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## Decision

**Matter of:** Skyward IT Solutions, LLC--Costs

**File:** B-421561.11

**Date:** October 25, 2023

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### DIGEST

Request for recommendation that protest costs be reimbursed is denied where the record does not establish that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest.

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### DECISION

Skyward IT Solutions, LLC, a small business of Gaithersburg, Maryland, requests that our Office recommend the agency reimburse it for the reasonable costs of filing and pursuing its protest. Skyward challenged the establishment of multiple blanket purchase agreements (BPAs), under request for quotations (RFQ) No. 75FCMC21Q0013, issued by the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS) for agile collaboration and modernization endeavors. Skyward argues that the agency unduly delayed taking corrective action in response to its clearly meritorious protest.

We deny the request.

### BACKGROUND

The agency issued the RFQ to vendors holding contracts under General Services Administration (GSA) Multiple Award Schedule (MAS) special item number (SIN) 54151S, for information technology professional services, using the procedures of Federal Acquisition Regulation (FAR) subpart 8.4. Agency Report (AR), Tab 4A, RFQ

at 1, 3.<sup>1</sup> On March 17, 2023, the agency established BPAs for the solicited requirement with eight vendors that had been identified as the apparent successful contractors.<sup>2</sup> AR, Tab 4A, RFQ at 1, 3. Five unsuccessful vendors, including Skyward, filed protests with our Office; the protests raised a variety of challenges to the agency's evaluation of quotations, the agency's conduct during exchanges, and the reasonableness of the agency's source selection decision. *Id.* After development of the protest, CMS advised that it was taking corrective action in response to two related protests--B-421561, B-421561.6, VivSoft Technologies, LLC; and B-421561.5, B-421561.9, BAO Systems, LLC--and requested dismissal because its corrective action in the other protests rendered Skyward's protest academic.<sup>3</sup> *Id.* Specifically, the agency advised that it intended to reevaluate quotations, make a new award decision, suspend all BPA awards pending the reevaluation, and take any additional action that the agency deems necessary. Req. for Dismissal at 1. We dismissed the protest as academic on June 27. *Skyward IT Solutions, LLC*, B-421561.3, B-421561.8, June 27, 2023 (unpublished decision).

## DISCUSSION

Skyward argues that the reimbursement of its protest costs is warranted here because its protest was clearly meritorious and the agency's decision to take corrective action after the submission of the agency report constituted undue delay. For the reasons discussed below, we deny the request.

When an agency takes corrective action in response to a protest, we may recommend the agency reimburse the protester its protest costs if, under the circumstances, we determine the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. 4 C.F.R. § 21.8(e); *Information Ventures, Inc.--Costs*, B-294580.2 *et al.*, Dec. 6, 2004, 2004 CPD ¶ 244 at 2. In other words, to prevail in its request, the protester must show (1) the agency unduly delayed taking corrective action, and (2) its protest was not only meritorious, but clearly meritorious. *Triple Canopy, Inc.--Costs*,

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<sup>1</sup> References herein to the agency report are to the report provided in response to Skyward's prior protest, which was docketed by our Office as B-421561.3, B-421561.8.

<sup>2</sup> The agency selected the following eight vendors for the establishment of BPAs: (1) Bellese Technologies, LLC, of Owings Mills, Maryland; (2) Coforma, LLC, of Washington, District of Columbia; (3) Dynanet Corporation, of Elkrigde, Maryland; (4) Flexion Inc., of Madison, Wisconsin; (5) Nava Public Benefit Corporation (PBC), of Washington, District of Columbia; (6) Octo Metric LLC, of Atlanta, Georgia; (7) Oddball, Inc., of Washington, District of Columbia, and (8) Softrams, LLC, of Leesburg, Virginia. AR, Tab 25, Award Notice at 1-2.

<sup>3</sup> The GAO attorneys assigned to the [DELETED] and [DELETED] protests conducted an outcome prediction alternative dispute resolution conference with the parties in those two protests, in which they advised the parties that GAO would likely sustain the protesters' challenges to the agency's evaluation under factor 1, demonstration of design capabilities.

B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 3. Our Office generally views an agency's action as prompt, that is, the agency did not unduly delay taking corrective action, when the corrective action is taken prior to the due date and time for submission of the agency report. *PNS Holdings, LLC.--Costs*, B-418798.3, Oct. 1, 2020, 2021 CPD ¶ 93 at 2-3. Additionally, a protest is clearly meritorious only if a reasonable agency inquiry into the protest allegations would show facts disclosing the absence of a defensible legal position. *Technatomy Corp.; Octo Consulting Grp., Inc.--Costs*, B-413116.49, B-413116.50, Dec. 14, 2016, 2016 CPD ¶ 366 at 3.

Skyward argues that two of its protest grounds were clearly meritorious. The first is Skyward's argument that three of the awardees should have been found ineligible for award, and as a result, those vendors should not have been included in the agency's exchanges with the "best suited" vendors. Cost Comments at 1. The second is Skyward's challenge to the agency's best-value tradeoff analysis, which the protester argued was "based on a mechanical counting of strengths and weaknesses" and failed to meaningfully consider Skyward's lower price.<sup>4</sup> *Id.* For the reasons discussed below, we find that neither allegation was sufficiently persuasive to support a view that the agency lacked a legally justifiable explanation to defend against the protest.

#### Eligibility for Award and Exchanges

Skyward argues that its protest ground--asserting that three of the awardees should have been found ineligible for award, and as a result, those vendors should not have been included in the agency's exchanges with the "best suited" vendors--was clearly meritorious. In support of this allegation, Skyward's protest asserted that the source selection memorandum revealed the contracting officer "found several of the proposed labor categories of [three of] the awardees . . . did not align precisely with the labor categories on their GSA schedule contracts," and that the "best value tradeoff analysis did not take into consideration that these [vendors] proposed prohibited open market items." Supp. Protest at 5. The protester argued that "[i]nstead, the [contracting officer] held exchanges with them and allowed them an opportunity to revise their labor categories so as to make their quotations acceptable," but did not "provide Skyward, who was equally rated with a lower price to the awardees in question . . . a similar opportunity to revise its quotation." *Id.*

The agency responded that the record did not support Skyward's position that the three specified awardees proposed open market items and therefore their quotations were "unacceptable"; rather, the agency maintained that "[a]s a matter of factual accuracy, the quotations submitted by [the three awardees] included only labor categories already available and awarded on their GSA MAS contracts 54151S." Supp. Memorandum of Law (MOL) at 3. The agency further explained that "[w]hile not required by the [s]olicitation, the [c]ontracting [o]fficer reviewed the proposed labor categories for all recommended awardees to ensure they had proposed only categories already

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<sup>4</sup> Although we discuss only the two allegations highlighted by Skyward in its request, we have reviewed each of Skyward's protest arguments, and find no basis to grant the request because none were clearly meritorious.

prenegotiated on their GSA MAS contracts” such that “they did not propose ‘open market’ categories,” and that “[t]his process confirmed that all prospective awardees had proposed labor categories that were in fact available on their GSA MAS contracts.” *Id.* (citing AR, Tab 23, Post Negotiation Memorandum at 42). The agency further clarified that, while also not required by the RFQ, as a further step in this process, the agency conducted a labor category mapping exercise on the quotations of the prospective awardees to see “whether the [prospective awardees] had submitted the best-suited GSA MAS labor category for the [RFQ] position description, or whether a better-suited GSA MAS labor category might be more squarely aligned with the [ ] position description.” *Id.* Pointing to the solicitation provision that expressly provides that once the agency identified “the best-suited [vendors] (*i.e.*, the apparent successful contractors),” the agency may “communicate with only those contractors, to address any remaining issues,” including “technical and price,” RFQ at 6, the agency argued that its actions in engaging in exchanges with the prospective awardees regarding the labor category mapping was proper and in accordance with the terms of the RFQ. *Id.*

We agree with CMS that this protest ground was not clearly meritorious. A contracting agency’s evaluation of quotations is a matter within the agency’s discretion. *Technatomy Corp.*, B-411583, Sept. 4, 2015, 2015 CPD ¶ 282 at 4. In reviewing an agency’s evaluation, our Office will examine the evaluation to ensure that it was reasonable and consistent with the solicitation’s stated evaluation criteria and with procurement statutes and regulations. *Id.* at 4-5. With regard to the protester’s assertion that three proposed awardees’ quotations were unacceptable due to proposing open market items, the agency’s arguments defending its evaluation of the three proposed awardees’ quotations and determination to engage in a labor category mapping exercise of only the quotations found to be best-suited presented defensible legal positions. First, to the extent the awardees did not propose open market items, as the agency claimed, the protester’s argument was without a factual basis. Second, the solicitation clearly permitted the agency to conduct exchanges with the best-suited vendors on any topic, RFQ at 6, so CMS also had a defensible legal position that it was reasonable to conduct exchanges regarding labor category mapping with only the best-suited vendors.

#### Best-Value Tradeoff

Skyward also asserts that its protest ground challenging the agency’s best-value tradeoff assessment was clearly meritorious. In its protest, Skyward argued that the contracting officer unreasonably removed Skyward’s quotation from the group of best-suited vendors (group 1) to the group of quotations not recommended for establishment of a BPA (group 2) based on a mechanical counting of strengths and weaknesses without considering their significance. Supp. Protest at 5-16. In addition, the protester asserted that the best-value tradeoff analysis was unreasonable and in violation of the solicitation’s requirements for failing to meaningfully consider Skyward’s significantly lower price. *Id.* at 11-17.

We have no basis to recommend the reimbursement of Skyward’s protest costs here because the record indicates that the agency had a defensible legal position. As

relevant here, the RFQ provided that after completion of the evaluation, the government would identify two groups: a group of vendors recommended for the establishment of a BPA (group 1), and a group of vendors not recommended for the establishment of a BPA (group 2). RFQ at 28-29 (“The TEP [technical evaluation panel] will make a recommendation based on all non-priced factors . . . which [vendors] should be in group 1 and which [vendors] will be in group 2.”). Although Skyward objects to the contracting officer’s determination that its quotation did not belong with group 1, despite that its quotation received the same (or similar) adjectival ratings as some of the vendors in group 1, our Office has previously explained that adjectival ratings serve only as a guide to, and not a substitute for, intelligent decision making, *LOGC2, Inc.*, B-416075, June 5, 2018, 2018 CPD ¶ 204 at 10, and that an agency’s evaluation is to be based on a qualitative assessment of the relative merits of the competing quotations. See *SRA Int’l, Inc.*, B-407709.5, B-407709.6, Dec. 3, 2013, 2013 CPD ¶ 281 at 12-13.

Here, the agency explained that although the TEP initially placed Skyward’s quotation in the group of best-suited vendors (group 1) based on the similarity of Skyward’s overall adjectival ratings to the overall ratings received by the other quotations in group 1, once the contracting officer, who was also the source selection authority, conducted his own assessment by looking behind the adjectival rating labels to the positive and negative aspects of each vendor’s quotation, the contracting officer concluded that Skyward’s quotation “was essentially technically equal to two [vendors] not recommended for” establishment of a BPA, and therefore, was more similar technically to the quotations in group 2 than group 1. Resp. to Req. for Costs at 5-6 (citing AR, Tab 21A, General Source Selection Memo (SSM); Tab 21B, Octo Metric SSM; Tab 21C, Nava PBC SSM; Tab 21D, Flexion SSM; Tab 21E, Dynanet SSM; Tab 21F, Bellese SSM; Tab 21G, Softrams SSM; Tab 21H, Coforma SSM; Tab 21I, Oddball SSM; Tab 26, Skyward SSM). As a result, the contracting officer moved Skyward’s quotation into group 2. *Id.*

The fact that Skyward’s quotation received similar adjectival ratings to the quotations in group 1, but was ultimately moved to group 2, does not, in and of itself, indicate that the agency’s evaluation was based on a mechanical counting of strengths and weaknesses or was otherwise unreasonable. As explained above, adjectival ratings serve only as a guide; an agency’s evaluation is to be based on a qualitative assessment of the relative merits of the competing quotations. Consistent with this standard, the agency asserted that the contracting officer looked behind the adjectival rating labels to the positive and negative aspects of Skyward’s and the other vendors’ quotations in deciding that Skyward’s quotation did not belong in group 1, which on its face presented a defensible legal position to the protester’s argument that the agency’s evaluation was mechanical in nature. Thus, Skyward’s protest ground was not clearly meritorious.

Moreover, the agency provided a reasonable response to the protester’s assertion that the contracting officer had not reasonably considered price in his tradeoff determination. In this context, the agency argued that Skyward’s assertion “ignores the [s]olicitation’s statement that ‘all evaluation factors other than cost or price, when combined, are significantly more important than cost or price’” and was “based on [the protester’s] assumption that Skyward’s [quotation] was ‘relatively equal’ to other recommended [vendors], which it was not.” MOL at 7 (quoting RFQ at 20). In addition, in response to

the protester's allegation that the tradeoff analysis did not show why the agency found that the technical superiority of the three awardees with the same adjectival ratings as Skyward was worth a price premium, the agency responded that, for each awardee, the contracting officer looked behind the adjectival ratings to the positive and negative aspects of the vendors' quotations and, based on this assessment and a comparison with the positive and negative aspects of Skyward's quotation, found that the technically superior attributes of the awardees' quotations were a "better value and worth the price premium." MOL at 6-7 (citing AR, Tab 21H, Coforma SSM at 58-61, 79-80; Tab 21C, Nava PBC SSM at 75-79, 99-100; Tab 21I, Oddball SSM at 61-64, 82-84).

Although Skyward maintains that the agency's best-value tradeoff was unreasonable, our Office has consistently stated that a protester's disagreement regarding the agency's judgment, without more, does not provide our Office with a sufficient basis to question the agency's evaluation. *Apex Transit Sols., LLC--Costs*, B-418631.4, Feb. 8, 2021, 2021 CPD ¶ 102 at 5-6. Here, it appears that the agency and the protester merely disagree as to the weight that should be given to the consideration of price and the agency's determination that the awardees' technical superiority merited a price premium. As a result, we conclude that Skyward's disagreement with the agency's best-value tradeoff assessment does not meet the high bar to be considered a clearly meritorious protest ground. See *Triple Canopy, Inc.-Costs*, *supra*.

In sum, because the record shows that the agency had a defensible legal position with respect to the arguments Skyward raised in its protest, we have no basis to grant Skyward's request.

The request for a recommendation for the reimbursement of costs is denied.

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General Counsel