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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: SpectrumS4, LLC--Costs

File: B-408227.4

Date: August 26, 2013

David M. Nadler, Esq., Dickstein Shapiro LLP, for the protester.
Col. Barbara Shestko, and Michael G. McCormack, Esq., Department of the Air Force, for the agency.
Pedro E. Briones, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reimbursement of protest costs is denied where protest grounds cannot be determined to be clearly meritorious because record was not fully developed due to agency's proposed corrective action in a related protest of the same procurement.

DECISION

SpectrumS4, LLC, of Burlington, Massachusetts, requests that our Office recommend that the firm be reimbursed the costs of filing and pursuing its protest against the award of various contracts under request for proposals (RFP) No. FA8721-11-R-0002, issued by the Department of the Air Force for professional acquisition and support services.

We deny the request.

BACKGROUND

On April 17, 2013, SpectrumS4 protested the contract awards, challenging the agency's technical evaluation and its decision not to conduct discussions. Spectrum did not challenge the agency's cost/price evaluation.

On April 19, PE Systems, of Littleton, Massachusetts, also protested the contract awards. PE Systems challenged the agency's cost/price evaluation, arguing that the agency failed to conduct a proper cost realism analysis. PE Systems did not challenge the agency's technical evaluation.

On May 17, the Air Force notified our Office that it intended to take corrective action in response to PE Systems' protest. The agency stated that it would "revisit" the cost realism evaluation and that, if evaluation results changed, the Air Force would terminate any improper awards and make new awards as appropriate. See Notice of Correction Action at 1. PE Systems objected to the proposed corrective action, arguing that it did not fully address PE Systems' protest issues.

On May 20, the Air Force filed an agency report in SpectrumS4's protest, denying and fully responding to the protest allegations. In support of its position, the agency submitted a memorandum of law, a contracting officer's statement, the technical evaluation record, the award documentation, and other ostensibly relevant documents.¹

On May 21, our Office convened a joint conference call with both protesters and the Air Force to seek further clarification of the agency's proposed corrective action in PE Systems' protest and to discuss its implications for SpectrumS4's protest. The Air Force explained that it intended to take corrective action by first performing a cost realism analysis in order to rank offers based on their proposal cost, then reviewing the agency's technical and past performance evaluations, and making a new source selection decision if necessary.² See Air Force May 21, 2013, Email to GAO. The Air Force stated that it would also consider all of the issues raised by the protesters in their respective protests and would take additional corrective action as the agency deemed necessary. Id.

On May 22, our Office dismissed SpectrumS4's and PE System's protests, concurrently, finding that the corrective action proposed by the Air Force rendered both protests academic.

DISCUSSION

SpectrumS4 requests that our Office recommend that the Air Force reimburse SpectrumS4 for the costs of filing and pursuing its protest, on the basis that the agency unduly delayed taking corrective action on SpectrumS4's protest. Request

¹ The agency report in SpectrumS4's protest was originally due on May 17, however our Office granted the Air Force's request to file its report on May 20, which was the due date for the agency report in PE System's protest.

² The RFP provided for award of multiple contracts on a lowest-price, technically acceptable basis following a two-step evaluation process. RFP (conformed) at 86-87. Step 1 involved ranking proposals by price; step 2 involved evaluating proposals under the solicitation's two non-price evaluation factors (technical and past performance) and selecting the six lowest-price proposals that were rated acceptable under both factors. Id.

for Reimbursement at 1. In SpectrumS4's view, it should be reimbursed its costs because the Air Force delayed taking corrective action until after it was compelled to do so by our Office and after submission of its agency report. Id. at 3.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs, if, 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 the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2013); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 5. 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. Apptis Inc.--Costs, B-402146.3, Mar. 31, 2010, 2010 CPD ¶ 123 at 4; Triple Canopy, Inc.--Costs, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 3. A protest is clearly meritorious where a reasonable agency inquiry into the protester's allegations would reveal facts showing the absence of a defensible legal position. Yardney Technical Prods., Inc.--Costs, B-297648.3, Mar. 28, 2006, 2006 CPD ¶ 65 at 4. The mere fact that an agency takes corrective action does not establish that the protest was clearly meritorious. Diligent Consulting, Inc.--Costs, B-299556.3, June 26, 2007, 2007 CPD ¶ 125 at 5.

Reimbursement is not appropriate in this case because the protest was not clearly meritorious.³ The agency submitted a report on the protest, asserting defensible legal positions and providing evidence to support their positions. In order for us to have reached a decision about the merits of SpectrumS4's protest, we would have had to develop the record further, including requiring the protester to file comments to weigh the merits of both parties' arguments. Ordinarily, we do not regard a protest as clearly meritorious where, as here, resolution of the protest required further record development to complete and clarify the record. Threat Mgmt. Group, B-407766.5, Mar. 28, 2013, 2013 CPD ¶ 84 at 6 (arguments not clearly meritorious where our Office required agency to provide additional explanation); Aptis Inc.--Costs, supra, at 5 (need for additional development demonstrates protest arguments not clearly meritorious). In any event, as noted above, the agency took

³ Contrary to SpectrumS4's assertions, Request for Reimbursement at 2-3, our Office did not express "serious concerns" with the Air Force's decision to take corrective action in only the PE Systems protest, nor "compel" the agency to take corrective action to address SpectrumS4's protest grounds.

corrective action in response to another party's protest that rendered SpectrumS4's protest academic.

The request is denied.

Susan A. Poling
General Counsel