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## Decision

**Matter of:** Rho Federal Systems Division, Inc.--Costs

**File:** B-420491.4

**Date:** August 11, 2022

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James Y. Boland, Esq., Michael T. Francel, Esq., and Lindsay M. Reed, Esq., Venable LLP, for the requester.

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### DIGEST

Request for a recommendation for reimbursement of protest costs is denied where the requester fails to demonstrate that any of the protest grounds, raised before the agency announced its intent to take corrective action in response to a supplemental protest, were clearly meritorious.

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### DECISION

Rho Federal Systems Division, Inc., a small business of Durham, North Carolina, requests that our Office recommend that the firm be reimbursed the reasonable costs of filing and pursuing its protest of the contract award to The Emmes Company, LLC, of Rockville, Maryland. The contract award was made under request for proposals (RFP) No. NIAID-DAIT-75N93020R00019, issued by the Department of Health and Human Services, National Institutes of Health (NIH) for services supporting NIH's Allergy and Asthma Statistical and Clinical Coordinating Center. Rho argues that its protest was clearly meritorious and that the agency unduly delayed taking corrective action.

We deny the request.

### BACKGROUND

NIH issued the RFP on August 20, 2020, seeking proposals to provide support services for the design, development, execution, and analysis of clinical research of allergic diseases and asthma performed at the National Institute of Allergy and Infectious

Diseases.<sup>1</sup> COS at 1. The solicitation contemplated award of a single cost-reimbursement type contract, on a best-value tradeoff basis, considering the following evaluation factors, in descending order of importance: technical, cost, and past performance. AR, Tab 3.1, RFP at 68, 117.

Following receipt of five proposals, an evaluation, and the establishment of a competitive range, NIH entered into discussions with three offerors, including with Rho and Emmes. COS at 2-3. After evaluating revised proposals, the agency awarded the contract to Emmes. *Id.* at 3.

On January 31, 2022, Rho protested the award to our Office. *See, generally*, Protest (B-420491). The protester alleged that NIH failed to follow the evaluation criteria set forth in the RFP, converted a best-value tradeoff procurement into a lowest-price, technically acceptable (LPTA) competition, and failed to make award on a cost-plus-fixed-fee basis. *Id.* at 9-13. Rho also argued that the agency failed to perform a cost realism analysis of Emmes's proposed cost, and failed to consider Rho's incumbent past performance reference. *Id.* at 13-17. Further, Rho asserted that NIH misevaluated technical proposals, including not considering technical risks arising from the awardee's low cost, and failed to assess the relative risks associated with each offeror's past performance. Supp. Protest at 6-24.

On February 11, Emmes, who intervened in the protest, requested a partial dismissal of the protest. Intervenor's Req. for Dismissal at 1. Specifically, Emmes sought dismissal of Rho's cost realism, technical, and past performance evaluation challenges, and the protester's assertion that NIH failed to make award on a cost-plus-fixed-fee basis as speculative and legally insufficient. *Id.* at 3-6. Our Office agreed, in part, and notified the parties that we intended to dismiss the challenges to NIH's award determination, and the agency's failure to assess technical risks arising from the awardee's low cost. GAO Notice of Decision on Partial Dismissal at 1.

In response to the remaining protest grounds, the agency filed an agency report, in which it maintained that the evaluation and source selection were reasonable and consistent with the RFP criteria. Subsequent to the receipt of the agency report, Rho filed a second supplemental protest, expanding its initial arguments relating to the evaluation of the technical, cost, and past performance proposals. Rho also argued that the agency failed to consider relevant information in making its responsibility determination, and that Emmes has a disqualifying organizational conflict of interest (OCI) that could not be mitigated. Comments and 2nd Supp. Protest at 79-83. In this regard, Rho alleged that one member of NIH's evaluation panel on a "nearly identical" procurement was a senior executive at Emmes and the signatory of Emmes's proposal

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<sup>1</sup> Specifically, the contractor will support the NIH's Asthma and Allergic Diseases Statistical & Clinical Coordinating Center (AA-SCCC). Protest (B-420491), Agency Report (AR), Tab 2, Contracting Officer's Statement (COS) at 1.

for this procurement.<sup>2</sup> *Id.* at 80-81. Rho asserted that this panel member evaluated Rho's proposal submitted in response to that related procurement. *Id.* In addition, Rho argued that another Emmes senior executive was a member of the evaluation panel on a third related procurement, in which Rho also participated. *Id.*

In response to these allegations, on March 23, the agency advised our Office that it intended to take corrective action. Notice of Corrective Action & Req. for Dismissal at 1. Specifically, the agency explained that it would conduct an OCI investigation, exclude Emmes from further consideration, reevaluate proposals, and make a new source selection determination. *Id.*

On the basis of the proposed corrective action, our Office dismissed the protest as academic. *Rho Fed. Sys. Div., Inc.*, B-420491 *et al.*, Apr. 1, 2022 (unpublished decision). On April 18, Rho filed this request. *See, generally*, Req. for Costs.

## DISCUSSION

Rho seeks a recommendation from our Office to be reimbursed its reasonable costs of filing and pursuing its protest grounds raised in its original and two supplemental protests. Rho alleges that the agency failed to take prompt corrective action in light of its clearly meritorious protest. Req. for Costs at 1.

Under the Competition in Contracting Act of 1984, our Office is authorized to recommend reimbursement of protest costs only where we find that an agency's actions violated a procurement statute or regulation. 31 U.S.C. § 3554(c)(1). Our Bid Protest Regulations provide that where an 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). This imposition of costs is not intended as an award to prevailing protesters or as a penalty to the agency, but rather, is designed to encourage agencies to take prompt action to correct apparent defects in competitive procurements. *Science Applications Int'l Corp.--Costs*, B-410760.5, Nov. 24, 2015, 2015 CPD ¶ 370 at 4. However, our 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.

Thus, as a prerequisite to our recommending the reimbursement of costs where a protest has been resolved 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. *Overlook Sys. Techs., Inc.--Costs*, B-298099.3, Oct. 5, 2006, 2006 CPD ¶ 184 at 6. Generally, the existence of any defensible legal position is sufficient to show that a

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<sup>2</sup> As noted above, the services sought in this procurement are in support of NIH's AA-SCCC. The related procurement, referenced by Rho, sought services to support the NIH's Autoimmune Diseases Statistical and Clinical Coordinating Center (AD-SCCC).

protest allegation was not clearly meritorious. *Procinctu Grp., Inc.--Costs*, B-416247.4, Sept. 21, 2018, 2019 CPD ¶ 36 at 4, *recon. denied*, *Procinctu Grp., Inc.--Recon.*, B-416247.5, Mar. 15, 2019, 2019 CPD ¶ 109. Additionally, while we consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest, we generally do not consider it to be prompt where it is taken after that date. *AGFA HealthCare Corp.--Costs*, B-400733.6, Apr. 22, 2009, 2009 CPD ¶ 90 at 3-4.

Rho contends that reimbursement is warranted here because NIH unreasonably decided to defend its “flawed evaluation,” which forced Rho to “expend unnecessary effort and cost evaluating the record and drafting comments” on the issues raised in Rho’s initial and first supplemental protests. Req. for Costs at 2. In this regard, the requester contends that those protest issues were clearly meritorious, and that NIH lacked a defensible legal basis to defend its evaluation. *Id.* at 4-11.

First, Rho argues that NIH failed to perform a proper cost realism assessment of the labor costs proposed by Emmes, which were much lower than Rho’s labor costs on the incumbent contract. *Id.* at 5-7. Second, the requester alleges that NIH unreasonably evaluated offerors’ past performance by failing to assess the relative risk of performance by each offeror and thereby not recognizing a significant advantage associated with Rho’s long-term, successful performance as the incumbent contractor. *Id.* at 7-9. Third, Rho contends that the agency’s evaluation of technical proposals was unreasonable and unequal, and while NIH treated both technical proposals as essentially equivalent, Emmes lacked equivalent experience, personnel, and capabilities to perform the requirement. *Id.* at 9. And fourth, Rho asserts that NIH improperly converted a best-value tradeoff procurement into an LPTA competition. *Id.* at 9-10. We consider each of Rho’s arguments in turn and, as explained below, conclude that none was clearly meritorious.

With respect to Rho’s cost realism arguments, the requester notes that Emmes’s proposed costs, totaling nearly \$44.7 million, were more than \$12 million lower than Rho’s proposed costs of \$56.8 million. *Id.* at 6-7. According to the requester, as the incumbent contractor, Rho had a unique understanding of the adequate costs of performing the contract, and hence, Emmes’s much lower costs should have “compelled” NIH to “inquire into whether it had performed an adequate cost realism analysis.” *Id.* at 6. Rho also contends that NIH should have analyzed whether the awardee’s lower compensation of approximately 15 percent reflected a sound management approach and Emmes’s proper understanding of the requirements. *Id.*

Based on our review of the record, we conclude that NIH presented a defensible legal argument in response to these cost realism challenges. In particular, the agency maintains that it conducted a thorough and well-documented cost realism evaluation, which determined that Emmes’s costs were reasonable, realistic for the work to be performed and reflected a clear understanding of the requirements. Resp. to Req. for Costs at 5-6. The agency notes that its cost realism analysis identified a primary reason for the total cost difference between Rho and Emmes as a “variation of proposed labor mix based on each proposed offeror’s approach, differences in rates of pay and salary

escalation rates (largely determined by an offeror's chosen approach with respect to promotions and merit pay--employee compensation--as well as inflationary cost-of-living projections)." *Id.*; AR, Tab 8.1, Summary of Cost Analysis & Cost Realism at 2. NIH argues that our Office agreed with this assessment, when we announced our intent to dismiss Rho's allegations that Emmes's low cost reflected its lack of understanding of the requirements and proposing an inadequate level of effort and staffing mix as legally insufficient. GAO Notice of Decision on Partial Dismissal at 1. NIH also maintains that Rho's higher cost could be attributed to its highest [DELETED] among the three offerors in the competitive range, and a substantially higher [DELETED], by over \$4 million. Resp. to Req. for Costs at 6-7.

Based upon our review of this record and the above NIH arguments, our Office would have needed to further analyze the agency's cost realism assessment to resolve the merits of the protester's allegations. As a result, we find that NIH presented a legally defensible argument with respect to the cost realism challenge, including by presenting explanations for the cost disparity and by noting that certain aspects of Rho's argument were tenuous and speculative. Accordingly, we conclude that the argument was not clearly meritorious.

Further, Rho contends that NIH unreasonably evaluated past performance by failing to assess the relative risk of performance for each offeror. Req. for Costs at 7-9. The requester alleges that despite the specific solicitation's requirement to "assess the relative risks associated with each offeror," NIH failed to conduct a "substantive comparative analysis" between Rho and Emmes. *Id.* at 7. Rho contends it was unreasonable for the agency to conclude that neither of the offerors presented any performance risk, and to consider both offerors' past performance record as equal. *Id.* at 7-8. In this regard, Rho argues that NIH improperly rejected its 20-year record of incumbent experience merely because it was performed under a cooperative agreement rather than a contract. *Id.*

In response, NIH presented a defensible legal argument. The agency noted that under the Federal Acquisition Regulation, past performance information is defined as pertaining to "a contractor's actions under previously awarded contracts or orders." Resp. to Req. for Costs at 7-9. As such, NIH argued that it properly, and within its discretion, excluded Rho's performance on the cooperative agreement from the past performance evaluation for this procurement. *Id.* at 8; Memorandum of Law at 14. The agency states that as a result, it reviewed the remaining past performance references for both offerors, and concluded that neither Rho nor Emmes presented a performance risk. Resp. to Req. for Costs at 7. We find the agency's position here reasonable and find that the agency presented a defensible legal argument.

Third, Rho contends that its argument alleging that NIH unreasonably and unequally evaluated technical proposals was clearly meritorious. Req. for Costs at 9. The requester alleges that NIH improperly failed to credit Rho's technical proposal for certain features that merited strengths while also assigning unwarranted weaknesses to Rho's proposal. *Id.* Rho also argues that the agency unreasonably elected not to raise the

firm's initial technical score after discussions, despite the fact that, according to the agency, the discussions successfully resolved all of NIH's concerns. Comments and 2nd Supp. Protest at 14-19. Further, Rho challenges NIH's treatment of Emmes's and Rho's technical proposals as essentially equivalent, arguing that Emmes lacked equivalent experience, personnel, and capabilities to perform the requirement. *Id.*

Based upon our review of the record, we find that NIH presented a defensible legal position in response to the technical evaluation challenge. As the agency notes, it conducted discussions with both Rho and Emmes because it identified a few weaknesses in both technical proposals, despite their relatively high scores. Resp. to Req. for Costs at 9-10; AR, Tab 9.3, Technical Evaluation Summary at 5. After discussions resolved the agency's concerns, NIH considered the two proposals, which were separated by only a four percent margin, technically equal. *Id.* NIH also explains that while it did not revise Rho's score, it properly took into account all the issues resolved through discussions, conducting a "qualitative assessment" of Rho's proposal "behind the point scores." Resp. to Req. for Costs at 10. Further, the agency argues that the technical evaluations were reasonable and that the protester's challenges constitute no more than disagreement with the evaluation judgments. *Id.*

As a fourth and final argument, Rho alleges that the agency lacked a defensible legal position for its argument that NIH improperly converted a best-value tradeoff procurement into an LPTA competition. Req. for Costs at 10-11. The requester contends that NIH first registered the basis for award in the Federal Procurement Data System (FPDS) as LPTA rather than as a best-value tradeoff, reflecting NIH's treatment of the evaluation as a *de facto* LPTA procurement. *Id.* at 11. Specifically, Rho argues that the agency disregarded the firm's "documented technical and past performance superiority," and made the award to Emmes solely on the basis of cost. *Id.* at 10-11.

Here, we conclude that NIH has presented a defensible legal position in rebutting the allegation that it conducted a *de facto* LPTA competition. Resp. to Req. for Costs at 10-11. The agency explains that it first incorrectly described the basis for award in FPDS as an LPTA but later corrected the mistake. *Id.* at 11. NIH also notes that it conducted a thorough evaluation of proposals, and after discussions, the technical proposals of Rho and Emmes were considered equal. *Id.* Similarly, both proposals were considered equal under the past performance factor. *Id.* NIH argues that as a result, cost properly became the determining factor in the agency's award decision. *Id.*

In sum, the record does not show that NIH lacked a defensible legal basis when it filed its agency report in response to Rho's original and first supplemental protests. Thus,

Rho has not met its burden to establish that any of its initial and first supplemental protest grounds were clearly meritorious.

The request is denied.

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General Counsel