



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

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Matter of: Monterey Consultants, Inc.

File: B-414761.6

Date: March 27, 2018

Thomas P. McLish, Esq., and Joseph W. Whitehead, Esq., Akin Gump Strauss Hauer & Feld LLP, for the protester.

Neil S. Deol, Esq., and Donald C. Mobly, Esq., Department of Veterans Affairs, for the agency.

Michael Willems, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation that agency reimburse costs of two sequential protests because agency failed to address issues alleged in first protest is denied where the agency promptly proposed corrective action in response to the second protest and the protest grounds in common between the first and second protest were not clearly meritorious.

DECISION

Monterey Consultants, Inc., a service-disabled veteran-owned small business of Dayton, Ohio, requests that our Office recommend that it be reimbursed the costs of filing and pursuing two protests of the award of a contract to Associated Veterans, LLC-Quality Solutions (AVQS), a service-disabled veteran-owned small business of Arlington, Virginia, under request for quotations (RFQ) No. VA245-17-Q-0076 issued by the Department of Veterans Affairs (VA) for advisory and assistance services in support of supply chain transformation. The protester alleges that the agency unduly delayed taking corrective action in response to a clearly meritorious protest because the agency's corrective action taken in response to Monterey's first protest did not effectively resolve its protest issues, forcing it to protest the procurement a second time on the same grounds.

We deny the request.

BACKGROUND

On June 5, 2017, Monterey protested the agency's award of a contract to AVQS on the grounds that the agency impermissibly downgraded its technical and past performance ratings by applying an undisclosed evaluation factor, and conducted an unreasonable or inadequately documented best-value tradeoff.¹ Agency Report (AR), Tab 4, Protest of Monterey from B-414761.1 (hereafter First Protest) at 2-4. On June 30, prior to filing the agency report, the agency notified the protester that it intended to take corrective action by cancelling the award and modifying the solicitation to better describe factors that can impact evaluation of technical capability and/or past performance. AR, Tab 8, Agency Request to Dismiss B-414761.1 and Notice of Corrective Action at 1.

In response to the agency's corrective action, our Office dismissed Monterey's protest on July 3, but AVQS protested the proposed corrective action on the basis that it was not rationally related to the concerns the agency sought to address. AR, Tab 9, AVQS Objection to Agency Request to Dismiss at 1-2. On September 5, the agency responded to AVQS's concerns by modifying the proposed corrective action. AR, Tab 14, Agency Notice of Corrective Action in B-414761.2. The agency indicated that in lieu of modifying the solicitation, the agency would instead clarify the experience aspect of the past performance and technical acceptability criteria to the evaluators, and reevaluate proposals in accordance with the terms of the RFQ. Id. The agency subsequently reevaluated proposals, and again awarded a contract to AVQS. AR at 4.

Monterey protested this award on November 6, 2017 alleging that: (1) the VA improperly and unreasonably downgraded its technical proposal for reasons not identified in the first evaluation of its proposal; (2) the VA improperly downgraded its past performance on the basis that it lacked past performance references of similar size and scope; and (3) the VA's best-value tradeoff was unreasonable and inadequately documented because the agency failed to explain why AVQS's proposal was worth an eleven percent price premium. AR, Tab 16, Protest of Monterey from B-414761.4 (hereafter Second Protest). On December 4, prior to filing the agency report, the agency again took corrective action in response to Monterey's protest because the agency had identified "discrepancies" in the procurement process that required corrective action, and proposed to again reevaluate existing proposals and make a new award decision. Our Office dismissed Monterey's second protest as academic on December 6. AR, Tab 17, Agency Notice of Corrective Action in B-414761.4.

DISCUSSION

Monterey now requests that we recommend the agency reimburse its costs for filing and pursuing these protests, because the agency unduly delayed taking corrective action in

¹ Monterey alleged two additional protest grounds in its initial protest regarding the terms of the RFQ and inadequate discussions that were subsequently abandoned and dismissed on that basis. Email from GAO attorney to Protester, June 30, 2017.

the face of a clearly meritorious protest. Request for Costs at 2-5. Specifically, Monterey contends that the agency took corrective action but did not correct the errors that lead it to take corrective action in response to the first protest. Id. at 3-5. According to Monterey, it is irrelevant that the agency's corrective action in the second protest was taken prior to the filing of the agency report, because the agency had already taken corrective action in response to the very same procurement deficiencies and the corrective action was therefore unduly delayed. Id. at 4. Monterey further contends that its initial protest was clearly meritorious because, among other things, the agency conceded that the initial evaluation arguably treated offerors differently with regard to experience, and, in its response to the second protest, the agency noted that it was taking corrective action in response to discrepancies in the procurement process. 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. 4 C.F.R. § 21.8(e); 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 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.

With respect to the promptness of the agency's corrective action, we review the record to determine whether the agency took appropriate and timely steps to investigate and resolve the impropriety. See Chant Eng'g Co., Inc.--Request for Costs, B-274871.2, Aug. 25, 1997, 97-2 CPD ¶ 58 at 4. While we usually consider corrective action to be prompt if taken before the due date for the agency report responding to the protest, we generally do not consider it to be prompt where it is taken after that date. See CDIC, Inc.--Entitlement to Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 2.

Additionally, we have previously concluded that where an agency fails to implement a promised corrective action, or implements a corrective action that fails to address a clearly meritorious issue raised in an initial protest, such that a 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, and constitutes undue delay. Louisiana Clearwater, Inc.--Recon. and Costs, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209.

Reimbursement is not appropriate in this case because the protest ground that was common between the first and second protest was not clearly meritorious. Here,

corrective action was taken in both protests before the agency report was filed, so a finding of undue delay could only be appropriate with respect to protest grounds that the protester was required to protest a second time. AR at 2-4. However, in this case, the only protest ground that is common between the first and second protests was the argument that the agency's best-value tradeoff was unreasonable or inadequately documented, which, for the reasons discussed below, was not clearly meritorious.²

In order for us to have reached a decision about the merits of the protester's best-value tradeoff argument, we would have had to develop the record significantly further, including the submission of an agency report and the protester's comments, to allow us to both review the agency's documentation supporting its best-value tradeoff decision and 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. See e.g., SpectrumS4, LLC--Costs, B-408227.4, Aug. 26, 2013, 2013 CPD ¶ 200 (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 corrective action in related protest); and MEC Development, LLC--Costs, B-403295.2, Oct. 18, 2010, 2010 CPD ¶ 264 at 4-5 (request for reimbursement of protest costs in second protest because agency failed to address issues alleged in prior protest is denied partly because additional development was needed to establish whether certain allegations were clearly meritorious). Therefore, reimbursement is not appropriate in this case.

The request is denied.

Thomas H. Armstrong
General Counsel

² The protester argues that, because both its first and second protests included challenges to the agency's evaluation of its technical proposal and past performance, it was forced to advance those arguments repeatedly. Protester's Comments on the Agency Report at 5-6. However, other than the fact that the challenges relate to the same portions of the protester's proposal they are entirely dissimilar. In the first protest, the protester challenged the agency's application of an unstated evaluation criterion to both its technical proposal and its past performance. First Protest at 2-3. By contrast, the protester's second protest does not allege that the agency applied an unstated evaluation criterion in evaluating its technical proposal, but rather argues that the agency's evaluation of its technical proposal found faults in its proposal the agency had not found in the original evaluation and is therefore unreasonable. Second Protest at 4-5. Similarly, the second protest did not allege that the agency applied an unstated evaluation criterion in assessing its past performance, but rather alleged that the agency did not correctly evaluate the size and scope of its past performance references. Second Protest at 6. We therefore do not address the question of whether these arguments were clearly meritorious, because the agency did not unduly delay its corrective actions in response to them.