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Decision

Matter of: Career Systems Development Corporation--Costs

File: B-411346.10

Date: July 18, 2018

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DIGEST

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

DECISION

Career Systems Development Corporation (CSD), of West Henrietta, New York, requests that our Office recommend that it be reimbursed the costs of filing and pursuing its protest of the Department of Labor’s (DOL) award of a contract to Management & Training Corporation (MTC), of Centerville, Utah, under solicitation No. DOLJ13PA20010, which was issued for the operation of the Earle C. Clements Job Corps Center (JCC) in Morganfield, Kentucky. CSD maintains that the agency unduly delayed taking corrective action in response to its clearly meritorious protest.

We deny the request.

BACKGROUND

CSD’s request follows a series of protests related to the agency’s efforts to select a contractor to operate the Clements JCC.¹ The agency initially issued the request for

¹ A full procedural history of the protests of the procurement at issue is described in a recent decision resolving two other CSD protests. See Career Sys. Dev. Corp., B-411346.11 et al., May 18, 2018, 2018 CPD ¶ 176 at 1-4.

proposals (RFP) in February 2013, seeking to award, on a best-value tradeoff basis, a cost-plus-incentive-fee contract for a 2-year base period with three option years. Agency Report (AR), Tab 1, RFP, at 1, 20.² DOL originally awarded the Clements operations contract to CSD, but the agency took voluntary corrective action in May 2016 following a protest brought by MTC. As part of the corrective action, which was to include a reevaluation of proposed costs and a new source selection decision, DOL requested in May 2017 that the eight firms in the competitive range submit revised cost proposals. Protest, exh. 10, Corrective Action Email, May 2, 2016; AR, Tab 9, RFP amend. 9, at 1. Firms also were permitted to submit “limited revisions” to their staff resources proposals if the changes were directly related to changes in the revised cost proposals. AR, RFP amend. 10, at 2. Thereafter, in November 2017, DOL completed its corrective action reevaluation and, this time, selected MTC, the incumbent contractor, for award.

Following a debriefing, CSD protested the award decision on December 13, 2017. In its protest, CSD first challenged the agency’s evaluation of MTC’s cost proposal, alleging that the firm impermissibly revised its cost proposal to a greater extent than contemplated as part of the corrective action and alleging that the awardee’s proposed costs were unrealistic. Protest, Dec. 13, 2017, at 10-19. CSD also alleged that the agency unreasonably evaluated its and MTC’s past performance, as well as objected to the source selection decision. Id. at 19-24.

On January 12, 2018, DOL filed its agency report in which the agency defended its evaluation and award decision. On January 16, following an initial review of the protest record, which now included both MTC’s revised cost proposal and revised staff resources proposal, counsel for CSD emailed agency counsel about two new concerns with the evaluation record. See AR, Tab 21, MTC Revised Cost Proposal; Tab 23, MTC Revised Staff Resources Proposal; Request for Costs, encl. 1, Email from CSD Counsel to Agency Counsel, Jan. 16, 2018 (11:35 a.m.). Specifically, in its email, CSD’s counsel contended that MTC was no longer eligible for award due to an alleged change in MTC’s proposed key personnel, and counsel questioned whether the agency’s consideration of earlier technical evaluation findings was proper in light of subsequent changes in MTC’s technical approach. Id. In the email, counsel for CSD explained that the outline of the arguments was “an important consideration as you determine the likelihood of the protest being sustained.” Id. A few days later, agency counsel advised counsel for CSD that DOL would not be taking corrective action at that time. Request for Costs, encl. 2, Email from Agency Counsel to CSD Counsel, Jan. 22, 2018 (9:29 a.m.).

Thereafter, CSD filed its formal comments on the agency’s report. In the January 22 filing, CSD maintained its initial protest grounds, objecting to the scope of MTC’s

² Unless otherwise indicated, citations to the protest record are to documents submitted by the protester and/or agency during the development of CSD’s December 13, 2017, protest (B-411346.8).

proposal revisions, the agency's cost realism evaluation, and the agency's past performance evaluation. Comments/Supp. Protest, Jan. 22, 2018, at 8-21. The protester also raised, as supplemental protest grounds, the two issues it first brought to the agency's attention in its January 16 email. See id. at 2-8.

Our Office requested that DOL submit a supplemental report responding to CSD's supplemental protest allegations by February 2. By email of January 25, prior to submitting a supplemental report, the agency advised our Office that it intended to take corrective action. Notice of Corrective Action Email, Jan. 25, 2018 (4:14 p.m.). Specifically, the agency explained that it intended to "reexamine the proposals of all offerors to determine compliance with the [RFP], as amended, and with applicable law and regulations." Id. DOL further represented that it would terminate MTC's contract, and award a "short-term, sole-source contract" to MTC to continue operations at Clements and "maintain the status quo."³ Id. On February 6, our Office dismissed CSD's protest as academic. Career Sys. Dev. Corp., B-411346.8, B-411346.9, Feb. 6, 2018 (unpublished decision). Thereafter, CSD filed its request that our Office recommend that CSD be reimbursed its protest costs.

DISCUSSION

CSD contends that reimbursement is warranted because its initial protest included clearly meritorious protest grounds, and the agency's corrective action, taken after it filed its initial report, was unduly delayed. Request for Costs at 1. CSD further maintains it should be reimbursed protest costs because a "[r]easonable, timely review" of the supplemental protest allegations outlined in its counsel's January 16 email would have obviated the need for CSD to prepare and file its comments and supplemental protest. Id. at 2.

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. 4 C.F.R. § 21.8(e); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. Thus, as a prerequisite to our recommending the reimbursement of costs where a protest has been settled by corrective action, the protest must not only 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 protester's allegations would reveal facts showing the absence of a defensible legal position. First Fed. Corp.--Costs, B-293373.2, Apr. 21, 2004, 2004 CPD ¶ 94 at 2.

³ CSD subsequently protested the sole-source contract, which resulted in our Office sustaining CSD's challenge. Career Sys. Dev. Corp., B-411346.11 et al., supra.

We find that reimbursement is not appropriate under the circumstances here. First, we disagree with CSD that its initial protest was clearly meritorious. In this respect, none of its three, primary arguments--focusing on MTC's proposal revisions and DOL's evaluation of costs and past performance--were without a defensible legal position. Indeed, for all protest grounds, a substantive response from the agency was necessary for our Office even to assess the merits of the allegations; that is, the allegations presented close questions that warranted further research and analysis.

By way of example, with respect to past performance, CSD objected to its satisfactory past performance rating in its initial protest. Protest, Dec. 13, 2017, at 19-22. The protester specifically challenged the agency's consideration of information contained in the past performance information retrieval system (PPIRS), and CSD further complained that DOL apparently limited its review to CSD's performance operating four specific centers rather than five of CSD's "top ranked centers." Id. at 21. In response, the agency provided a detailed explanation of how it conducted its past performance evaluation, including what information the evaluators considered and why the information was assessed. For instance, the record reflected that DOL considered various past performance information during its original evaluation and updated that information during its reevaluation by reviewing more recent data included in the PPIRS. See Memorandum of Law/Contracting Officer's Statement, Jan. 13, 2018, at 12. The agency also explained its rationale for the ratings assigned to both CSD and MTC. See AR, Tab 27, Source Selection Decision, at 7-8 and 11-12 (detailing the past performance reevaluations).

Based on our review of the record, we cannot conclude that CSD's past performance protest allegations were clearly meritorious. Rather, the record demonstrated that the agency properly reviewed various pieces of information regarding the offerors' performance on relevant contracts, and that the ratings were reasonably assigned in accordance with the solicitation evaluation criteria. In our view, DOL's response presented a defensible legal position based on the factual record. This is the case for CSD's past performance challenges, as well as its other initial protest grounds. Consequently, we are provided no basis to recommend that CSD be reimbursed the cost of pursuing these allegations.

Next, with regard to CSD's supplemental protest grounds, we conclude that DOL did not unduly delay taking corrective action because it acted prior to the deadline for submitting its supplemental report. When an agency takes corrective action before the due date set for receipt of an agency report, our Office views such action as prompt and will not recommend the reimbursement of costs. Science Applications Int'l Corp.-- Costs, B-410760.5, Nov. 24, 2015, 2015 CPD ¶ 370 at 6. Here, our Office requested that DOL submit its supplemental report by February 2, and the agency notified our Office of its intent to take corrective action several days prior, by email of January 25.

Under these circumstances, we consider the corrective action to have been prompt.⁴ See Metalcraft, Inc.--Costs, B-402181.3, May 17, 2010, 2010 CPD ¶ 116 at 3 (finding that corrective action was not unduly delayed when taken prior to the submission of a supplemental agency report and where supplemental protest allegations were not related to the initial protest such that the agency's investigation of the initial protest should have revealed the asserted evaluation errors).

In addition, we decline to accept the protester's argument that the January 16 email from CSD's counsel outlining its supplemental allegations--the allegations that ultimately led to DOL's decision to take corrective action--supports that the corrective action was unduly delayed. Again, as a general rule, so long as an agency takes corrective action by the due date of its protest report, we regard the action as prompt, and will not grant a request to recommend reimbursement of protest costs. See Brian X. Scott--Costs, B-400168.3, Aug. 18, 2008, 2008 CPD ¶ 161 at 2. Thus, that DOL elected to take its corrective action after CSD filed its supplemental protest with our Office does not demonstrate that the corrective action was unduly delayed, even where the agency had advance notice of potential supplemental allegations.

In this regard, the purpose of awarding costs is not to reward the protester or to punish the agency, but to encourage agencies to take corrective action in response to meritorious protests before protesters have expended additional unnecessary time and resources pursuing their claims. Goode Construction, Inc.--Protests and Costs, B-288655.4 et al., Jan. 28, 2002, 2002 CPD ¶ 25 at 3. Here, neither DOL's supplemental report, nor the protester's supplemental comments, was filed; CSD was not required to expend additional time or resources preparing supplemental comments, and the purpose of section 21.8(e) of our Regulations has been served. Despite the agency having advance notice of the protest allegations that ultimately led to its

⁴ In its reply to the agency's response to CSD's request for costs, CSD asserts that the agency's decision ultimately to cancel the Clements RFP and issue a new solicitation for the services further supports the protester's request for costs. Reply in Support of Request for Costs at 2. In this regard, according to CSD, the agency's rationales for cancelling the solicitation existed before DOL awarded the contract to MTC, such that it was unfair for CSD "to compete under and enforce compliance with a solicitation DOL should have abandoned." Id.; see also Career Sys. Dev. Corp., B-411346.11 et al., supra (discussing the agency's rationales for cancelling the Clements solicitation). We find this argument unavailing. As explained herein, our focus in assessing whether an agency should reimburse protest costs is whether the protest grounds asserted were clearly meritorious, and whether the corrective action was unduly delayed despite the clearly meritorious protest grounds. See, e.g., Apptis Inc.--Costs, B-402146.3, Mar. 31, 2010, 2010 CPD ¶ 123 at 4. In this regard, even if the agency had a valid independent basis for cancelling a solicitation, the focus of our analysis remains on the merits of the protest grounds actually asserted. As explained herein, CSD's protest allegations were not clearly meritorious and the corrective action was not unduly delayed such that costs should be reimbursed, regardless of any agency concerns with the solicitation itself.

decision to take corrective action, we cannot conclude that the corrective action was unduly delayed. See The Sandi-Sterling Consortium--Costs, B-296246.2, Sept. 20, 2005, 2005 CPD ¶ 173 at 3 (finding agency's corrective action not unduly delayed when it was filed after the due date for an agency report, but prior to the delayed submission of the report, because protester was not put to the time and expense of filing comments in response to the report).

In sum, there is no basis for recommending that CSD be reimbursed the costs of filing and pursuing its initial and supplemental protest.

The request is denied.

Thomas H. Armstrong
General Counsel