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## Decision

**Matter of:** 22nd Century Team, LLC--Costs

**File:** B-412742.4

**Date:** December 15, 2016

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### DIGEST

Request for a recommendation that the agency reimburse the protester the costs of filing and pursuing its protest is granted, where the record shows that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest.

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### DECISION

22nd Century Team, LLC, of McLean, Virginia, requests that we recommend that it be reimbursed the costs of filing and pursuing its protests challenging the award of a task order to Ellumen, Inc., of Arlington, Virginia, issued by the Department of the Army, Army Materiel Command, under request for proposals (RFP) No. W52P1J-14-R-0123 for strategic communication support services. We dismissed the protests after the agency advised our Office that it would take corrective action. 22nd Century argues that its protests were clearly meritorious and that the agency's corrective action was unduly delayed.

We grant the request in part and deny it in part.

### BACKGROUND

On August 13, 2015, the Army issued the RFP for strategic communication support services to Chief Information Officer - Solutions and Partners 3 (CIO-SP3) small

business contract holders.<sup>1</sup> RFP at 1. The solicitation required the performance of eight tasks: (1) strategic initiatives group support; (2) strategic communications support; (3) property book support; (4) information management officer support; (5) security support; (6) management analyst support; (7) executive administration support; and (8) video imaging support. Id. at 2; see also Performance Work Statement (PWS) at 12-23.

Award was to be made to the technically acceptable offer with the lowest price. RFP at 27. Offers were to be evaluated under two factors: (1) technical, which included the technical approach and staffing plan subfactors; and (2) price. Id. Under the technical factor, offers would be rated as acceptable or unacceptable, and if rated unacceptable under any factor or subfactor, the entire proposal would be rendered technically unacceptable and ineligible for award. Id.

As relevant here, the solicitation stated that, with respect to the staffing plan subfactor, the offeror should describe the responsibilities and primary skill set required for each position, and should submit sample resumes for all identified key personnel and labor categories. RFP, Amend. 002, at 5. The resumes would serve as a representation of the skill set the offeror intends to solicit and propose. Id. Further, the RFP explained that the staffing plan must satisfactorily address each of the elements set forth in the RFP and failure to do so would result in an unacceptable rating. RFP at 27. With respect to strategic planning, the PWS stated that the contractor shall possess several skills, including that “[t]he Contractor should be highly qualified, with at least ten years of higher headquarters strategic planning experience, preferably in the Army or another DoD component; master’s degree preferred.” PWS at 15.

The Army received five proposals, including ones from 22nd Century and Ellumen, and issued an award to Ellumen. Agency Report (AR), Tab 38, Selection Decision, at 1, 15. In its evaluation, the Army concluded that 22nd Century’s proposal was acceptable under the technical approach subfactor, but unacceptable under the staffing plan subfactor under four tasks (strategic initiatives group support, strategic communications support, management analyst support, and executive administration support), and therefore unacceptable under the technical factor. See Protest, Feb. 15, 2016, Exh. A, 22nd Century Post Award Debriefing Slides, at 6-8. 22nd Century filed its first protest challenging the evaluation of its technical proposal as unacceptable, and argued that the Army erred by not referring it to the Small

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<sup>1</sup> The Chief Information Officer - Solutions and Partners 3 (CIO-SP3) Small Business Government-Wide Acquisition Contract (GWAC) is a 10-year indefinite-delivery, indefinite-quantity contract administered by the National Institutes of Health, and is intended to provide a wide range of information technology (IT) solutions and services. See <https://nitaac.nih.gov/services/cio-sp3-small-business> (last visited Dec. 14, 2016).

Business Administration (SBA) for review under the Certificate of Competency (COC) program. Protest, Feb. 15, 2016, at 6-11. Prior to filing the agency report, the Army advised that it would take corrective action by opening discussions with all offerors in the competitive range (Ellumen and 22nd Century), clarifying the evaluation methodology, evaluating revised proposals, and rendering a new award decision; our Office dismissed the protest. 22nd Century Technologies, Inc., B-412742.1, Mar. 25, 2016 (unpublished decision).

The Army conducted discussions, and received and evaluated final proposal revisions. 22nd Century responded to the discussion questions and stated that strategic planning is not defined in the RFP, but that the resume submitted is that of an individual with at least 10 years of higher headquarters strategic planning experience. AR, Tab 18, 22nd Century Response to Additional Discussion Questions, at 1. In addition, 22nd Century submitted an annotated resume that highlighted what it believed to be more than 10 years of the required experience. Id., Tab 19, 22nd Century Annotated Resume.

In its reevaluation, the Army concluded that 22nd Century's staffing under the strategic communications support task remained unacceptable, specifically, that the key person proposed for the task did not possess the required experience. AR, Tab 41, 22nd Century Post Award Debriefing Slides at 5-10. The agency also determined that Ellumen's evaluated price was \$15,003,445; the agency did not evaluate 22nd Century's price of \$11,960,275 because its proposal was deemed unacceptable. Id. at 9. The Army again selected Ellumen for award.

22nd Century filed its second protest, again challenging the Army's conclusion that its technical proposal was unacceptable, and that the Army should have referred its proposal to the SBA for a COC.<sup>2</sup> Protest, May 23, 2016, at 8-12. The Army filed its agency report responding to the protest grounds. Upon review of the agency report, 22nd Century filed a supplemental protest arguing that the report confirms the Army had evaluated offers disparately, and that Ellumen's technical proposal should also have been found unacceptable for failing to meet the higher headquarters strategic planning requirement. Supplemental Protest, July 5, 2016, at 5-13.

Thereafter, the Army advised that upon reviewing the supplemental protest, which raised issues concerning the awardee's qualifications, it would take corrective action; our Office again dismissed the protests. 22nd Century Technologies, Inc., B-412742.2, B-412742.3, July 19, 2016 (unpublished decision). The Army has since determined that the solicitation inadequately defines its requirements, and

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<sup>2</sup> 22nd Century additionally argued that the Army had conducted inadequate and misleading discussions. In addition, as it had argued in its first protest, 22nd Century alleged that the awardee's price was unreasonable as compared to 22nd Century's lower-priced proposal. Protest, May 23, 2016, at 12-14.

needs significant revision. As a result, the Army has cancelled the solicitation. Response to Request for Recommendation on Costs, Attachment 3, Notice of Cancellation of Procurement dated July 22, 2016.

## DISCUSSION

22nd Century requests that our Office recommend that the agency reimburse the protester the costs of filing and pursuing its protests. The agency opposes 22nd Century's request, arguing that the allegations in the first protest were neither clearly meritorious nor the basis for the government taking corrective action, and that the agency otherwise took timely corrective action in response to the first and supplemental protests. The agency also argues that because it investigated the arguments raised in both protests and took timely corrective action, 22nd Century is not entitled to reimbursement of its costs associated with the second protest.

When a procuring agency takes corrective action in response to a protest, our Office may recommend that it reimburse the protester its 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, and thereby caused the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. A1C Partners, LLC--Costs, B-409189.3, Sept. 30, 2014, 2014 CPD ¶ 295 at 2-3. 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. Chase Supply, Inc.--Costs, B-411849.3, May 17, 2016, 2016 CPD ¶ 134 at 5. For the reasons discussed below, we conclude that the record here demonstrates that the agency's corrective action in response to two clearly meritorious protest issues relating to the agency's technical evaluation of the protester's proposal and failure to refer the protester to the SBA for a COC was not timely, and we recommend that the agency reimburse 22nd Century for its first and second protest costs.

### Clearly Meritorious Protest Allegations

In its first evaluation, the agency found that several of the protester's sample resumes did not meet the staffing plan requirements and therefore concluded the protester's offer was unacceptable. Thereafter, 22nd Century filed a protest arguing that the resumes it provided met the solicitation's requirements and should have been found acceptable, the agency evaluated its proposal against unstated evaluation criteria, and, in any event, the agency should have referred 22nd Century to the SBA for a COC review if the offer was unacceptable. Protest, Feb. 15, 2016, at 6-11. After the first protest and the agency's corrective action involving reevaluation, the agency again found 22nd Century's proposal unacceptable under the staffing plan subfactor, specifically as it relates to the sample resume submitted to support the strategic communications support task.

In its second protest, 22nd Century again argued that its sample resume met the RFP's requirements and that the agency's determination resulted in holding the protester to a higher standard than it did the other offerors, and thus treated 22nd Century unequally. Protest, May 23, 2016, at 9. Specifically, the protester argued that the sample resume shows more than 10 years of the required experience, especially since the RFP never elaborated on what it meant by "higher headquarters strategic planning." Protest, May 23, 2016, at 6 and 13; Comments at 4. The protester also argued that even if found unacceptable for personnel, as one of only two offerors in the competitive range and as the offeror with the lowest price, the agency was required to refer 22nd Century to SBA for a responsibility determination under the COC program. Protest, May 23, 2016, at 5-10.

In its agency report, the Army contended that it reasonably determined that 22nd Century's key personnel sample resume for the strategic communications support task demonstrates only [DELETED] years of higher headquarters strategic planning experience, and not the 10 years required by the PWS. The Army acknowledged, however, that the resume showed a high level of strategic communication and public affairs qualifications. AR at 9; AR, Tab 38, Selection Decision, at 13-14. Further, the agency argued it was not required to refer 22nd Century's proposal to the SBA because the proposal on its face failed to conform to a material term of the solicitation, making its evaluation conclusion a matter of acceptability, and not a matter of responsibility. AR at 11-12.

Solicitations must contain sufficient information to enable offerors to compete intelligently and on a relatively equal basis. Coastal Int'l Sec., Inc., B-411756, B-411756.2, Oct. 19, 2015, 2015 CPD ¶ 340 at 4. Here, 22nd Century set forth its interpretation of higher headquarters strategic planning in its initial protest and in its response to discussions. Protest, Feb. 15, 2016, at 10; AR, Tab 18, 22nd Century Response to Additional Discussion Questions, at 1. The evaluators realized and acknowledged during the reevaluation that the solicitation did not adequately define the term, see AR, Tab 35, Technical Evaluation Consensus Report, at 19-20, but the agency did nothing to correct this defect in the procurement while undertaking its corrective action. At the conclusion of the reevaluation, the agency again found 22nd Century's proposal unacceptable. Based upon the record, we agree with the protester that there was a lack of guidance in the RFP with respect to the meaning of "higher headquarters strategic planning."

Further, the agency's July 22, 2016 notification to offerors that it was cancelling the solicitation demonstrates that the solicitation did not provide sufficient guidance on this term. Specifically, the agency stated that the solicitation did not adequately address its needs as follows:

[T]he Government had not defined the key terms "higher headquarters," "strategic planning," or "strategic communications." Due to these ambiguities, no offeror could meet the Government's

unclear minimum requirements or be eligible for award. The meaning of the terms, unclear even amongst the evaluation team, profoundly impact the Task 1 and 2 requirements, which account for more than 30 percent of the requirement's total scope. Defining the terms constitutes more than a minor modification.

Notice of Cancellation, July 22, 2016, at 1. On this basis, we find the protest allegation to be clearly meritorious.

In addition, we find the protest allegation concerning referral to SBA to be clearly meritorious. The Small Business Act provides that it is the SBA's duty to certify to government procurement officers with respect to all the elements of contractor responsibility (including capability, competency, capacity, credit, integrity, perseverance, and tenacity) of any one or group of small business concerns to receive and perform a specific government contract. 15 U.S.C. § 637(b)(7)(A). SBA's implementing regulations specifically require a contracting officer to refer a small business concern to SBA for consideration for a COC when the contracting officer "[r]efuses to consider a small business concern for award of a contract or order after evaluating the concern's offer on a non-comparative basis (e.g., a pass/fail, go/no go, or acceptable/unacceptable) under one or more responsibility type evaluation factors (such as experience of the company or key personnel or past performance)." 13 C.F.R. § 125.5(a)(2)(ii).

Here, the RFP evaluation scheme rated offerors on a non-comparative basis, i.e., offers would be rated as acceptable or unacceptable, and if rated unacceptable under any factor or subfactor, the entire proposal would be rendered technically unacceptable and ineligible for award. The Army's conclusion that 22nd Century proposed unacceptable staffing clearly relates to its capability to perform the contract, not simply the adequacy or completeness of its proposal submission. A proposal's responsiveness, or acceptability, concerns an offeror's commitment to provide the required goods or services and is determined by the agency from the face of the proposal. See Coastal Environmental Group, Inc., B-407563 et al., Jan. 14, 2013, 2013 CPD ¶ 30 at 4. In contrast, responsibility relates to an offeror's capability to perform a contract. Id. A responsibility-type technical evaluation factor assessing the capability of the offeror remains a matter of responsibility, notwithstanding the associated performance obligations. Id. at 6.

Therefore, following discussions, when the Army again concluded that 22nd Century's proposal was unacceptable based solely on the sample resume of one individual, the Army, in essence, concluded that 22nd Century lacked the capability to perform this contract, and thus was not a responsible offeror. Accordingly, the Small Business Act requires that the Army should have referred 22nd Century to the SBA for a COC in accordance with 13 C.F.R. § 125.5(a)(2)(ii).

## Undue Delay

Generally, when an agency takes corrective action before the due date of its report, we regard such action as prompt and will not recommend reimbursement of protest costs. The Sandi-Sterling Consortium--Costs, B-296246.2, Sept. 20, 2005, 2005 CPD ¶ 173 at 2-3. Our Office has recognized that the mere promise of corrective action, without prompt implementation, has the obvious effect of circumventing the goal of the bid protest system for the economic and expeditious resolution of bid protests. See Louisiana Clearwater, Inc.--Recon. & Costs, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209 at 6. Where an agency fails to implement the promised corrective action, or implements corrective action that fails to address a clearly meritorious issue raised in an initial protest, such that the protester is put to the expense of subsequently protesting the very same procurement deficiency, the agency's action has precluded the timely and economical resolution of the protest. Id.; Chase Supply, Inc., supra at 5-6.

22nd Century does not dispute that the Army took corrective action prior to the time for filing the agency report in response to the first and supplemental protests. Instead, the protester argues that the agency's corrective action in response to the first protest failed to address the issues raised by the protester, thereby requiring the protester to challenge the same grounds in its second protest. As a result, 22nd Century contends that it should be reimbursed the costs of all of its protests.

In its initial protest, 22nd Century challenged the evaluation of its technical proposal as unacceptable based on unstated evaluation criteria, and argued that the Army erred by not referring it to the SBA for review under the COC program. Protest, Feb. 15, 2016, at 6-11. The agency, with two exceptions, did take corrective action in response to the first and a supplemental protest filed by 22nd Century because, in both instances, the action was taken prior to the agency filing its report. The record shows that in response to the first protest, the agency held discussions, allowed for final proposal revisions, and reevaluated proposals. This action specifically addressed most of the evaluation challenges raised by 22nd Century, and 22nd Century did in fact improve its evaluation results, eliminating all but one of the evaluated deficiencies it had challenged in its protest. Compare AR, Tab 15, 22nd Century Discussions Letter dated April 5, 2016 with Tab 41, 22nd Century Debriefing Slides, at 7. In this regard, the corrective action taken by the agency generally provided the relief sought by the protester in its first protest.

However, during the reevaluation, the agency found that the solicitation was unclear as to the meaning of higher headquarters strategic planning with respect to key personnel resumes--an issue raised by 22nd Century in its initial protest and during discussions--yet the agency nonetheless found 22nd Century's proposal unacceptable. AR, Tab 35, Technical Evaluation Consensus Report, at 19-20. Further, upon again finding 22nd Century to be unacceptable for the second time, the agency failed to refer 22nd Century to the SBA for a COC review. We therefore

find that the agency did not timely take corrective action in response to these clearly meritorious issues raised in 22nd Century's first protest.

In addition, the Army did not timely take corrective action in response to the second protest, which raised the same two clearly meritorious protest grounds relating to the agency's technical evaluation of the protester's proposal and referral to the SBA for a COC. Instead, the Army filed its agency report again defending its rejection of 22nd Century's proposal as unacceptable and its failure to refer 22nd Century to the SBA. As a result, we find that the agency's corrective action in response to the second protest was unduly delayed.<sup>3</sup>

In response to the supplemental protest filed by 22nd Century after receipt of the agency report on the second protest, the agency did not file a supplemental agency report. Instead, the agency decided to take corrective action. Since the final supplemental protest challenged--for the first time--the agency's evaluation of the awardee's proposal, we conclude that the issue raised is distinct from the first two challenges to the evaluation of the protester's own proposal. Accordingly, since the agency acted promptly in response to this issue, we find that the corrective action taken was not unduly delayed.

## RECOMMENDATION

We recommend that the Army reimburse 22nd Century's costs of filing and pursuing its initial and second protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester's certified claim for costs, detailing the time spent and the cost incurred, must be submitted to the agency within 60 days after receiving this decision.

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<sup>3</sup> As a general rule, a successful protester should be reimbursed the costs incurred with respect to all the issues pursued, not merely those upon which it has prevailed. The Salvation Army Cmty. Corr. Program--Costs, B-298866.3, Aug. 29, 2007, 2007 CPD ¶ 165 at 7. In appropriate cases, we have limited our recommendation for the award of protest costs where a part of those costs is allocable to an unsuccessful protest issue that is so clearly severable from the successful issues as to essentially constitute a separate protest. Burns & Roe Servs. Corp.--Costs, B-310828.2, Apr. 28, 2008, 2008 CPD ¶ 81 at 3. Here, we find that the protester's challenges in its first and second protest all relate to the agency's technical evaluation of 22nd Century's proposal and are intertwined with the clearly meritorious protest issues.



The request that our Office recommend that 22nd Century be reimbursed its protest costs is granted in part and denied in part.

Susan A. Poling  
General Counsel