



Decision

Matter of: AeroSage, LLC--Costs

File: B-417803.2

Date: October 29, 2019

David M. Snyder, AeroSage, LLC, for the protester.
Benjamin Ratichek, Esq., Department of Veterans Affairs, for the agency.
John Sorrenti, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Request for recommendation of reimbursement of protest and bid preparation costs following corrective action is denied where the record does not establish that the agency unduly delayed taking corrective action when it announced its decision to take corrective action by the time established for the submission of the agency's report.

DECISION

AeroSage, LLC, a service-disabled veteran-owned small business (SDVOSB) of Tampa, Florida, requests that we recommend reimbursement of the reasonable costs of filing and pursuing its protest of the terms of request for quotations (RFQ) No. 36C78619Q0312, the evaluation of quotations, and the award of a contract to Crystal Flash, Inc., of Grand Rapids, Michigan, by the Department of Veterans Affairs (VA), for diesel fuel and ethanol-free gasoline at Fort Custer National Cemetery in Augusta, Michigan.¹ AeroSage also requests reimbursement for bid preparation costs.

¹ AeroSage refers to its protest as having been jointly filed with SageCare, Inc., and argues that SageCare also is entitled to reimbursement. Our Office recognized, and docketed, the protest as filed solely by AeroSage, LLC. SageCare submitted a quotation in response to the RFQ, and filed a request to intervene in AeroSage's protest. We denied this request because SageCare was not the awardee, and the agency found SageCare's quotation technically non-responsive, and thus SageCare did not show that it had a substantial chance of receiving an award if AeroSage's protest was denied.

We deny the request.

BACKGROUND

On May 22, 2019, the agency issued the RFQ for diesel fuel and ethanol-free gasoline at Fort Custer National Cemetery. AeroSage submitted a quotation in response to the RFQ, and on July 23, 2019, the agency notified AeroSage that its quotation was found to be technically non-responsive because the quotation provided for delivery of fuel to the wrong location. Two days later, the agency made award to Crystal Flash. On July 29, 2019, AeroSage filed a protest with our Office, arguing that the RFQ should have been set aside for SDVOSBs, that its quotation was unfairly rejected as nonresponsive, and that the contract was improperly awarded to another vendor.²

On August 28, the day the agency report was due to our Office, the agency notified GAO of its intent to take corrective action in response to AeroSage's protest, and requested dismissal of the protest as academic. The agency stated that it would implement corrective action by (1) cancelling the solicitation; (2) terminating the awarded contract; (3) conducting additional market research; (4) reexamining the solicitation and revising it as appropriate; and (5) issuing a new solicitation. Based on the agency's corrective action, our Office dismissed the protest as academic.³ AeroSage, LLC, B-417803, Sept. 4, 2019 (unpublished decision). On September 6, AeroSage filed its request that our Office recommend reimbursement of protest and bid preparation costs.

DISCUSSION

AeroSage contends that reimbursement is warranted because the agency unduly delayed taking corrective action and its protest grounds were clearly meritorious. The agency responds that it did not unduly delay in taking corrective action because it filed notice of corrective action before the agency report was due.

² AeroSage filed an agency-level protest in June 2019, prior to the deadline for quotations, arguing that the RFQ should have been set-aside for SDVOSBs, and subsequently filed its protest at GAO.

³ AeroSage requested reconsideration of this decision; we dismissed that request because AeroSage failed to show how the decision was legally erroneous. AeroSage, LLC--Recon., B-417803.3, Sept. 26, 2019 (unpublished decision). AeroSage then filed a second request for reconsideration of this dismissal, alleging that new information showed that the agency never cancelled the solicitation. After confirming that the agency had indeed terminated the contract with Crystal Flash and cancelled the solicitation, we dismissed AeroSage's second request for reconsideration. AeroSage, LLC--Recon., B-417803.4, Oct. 7, 2019 (unpublished decision).

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs where, 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, 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 5. With respect to the promptness of the agency's corrective action under the circumstances, 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. As a general rule, so long as an agency takes corrective action by the due date for filing its protest report, we regard the action as prompt, and will not consider a request to recommend reimbursement of protest costs. Career Sys. Dev. Corp.--Costs, B-411346.10, July 18, 2018, 2018 CPD ¶ 249 at 5; Brian X. Scott--Costs, B-400168.3, Aug. 18, 2008, 2008 CPD ¶ 161 at 2.

Here, we have no basis to conclude that the agency unduly delayed taking corrective action in response to a clearly meritorious protest. As explained above, the agency's corrective action took place on the deadline set by our Office for the agency to file its report. The agency's decision to take corrective action instead of filing the agency report meant that the protester did not expend any additional time or resources in responding to the agency report in order to obtain relief. Accordingly, we view the corrective action as prompt, and therefore there is no basis for recommending reimbursement of AeroSage's protest costs. Career Sys. Dev. Corp.--Costs, *supra*.

AeroSage argues that the promptness of corrective action should be measured from the time AeroSage first challenged the terms of the solicitation in its agency-level protest filed in June 2019. Our authority to recommend payment of protest costs, including attorneys' fees, extends to parties whose protests to our Office support a finding that a solicitation or proposed award of a contract does not comply with a procurement statute or regulation. 31 U.S.C. § 3554(c)(1). The provision in our Regulations providing for the possibility of a recommendation that protest costs be reimbursed where an agency takes corrective action in response to a protest with our Office is intended to ensure fair treatment of protesters who make substantial investments of time and resources to pursue clearly meritorious protests in this forum, but who do not have the opportunity to recoup their costs because of agency corrective actions. All Marine Servs., Ltd.--Entitlement to Costs, B-270514.2, Feb. 13, 1996, 96-1 CPD ¶ 75 at 2. It is not intended to ensure the fairness of agency-level processes occurring prior to the filing of a protest with our Office. Innovative Logistics Techniques, Inc.--Costs, B-289031.3, Feb. 4, 2002, 2002 CPD ¶ 34 at 4-5; R.J. Sanders, Inc.--Claims for Costs, B-245388.2, Apr. 14, 1992, 92-1 CPD ¶ 362 at 3. Quite simply, the fact that AeroSage earlier raised its concerns about the solicitation terms with the agency is of no significance to our determination

whether the agency took prompt corrective action after AeroSage filed its protest with our Office.⁴

AeroSage also argues that it is entitled to bid preparation costs under 31 U.S.C. § 3554(c)(1), which states that GAO may recommend that the agency pay bid and proposal preparation costs when GAO has determined that a solicitation or award of a contract did not comply with a statute or regulation.⁵ The agency responds that because GAO did not sustain the protest, this statute is inapplicable and AeroSage is not entitled to bid preparation costs.

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. Our Office has generally recommended recovery of bid and proposal preparation costs only in instances where the protester has been unreasonably excluded from competition and where other remedies as enumerated in our regulations are not appropriate. See SCB Solutions, Inc.--Recon., B-410450.2, Aug. 12, 2015, 2015 CPD ¶ 255 at 5 (recommending reimbursement of quotation preparation costs where delivery order was fully performed and the agency did not plan to resolicit its requirements). Here, our Office did not determine that a solicitation or contract award failed to comply with a statute or regulation, or that AeroSage had been unreasonably excluded from the competition. It follows that there is no basis for us to recommend reimbursement of AeroSage's bid preparation costs.

The request is denied.

Thomas H. Armstrong
General Counsel

⁴ Since we decide this request for reimbursement of costs based on our finding that the agency did not unduly delay taking corrective action, we need not address whether the protest here was "clearly meritorious." Brian X. Scott--Costs, supra.

⁵ Our bid protest regulations at 4 C.F.R. § 21.8(d) mirror this statute.