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Decision

Matter of: ORBIS Sibro, Inc.

File: B-418165.4

Date: August 21, 2020

Jerome S. Gabig, Esq., Wilmer & Lee, PA, for the protester.
Chinedum U. Okparaekke, Esq., Department of the Navy, for the agency.
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DIGEST

Request for recommendation to reimburse the costs of filing and pursuing an earlier protest is denied where the agency did not unduly delay implementing the proposed corrective action.

DECISION

ORBIS Sibro, Inc., of Mount Pleasant, South Carolina, requests that our Office recommend that the Department of the Navy, reimburse the firm the reasonable costs of filing and pursuing its protest challenging the issuance of a task order to Morgan Business Consulting, LLC, of Arlington, Virginia, under task order solicitation No. N6660418R3012, issued by the Department of the Navy, for program management, financial and business management, technical and engineering management, and integrated logistics support services.

We deny the request.

BACKGROUND

ORBIS Sibro filed its protest with our Office, docketed as B-418165, on October 15, 2019, arguing that the agency's cost realism analysis and past performance evaluation of its proposal were unreasonable and these errors resulted in a flawed source selection decision.¹ On October 31, prior to the agency report due date, the Navy informed our

¹ Although firms that compete for task orders under indefinite-delivery, indefinite-quantity contracts are generally referred to as "vendors" who submit "quotations" and

Office and the parties that it intended to take corrective action in response to the protest. Notice of Corrective Action. The agency represented that its corrective action would include reevaluating the proposals in accordance with the solicitation, making a new selection decision, and taking any other corrective action deemed appropriate. *Id.*; Electronic Protest Docketing System No. 18. The Navy further represented that it would consider all protest grounds raised and continue to stay the award of the contract. Notice of Corrective Action. On November 7, our Office dismissed the protest because the Navy's corrective action rendered the protest academic. *ORBIS Sibro, Inc.*, B-418165, Nov. 7, 2019 (unpublished decision).

DISCUSSION

ORBIS Sibro now requests that our Office recommend it be reimbursed for its costs of filing and pursuing the protest, including attorneys' fees, because the Navy has, in its view, unreasonably delayed implementing the proposed corrective actions that caused our Office to dismiss its protest as academic. Req. at 1. ORBIS Sibro primarily complains that the length of time that the Navy has taken to implement its corrective action--eight months thus far--constitutes "an inordinate delay," and that its protest grounds were clearly meritorious. *Id.* at 4-5.

The Navy disagrees with the protester's contention that the agency's implementation of the corrective action is unduly delayed. In this regard, the agency states that the typical duration of a source selection of similar magnitude ranges from 12 to 18 months. Contracting Officer Statement (COS) at 1. The agency explains it began implementing its corrective action plan on November 12, 2019, and that the plan involved performing an entirely new evaluation of all proposals, taking into consideration the allegations raised by protesters challenging the previous award decision.² *Id.* The corrective action plan, according to the Navy, required the agency to reconvene its evaluation team and identify a new source selection authority. Agency Response to Req. at 2. In this regard, the Navy intended to "discard the previous evaluations in whole and perform a complete and thorough review of each offeror's proposal from the beginning" COS at 1.

The agency also represents that its efforts to expeditiously complete the corrective action were impacted by several challenges, including personnel changes that affected the composition of the evaluation team, selection official, and legal counsel. Moreover, the Navy explains that the 2020 COVID-19 pandemic presented logistical challenges as

are "issued" task orders, the record and the parties' submissions primarily use the terms "offerors," "proposals," and "award." For the sake of consistency with the record, we refer to the firms that competed here as offerors who submitted proposals for award of a task order.

² In addition to ORBIS Sibro, two other vendors challenged the prior award. These protests were docketed as B-418165.2 and B-418165.3 respectively.

a result of the majority of agency's workforce being required to move to a full-time telework environment. *Id.* The agency, nonetheless, represents that it is continuing to diligently implement its corrective action plan in a cautious manner to ensure that its evaluation is consistent with the solicitation.³ Agency's Response to Req. at 2.

When a procuring agency takes corrective action in response to a protest, our Office may recommend that the agency pay the protester its reasonable costs of filing and pursuing the protest. 4 C.F.R. § 21.8(e). However, our Bid Protest Regulations do not contemplate a recommendation for the reimbursement of protest costs in every case where an agency takes corrective action, but rather only where an agency unduly delays taking corrective action in the face of a clearly meritorious protest. *Information Ventures, Inc.--Costs*, B-294580.2 *et al.*, Dec. 6, 2004, 2004 CPD ¶ 244 at 2. When an agency takes corrective action on or 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. *Innovative Techs., Inc.--Costs*, B-415810.3, Mar. 12, 2018, 2018 CPD ¶ 107 at 2. We have recognized that the reimbursement of protest costs may be appropriate, in some instances, where an agency does not timely implement the promised corrective action that led to the dismissal of an earlier protest. *Computer Cite--Costs*, B-402792.5, B-403769.2, Apr. 14, 2011, 2011 CPD ¶ 85 at 2-3. Our Office has also found that months-long delays do not by themselves constitute an undue delay where an agency reasonably justifies or explains those delays. *Id.* at 3.

Here, ORBIS Sibro is not alleging that the Navy unduly delayed *taking* corrective action, but that the Navy has unduly delayed *implementing* the proposed corrective action.⁴ Req. at 1. We disagree. The record shows that the agency began implementing its corrective action shortly after ORBIS Sibro's protest was dismissed and that these efforts have been, and continue to be, on-going. See, e.g., Agency Report (AR), Tab 1, Agency Emails to ORBIS Sibro (showing that, between December 10, 2019 and June 22, 2020, the agency made several requests to ORBIS Sibro for the firm to confirm extension of the validity of its proposal).

Additionally, we do not find unreasonable the agency's explanations regarding the personnel and logistical challenges it faced in attempting to diligently implement the proposed corrective action, in light of the stated intention to begin "anew" the evaluation of proposals. Agency Response to Req. at 2; COS at 1. As the agency has pointed

³ By way of example, the Navy states that the original source selection evaluation for the subject solicitation took approximately 11 months from the proposal submission deadline until the eventual award date. Agency's Response to Req. at 2.

⁴ To be clear, had the requester made such an allegation--that the Navy unduly delayed taking corrective action--that claim would have been denied. As our Office has consistently stated, when an agency takes corrective action on or before the due date set for receipt of the agency report, we view such action as prompt and will not recommend the reimbursement of costs. *Innovative Techs., Inc.--Costs*, B-415810.3, Mar. 12, 2018, 2018 CPD ¶ 107 at 2.

out, the prior source selection process for the subject solicitation took almost 11 months to complete, without the logistical challenges now presented by the 2020 COVID-19 pandemic. Further, while the requester expresses its frustration with the duration of the corrective action, and with the agency's lack of responsiveness to communications in May 2020, the record shows that the agency advised ORBIS Sibro, as recently as July 22, that the agency was still in the process of its reevaluation, and that it anticipated making an award prior to the current expiration of proposal validity date (August 31). *Compare* Req. at 3-4 with AR, Tab 2, Agency July 22 Email to Protester at 1.

Finally, ORBIS Sibro cites to several of our decisions as support for its request for a recommendation for the reimbursement of costs. We find that the cases relied on by the requester to be inapplicable to the circumstances here. For example, in *Commercial Energies, Inc.--Recon. and Decl. of Entitlement to Costs*, B-243718, B-243718.2, Dec. 3, 1991, 91-2 CPD ¶ 499, our Office concluded that the protester was entitled to its protest costs, because the agency had waited nearly five months to start implementing the proposed corrective action--which, in that instance, was to amend and reissue the solicitation--and was ultimately unable to provide any explanation for its delay. In that decision, we found that, among other things, the agency had admitted "that procurement laws and regulations were violated in the award of a contract to [the awardee]," and that the agency, nonetheless, allowed continued performance of the improperly awarded contract.⁵ *Id.* at 3. By contrast here, the Navy commenced its corrective action shortly after the protest was dismissed, and the agency has stayed performance of the contract while implementing its corrective action. Moreover, as discussed above, we find unobjectionable the explanation provided by the Navy for the length of time that the implementation of the corrective action has taken here.

Similarly, in *Pemco Aeroplex, Inc.--Recon. and Costs*, B-275587 *et al.*, Oct. 14, 1997, 97-2 CPD ¶ 102, our Office recommended that the protester be reimbursed the costs of filing and pursuing its protest, where the agency proposed to take corrective action, which included issuing an amendment to the solicitation, receiving revised proposals, conducting a reevaluation, and making a new source selection decision. In that

⁵ We note that our *Commerical Energies* decision specifically discussed the fact that the agency waited until the day the agency report was due to file its notice of corrective action that admitted to the deficiencies alleged by the protester. Our Office, however, has since reiterated, in countless subsequent decisions, that when an agency takes corrective action *on or before* the due date set for receipt of the agency report, we will view such action as prompt and will not recommend the reimbursement of costs. See, e.g., *INTELiTEAMS, Inc.--Costs*, B-418123.2, B-418180.2, Feb. 25, 2020, 2020 CPD ¶ 76 at 3; *Livanta, LLC--Costs*, B-404215.2, Apr. 5, 2011, 2011 CPD ¶ 82 at 3; *AGFA HealthCare Corp.--Costs*, B-400733.6, Apr. 22, 2009, 2009 CPD ¶ 90 at 3-4; *The Sandi-Sterling Consortium--Costs*, B-296246.2, Sept. 20, 2005, 2005 CPD ¶ 173 at 3; *Jack Faucett Assocs.--Recon., Protest, and Costs*, B-278961 *et al.*, Apr. 17, 1998, 98-1 CPD ¶ 109 at 3.

instance, despite the passage of more than four months, our Office found that the agency had not even taken the first step to implement the proposed corrective action (*i.e.*, issuing an amendment to the solicitation), and again, the agency, there, offered no meaningful explanation for the delay. *Id.* at 6. Here, as discussed, the Navy took steps, within weeks of the dismissal of the protest, to implement its proposed correction action, and the record reflects the agency continues to proceed towards completing its reevaluation and new source selection.⁶ Moreover, the agency has also represented to the requester that the Navy expects to complete its corrective action by August 31. AR, Tab 2, Agency July 22 Email to Protester at 1.

Under the circumstances here, we do not find that the agency's actions constitute undue delay in implementing the proposed corrective action. *See, e.g., J & J/BMAR Joint Venture, LLP--Costs*, B-290316.7, July 22, 2003, 2003 CPD ¶ 129 (finding that a 9-month delay in the implementation of corrective action was not an undue delay under the circumstances); *A1 Procurement JVD--Costs*, B-404800.2, B-404800.3, Aug. 24, 2011, 2011 CPD ¶ 190 (finding reasonable the agency's explanation of the delay in implementing the proposed corrective action). Where, as here, the record confirms that the agency acted reasonably and without undue delay in implementing the corrective action proposed, the requester is not entitled to recover the costs of filing and pursuing

its protest.⁷ *Computer Cite--Costs*, *supra* at 3-4; *Forge Ahead Co.--Decl. of Entitlement to Costs*, B-256681.2, Nov. 28, 1994, 94-2 CPD ¶ 211.

⁶ We also disagree with the requester that our decision in *FCi Fed., Inc.*, B-408558.7, B-408558.8, Aug. 5, 2015, 2015 CPD ¶ 245, is applicable here. In that decision, we sustained FCi Federal's challenge to the agency's implementation of corrective action in response to a prior sustained protest. Here, because the Navy took corrective action before the due date for the agency report, we have never decided the merits of the protest. Similarly, the requester's reliance on our decision in *East Coast Nuclear Pharmacy--Costs*, B-412053.5, Aug. 31, 2016, 2016 CPD ¶ 249 is misplaced. In that decision, we recommended reimbursement of protest costs where we found the protester's challenges to be clearly meritorious and the agency unduly delayed taking corrective action. In *East Coast Nuclear Pharmacy*, the agency did not decide to take corrective action until after it had submitted the initial agency report and an additional agency report, in response to the protester's filing of two supplemental protests. Because we found the allegations raised in the initial protest to be clearly meritorious, we granted the recommendation for costs because the agency had unduly delayed taking corrective action in the face of a clearly meritorious protest. *Id.* at 6.

⁷ Because we find that the agency had not unduly delayed implementing its proposed corrective action, we do not address ORBIS Sibro's argument that its protest was clearly meritorious. *J & J/BMAR Joint Venture, LLP--Costs*, *supra* at 3 n.2.

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

Thomas H. Armstrong
General Counsel