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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

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Decision

Matter of: Brandes Associates Inc.

File: B-412548.5

Date: August 24, 2016

Jason A. Carey, Esq., J. Hunter Bennett, Esq., Kevin T. Barnett, Esq., and Wesley W. Wintermyer, Esq., Covington & Burling, LLP, for the protester. Samantha M. Basso, Esq., Department of the Navy, 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 for recommendation that agency reimburse protester's costs is denied where agency took prompt corrective action in response to a supplemental protest and to newly-discovered information that was not previously available to the agency.

DECISION

Brandes Associates, Inc., of Lone Tree, Colorado, requests that our Office recommend that the Department of the Navy reimburse attorneys' fees and costs that the firm incurred in filing and pursuing a protest under request for proposals (RFP) No. N00024-13-R-3157, issued by the Navy to procure program management services, after the Navy took voluntary corrective action in response to the protest. Brandes argues that the agency did not take timely corrective action in the face of a clearly meritorious protest.

We deny the request.

BACKGROUND

On December 14, 2015, Brandes filed a protest with our Office challenging the agency's decision to issue a task order to American Electronics, Inc. (Amelex), after a competition between small businesses under the agency's Seaport-e multiple-award task order contract. Brandes challenged various aspects of the evaluation of proposals, including that the awardee had engaged in an improper "bait and switch" of key personnel, or failed to inform the agency that various key personnel were

unavailable prior to award, and that the agency performed an unreasonable cost realism evaluation of the awardee's cost proposal.¹ Protest at 22-25, 26-29.

With respect to its first allegation, Brandes pointed to the awardee's post-award efforts to hire (through public job postings and solicitation of Brandes's own personnel) employees for nine of the task order's labor categories, including four categories listed as key personnel in the solicitation. Id. at 22-25. With respect to its second allegation, the protester relied on its own market research and pricing methodology to argue that the awardee's proposed cost was unrealistically low. Id. at 26-29.

On December 31, the agency provided to the protester and our Office documents in advance of the agency report, which formed the basis for a supplemental protest filed by Brandes on January 11, 2016. See generally Supp. Protest; see also Request for Costs at 2. The supplemental protest challenged the rationality of specific aspects of the evaluation of Amelex's cost proposal and the evaluation of the relative merits of strengths assigned to both proposals. Supp. Protest at 23-32, 35-37. The protester also argued that the produced documents showed that Amelex had lost one of its key personnel prior to award but failed to inform the agency of this material change to its proposal. Id. at 33-34.

On January 13, the agency submitted a full agency report to our Office responding to the initial protest allegations. On January 22, however, the agency informed our Office that it intended to take corrective action. The agency stated its rationale for corrective action as follows: "[t]he protest raises concerns to the Agency regarding the evaluation of Key Personnel that necessitates resolution by the Contracting Officer in accordance with the Federal Acquisition Regulation. During this time the Agency also intends to review other allegations raised, as necessary." Corrective Action Notice at 1. On February 1, our Office dismissed the protest as academic, and Brandes's request for costs followed.

DISCUSSION

Brandes asks our Office to recommend that the agency reimburse the firm its costs because the agency failed to take timely corrective action in response to its clearly meritorious protest. Brandes asserts that its allegations that Amelex failed to notify

¹ The record shows that Amelex's evaluated cost was \$20,752,498.03 and Brandes's evaluated cost was \$21,411,990.82. AR, exh. 16, Source Selection Decision, at 3. As noted, the acquisition here was conducted under the Navy's Seaport-e multiple-award task order contract vehicle. Since the value of this task order is in excess of \$ 10 million, this procurement is within our jurisdiction to hear protests related to the issuance of task orders under multiple-award contracts. 10 U.S.C. § 2304c(e)(1)(B).

the agency that one of its key personnel had become unavailable during the pendency of the evaluation, and that the agency conducted an unreasonable cost realism evaluation of the awardee's proposal, were clearly meritorious. The protester argues that the corrective action was not timely because it was taken after the filing of the agency report. The firm asserts that its supplemental protest only expanded upon the issues raised in the initial protest as new documents became available, and the measure of the timeliness of the corrective action should be its response to the initial protest, not the supplemental protest.

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, 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 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); Information Ventures, Inc.--Costs, B-294580.2 et al., Dec. 6, 2004, 2004 CPD ¶ 244 at 2-3. 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. Triple Canopy, Inc.--Costs, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 3. We consider a protest to be clearly meritorious where a reasonable agency inquiry into the protester's allegations would reveal facts showing the absence of a defensible legal position; i.e., where the protest does not involve a close question. Id.

The Navy responds that Brandes's initial protest was not clearly meritorious and that timeliness of corrective action should be measured from the supplemental protest, not the initial protest. The agency argues that it took timely corrective action in response to the supplemental protest filed on January 11. We agree.

Brandes's initial protest involved an allegation that Amelex engaged in an improper "bait and switch" or, alternatively, failed to inform the agency of material changes in its staffing. The record shows that after the award on November 20, 2015, Amelex requested the substitution of six positions, five for the purpose of hiring incumbent personnel, and one to replace a key person it no longer employed. This request, made on December 14, sought permission to substitute five key personnel with incumbent personnel, and to substitute a sixth key person, indicating "[t]he proposed has terminated and is no longer an Amelex employee." AR, exh. 21, email to agency dated Dec. 14, 2015, at 4.

While the record shows that Amelex did seek to replace key personnel after award, the allegation of bait and switch is not clearly meritorious on this record.² Moreover,

² The agency argues that since Amelex sought to hire more qualified incumbent personnel, there is no evidence of bait and switch. Amelex asserts that the key

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Brandes's allegation that Amelex failed to inform the agency of a material change in its key personnel was not clearly meritorious at the time the agency filed its agency report. In this regard, our Office has held that offerors are obligated to advise agencies of changes in proposed staffing and resources, even after submission of proposals. Greenleaf Constr. Co., Inc., B-293105.18, B-293105.19, Jan. 17, 2006, 2006 CPD ¶ 19 at 10. The failure of an offeror to inform the agency of a change in proposed staffing and resources may render the evaluation and subsequent award decision unreasonable where it results in the agency being unable to evaluate the actual employees as they existed at the time of award. See id. at 9-10.

Amelex's substitution request was provided to the parties on December 31, 2015, and formed the basis for the allegation in the supplemental protest that the awardee failed to inform the Navy of a material change in its proposal prior to award. However, the correspondence did not indicate when this key person was terminated; specifically, whether it was prior to or subsequent to the issuance of the task order. Thus, at the time the agency filed its agency report, a reasonable agency inquiry would not have shown that the protest was clearly meritorious.

It was not until January 12, 2016, and subsequently confirmed in January 20 filings of the intervenor, that it was revealed that this key person was terminated on September 23, 2015. See Intervenor's Submissions, dated Jan. 12 and 20. Consequently, the agency was not informed until January 12, at the earliest, that the key person had been terminated prior to contract award. As the record shows that the agency took corrective action on January 22, in response to the information it learned on January 12, and prior to submitting a supplemental agency report, we cannot say that the agency unduly delayed taking corrective action. See LGS Innovations LLC, B-405932.3, Apr. 26, 2012, 2012 CPD ¶ 147 at 2 (when agency takes corrective action before due date set for receipt of the agency report, such action is prompt and our Office will not recommend the reimbursement of costs).

Our review of the record also shows that Brandes's protest of the agency's evaluation of Amelex's cost proposal is not clearly meritorious. The firm's initial challenge to the evaluation was based on its own cost proposal and market research to argue that Amelex's proposed cost was unrealistically low. It was not until the protester had the opportunity to review the documents produced on December 31 that it alleged three specific challenges to the evaluation of Amelex's cost proposal.³ While Brandes' included general allegations against the

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personnel named in its proposal were available to perform on the contract, but that it was offering to hire incumbent key personnel for the benefit of the government.

³ In its supplemental protest, Brandes argued that the agency improperly failed to consider individual labor rates, miscalculated an average labor rate for one labor

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reasonableness of the agency's cost evaluation in its initial protest, the record does not support the conclusion that the agency was on notice of the later, more specific allegations found in the supplemental protest.

The request is denied.

Susan A. Poling
General Counsel

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category, and failed to compare the awardee's rates to historical rates for the incumbent workforce. Supp. Protest at 24-33.