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Decision

Matter of: STG, Inc.

File: B-415580.3

Date: March 27, 2018

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Terrius D. Greene, Esq., Department of Homeland Security, 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 reimbursement of protest costs is denied where the agency did not unduly delay taking corrective action in response to supplemental protest grounds and where the remaining protest grounds were not clearly meritorious.

DECISION

STG, Inc., of Reston, Virginia, requests that our Office recommend it be reimbursed the reasonable costs of filing and pursuing its protest of the issuance of a task order to Enterprise Services, LLC, of Herndon, Virginia, by the Department of Homeland Security, United States Customs and Border Protection, under solicitation No. C-3942-0 for network operations center services. We dismissed the protest as academic based on the agency's corrective action. STG argues that the agency unduly delayed taking corrective action in response to a clearly meritorious protest.

We deny the request.

BACKGROUND

The agency issued the request for proposals (RFP) on April 5, 2017, to holders of the National Institutes of Health, Information Technology Acquisition and Assessment Center, "Chief Information Officer–Solutions and Partners 3" governmentwide acquisition contract. Agency Report (AR), Tab 1, Memorandum of Law at 1; AR, Tab 2, RFP Letter at 1. The RFP contemplated a best-value award of a task order based on the following three evaluation factors: (1) technical/management approach, (2) past performance, and (3) price. AR, Tab 2, Instructions to Offerors at 3. The technical

factor included four subfactors, in descending order of importance: (1) demonstrated understanding of the requirement; (2) staffing/resource management plan; (3) proactive and predictive analysis plan; and (4) incoming transition plan. Id. at 3-4. The RFP provided that all non-price evaluation factors, when combined, were significantly more important than price, but that when considering proposals of substantially equal technical merit, price would become the more significant factor. Id. at 9.

The agency received seven proposals in response to the RFP, including proposals from STG and Enterprise Services, and announced the issuance of a task order to Enterprise Services on September 21, 2017. Memorandum of Law at 4. STG received a debriefing on October 5, and submitted additional questions on October 6. Id. The agency answered those additional questions on October 13, and STG filed its initial protest on October 18. Id.

STG's initial protest argued that the agency: (1) unreasonably failed to assign multiple additional strengths under each technical subfactor, as well as incorrectly assigning weaknesses under two technical subfactors; (2) unreasonably failed to assign a superior rating for some of its past performance references; (3) unreasonably downgraded STG's overall past performance rating on the basis of two neutral past performance ratings.¹ Protest at 13-31. The agency primarily argued in response that its evaluation of STG's proposal was reasonable, and that STG's protest arguments amounted to disagreement with the agency's evaluation. See, e.g., Memorandum of Law at 4-6.

Following the submission of the agency report, STG filed a supplemental protest alleging additional grounds related to the evaluation of its own proposal and disparate treatment in both the technical and past performance evaluations, as well as alleging that the agency had impermissibly double-counted some of the awardee's technical strengths. Supplemental Protest at 2-18. Prior to filing a supplemental agency report, the agency notified our Office that it intended to reevaluate technical proposals and past performance submissions and make a new source-selection decision. Agency Notice of Corrective Action at 1. Our Office dismissed the protest as academic on December 5, 2017. STG Inc., B-415580, B-415580.2, Dec. 5, 2017 (unpublished decision). Thereafter, STG filed its request for protest costs.

DISCUSSION

STG requests that we recommend that it be reimbursed the reasonable costs of filing and pursuing its initial and supplemental protests. STG argues that several of its initial protest grounds were clearly meritorious, and STG further argues that there is a clear nexus between the initial and supplemental protest grounds. Request for Costs at 2-4.

¹ STG made several additional allegations in its initial protest two of which it subsequently withdrew, and one of which was dismissed as speculative and legally insufficient. Email from GAO to protester, Nov. 8, 2017.

Therefore, STG contends that the corrective action taken by the agency was not timely because it was not taken until after the agency report responding to the initial protest grounds was produced. Id.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs where, based on the record, 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 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, *i.e.*, not a close question. J.F. Taylor, Inc.--Entitlement to Costs, B-266039.3, July 5, 1996, 96-2 CPD ¶ 5 at 3. A protest is clearly meritorious where a reasonable agency inquiry into the protest allegations would have shown facts disclosing the absence of a defensible legal position. Triple Canopy, Inc.--Costs, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 3.

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. The imposition of costs is not intended as an award to prevailing protesters or as a penalty to the agency, but rather, is designed to encourage agencies to take prompt action to correct apparent defects in a competitive procurement. See Takota Corp.--Costs, B-299600.2, Sept. 18, 2007, 2007 CPD ¶ 171 at 3. Here, we conclude that reimbursement is not appropriate.

Clearly Meritorious

With regard to STG's initial protest grounds, we find that none of them were clearly meritorious. For example, STG challenged the agency's failure to award it several strengths under the technical/management approach evaluation factor, and similarly contended that the agency erred in rating one of its past performance references as satisfactory rather than superior. Protester's Comments on Agency Response to Request for Costs at 2-4. The protester noted that the evaluators narratively described several features positively, but that those positive descriptions did not result in strengths. Id. The agency responded to these arguments by noting that the protester did not identify any features of the evaluation that were unreasonable or inconsistent with the terms of the solicitation, but rather merely recited various portions of its proposal that the protester believed deserved to have received better ratings, contesting the agency's judgment with respect to the evaluation. Agency Response to Request for

Costs at 4-5. The protester additionally, contends that these claims were clearly meritorious because the agency did not substantively address why it should not have received strengths or superior ratings for those portions of its proposal. Comments on Agency Response at 4.

The evaluation of technical proposals and the determination of the relative merit or relevance of past performance references are generally matters within the agency's discretion, which our Office will not disturb unless they are shown to be unreasonable or inconsistent with the RFP's evaluation criteria. American Systems Corp., B-413952.3, B-413952.4, June 23, 2017, 2017 CPD ¶ 204 at 6; NCI Information Systems, Inc., B-412680, B-412680.2, May 5, 2016, 2016 CPD ¶ 125 at 5; ORBIS Inc., B-408033.2, June 3, 2013, 2013 CPD ¶ 140 at 5. In this regard, an agency is not required to document all "determinations of adequacy" or explain why a proposal did not receive a strength, weakness, or deficiency for a particular item. Allied Tech. Group, Inc., B-412434, B-412434.2, Feb. 10, 2016, 2016 CPD ¶ 74 at 13. The protester simply disagrees with the agency as to the merit of its proposed approach, and such disagreement, without more, does not form the basis for us to conclude that an evaluation was unreasonable.² See DynCorp International, LLC, B-412451,

² With respect to STG's argument concerning the agency's assignment of a weakness under the staffing/resource management plan technical subfactor, the protester identified clear inconsistencies in the record which suggest that the weakness may not have been appropriately assigned. Protest at 18-20. For example, the evaluators appeared to assess STG a weakness for only assigning **[DELETED]** personnel to the secondary network operations site, noting that 30 personnel would be optimal. AR, Tab 10, STG Consensus Report at 2-3. However, that specific personnel number is not reflected in the RFP, and the pricing template provided with the RFP appears to contemplate only 9 personnel assigned to that location. Agency Report, Tab 16, Pricing Template. Even assuming that the protester is correct, however, that the agency erred in this respect, the protester cannot show prejudice. Prejudice is an essential element to every viable protest, and where an agency's improper actions did not affect the protester's chances of receiving award, there is no basis for sustaining the protest. See, e.g., American Cybernetic Corp., B-310551.2, Feb. 1, 2008, 2008 CPD ¶ 40 at 2-3. In this case, the protester was both lower technically-rated than the awardee and significantly higher-priced (approximately \$25 million, or 33% percent higher). Agency Reply to Request for Costs at 5. The removal of a single weakness would be unlikely to alter the protester's overall rating, but, even if the protester's technical rating were improved such that it received the highest possible overall rating, the protester would remain significantly higher priced than the awardee, who received the highest possible overall rating. Therefore, it is unlikely that the removal of this weakness would affect the agency's best-value tradeoff, and any possible error with respect to this assigned weakness did not prejudice the protester. See American Cybernetic Corp., *supra* at 2-3. For those reasons, we cannot conclude that this protest ground was clearly meritorious.

B-412451.2, Feb. 16, 2016, 2016 CPD ¶ 75 at 7-8. We, therefore, cannot conclude that these protest grounds were clearly meritorious.

Additionally, the protester claimed that the agency impermissibly rated its past performance as satisfactory rather than superior because it negatively considered two past performance references that received neutral ratings. Comments on Agency Response at 3-4. Specifically, the protester contends that it should have logically received a superior rating because the majority of its relevant past performance references received a superior rating.³ Protest at 29. The protester also points to summary language in the source selection decision that indicated that STG's past performance was satisfactory based on the combination of the superior, satisfactory and neutral ratings. Comments on Agency Response at 3-4.

As a preliminary matter, the record does not support that the agency considered STG's neutral-rated past performance references negatively, merely that two of the submitted references were rated neutral and that all ratings were considered as part of the evaluation of STG's past performance. See, e.g., AR, Tab 7, Source Selection Decision Memorandum at 8. Furthermore, STG's argument that it should have received a superior rating because the majority of its relevant past performance references were superior ignores the fact that its past performance references varied in size, scope and complexity, and need not be given equal weight in an evaluation. Given that the protester's allegations constitute, in effect, nothing more than disagreement with agency's evaluation, we decline to accept that these protest grounds were clearly meritorious.

Unduly Delayed

In its supplemental protest, STG raised new challenges to the agency's evaluation of its own and the awardee's proposal. In response to the supplemental protest grounds, the agency notified our Office that it intended to reevaluate technical proposals and past performance submissions and make a new source-selection decision. Notice of Corrective Action at 1. Taking this action, rather than filing a supplemental agency report responding to the new allegations, constitutes the prompt action that our protest procedures contemplate with respect to the supplemental protest grounds.

STG argues that there is a nexus between its initial and supplemental protest grounds and that the challenges raised in its initial protest are not severable from or intertwined with its supplemental protest grounds. Request for Costs at 3. STG therefore argues that the agency's corrective action in response to both the initial and the supplemental protest was unduly delayed. Id. While certain of STG's protest grounds related to protest grounds in its initial protest, several, such as the alleged double-counting of strengths in the awardee's proposal, represented entirely new protest grounds. Agency

³ STG's five past performance references received ratings of: (1) superior, (2) superior, (3) satisfactory, (4) neutral, and (5) neutral.

Response at 4. While the agency did not indicate which specific protest grounds prompted it to take corrective action, as discussed above, the protester has failed to demonstrate that its initial protest grounds provided a clearly meritorious basis to sustain the protest. Notice of Corrective Action at 1. To the extent the agency took corrective action in response to any of the supplemental protest grounds, the corrective action was not unduly delayed because it was taken in response to new protest grounds first raised in the supplemental protest and prior to the agency filing a supplemental agency report addressing those grounds. See Imagine One Tech. & Mgmt., Ltd.-- Costs, B-412860.3, Dec. 9, 2016, 2016 CPD ¶ __ at 6 (concluding that corrective action taken in response to supplemental protest grounds that arguably have a nexus to initial protest grounds is not unduly delayed where the related initial protest grounds were not clearly meritorious). Therefore, because the protester's initial protest grounds were not clearly meritorious and the agency's corrective action was not unduly delayed with respect to the supplemental protest grounds, reimbursement is not appropriate in this case.

The request for costs is denied.

Thomas H. Armstrong
General Counsel