



Decision

Matter of: Southern Aire Contracting, Inc.--Costs

File: B-418070.3

Date: February 21, 2020

Benjamin S. Lowenthal, Esq., Hendrick Phillips Salzman & Siegel PC, for the protester. Major Mark T. Robinson and Robert B. Neill, Esq., Department of the Army, for the agency.

Louis A. Chiarella, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation of reimbursement of costs of pursuing its protest is denied where the agency proposed corrective action before filing the agency report and the protest grounds were not clearly meritorious.

DECISION

Southern Aire Contracting, Inc. (SAC), a small business of Jacksonville, Florida, requests that we recommend that it be reimbursed the costs of filing and pursuing its protest challenging its nonselection for award of a contract under request for proposals (RFP) No. W911SF-18-R-0022, issued by the Department of the Army for repair and construction services at Fort Benning, Georgia. We dismissed the protest, prior to the submission of the agency's report, after the Army advised our Office that it would take corrective action by reviewing its evaluation of proposals and making a new award decision.

We deny the request.

BACKGROUND

The RFP was issued on April 29, 2019, as a small business set-aside, and contemplated the award of multiple indefinite-delivery, indefinite-quantity (IDIQ) contracts under which task orders would subsequently be placed for the required services. Protest (B-418070), exh. 2, RFP at 1. The RFP established that awards would be made on a lowest-price, technically acceptable (LPTA) basis, based on three

evaluation factors--technical ability, past performance, and price.¹ Agency Dismissal Request, exh. B, RFP amend. 2 at 37-38.

Thirty-three offerors, including SAC, submitted proposals by the June 27 closing date. The agency evaluated proposals and, on September 16, issued a preaward notice to seven offerors, including SAC, of their apparent selection for award.² However, on September 21, the Army issued a corrected preaward notice which listed only five successful offerors and which did not include SAC.³

On September 27, SAC filed a protest with our Office, alleging the agency's evaluation was unreasonable and inconsistent with the stated evaluation criteria. Protest (B-418070) at 6-8. On October 16, prior to the October 28 due date for its agency report, the Army submitted a dismissal request, arguing that SAC's protest was factually and legally insufficient. On October 17, we notified the parties that the agency report requirement was now suspended until further notice pending resolution of the dismissal request. In its subsequent response to the dismissal request, filed on October 21, SAC argued that its protest adequately showed how the agency erred in its evaluation.⁴

On October 24, the Army elected to withdraw its dismissal request and, on October 29--prior to the submission of an agency report--the Army notified our Office that it would take corrective action by reviewing its evaluation of offerors' proposals and make a new award decision. Our Office had not established a new due date for the agency report after the October 24 dismissal request withdrawal and before the October 29 corrective action notification. We thereafter dismissed SAC's protest as academic based on the announced corrective action. Southern Aire Contracting, Inc., B-418070, B-418070.2, Nov. 1, 2019 (unpublished decision).

DISCUSSION

SAC requests that our Office recommend that the agency reimburse the protester's costs of filing and pursuing its underlying protest. SAC argues the agency unduly

¹ An LPTA source selection process is one in which all non-price factors are evaluated for acceptability (e.g., acceptable or unacceptable), and that among those offerors determined to be technically acceptable in all regards, award is made on the basis of the lowest evaluated price. Federal Acquisition Regulation § 15.101-2.

² The RFP stated the agency intended to make five IDIQ contract awards. Protest (B-418070), exh. 2, RFP at 1.

³ The contracting officer subsequently informed SAC that the agency had in fact selected five offerors for award, that SAC was not among the five lowest-priced, technically acceptable offerors, and that the first preaward notice had been in error. Agency Dismissal Request at 4.

⁴ SAC also filed a supplemental protest (B-418070.2) based on information received as part of the agency's dismissal request.

delayed taking corrective action by doing so after the October 28 report due date, and that its protest was clearly meritorious as evidenced by the Army's decision to take corrective action. Protest (B-418070.3) at 3-4. The Army argues its corrective action was not unduly delayed insofar as it occurred before the agency report--which GAO had suspended--was due. Memorandum of Law at 3-4. The agency also contends that SAC's underlying protest cannot be considered clearly meritorious because the protest record (e.g., agency report, protester's comments) was not sufficiently developed. Id. at 4-5.

Under our Bid Protest Regulations, 4 C.F.R. § 21.8(e), we may recommend that a protester be reimbursed the costs of filing and pursuing a protest where the contracting agency decides to take corrective action in response to the 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, thereby causing a protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Synchron, LLC--Costs, B-412622.4, Aug. 31, 2016, 2016 CPD ¶ 250 at 4-5; The Sandi-Sterling Consortium--Costs, B-296246.2, Sept. 20, 2005, 2005 CPD ¶ 173 at 2. We will not recommend reimbursement of protest costs where, under the facts and circumstances of a given case, the agency has taken reasonably prompt corrective action. The Sandi-Sterling Consortium--Costs, supra; TRS Research & Transp. Planning & Servs., Inc.--Costs, B-290122.2, July 25, 2002, 2002 CPD ¶ 126 at 2.

In general, if an agency takes corrective action in response to a protest by the due date for its report in response to the protest, we consider such action to be prompt and will not recommend reimbursement of protest costs. The Sandi-Sterling Consortium--Costs, supra, at 2-3. This is the case even where the report due date is extended; in such circumstances, although the corrective action may have been somewhat delayed relative to the original report date, we do not consider this to be an undue delay, since it did not result in the protester's being put to the time and expense of filing comments in response to the report. Id. (finding agency's corrective action not unduly delayed when it was filed after the due date for an agency report, but prior to the submission of the report, because protester was not put to the time and expense of filing comments in response to the report); TRS Research & Transp. Planning & Servs., Inc.--Costs, supra.

Here, the Army's proposed corrective action occurred prior to the agency report being due, and neither its report nor the protester's comments were filed. As set forth above, our Office suspended the agency report on October 17 in light of the pending dismissal request, and had not reestablished a new report due date before the agency's proposed corrective action occurred--on the 31st day after the protest's filing. Thus, SAC was not required to expend additional time or resources preparing report comments, and the purpose of section 21.8(e) of our Regulations has been served. See Career Sys. Dev. Corp.--Costs, B-411346.10, July 18, 2018, 2018 CPD ¶ 249 at 5. Under these circumstances, we consider the corrective action to be prompt; it follows that there is no basis for recommending reimbursement of SAC's protest costs.

In any event, we cannot say that SAC's protest was clearly meritorious. We consider a protest to be clearly meritorious when the agency lacked a defensible legal position; that is, that the protest does not involve a close question. Synchron, LLC--Costs, supra, at 5. Contrary to the protester's assertion, our Office has consistently stated the mere fact that an agency decides to take corrective action does not establish that a protest is clearly meritorious. Innovative Techs., Inc.--Costs, B-415810.3, Mar. 12, 2018, 2018 CPD ¶ 107 at 3; Alaska Structures, Inc.--Costs, B-298575.4, Jan. 22, 2007, 2007 CPD ¶ 15 at 8. Nor did the Army's corrective action notice contain any admission of the protest's merit by stating that such action was warranted. Cf. Browning-Ferris Indus. of Hawaii, Inc.--Costs, B-278051.2, Apr. 27, 1998, 98-1 CPD ¶ 122 at 5 (finding protest to be clearly meritorious in light of agency's admission that it lacked any documentation to support its solicitation estimates). Here, deciding whether SAC's protest was meritorious, let alone clearly meritorious, would have required further development of the protest record--including a complete agency report and the protester's comments on the report--and would have required substantial further legal analysis. Career Quest, a division of Syllan Careers, Inc.--Costs, B-293435.5, Apr. 13, 2005, 2005 CPD ¶ 79 at 3. In sum, insofar as SAC's protest did not present any issues that could be described as clearly meritorious, and as the Army's corrective action was not unduly delayed, it follows that there is no basis for recommending reimbursement of SAC's protest costs. Synchron, LLC--Costs, supra.

The request that we recommend reimbursement of protest costs is denied.

Thomas H. Armstrong
General Counsel