



Decision

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Matter of: United States Marine Corps--Reconsideration

File: B-415171.4

Date: December 14, 2018

Lisa L. Baker, Esq., United States Marine Corps, for the agency. Lois Hanshaw, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration is denied where requesting party fails to demonstrate that our prior decision contained errors of fact or law, and fails to present information not previously considered that would warrant reversal or modification of prior decision.

DECISION

The Marine Corps Tactical Systems Support Activity (the Corps) requests that we reconsider our decision in CSRA LLC--Costs, B-415171.3, August 27, 2018 CPD ¶ 307 in which we granted in part and denied in part CSRA's request for a recommendation from our Office that it be reimbursed the costs associated with filing and pursuing its protest (B-415171.2) challenging the terms of the corrective action undertaken by the Corps. The agency alleges that we erred in determining that CSRA's request was clearly meritorious.

We deny the request for reconsideration.

BACKGROUND

The agency initially made award to C4Planning Solutions LLC (C4PS) on August 18, 2017. After being advised of the agency's award decision, CSRA protested to our Office, maintaining that the agency unreasonably evaluated proposals and made an unreasonable best-value tradeoff award decision. As relevant here, CSRA asserted that C4PS's proposal contained a material misrepresentation because C4PS's proposal identified the protester's incumbent staff as C4PS's own proposed personnel, without permission to do so. In response to the protest, the agency took corrective action by entering into discussions with CSRA and C4PS regarding their staffing plans and requesting revised staffing proposals that did not identify personnel by name; the

agency would not permit offerors to make changes to other parts of their technical proposals or to revise their prices.¹ Based on the agency's proposed corrective action, we dismissed CSRA's protest as academic. CSRA LLC, B-415171, Sept. 28, 2017 (unpublished decision).

In response, CSRA again protested to our Office, asserting that the agency's corrective action was too restrictive and that offerors should be able to revise all parts of their proposals. After the filing of the agency report and our Office's development of the protest record, the agency took corrective action by granting the relief that CSRA requested: specifically, the Corps allowed CSRA and C4PS to revise other aspects of their proposals. Based on the agency's proposed corrective action, we again dismissed CSRA's protest as academic. CSRA LLC, B-415171.2, Dec. 19, 2017 (unpublished decision).

CSRA subsequently requested that our Office recommend that it be reimbursed the costs associated with filing and pursuing its protest (B-415171.2). CSRA asserted that its protest was clearly meritorious because (1) the agency's decision to limit proposal revisions was unreasonable, and (2) the agency's decision to take corrective action in response to the initial protest was a pretext to avoid a decision on the merits.² As relevant to CSRA's first argument, CSRA argued that the agency lacked a defensible legal position for limiting proposal revisions. Specifically, CSRA argued that the solicitation revision to remove any identification of personnel constituted a solicitation amendment that would have an impact on all aspects of CSRA's and C4PS's offerors' proposals. Tab 45, Request for Reimbursement, at 1-2. In response, the agency argued that because it neither amended, nor materially changed the request for proposals (RFP), its decision to limit the corrective action and not allow parties to revise all portions of their proposals was permissible. In this regard, the agency maintained that no other parts of the proposals were affected by the action being taken. Decision at 6-7.

We found CSRA's first argument clearly meritorious and granted its request for reimbursement of costs. In our decision, we concluded that the agency's decision to remove any identification of staff constituted a solicitation amendment, and that the agency failed to show a reasonable expectation that the revisions would not have a

¹ The agency's proposed corrective action notice stated "to the extent the PWS [Performance Work Statement] was unclear or [o]fferors were confused regarding the [a]gency's requirement, the [a]gency's proposed corrective action will clarify its requirement" and would seek revised staffing plans that did not reference named individuals. See Tab 6, Revised Corrective Action Notice, at 3. The agency's request for reconsideration included a record of documents, referenced by tabs, associated with the prior protests.

² We found that CSRA's second argument was not clearly meritorious and is not in issue here; we therefore do not discuss it further.

material impact on other parts of offerors' proposals. Decision at 7. Accordingly, we found that the agency was required to allow offerors to revise all areas of their proposals. We also explained that even in the absence of a solicitation amendment, the agency should have allowed revisions to other parts of proposals because the corrective action included conducting discussions, and the agency failed to show that the removal of named personnel would not affect other aspects of CSRA's proposal. Decision at 8-9.

The agency seeks reconsideration of our decision.

DISCUSSION

The agency contends that our decision contained factual and legal errors and improperly recommended the protester be reimbursed its costs, based on the conclusion that the protest was clearly meritorious.³

Under our Bid Protest Regulations, to obtain reconsideration, a requesting party must demonstrate that our prior decision contains errors of fact or law, or present new information not previously considered that would warrant reversal or modification of our earlier decision. 4 C.F.R. § 21.14(a); Department of Defense--Recon., B-415155.3, Mar. 6, 2018, 2018 CPD ¶ 102 at 2. The repetition of arguments made during our consideration of the original protest and disagreement with our decision do not meet this standard. Veda, Inc.--Recon., B-278516.3, B-278516.4, July 8, 1998, 98-2 CPD ¶ 12 at 4.

The agency argues that we erred in finding the protest clearly meritorious and focuses on our Office's requests for additional documents after the submission of the agency report during the development of the B-415171.2 protest record. Recon. Request at 14. The Corps asserts that our need for additional documents from the agency shows that CSRA's protest presented a close question that could not be resolved without substantial further development, and that reimbursement is not warranted in this circumstance. Id.

The agency also made this argument in its response to the request for reimbursement of costs. Specifically, the agency stated, "GAO's continued request for additional documentation resulting in substantial further development of the record, subsequent to the agency report, shows that the protest involved a close question and was not clearly meritorious." Tab 46, Response to Request for Reimbursement, at 2. As noted above, the repetition of arguments made during our consideration of the original request for reimbursement, and disagreement with our decision, does not meet our Office's standard for reconsideration. Veda, Inc.--Recon., supra.

³ The agency has made arguments that are in addition to, or variations of, those discussed below. We have considered all of the agency's assertions and find no basis to reconsider our decision.

Additionally, this argument incorrectly suggests that by withholding relevant documents, and proceeding to defend a protest despite not having a defensible legal position, an agency may avoid a recommendation by our Office that the agency reimburse a protester's costs. We have explained that 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. Vane Line Bunkering, Inc.--Costs, B-416033.2, July 5, 2018, 2018 CPD ¶ 299 at 5. Stated differently, it is the agency's responsibility, not GAO's, to investigate the protest allegations to determine whether the agency has a defensible legal position. If the agency chooses to proceed without having a defensible legal position, it risks that our Office will determine, as it did here, 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. See 4 C.F.R. § 21.8(e); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6.

In this regard, our decision concluded that "the record available to the agency at the time the corrective action protest (B-415171.2) was filed should have shown the absence of a defensible legal position." Decision at 9. It bears mention that the documents that our Office required to resolve the protest were in the agency's possession from the beginning. Therefore, the agency's failure to take prompt corrective action in the face of a clearly meritorious issue--not our development of the protest--caused the undue delay. In short, our development of the protest led us to the conclusion that should have been apparent to the agency based on the record available at the time of the protest (B-415171.2) filing, *i.e.*, that the protest was clearly meritorious. Accordingly, the agency has shown no error in our decision, and thus has not provided a basis for us to reconsider the decision.

The agency also asserts that reconsideration is warranted because our decision erred in finding that a latent ambiguity existed in the RFP. The Corps argues that we committed error by raising sua sponte the issue of a latent ambiguity in the solicitation and that this issue required substantial further development. Recon. Request at 13, 16. Alternatively, the agency contends that to the extent CSRA timely raised this argument after comments were filed, this argument should be viewed as a supplemental protest, in response to which the agency promptly took corrective action.

We disagree. The protest decision did not determine that a latent ambiguity existed,⁴ but, rather, stated that "the corrective action here was a solicitation amendment that

⁴ In decisions considering this issue, we explained that where there is a latent ambiguity and both parties' interpretation of the provision may be reasonable, the appropriate course of action is to clarify the requirement and afford offerors an opportunity to submit proposals based on the clarified requirement. See e.g., Coastal International Security, Inc., B-411756, B-411756.2, Oct. 19, 2015, 2015 CPD ¶ 340 at 4, 15-16. We did not (continued...)

resolved a potential ambiguity with regard to whether offerors could demonstrate the merits of their technical approaches by identifying specific individuals and their qualifications and experience.” Decision at 7. Thus, our decision does not turn on the existence of a latent ambiguity in the solicitation, but on the agency’s decision to limit the revisions offerors could make to their proposals following the solicitation amendment.⁵ Thus, even had we incorrectly characterized the reason for the agency’s amendment of the solicitation, this would not provide a basis to grant the request for reconsideration.⁶ In this regard, the agency does not contend that we erred in determining that the solicitation was amended or that the agency lacked a defensible legal position in limiting the scope of proposal revisions.

To the extent the agency contends that the reference to an ambiguity in the decision shows that we raised the issue sua sponte or that this issue was a supplemental protest ground, we disagree. Where a party raises an issue in its filings, GAO has not raised the issue sua sponte. See Science Applications Int'l Corp.; Department of the Navy--Request for Recon., B-247036.2, B-247036.3, Aug. 4, 1992, 92-2 CPD ¶ 73 at 5-6. In this regard, CSRA’s request for reimbursement of costs, and the agency’s response thereto, raised the issue of how the solicitation was interpreted in arguing whether the

(...continued)

reach such a conclusion in the request for reimbursement of costs. We found that CSRA’s arguments concerning the limitations of the scope of proposal revisions were clearly meritorious and that the agency failed to take timely corrective action. Decision at 10. We recommended that the agency reimburse the protester the reasonable costs of filing and pursuing this request for reimbursement with regard to its challenge to the scope of proposal revisions. Id.

⁵ Our decision also stated that even if the agency had not issued a solicitation amendment, the agency still should have permitted revisions to other parts of the proposals because the agency proposed to engage in discussions and failed to show that the removal of named personnel would not affect other aspects of CSRA’s proposal. Decision at 8-9. The agency has not challenged this aspect of our decision.

⁶ Based on the record here, we do not view as incorrect our assertion that the agency took corrective action to address a potential ambiguity. In this regard, the agency’s proposed corrective action notice in the B-415171 protest stated “to the extent the PWS was unclear or [o]fferors were confused regarding the [a]gency’s requirement, the [a]gency’s proposed corrective action will clarify its requirement” and would seek revised staffing plans that did not reference named individuals. See Tab 6, Revised Corrective Action at 3. As stated above, the appropriate course of action when there is a latent ambiguity is to clarify the requirement and afford offerors an opportunity to submit proposals based on the clarified requirement. Here, the agency’s corrective action was to clarify the requirement and allow offerors to submit revised responses. Coastal International Security, Inc., supra.

corrective action constituted an amendment. See Tab 45, Request for Reimbursement, at 3, 8; Tab 46, Response to Request for Reimbursement, at 3.

The request is denied.

Thomas H. Armstrong
General Counsel