



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.

Decision

Matter of: Zeneth Technology Partners

File: B-418571.6

Date: July 24, 2020

Lawrence J. Sklute, Esq., and Lana Meller, Esq., Sklute & Associates, for the protester. Megan R. Nathan, Esq., Department of Education, for the agency. Robert T. Wu, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation that protester be reimbursed costs of filing and pursuing protest challenging the establishment of blanket purchase agreements with various vendors is denied where the protester has not shown the initial protest was clearly meritorious or that the agency unduly delayed taking corrective action in response to the supplemental protest.

DECISION

Zeneth Technology Partners, of Vienna, Virginia, requests that our Office recommend that the Department of Education reimburse attorneys' fees and costs that the firm incurred in filing and pursuing a protest under request for quotations (RFQ) No. 910031-19-R-0012, issued by the Department of Education for the provision of cybersecurity and privacy support services, after the agency took voluntary corrective action in response to the protest. Zeneth argues that the agency did not take timely corrective action in the face of a clearly meritorious protest.

We deny the request.

BACKGROUND

On March 15, 2020, Zeneth protested the agency's decision to not establish a blanket purchase agreement (BPA) with the firm. Protest (B-418571). Zeneth challenged various aspects of the agency's evaluation and award decision, to which the agency responded in an agency report dated April 15, 2020. Memorandum of Law (MOL) (B-418571) at 6-12. On April 27, the protester submitted comments and a supplemental protest, where the firm argued, among other things, that the agency improperly rejected

its quotation based on a price realism analysis, which Zeneth argued was an unstated solicitation evaluation factor. Protester's Comments and Supp. Protest (B-418571) at 51-53.

On May 1, before the deadline set for the receipt of the agency report in response to the supplemental protest, the agency submitted a request for dismissal, informing our office that it intended to take corrective action after considering the supplemental protests filed by various protesters, including Zeneth. Agency Request for Dismissal (B-418571) at 1. The agency stated that it would reevaluate all quotations and make a new source selection decision. As a basis for determining that corrective action was warranted, the agency specifically highlighted the supplemental protest allegation that the agency conducted an improper price realism evaluation. *Id.* On May 12, we dismissed the protests because the agency's corrective action rendered them academic. Zeneth Technology Partners, B-418571, B-418571.5, May 12, 2020 (unpublished decision). This request for costs followed on May 18.

DISCUSSION

Zeneth argues that reimbursement is warranted because its "initial protest included clearly meritorious protest grounds, and the agency's corrective action, taken after it filed its initial report, was unduly delayed." Request for Costs at 2. The protester points to various allegations raised in its protest to support its position that reimbursement of costs is warranted. *Id.* at 3-27. Although we do not specifically address all of Zeneth's arguments, we have fully considered each of them and conclude that none provide a basis to recommend that the agency reimburse the firm's costs of filing and pursuing the protest.

When a procuring agency takes corrective action in response to a protest, we may recommend that the agency reimburse the protester its 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 a 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); *Information Ventures, Inc.--Costs*, B-294580.2 *et al.*, Dec. 6, 2004, 2004 CPD ¶ 244 at 2-3. Thus, 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. *Triple Canopy, Inc.--Costs*, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 3. We consider a protest to be clearly meritorious where a reasonable agency inquiry into the protester's allegations would reveal facts showing the absence of a defensible legal position; *i.e.*, where the protest does not involve a close question. *Id.*

Clearly Meritorious

As a preliminary matter, we note that the agency, in its agency report to Zeneth's initial protest, substantively responded to all of the allegations raised by Zeneth in the protest.

See, e.g., MOL (B-418571) at 6-12. In its request for costs, Zeneth now argues, among other things, that its initial protest allegation--that the agency applied an unstated evaluation criterion in evaluating experience and expertise under the technical approach factor--was clearly meritorious. Protester's Request for Costs at 2-6. The protester contends that experience and expertise are "not reasonably related or encompassed by the technical approach factor," which Zeneth asserts was to only consider how the services were to be delivered, "as opposed to a demonstration of experience/expertise." *Id.* at 4. The agency responds that knowledge, skill, and expertise were technical requirements, and the agency's consideration of these aspects of the quotations was reasonable. Agency's Response to Request for Entitlement at 7-8. We agree.

Under the terms of the RFQ, technical approach was to be "evaluated to determine the vendor's ability to delivery cybersecurity services." Agency Report (AR), Tab E, RFQ at 37. Consistent with the agency's position, by evaluating a vendor's ability to deliver the cybersecurity services, considerations beyond how services were to be delivered, were reasonably contemplated under the evaluation criteria. Specifically with respect to experience and expertise, we conclude that both of these considerations reasonably relate to a vendor's ability to deliver the required services and could properly be considered under the technical approach factor. Therefore, far from being clearly meritorious, we find this aspect of Zeneth's protest to have no merit at all.

Zeneth also argues, for example, that its various challenges to the agency's evaluation of the firm's quotation were clearly meritorious. In this regard, the protester references various filings submitted during the initial protest and argues that a "plethora of evaluation information supports [Zeneth's] contention." Protester's Request for Costs at 7. Zeneth specifically points to what it alleges is a contradiction between evaluation remarks and conclusions reached by the technical evaluation team (TET) in the evaluators' consensus evaluation report. *Id.* The protester argues that evaluation comments that Zeneth did not have sufficient expertise is "internally and inherently inconsistent with the technically acceptable evaluation" of the firm's quotation under the technical approach factor. *Id.*

With respect to Zeneth's various challenges to the agency's evaluation, which the protester incorporates into its request by reference, we have reviewed the various filings and do not find any allegation to be clearly meritorious. In this regard, the evaluation of technical proposals is a matter within the discretion of the contracting agency, since the agency is responsible for defining its needs and the best method for accommodating them. *SRA Int'l, Inc.*, B-408624, B-408624.2, Nov. 25, 2013, 2013 CPD ¶ 275 at 5. In reviewing an agency's evaluation, we will not reevaluate technical proposals, but instead will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation's stated evaluation criteria and with procurement statutes and regulations. *Id.*

As to the specific allegation raised by Zeneth in its request for costs--the alleged contradiction between evaluators' comments and the finding that Zeneth's quotation was technically acceptable--even if the TET did not view the protester's expertise

favorably in the evaluation, this is not irreconcilable with an overall finding of technical acceptability. As such, the alleged inconsistency proffered by the protester does not evince an unreasonable evaluation, and, thus, is not a clearly meritorious protest allegation.

As these examples demonstrate, we find that Zeneth's initial protest allegations were not clearly meritorious and decline to recommend reimbursement of costs associated with those allegations. *Science Applications Int'l Corp.--Costs*, B-410760.5, Nov. 24, 2015, 2015 CPD ¶ 370 at 3-4 (declining to recommend reimbursement of costs where initial protest were not determined to be clearly meritorious).

Undue Delay

Finally, Zeneth attempts to argue that the agency unduly delayed in taking corrective action because the supplemental protest grounds are "so intertwined with the initial protest allegations" that a reasonable investigation by the agency "would have revealed the flaws disclosed in [the] supplemental protest." Request for Costs at 11-27. The agency responds that nothing in Zeneth's initial protest reasonably placed the agency on notice of the supplemental protest grounds alleged, including any potential improper price realism analysis. Agency Response at 11-12. Consequently, the agency asserts that it did not unduly delay taking corrective action in response to the supplemental protest grounds alleged. *Id.* at 12. We agree.

In general, if an agency takes corrective action in response to a protest by the due date for its report in response to the protest, we consider such action to be prompt and will not recommend reimbursement of protest costs, even where the protest is clearly meritorious. *TRAX Int'l Corp.--Costs*, B-410441.5, Aug. 26, 2015, 2015 CPD ¶ 276 at 3-4. Where the agency takes corrective action prior to the supplemental agency report, we will generally view this action as prompt where the allegations raised in the supplemental protest were not related to the initial protest, that is, unless the agency's investigation of the initial protest should have revealed the asserted evaluation flaws alleged in the supplemental protest. *Metalcraft, Inc.--Costs*, B-402181.3, May 17, 2010, 2010 CPD ¶ 116 at 3.

Zeneth raises various allegations in its supplemental protest challenging the agency's evaluation of the successful vendors under the technical and past performance factors, as well as the agency's evaluation of price reasonableness and realism. Protester's Comments and Supp. Protest at 29-53. First, it is not apparent from our review that the issues raised by the protester in its supplemental protest were clearly meritorious. At the very least, further development of the record--to include the agency's response to the new allegations--would be required to resolve the issues raised in the supplemental protest. Additionally, our review of the supplemental protest allegations does not show that they are reasonably related to the issues raised in the initial protest, such that the agency would have been on notice of the issues raised in the supplemental protest on reasonable investigation of the record. Thus, we conclude that the agency did not unduly delay taking action on the supplemental protest allegations.

In this regard, while Zeneth's initial protest focused primarily on challenges to its own evaluation, the supplemental protest primarily focused on the agency's evaluation of the quotations submitted by the successful vendors, and the agency's price evaluation. For example, in its supplemental protest, Zeneth challenged the agency's evaluation of past performance for two of the successful vendors. Protester's Comments and Supp. Protest at 33-36. Even if this issue were found to be clearly meritorious--which cannot be determined without further development of the record--we conclude that the agency promptly took corrective action in response to these supplemental allegations because they are not related to the initial protest.

As discussed, when an agency takes corrective action before the due date set for receipt of the agency report, our Office views such action as prompt and will not recommend the reimbursement of costs. *LGS Innovations LLC*, B-405932.3, Apr. 26, 2012, 2012 CPD ¶ 147 at 2. Here, Zeneth filed its supplemental protest on April 27, and our Office requested that the agency submit its report responding to the supplemental protest by May 8. The agency notified our Office of its intent to take corrective action on May 1. Under these circumstances, we consider the corrective action to have been prompt. As such, there is no basis for recommending that Zeneth be reimbursed the costs of filing and pursuing its initial and supplemental protest. *Career Sys. Dev. Corp.--Costs*, B-411346.10, July 18, 2018, 2018 CPD ¶ 249 at 4-5.

The request for reimbursement of costs is denied.

Thomas H. Armstrong
General Counsel