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Decision

Matter of: NARCORPS Specialties, LLC--Costs

File: B-418971.4

Date: January 21, 2021

Jacob W. Scott, Esq., Smith, Currie & Hancock, LLP, for the requester.
James C. Caine, Esq., and Stephanie Kearney-Quilling, Esq., Department of Homeland Security, for the agency.
Young H. Cho, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation that protest costs be reimbursed is denied where the requester has not shown that the initial protest grounds were clearly meritorious or that the agency unduly delayed taking corrective action in response to the supplemental protest.

DECISION

NARCORPS Specialties, LLC, of Orange Park, Florida, requests that our Office recommend that the Department of Homeland Security, Federal Law Enforcement Training Center (FLETC), reimburse the firm the reasonable costs of filing and pursuing its protest challenging the award of a contract to Ops Tech Alliance LLC (OTA) under request for proposals (RFP) No. 70LGLY20RGLB00004, issued by FLETC for role-player services, after the agency took voluntary corrective action in response to NARCORPS's supplemental protest. NARCORPS argues that the agency did not take timely corrective action in the face of a clearly meritorious protest.

We deny the request.

BACKGROUND

The RFP, issued on April 24, 2020, under Federal Acquisition Regulation (FAR) parts 12 and 15, contemplated the award of a single labor-hour contract with fixed-price and cost-reimbursement line items, for role-player services. Agency Report (AR),

Tab 7, RFP amend. 4, at 521, 523, 710, 711.¹ Award was to be made on a best-value tradeoff basis considering the following evaluation factors: (1) prior experience; (2) management, staffing, and scheduling approach; (3) past performance; and (4) price. *Id.* at 711. The procurement was to be conducted in two phases. AR, Tab 9, RFP amend. 6, at 724. In phase one, offerors were to submit written proposals for the prior experience evaluation factor only. *Id.* at 724, 725. After the evaluation of phase one submissions, offerors would be notified whether they could participate in phase two of the procurement, which required, as relevant here, an oral presentation by offerors addressing the management, staffing, and scheduling approach evaluation factor. *Id.* at 707. Offerors selected to participate in phase two of the procurement would be permitted to submit, among other things, slides to assist in the oral presentation. *Id.* The solicitation stated, however, that the slide presentation submitted by the offeror would not be evaluated. *Id.*

On July 31, 2020, NARCORPS filed a protest with our Office of the award of a contract to OTA. Protest at 1. The initial protest, which was docketed as B-418971.1, challenged the agency's evaluation of the awardee's proposal under the prior experience, past performance, and price factors, as well as the selection decision. NARCORPS also alleged that the agency was unreasonable in allowing OTA to "flagrantly defy the [a]gency's disclosure requirement." *Id.* at 23. This protest was filed within 10 days of NARCORPS learning that OTA was the apparent successful offeror but before NARCORPS received its requested and required debriefing, in accordance with section 15.506 of the FAR. *Id.* at 4.

On August 10, NARCORPS filed its first supplemental protest after receipt of its written debriefing on July 31. First Supp. Protest at 2. In this protest, NARCORPS challenged the agency's evaluation of NARCORPS's proposal under the management, staffing, and scheduling approach factor, raising two primary arguments. NARCORPS argued that the agency applied unstated evaluation criteria and assessed weaknesses that were inconsistent with other areas of the agency's evaluation.² First Supp. Protest at 22-35.

On September 8, the agency responded to NARCORPS's arguments raised in the protest and first supplemental protest.³ On September 18, NARCORPS filed its

¹ The solicitation was amended seven times. Unless otherwise noted, citations are to the record provided with the prior protest (B-418971.1) filed with our Office.

² The record shows that the agency did not specifically identify strengths or weaknesses but rather discussed different aspects of the offerors's proposals in support of the overall adjectival ratings assigned to the proposals. However, because the parties refer to the agency's evaluation conclusions as strengths and weaknesses, for ease of reference, we do the same. See, e.g., Agency Report (AR), Tab 17, Technical Evaluation Board (TEB) Report at 939-942.

³ Because NARCORPS's first supplemental protest revised the protest grounds raised in its initial protest and raised supplemental protest grounds in a single filing, GAO

comments and second supplemental protest. In its comments, NARCORPS pointed out, for the first time, that while the solicitation advised that the oral presentation slides submitted for the management, staffing, and scheduling approach factor would not be evaluated, the record showed that the agency relied heavily on the slides in the evaluation of this factor. Comments and 2nd Supp. Protest at 4-10. In support of this argument, NARCORPS pointed to the TEB's evaluation of OTA's oral presentation, which clearly indicated that the agency relied on OTA's oral presentation slides as part of the agency's evaluation. *Id.* at 5-9. In this regard, NARCORPS noted that more than 60% of the agency's evaluation appeared to have been directly quoted from OTA's oral presentation slides. *Id.* at 9. In addition to its comments answering the agency's response to the arguments NARCORPS made in its initial and first supplemental protests, NARCORPS raised other supplemental protest grounds, challenging the agency's evaluation of OTA's proposal and arguing that the agency's evaluation of proposals was unequal. *Id.* at 16-37.

On September 23, prior to the due date established for the second agency report, the agency advised that it would take corrective action. In its notice, the agency stated that it was taking corrective action:

solely to address Protester's comments concerning the [TEB] evaluating the offerors['] slides in regards to [the management, staffing, and scheduling approach factor] of the solicitation. The Agency has confirmed that contrary to the clear requirements of the solicitation, [] when the TEB was drafting their consensus report directly after the offerors presentations, the TEB made use of, compared, and compiled their notes using the slides.

Notice of Corrective Action at 1. The agency explained that it would allow offerors to submit written technical proposals for the management, staffing, and scheduling approach factor. *Id.* The agency further represented that the previous award would be vacated and a new selection decision would be made.⁴ *Id.* As a result, on September 29, our Office dismissed NARCORPS's protests as academic. NARCORPS Specialties, LLC, B-418971 *et al.*, Sept. 29, 2020 (unpublished decision). This request follows.

requested that the agency file a single consolidated agency report addressing the protest grounds raised in the initial and first supplemental protest. First Supp. Protest at 1 n.2; Electronic Protest Docketing System No. 19.

⁴ In making a new award decision, the agency also represented that a new selection official would be appointed. Notice of Corrective Action at 1.

DISCUSSION

NARCORPS asks our Office to recommend that FLETC reimburse the requester for the costs associated with filing and pursuing its first supplemental protest, specifically those protest grounds challenging the agency's evaluation of its proposal under the management, staffing, and scheduling approach factor and the best-value determination.⁵ Req. at 5. The requester asserts these arguments were raised in its first supplemental protest and were clearly meritorious because any reasonable inquiry by the agency would have revealed the improprieties in the agency's evaluation, *i.e.*, the agency relied on the oral presentation slides in conducting its evaluation of proposals, contrary to the terms of the solicitation. *Id.* at 6. NARCORPS further contends that FLETC unduly delayed taking corrective action in response to its protest because, according to NARCORPS, "FLETC did not allege that NARCORPS' Comments on the Agency Report uncovered new information," and the agency had all the necessary information to conduct its review and recognize its concerns before NARCORPS filed its comments but chose not to. *Id.* at 10-11.

The agency responds that it did not unduly delay taking corrective action in the face of a clearly meritorious protest because the agency took corrective action solely based on a new issue raised by NARCORPS in its comments and second supplemental protest, specifically the allegation that the agency had relied on the offerors' oral presentation slides in its evaluation. Agency Resp. at 2. The agency maintains that it only became aware of the specific issue when the requester raised it, for the first time, in the comments and second supplemental protest. The agency explains that, based on an investigation of that claim, FLETC determined that the evaluation was flawed because the evaluators had improperly used offerors' oral presentation slides as part of the evaluation of proposals. *Id.*

The agency also contends that the arguments raised by NARCORPS in its initial protests were very different. Specifically, in its first supplemental protest, FLETC asserts that NARCORPS, in trying to bolster its argument that NARCORPS should have received a higher rating, actually argued that the agency should have used the information in the oral presentation slides during the agency's evaluation. *Id.* By contrast, FLETC points out that, in the second supplemental protest, NARCORPS argued that the agency "in fact used the slides in the evaluation in violation of the solicitation." *Id.* Finally, the agency asserts that its corrective action was prompt because it was taken in response to the issues raised in NARCORPS's second supplemental protest. *Id.*

Under the Competition in Contracting Act of 1984, our Office may recommend that protest costs be reimbursed only where we find that an agency's action violated a procurement statute or regulation. 31 U.S.C. § 3554(c)(1). When a procuring agency

⁵ The requester acknowledges that the agency's corrective action in response to its second supplemental protest was prompt and limits its request to costs related to the first supplemental protest and its comments. Req. at 6 n.3.

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. Thus, as a prerequisite to our recommending the reimbursement of costs where a protest has been resolved 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. *Harley Marine Servs., Inc.--Costs*, B-416033.4, Mar. 15, 2019, 2019 CPD ¶ 121 at 4. 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. *Id.*

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. 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 2-3.

Here, we disagree with NARCORPS that the arguments raised in its first supplemental protest were clearly meritorious because, according to the requester, a reasonable inquiry would have revealed facts showing the absence of a defensible legal position. In its first supplemental protest, NARCORPS first challenged weaknesses assessed to its proposal. First Supp. Protest at 23-28. NARCORPS asserted that the agency was unreasonable in assessing these weaknesses because the weaknesses were assessed for failing to address matters not raised in the solicitation.⁶ *Id.* NARCORPS also argued that even if the RFP had contained those requirements, NARCORPS had, in fact, addressed those areas in its proposal, pointing to its oral presentation slides as evidence. *Id.*

For example, with regard to the weakness assessed for failing to include a detailed description of the proposed administrative staff, NARCORPS first argued that the solicitation had no such requirement. *Id.* at 23. According to NARCORPS, the RFP only required that offerors provide a staffing plan that described its approach to ensuring that the government had the necessary staff "to meet the requirements of the

⁶ Specifically, NARCORPS challenged the following weaknesses assessed by the agency: (1) failing to include a detailed description of administrative staff; (2) not having a staff dedicated to scheduling; and (3) failing to describe how it would provide cross functional training. First Supp. Protest at 23-28.

[s]tatement of work and to adjust to changing staffing requirements.” *Id.* The protester asserted that even if the RFP had required offerors to provide a detailed description of the proposed administrative staff, NARCORPS’s proposal did so sufficiently. Specifically, NARCORPS states: “As explained in the *slides* that accompanied its oral presentation . . . NARCORPS’[s] staffing plan included ‘Administrative Staff including [DELETED] to support [the] [DELETED] [contract line item number].” *Id.* at 24 (emphasis added).

NARCORPS’s protest proceeds to make similar arguments in regards to the other assigned weaknesses. *Id.* at 25-28. Nothing in NARCORPS’s challenges to the assessed weaknesses, however, suggested that the agency improperly relied on the oral presentation slides in its evaluation. Rather, as reflected above, NARCORPS’s first supplemental protest alleged that the agency unreasonably assigned weaknesses to its proposal when information addressing the agency’s concerns was clearly provided in slides accompanying NARCORPS’s oral presentation. This is in stark contrast to the allegation that, in evaluating proposals, the agency improperly relied upon the oral presentation slides in contravention of the terms of the solicitation.

NARCORPS also argued in the first supplemental protest that the agency’s evaluation contained “unexplained inconsistencies and contradictions” in regards to the evaluation of NARCORPS’s proposal under the management, staffing, and scheduling approach factor. *Id.* at 28-35. In support of these arguments, NARCORPS points to various areas in the agency’s evaluation of its proposal that, in its view, were positive, while pointing to the areas that the agency found to be lacking and arguing that the agency’s conclusion was unreasonable or contradictory. While NARCORPS refers to the fact that in assessing a weakness, the agency’s evaluation “quot[ed] from NARCORPS’[s] presentation sides,” First Supp. Protest at 32, nothing in NARCORPS’s challenges to the agency’s evaluation even suggested that the agency improperly relied on the oral presentation slides in its evaluation. Rather, the protester’s arguments pointed to numerous statements in its slides that provided the purported details that were identified as lacking when the agency assessed the weaknesses. *Id.* at 32-33. As a result, we do not find that a reasonable inquiry into NARCORPS’s arguments, *i.e.*, the agency’s application of unstated evaluation criteria and the agency’s allegedly conflicting evaluation, would have revealed that the agency’s evaluation was flawed because it relied on oral presentation slides in its evaluation despite the solicitation stating that the slides would not be considered as part of the agency’s evaluation.

In response to these allegations, FLETC provided an agency report addressing each of the protester’s challenges to the agency’s evaluation of NARCORPS proposal under the management, staffing, and scheduling approach factor. Memorandum of Law at 16-26. As a result of the agency’s decision to take corrective action based on the new arguments presented in the protester’s comments to the agency report, we dismissed the protest as academic, without deciding the merits of the initial protest. *NARCORPS Specialties, LLC, B-418971 et al.*, Sept. 29, 2020 (unpublished decision). Although we did not decide the merits of the allegations in NARCORPS initial protest, we do not find

that the allegations raised there were so clearly meritorious that a reasonable agency inquiry would reveal facts showing the absence of a defensible legal position.

In this regard, we reject NARCORPS's apparent view that the very general challenge to the agency's technical evaluation in its initial protest should be deemed clearly meritorious merely because the agency later took corrective action in response to a specific supplemental protest ground that NARCORPS argues could have been discovered earlier. Although, the filing of a protest should trigger an agency's review of the procurement, a general protest ground will not be found clearly meritorious where that protest ground did not raise the issue that eventually led to the corrective action. See *Procinctu Grp., Inc.--Recon.*, B-416247.5, Mar. 15, 2019, 2019 CPD ¶ 109 at 5; *Intercontinental Constr. Contracting, Inc.--Costs*, B-400729.3, Mar. 4, 2009, 2009 CPD ¶ 44 at 3. As discussed above, nothing in NARCORPS's first supplemental protest would have led the agency to conclude that it improperly utilized the oral presentation slides. Although NARCORPS acknowledged, in a footnote, that the solicitation stated that the slides would not be evaluated, it nonetheless argued that the slides should have been considered by the agency because "they serve[d] as a contemporaneous record of NARCORPS'[s] Phase 2 oral presentation." First Supp. Protest at 16 n.10.

Because we do not find NARCORPS first supplemental protest to have been clearly meritorious, we need not reach the question of whether the agency's corrective action was unduly delayed. See, e.g., *Oready, LLC--Costs*, B-418297.2, Mar. 30, 2020, 2020 CPD 131 at 4; *Baxter Healthcare Corp.--Costs*, B-259811.3, Oct. 16, 1995, 95-2 CPD ¶ 174 at 6. As reflected in our analysis above, the allegations raised in the supplemental protest were not related to the initial protest such that the agency's investigation of the initial protest should have revealed the asserted evaluation flaws alleged in the supplemental protest. Nonetheless, even if we found NARCORPS's first supplemental protest clearly meritorious--which we do not--we would not have found that the agency unduly delayed taking corrective action. When an agency takes corrective action in response to a newly raised allegation prior to the deadline for supplemental agency report, we will generally view this action as prompt. See *Metalcraft, Inc.--Costs, supra* at 3.

The request that we recommend reimbursement of protest costs is denied.

Thomas H. Armstrong
General Counsel