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**Comptroller General
of the United States**

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Decision

Matter of: Coastal-Enviroworks Joint-Venture--Costs

File: B-410576.4

Date: July 21, 2015

Pamela J. Mazza, Esq., Megan C. Connor, Esq., and Peter B. Ford, Esq., Piliero Mazza PLLC, for the protester.
Kathleen Clever, Environmental Protection Agency, for the agency.
Lois Hanshaw, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Our Office will not recommend the reimbursement of the costs of filing and pursuing a protest where the agency took corrective action, unless the agency unduly delays taking corrective action in the face of a clearly meritorious protest; this standard is not met where the record shows that the initial protest was not clearly meritorious, and where, even if the supplemental protest was clearly meritorious, the agency did not unduly delay taking corrective action after receipt of the supplemental protest.

DECISION

Coastal-Enviroworks Joint-Venture (Coastal), of Edgewood, New York, requests that our Office recommend that the Environmental Protection Agency (EPA) reimburse its costs of pursuing its protest of the award of a contract to Integrated Environmental Solutions, Inc. (IES), under request for proposals (RFP) No. SOL-R-7-14-00008, issued for environmental lead remediation.

We deny the request.

BACKGROUND

Issued on July 8, 2014, as a HUBZone small business set-aside, the RFP contemplated the award of a fixed-price, indefinite-delivery/indefinite-quantity (ID/IQ) contract for a base year and two one-year option periods for environmental

remediation services. RFP at 41, 42, 105, 107.¹ The RFP stated that award would be made on a lowest-priced, technically-acceptable basis, considering five evaluation factors: (1) corporate experience; (2) key personnel; (3) past performance; (4) project management plan; and (5) price. Id. at 109-10, 112.

As relevant to corporate experience, the RFP required offerors to demonstrate at least five years of experience in environmental corporate experience, hazardous waste disposal, residential earthmoving, and excavation. Id. at 109, 113. The RFP advised that the experience and qualifications of only the prime contractor would be considered. Id. at 109. The RFP permitted the prime contractor to submit experience performed as a subcontractor, and required any such experience to be clearly identified. Id. Thus, to be deemed technically acceptable, the prime contractor was required to demonstrate that it met all minimum technical requirements on its own merits. Id. at 112.

With respect to past performance, offerors were required to submit three client references demonstrating projects relevant to the performance work statement and technical factors. Id. at 110. Offerors were required to indicate whether projects had been performed as a prime contractor or subcontractor. Id. The RFP stated that team subcontracting experience would not be considered. Id.

Three offers were received by the RFP closing date. IES's proposal identified IES as the prime contractor that had performed the work offered for corporate experience and past performance. Agency Report (AR), Tab 10, IES Proposal, at 415-21, 438-47. IES also indicated that it would perform as the prime contractor on this acquisition. Id. at 414, 421. IES twice mentioned its sister company, Industrial & Environmental Services, LLC (Industrial) in its proposal. The first reference described the type of work Industrial performs, while the second indicated that the two companies share financial, labor, and equipment resources when completing projects. Id. at 415, 468. After reviewing proposals, the source selection team determined that all offers were technically acceptable and selected IES for award as the lowest-priced offeror. Tab 44, Source Selection Decision, at 1133, 1136-37.

As relevant here, Coastal's initial protest alleged that IES lacked the required corporate experience and past performance because Coastal was unable to find any contracts awarded to IES through various internet searches. Protest at 5. Coastal also asserted that the agency improperly evaluated IES's corporate experience and past performance by either "downplaying" IES's lack of experience, or improperly giving IES evaluation credit for its subcontractor's experience. Id. at 4. EPA responded in an agency report to our Office that its evaluation was

¹ EPA used a Bates numbering system in preparing the agency report; our citations are to those numbers.

proper and its determination of technical acceptability was based on the experience presented in IES's proposal, rather than information available through internet searches. Legal Memorandum at 2.

On November 17, Coastal filed its comments to the agency report and raised a supplemental ground of protest. As relevant here, Coastal's comments alleged more specifically that IES lacked the required corporate experience and past performance because IES misrepresented the experience of its sister company, Industrial, as its own. Comments at 3-6. Coastal also asserted that the agency's evaluation of Industrial's experience was improper. Comments at 6-9.

On November 18, our Office requested that EPA provide a report addressing Coastal's supplemental protest by November 26. The next day, the agency advised our Office that, based on the information received from the protester and IES, it was taking corrective action by terminating the challenged contract and reevaluating IES's proposal. We found that this rendered IES's protest academic, and dismissed it. Coastal's request for reimbursement of its costs followed thereafter.

DISCUSSION

Coastal requests that our Office recommend it be reimbursed the costs associated with filing and pursuing its protest, including reasonable attorneys' fees. Protester's Request at 1. The protester asserts that the agency unreasonably delayed in response to the protester's clearly meritorious protest and contends that reimbursement for costs associated with its initial and supplemental protests is appropriate because the protest grounds were not severable. Id. at 1, 5.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs where, 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) (2015); Threat Management Group, B-407766.5, Mar. 28, 2013, 2013 CPD ¶ 84 at 3-4. The mere fact that an agency decides to take corrective action does not also establish that a statute or regulation clearly has been violated. Diligent Consulting, Inc.--Costs, B-299556.3, June 26, 2007, 2007 CPD ¶ 125 at 4. Thus, as a prerequisite to our recommending the reimbursement of costs 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, *i.e.*, not a close question. InfraMap Corp.--Costs, B-405167.3, Mar. 26, 2012, 2012 CPD ¶ 123 at 3. A protest is clearly meritorious where a reasonable agency inquiry into the protest allegations would have shown facts disclosing the absence of a defensible legal position. LSL Indus., Inc.--Costs, B-291777.2, Aug. 18, 2003, 2004 CPD ¶ 99 at 4.

With respect to the supplemental protest, we deny the request because the agency took corrective action prior to the date set for it to respond to the supplemental protest. Under these circumstances, we view the agency's action as prompt and will not recommend the reimbursement of costs. LGS Innovations LLC, B-405932.3, Apr. 26, 2012, 2012 CPD ¶ 147 at 2.

We also decline to recommend reimbursement of costs associated with Coastal's original protest. We have reviewed all of Coastal's original protest allegations as well as the underlying record and conclude that none of the issues was clearly meritorious. As noted above, Coastal's initial protest alleged that IES's proposal and the agency's evaluation thereof were inconsistent with the solicitation's criteria.² In contrast, Coastal argued for the first time in its comments that IES's proposal was unacceptable and its evaluation was flawed because IES improperly relied on the experience of its sister company. While the initial protest and comments challenged the acceptability and evaluation of IES's technical proposal, Coastal's comments, for the first time, presented information that provided the agency with a basis to question whether IES complied with the corporate experience and past performance requirements of the solicitation. In our view, the allegations in Coastal's initial protest were distinct from the issue on which the corrective action was based, and, without the specific information that was provided in the comments, were not clearly meritorious.

Additionally, to the extent that Coastal argues that a reasonable inquiry should have led the agency to conclude that it did not have a defensible legal position, we disagree. As stated above, the RFP required an offeror to use its own experience to meet the requirements for corporate experience and past performance. RFP at 110, 112. As the protester acknowledged in its comments, "IES's slight of hand, [in] supplanting the corporate experience and past performance of its affiliate for itself" was not apparent from the face of the proposal. Comments at 2. For example, the record shows that IES's proposal identified only IES as the prime contractor that had performed the referenced experience, and would perform on the current requirement. Moreover, IES's brief references to Industrial in its proposal neither indicate that Industrial had performed the offered experience, nor suggest

² The protester's initial arguments are not supported by the record. For example, they do not show that the agency's evaluation was unreasonable or inconsistent with the RFP's terms.

that Industrial would be performing the current requirement. On this record, we conclude that the protest was not clearly meritorious.

The request is denied.

Susan A. Poling
General Counsel