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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Northrop Grumman Systems Corporation--Costs

File: B-412278.6

Date: February 7, 2017

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Christian M. Butler, Esq., Department of Homeland Security, for the agency.
Charmaine A. Stevenson, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation that procuring agency reimburse protest costs is denied where, although agency took corrective action after filing two agency reports, protester did not show that its initial or supplemental protest grounds were clearly meritorious.

DECISION

Northrop Grumman Systems Corporation, of McLean, Virginia, requests that our Office recommend that it be reimbursed the costs associated with filing and pursuing its protests against the Department of Homeland Security's (DHS) award of a contract to Raytheon Company, of Waltham, Massachusetts, under solicitation No. HSSA01-14-R-1006 for cybersecurity information technology systems.

We deny the request.

BACKGROUND

DHS issued the solicitation on July 2, 2014, seeking proposals for the performance of a single-award indefinite-delivery, indefinite-quantity contract for one base year and four 1-year option periods, for DHS' Development, Operations, and Maintenance (DOMino) procurement supporting the National Cybersecurity Protection System to protect the ".gov" domain from cyberattacks. Agency Memorandum of Law (MOL) at 2. DHS first awarded the contract to Raytheon, and

on October 5, 2015, Northrop protested the award, alleging that the agency had failed to consider organizational conflicts of interest (OCIs) and challenging the evaluation of proposals. On October 28, our Office dismissed the protest as academic because the agency advised that it would reconsider any potential OCIs and the evaluation of proposals, and determine whether to reaffirm the award or make a new award. Northrop Grumman Systems Corp., B-412278, Oct. 28, 2015 (unpublished decision).

The agency reaffirmed the award to Raytheon, and on June 15, 2016, Northrop again filed a protest, and ultimately four supplemental protests, alleging that the agency failed to reasonably evaluate OCIs, procurement integrity issues, and appearances of impropriety regarding Raytheon and another offeror; conducted unequal discussions with Raytheon; unreasonably evaluated the offerors' technical proposals, proposed costs, and past performance; and again made an improper and flawed award decision. During the course of the protest, DHS filed initial and supplemental agency reports. On July 26, and then again on August 21, the GAO attorney for the protest notified the parties that he intended to hold a hearing. Emails from GAO dated July 26, 2016 and Aug. 21, 2016. However, prior to our Office conducting a hearing, DHS advised that it would again take corrective action and our Office dismissed the protests as academic on August 30. Northrop Grumman Systems Corp., B-412278.2 et al., Aug. 30, 2016 (unpublished decision). Northrop then filed this request.

DISCUSSION

Northrop requests we recommend that the agency reimburse its costs of pursuing its initial and supplemental protests. Northrop argues that the fact that the corrective action addresses all of its allegations indicates that its protests were clearly meritorious. Northrop further argues that DHS' corrective action, taken after the agency filed two agency reports, which then required Northrop to file comments, was unduly delayed. DHS responds that it took corrective action upon newly discovering that current DHS employees that participated in the DOMino procurement may have had disqualifying financial interests in one or more companies that submitted proposals. DHS further argues that its agency reports provided a colorable defense to all of Northrop's protest allegations, and since our Office intended to conduct a hearing to further develop the record, the protest allegations were not clearly meritorious.

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 costs of filing and pursuing the protest. 4 C.F.R. § 21.8(e). 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. 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. *Id.* The mere fact that an agency decides to take corrective action does not necessarily establish the absence of a defensible legal position, nor that a statute or regulation has clearly been violated. Yardney Technical Prods., Inc.--Costs, B-297648.3, Mar. 28, 2006, 2006 CPD ¶ 65 at 4.

In our view, none of Northrop's protest allegations were sufficiently persuasive to support a view that the agency lacked a legally justifiable explanation to defend against the protest. Although we discuss only some of the allegations raised in the protests, we have reviewed each of the arguments, and find no basis to grant the request because none were clearly meritorious.

OCI and Unfair Competitive Advantage Protest Allegations

In its protests, Northrop argued that two former DHS officials had competitively useful nonpublic information, obtained additional information after leaving the agency, and used this information to participate in the preparation of the Raytheon proposal. Protest at 28-41; Supp. Protest at 15-29. Northrop also argued that one of the former DHS officials used the competitively useful nonpublic information in the preparation of the proposal of another offeror. 2nd Supp. Protest at 2.

In response, the agency argued that the contracting officer had performed a thorough investigation¹ and reasonably concluded that any procurement-related information to which the former DHS officials had access at the time of their February 2012 departures from the agency--over two years before the solicitation was issued--was not competitively useful, and that neither official had obtained competitively useful information after their departures from the agency. MOL at 12-39; Agency Report (AR), Tab J.1, Contracting Officer's OCI Determination and Findings at 63-66. The agency further argued that even if some of the information was competitively useful, the information had been disclosed to all offerors via the bidder's library established for the use of all offerors for proposal preparation, thereby mitigating any potential unfair competitive advantage. *Id.* at 25-31; AR, Tab J.1, Contracting Officer's Determination and Findings at 63-64. DHS stated that

¹ The agency stated that it reviewed emails and program and acquisition documents; obtained certifications from all of the evaluators, the source selection official, and each DHS employee named in the allegations; and conducted interviews with two current and former Raytheon employees. MOL at 7-9; see also AR, Tab J.1, Contracting Officer's OCI Determination and Findings.

these conclusions were supported by the fact that the Raytheon proposal was rated as unacceptable following the initial evaluation of proposals, and that it was the conduct of discussions that enabled Raytheon to submit an improved final proposal revision (FPR) resulting in its contract award. Supp. MOL at 25-27.

We cannot conclude on the record before us that the protester's arguments were clearly meritorious. The GAO attorney assigned to the protest had scheduled a hearing to further develop the record, which would have required further analysis of the parties' positions. Because the agency provided a defensible legal position and resolution of these issues required further development of the record, in our view, they presented a close question and therefore we cannot conclude that they were clearly meritorious. See Science Applications Int'l Corp.--Costs, B-410760.5, Nov. 24, 2015, 2015 CPD ¶ 370 at 7.

Unequal Discussions

Northrop also argued that the agency improperly allowed Raytheon to submit a key management and personnel list (KMPL) for one of its proposed subcontractors after receipt of FPRs, and thereby allowed only Raytheon to revise what would otherwise have been an unacceptable proposal.² 4th Supp. Protest at 7-12. DHS contested that the communications with Raytheon to secure its proposed subcontractor's KMPL constituted discussions, and argued that DHS required the KMPL solely for the purpose of determining Raytheon's responsibility to perform the contract, not for proposal evaluation. Supp. MOL at 8-13.

On this record, Northrop's claim of unequal discussions is also not clearly meritorious. Although we agree with the protester that the RFP required the KMPL to be submitted for all proposed subcontractors, as the agency notes, the KMPL was not required for the agency to substantively evaluate Raytheon's proposal under the technical evaluation criteria or security requirements of the RFP.³ A

² The solicitation required offerors to submit, in Volume I of their proposals, an attachment that contained acquisition risk questions. RFP, Amend. 4 at 72. The questions related to: general information about the company; foreign ownership, control and influence; the KMPL; and company relationships. RFP, Amend. 1, Attach. J-9. The KMPL section required offerors, including their subcontractors, to provide information about clearances and citizenship for its key management and personnel. Id.

³ The agency explains that the KMPL for this subcontractor was not relevant for purposes of any of the evaluation factors set forth in the solicitation, specifically the staffing and security factors, since Raytheon proposed this subcontractor to perform \$0 of work because the subcontractor was proposed to perform in only a surge or back-up capacity. Supp. MOL at 9-10.

request for, or providing of, information that relates to offeror responsibility, rather than proposal evaluation, does not constitute discussions and thus does not trigger the requirement to hold discussions with other competitive range offerors. General Dynamics-Ordnance & Tactical Sys., B-295987, B-295987.2, May 20, 2005, 2005 CPD ¶ 114 at 10.

In determining whether to recommend cost reimbursement, we need not definitively resolve whether the protests were meritorious; rather we must determine whether they were clearly meritorious--that is, that they did not present close questions for which there was no defensible legal position. Triple Canopy, Inc.--Costs, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 4. The allegations raised by Northrop in its initial and supplemental protests do not meet the high bar set by the clearly meritorious standard. Since none of Northrop's protest allegations were clearly meritorious, and despite the fact that the agency decided to take corrective action after filing two agency reports, we cannot recommend that the agency reimburse Northrop the costs of filing and pursuing its protests.

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

Susan A. Poling
General Counsel