP, for the protester.

Maj. James W. Nelson, Department of the Army, for the agency.

Paul E. Jordan, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Reimbursement of protest costs based on agency corrective action is not warranted where the protest was not clearly meritorious.

DECISION

LGS Innovations LLC requests that we recommend that it be reimbursed the costs of filing and pursuing its protests challenging the Department of the Army's issuance of delivery order No. W91QUZ-06-D-0021/0009 to AT&T Government Solutions for infrastructure modernization at the Wiesbaden, Germany Command Battle Center (CBC).

We deny the request.

The RFP provided for the issuance, on a "best value" basis, of a fixed-price delivery order to provide a turnkey solution to upgrade and modernize the voice and data networks at the CBC. Proposals were to be evaluated under three factors: technical, management, and price. When the agency issued the delivery order to AT&T, LGS protested, asserting that the technical evaluation was unreasonable based on LGS's belief that the agency had applied an unstated evaluation preference for AT&T's technical solution; that the best value, tradeoff determination was flawed; and that the agency failed to conduct meaningful or equal discussions related to the "preferred" technical solution. In its agency report, the Army denied applying any unstated evaluation preference and defended both its best value determination and its conduct of discussions.

In its comments and supplemental protest, LGS reiterated its original protest grounds and for the first time alleged that the evaluators assigned AT&T's proposal two strengths related to features of its technical solution while assigning no comparable strengths to LGS's proposal of the same or better features. Our Office requested that the agency furnish a supplemental report to LGS's comments/supplemental protest. Prior to the due date for that report, the agency advised that it intended to take corrective action including reevaluating the proposals and making a new source selection. We dismissed LGS's protests as academic (B-405932, B-405932.2, Dec. 1, 2011).

LGS requests that we recommend that it be reimbursed the reasonable costs of filing and pursuing its protests, including attorneys' fees. LGS asserts that its protest grounds were clearly meritorious, and that the agency unduly delayed taking corrective action, as evidenced by its failure to do so until after it filed the agency report on the original protest and LGS had filed its comments/supplemental protest.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs where, 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. Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2011); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. Thus, as a prerequisite to our recommending that costs be reimbursed where a protest has been settled by corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious, *i.e.*, not a close question. J.F. Taylor, Inc.--Entitlement to Costs, B-266039.3, July 5, 1996, 96-2 CPD ¶ 5 at 3; Baxter Healthcare Corp.--Entitlement to Costs, B-259811.3, Oct. 16, 1995, 95-2 CPD ¶ 174 at 4-5; GVC Cos.--Entitlement to Costs, B-254670.4, May 3, 1994, 94-1 CPD ¶ 292 at 3. 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. First Fed. Corp.--Costs, B-293373.2, Apr. 21, 2004, 2004 CPD ¶ 94 at 2.

We find that reimbursement is not appropriate in this case. With regard to LGS's supplemental protest, the agency took corrective action promptly because it acted prior to the deadline for submitting its supplemental report. When an agency takes corrective action before the due date set for receipt of the agency report, our Office views such action as prompt and will not recommend the reimbursement of costs. The Sandi-Sterling Consortium--Costs, B-296246.2, Sept. 20, 2005, 2005 CPD ¶ 173 at 2-3. Thus, we have no basis to recommend reimbursement of costs associated with the supplemental protest.

We also find that the initial protest was not clearly meritorious. LGS's initial protest focused on its assertion that the agency had applied an unstated preference for a

specific technical solution, which impacted both the conduct of discussions and the best value determination. Even though the agency's corrective action provided for reevaluation of the proposals, the agency does not concede that its original evaluation was based on a preference for AT&T's technical solution; instead, it maintains that its decision to take corrective action was based on LGS's supplemental protest, which specifically challenged the apparent unequal treatment of the vendors, as reflected in the assignment of strengths to AT&T's proposal but not to LGS's. Response to Cost Request at 2. While the evaluators assigned strengths to AT&T's technical solution, based on our review of the record, it did not appear that the agency had an unstated preference for that solution. In this regard, the source selection authority recognized that AT&T's solution was not a requirement, but agreed that it was more compatible with the existing site architecture than LGS's solution and would significantly reduce the risk of integration problems. Price Negotiation Memorandum at 15. We think that the agency's recognition of technical advantages associated with a more compatible solution did not constitute an improper unstated technical preference. Thus, LGS's protest on that issue was not clearly meritorious.

The request for costs is denied.

Lynn H. Gibson
General Counsel