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Decision

Matter of: Cooper/Ports America, LLC

File: B-419000.3

Date: February 18, 2021

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Christopher Alwood, Esq., and Christina Sklarew, 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 single protest ground remaining from the initial protest was not clearly meritorious, and where the agency took prompt corrective action in response to supplemental protest grounds.

DECISION

Cooper/Ports America, LLC (Cooper/Ports) of Houston, Texas, requests that our Office recommend that it be reimbursed the reasonable costs of filing and pursuing its protest of the award of a contract to James J. Flanagan Shipping Corporation (Flanagan), of Beaumont, Texas, under request for proposals (RFP) No. HTC711-20-R-R002, issued by the United States Transportation Command (USTRANSCOM)¹ for stevedoring and related terminal services at the Port of Beaumont, Port Arthur, and the Port of Corpus Christi, in Texas.

We deny the request.

¹ The Department of the Air Force is defending the request on behalf of USTRANSCOM, one of eleven unified combatant commands within the Department of Defense.

BACKGROUND

The agency issued the RFP on January 9, 2020, pursuant to the procedures of Federal Acquisition Regulation (FAR) subpart 12.6 and part 15. Agency Report (AR), Tab 3, RFP at 1, 29. The solicitation contemplated the award of an indefinite-delivery, indefinite-quantity contract under which task orders for stevedoring and related terminal services would be placed over a 5-year period. *Id.* at 3; AR, Tab 4, Performance Work Statement at 3. The RFP established that award would be made on a lowest-price, technically acceptable basis, considering a single technical evaluation factor and price. RFP at 30.

The agency received proposals from two offerors, Flanagan and Cooper/Ports. AR, Tab 191, Notice of Unsuccessful Offer at 1. On July 28, 2020, the agency notified Cooper/Ports that it had selected Flanagan for award. *Id.*

On August 10, Cooper/Ports filed an initial protest with our Office, docketed as B-419000.1, challenging the award to Flanagan. Specifically, the protester alleged that: (1) the agency conducted an unreasonable technical evaluation; (2) the agency treated offerors unequally by issuing a last-minute extension to the deadline for receipt of proposals; (3) Flanagan's proposal was technically unacceptable; and, (4) the agency unreasonably found Flanagan responsible. Protest at 3, 9-28.

On August 26, the agency submitted a request for dismissal, arguing that the first, third, and fourth grounds of the protest were legally and factually insufficient, and that the second ground of protest was untimely. Request for Dismissal, Aug. 26, 2020, at 2-7. On September 3, our Office informed the parties that we intended to dismiss the second and third grounds of protest. Concordantly, we instructed the agency to submit its report addressing the protester's remaining arguments: that the agency conducted an unreasonable technical evaluation and that the agency unreasonably found Flanagan to be responsible.

On September 9, the agency produced its report in response to the protest. In its report, the agency revealed that, as part of its consideration of Flanagan's responsibility, it had made email inquiries regarding Flanagan with the president of International Longshoremen's Association (ILA) Local 1924. AR, Tab 181, Memorandum for Record on Responsibility Determination at 1. The memorandum did not specify whether the agency had received any replies from ILA Local 1924. *Id.* On September 11, Cooper/Ports filed a request that the agency produce additional documents, including "[a]ll documents produced and received by the Government in connection with its inquiry 'into specific allegations regarding [Flanagan's] responsibility,' to include its 'email inquiries with the Port Director at the Port of Beaumont and President of ILA Local 1924' and any replies received." Cooper/Ports Request for Additional Documents, Sept. 11, 2020, at 1-2. In response to Cooper/Ports's request, the agency stated that it did not have any documents relevant to the specific request regarding inquiries with ILA Local 1924. See Response to Request for Additional Documents, Sept. 14, 2020, at 1-2.

On September 21, Cooper/Ports filed its comments on the agency report for the initial protest, which included as an attachment copies of agency communications with the president of ILA Local 1924 regarding Flanagan that the agency had previously stated it did not have and therefore did not include in its report. See Cooper/Ports Comments & Supp. Protest. In its comments on the agency report, Cooper/Ports withdrew all of its initial grounds of protest except its challenge to the agency's responsibility determination. *Id.* at 3, n.2. In this filing, the protester also raised, as supplemental protest grounds docketed as B-419000.2, allegations that: (5) the agency improperly withheld material documents from its agency report; (6) the agency made misstatements in and misrepresented the results of its responsibility investigation; and (7) the agency unreasonably failed to recognize that the awardee had misrepresented the status of its collective bargaining agreements in its proposal. *Id.* at 3-19. Also in its filing, while not identifying it as a supplemental protest ground, the protester raised for the first time the specific allegation that the agency's responsibility determination was unreasonable, based on its failure to consider the above-referenced communications between the agency and the president of ILA Local 1924. *Id.* at 24-26.

On September 29, eight days after Cooper/Ports filed its supplemental protest and before the deadline for the supplemental agency report, the agency notified our Office that it intended to take corrective action. Notice of Corrective Action, September 29, 2020, at 1-2. Specifically, the agency stated it would perform a new responsibility determination to ensure that the determination was based on the complete record and make a new award decision in accordance with the solicitation. *Id.* The agency also stated it might take other corrective action that it deemed appropriate. *Id.*

On October 27, we dismissed the protest based on our conclusion that the agency's intended action of making a new responsibility determination, and a new selection decision, together with the possibility of taking such other steps it deems appropriate, rendered the protest academic. *Cooper/Ports America, LLC*, B-419000.1, Oct. 27, 2020 (unpublished decision). Subsequently, Cooper/Ports timely filed this request, pursuant to 4 C.F.R. §21.8(e), that we recommend USTRANSCOM reimburse Cooper/Ports its reasonable costs of filing and pursuing the protest.

DISCUSSION

Cooper/Ports contends that it should be reimbursed the costs of pursuing its protest and supplemental protest because USTRANSCOM failed to take prompt corrective action in response to its clearly meritorious protest grounds. Req. for Costs at 9-14.

Cooper/Ports asserts that USTRANSCOM delayed taking corrective action on its initial protest grounds by waiting until after it filed its agency report, and that a reasonable agency inquiry would have revealed the merit of the alleged errors in the responsibility determination and obviated the need for the protester to prepare and file its comments and supplemental protest. Req. for Costs at 12-14. The protester further contends that it is entitled to reimbursement of all costs incurred, including costs for the initial grounds it withdrew. Protester's Reply to the Agency at 8-10. In this regard, the protester

argues that its initial challenge to the agency's responsibility determination and all three supplemental protest grounds were clearly meritorious and that the other issues it pursued were intertwined with the alleged clearly meritorious protest grounds. *Id.*

Generally, the agency responds that it defended its position relative to the initial protest challenges because it did not regard those arguments as meritorious, and that its corrective action was based on protest issues first raised in Cooper/Ports's comments and supplemental protest. Agency Response at 3-6. For the reasons set forth below, we agree with the agency and find no basis to recommend reimbursement of costs here.

Where 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. 4 C.F.R. § 21.8(e); *AAR Aircraft Servs.--Costs*, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 5. That is, as a prerequisite to our recommendation that protest costs be reimbursed, the protest must not only have been meritorious, but it also must have been clearly meritorious, *i.e.*, not a close question. *InfraMap Corp.--Costs*, B-405167.3, Mar. 26, 2012, 2012 CPD ¶ 123 at 3. A protest is clearly meritorious where a reasonable agency inquiry into the protester's allegations would reveal facts showing the agency had no defensible legal position. *First Fed. Corp.--Costs*, B-293373.2, Apr. 21, 2004, 2004 CPD ¶ 94 at 2. The existence of any defensible legal position or close question is sufficient to show that a protest allegation was not clearly meritorious so as to warrant reimbursement of protest costs. See *Triple Canopy, Inc.--Costs*, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 3.

Initial Protest Grounds

With regard to the initial protest, as noted above, all of the initial protest grounds were withdrawn by the protester, with the exception of the single ground challenging the reasonableness of the agency's responsibility determination that Cooper/Ports continued to pursue in its comments. See Comments & Supp. Protest at 3, n.2. In this regard, Cooper/Ports argued that the contracting officer failed to consider available relevant information regarding Flanagan's responsibility because if it had, the agency "could not have reasonably determined" that Flanagan could comply with the responsibility requirements related to its ability to provide the required labor and necessary technical equipment to perform the contract.² Protest at 19-27.

² In its initial protest, Cooper/Ports cites to various communications between ILA union representatives and Flanagan, as well as a declaration by a Cooper/Ports vice-president, as evidence of relevant information that should have rendered Flanagan non-responsible or that the agency otherwise failed to consider. See, e.g., Protest at 21, n.14. However, at no point in the initial protest does the protester allege that the agency failed to consider its own communications with ILA Local 1924 in which it inquired about the responsibility of Flanagan, or otherwise explain why the cited communications between third parties should have been available to the agency.

In its report responding to the initial protest, the agency contended that its determination was reasonable, generally arguing that Cooper/Ports did “not present evidence sufficient to demonstrate that [Flanagan] is unable to perform all contract requirements nor does it establish that the [contracting officer] did not consider certain information in making her responsibility determination.” Memorandum of Law (MOL) at 9-10. The agency explained that, prior to making the responsibility determination, the contracting officer had investigated “nearly identical non-responsibility allegations” that were previously asserted by Cooper/Ports in an earlier protest with our Office. *Id.* at 10; see also Protest, B-418504, Feb. 21, 2020 at 7-16. The agency further argued that the protester’s challenges to the agency’s responsibility determination amounted to nothing more than disagreement. *Id.* at 13.

Here, we cannot conclude that Cooper/Ports’s initial challenge to the agency’s responsibility determination was clearly meritorious, *i.e.*, that it was not a close question or that the agency lacked a legally defensible position. As a general matter, our Office does not review affirmative determinations of responsibility by a contracting officer. 4 C.F.R. § 21.5(c); *FCi Fed., Inc.*, B-408558.4 *et al.*, Oct. 20, 2014, 2014 CPD ¶ 308 at 7. We will, however, review a challenge to an agency’s affirmative responsibility determination where the protester presents specific evidence that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. 4 C.F.R. § 21.5(c); *Southwestern Bell Tel. Co.*, B-292476, Oct. 1, 2003, 2003 CPD ¶ 177 at 8.

The record demonstrates that the contracting officer considered, as part of the responsibility determination, the information relevant to Flanagan that Cooper/Ports alleged the agency had failed to consider in its initial protest. See MOL at 10-13 (*citing* AR, Tab 181, Memorandum for Record on Responsibility Determination). The agency’s contemporaneous memorandum shows that the contracting officer had investigated nearly identical allegations raised by Cooper/Ports against Flanagan in B-418504, challenging Flanagan’s ability to provide the required labor and necessary technical equipment to perform the contract, and still found Flanagan to be responsible. AR, Tab 181, Memorandum for Record on Responsibility Determination at 1. The record specifically shows that the contracting officer considered the status of Flanagan’s license to operate at the Port of Beaumont, the status of Flanagan’s collective bargaining agreements, alleged underpayments in wages by Flanagan, and Flanagan’s ability to provide the equipment required to perform the contract. *Id.*

The protester also argues that this protest ground was clearly meritorious because a reasonable inquiry by the agency would have revealed the relevant documents that later triggered the agency’s corrective action, namely, the communications between the agency and ILA Local 1924 regarding Flanagan’s responsibility.³ Req. for Costs at 2.

³ The protester’s reliance on the fact that its production of the agency’s communications with ILA Local 1924 triggered the agency’s corrective action is misplaced. See Req. for

In support of this argument, Cooper/Ports repeatedly notes that the agency's memorandum documenting the responsibility determination shows that the contracting officer was aware the agency had made inquiries to ILA Local 1924.⁴ See, e.g., Protester's Reply to the Agency at 4. Cooper/Ports argues that the agency should have known to search for a response to these inquiries. *Id.*

In response, the agency explains that it failed to discover the relevant communication with ILA Local 1924 and other documents before the protester submitted its supplemental protest because the contract specialist who created the documents had been reassigned from this acquisition.⁵ Agency Response at 4. Given that the initial protest did not identify ILA Local 1924's response to the agency's inquiries and the protester has not provided any specific evidence that the contracting officer was aware of the documents before the filing of the supplemental protest, we see no basis to conclude that the contracting officer should have identified these relevant documents as part of her reasonable inquiry into the initial protest grounds.

On this record, we do not find that this initial protest ground meets the high bar set by the clearly meritorious standard. See, e.g., *Oready, LLC--Costs*, B-418297.2, Mar. 30, 2020, 2020 CPD ¶ 131 at 5 (citing *Northrop Grumman Sys. Corp.--Costs*, B-412278.6, Feb. 7, 2017, 2017 CPD ¶ 68 at 5). Accordingly, we do not recommend reimbursement of costs from the initial protest.

Supplemental Protest Grounds

We find that the agency took corrective action in response to Cooper/Ports's supplemental challenges (those raised for the first time after the submission of the agency report) without undue delay. With respect to the promptness of an agency's corrective action under the circumstances of a protest, 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

Costs at 2. The mere fact that an agency decides to take corrective action does not necessarily establish that a protest is clearly meritorious, or that the protester is entitled to reimbursement of costs. *Metalcraft, Inc.--Costs*, B-402181.3, May 17, 2010, 2010 CPD ¶ 116 at 3.

⁴ As noted above, in its memorandum determining that Flanagan was responsible, the agency stated only that it made inquiries with ILA Local 1924 and did not specify whether it had received any responses that it relied upon. AR, Tab 181, Memorandum for Record on Responsibility Determination at 1.

⁵ In response to a separate protest challenging the scope of the agency's corrective action, the agency noted that the contract specialist had failed to properly file the documents in the contract file before being reassigned. Request for Dismissal, B-419000.2, Oct. 19, 2020 at 3.

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.

As discussed above, eight days after Cooper/Ports filed its supplemental protest--including alleging for the first time that the agency's responsibility determination had failed to consider the relevant communications between the agency and the president of ILA Local 1924--and before the deadline for the supplemental agency report, the agency notified our Office that it intended to take corrective action. Notice of Corrective Action at 1-2. This action by the agency, rather than filing a supplemental agency report responding to the new allegations, constitutes the prompt action that our protest procedures contemplate. Because we find the agency responded to these allegations without undue delay, we do not recommend reimbursement of the supplemental protest costs.

The request is denied.

Thomas H. Armstrong
General Counsel