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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: T Square Logistics Services Corporation--Costs

File: B-297790.4

Date: April 26, 2006

Richard B. Oliver, Esq., and David J. Ginsberg, Esq., McKenna Long & Aldridge LLP, for the protester.

Michael J. O'Farrell, Jr., Esq., Department of the Air Force, for the agency.

Katherine I. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Government Accountability Office recommends that protester be reimbursed the reasonable costs of filing and pursuing protests where the agency unduly delayed taking corrective action in response to protests which were clearly meritorious as indicated by the fact that the corrective action was in response to "outcome prediction" alternative dispute resolution conducted by GAO attorney after the agency report has been filed.

2. Where agency downgrades the protester's past performance to "little confidence" because it lacks experience in several functional areas covered by the solicitation and this directly resulted in a higher priced proposal being selected for award, and agency conducts discussions but does not mention to the protester this evaluated lack of experience, the agency has failed to conduct meaningful discussions.

DECISION

T Square Logistics Services Corporation requests that we recommend that it be reimbursed the costs of filing and pursuing its protests challenging the award of a contract to Data Monitor Systems, Inc., by the Department of the Air Force under request for proposals (RFP) No. FA6643-05-R-0006, for base operating support (BOS) services at Grissom Air Reserve Base, Indiana.

We recommend that the Air Force reimburse T Square's protest costs.

The RFP, issued June 6, 2005, contemplated the award of a combined fixed-price and time-and-materials contract for 1 base year with nine 1-year options. The solicited BOS services included (1) base supply function, (2) motor vehicle management

function, (3) traffic management function, (4) transient aircraft services, (5) recurring real property maintenance function, (6) fuels function, (7) airfield management function, and (8) meteorological function.

The RFP provided for offerors to meet certain minimum qualification requirements, and to submit technical proposals addressing the program management/staffing and financial plan subfactors, which would be evaluated on a “technical acceptability” basis. The RFP provided that past performance was to be evaluated for “recency,” that is, currently ongoing or completed within the last 3 years; “relevancy,” based on the scope, magnitude, and complexity of the contracts, including the extent of performance by teaming partners and subcontractors; and quality of performance on referenced contracts. This evaluation would result in an overall confidence performance risk assessment of the offeror’s ability to successfully perform the proposed effort. The possible confidence ratings, listed in descending order of quality, were “high confidence,” “significant confidence,” “confidence,” “unknown confidence,” “little confidence,” and “no confidence.” RFP § M-3.4.

Ten firms, including T Square and Data Monitor, submitted offers by the closing date for receipt of proposals. All offerors were determined to meet the minimum qualifications, and one offeror was determined to be technically unacceptable. The agency conducted written discussions with the remaining nine offerors during which evaluation notices were issued to each offeror. After discussions were concluded, final proposal revisions were requested and evaluated. Data Monitor was the lowest priced offeror at \$51,530,704.29 of the three offerors that received the highest performance risk assessment awarded of “significant confidence.” Although T Square submitted a lower price [DELETED], it received an overall performance risk assessment of “little confidence.”

The source selection authority concluded that despite “the Very Relevant contracts with Exceptional performance data which covered [DELETED] eight functions [DELETED],” T Square warranted an overall performance risk assessment of “Little Confidence,” because of “substantial doubt in [T Square’s] ability to perform due to lack of performance data in [DELETED] Agency Report, Tab 10, Source Selection Decision, at 2. T Square’s evaluated lack of experience in these functional areas was not mentioned to it during discussions. The agency determined that Data Monitor’s proposal represented the best value to the government, and Data Monitor was awarded the contract.

In its initial protest and two supplemental protests, T Square basically argued that the agency should have communicated in discussions its concern that T Square lacked experience in certain BOS functions, and that had it been informed that the agency considered the gaps in its experience in certain BOS functions to be a significant weakness, it would have added subcontractors with the requisite experience.

The Air Force filed a report responsive to the protests. In its report, the contracting officer argued that no discussions on this matter were deemed necessary because the lack of very relevant performance data in [DELETED] was “never deemed a deficiency, weakness or adverse past performance information which could be resolved or corrected via discussions.” Contracting Officer’s Statement at 7. T Square filed comments on the agency’s report arguing that discussions were required.

On February 13, 2006, after receipt of the comments, our Office’s attorney handling the protests conducted an “outcome prediction” alternative dispute resolution (ADR) conference, at the request of the agency. During the ADR, she advised the parties that it was her view that the protests were likely to be sustained, and explained the basis for this view, which is discussed below.¹

The record showed that the agency’s determination that T Square was lacking in experience in [DELETED] of the functional areas directly resulted in a “low confidence” rating, and that this rating was the reason that T Square was not considered for award notwithstanding its lower price. Under the circumstances, once the agency decided to conduct discussions--as it did in this case--it was obligated to point out T Square’s evaluated lack of experience in these functions in order for the discussions to be considered meaningful. See Federal Acquisition Regulation § 15.306(d)(3); Cygnus Corp., Inc., B-292649.3, B-292649.4, Dec. 30, 2003, 2004 CPD ¶ 162 at 3; Alliant Techsystems, Inc.; Olin Corp.; B-260215.4, B-260215.5, Aug. 4, 1995, 95-2 CPD ¶ 79 at 7-8.

While the Air Force characterized the gaps in T Square’s BOS experience as involving merely historical information that could not be changed so that discussions on this point were not required, the protester asserted that had it known that the agency would severely downgrade it for any gaps in its BOS experience, then T Square would have obtained new team member(s) with the requisite experience; T Square provided a declaration from its president stating that had he been aware of the agency’s concerns he would have proposed teaming with two specific companies with which T Square had previously teamed, which have experience in the

¹ In outcome prediction ADR, the GAO attorney handling a protest convenes the parties, at their request or at GAO’s initiative, and explains what the GAO attorney believes the likely outcome will be and the reasons for that belief. A GAO attorney will engage in this form of ADR only if she or he has a high degree of confidence regarding the outcome. Where the party predicted to lose the protest takes action obviating the need for a written decision (either the agency taking corrective action or the protester withdrawing the protest), our Office closes the case. Although the outcome prediction reflects the view of the GAO attorney, and generally that of a supervisor as well, it is not an opinion of our Office, and it does not bind our Office, should issuance of a written decision remain appropriate.

[DELETED] BOS functions in which the agency questioned T Square's experience, and which have indicated a willingness to subcontract with T Square on the BOS services work at Grissom AFB. Protest (B-297790.3) at 11; Protester's Comments, Declaration of President, at 2.

During the ADR conference, the parties were informed by the GAO attorney that from her review of the record, it was clear that meaningful discussions were not conducted by the agency, where the protester was not informed of the agency's concern that the firm lacked certain experience that resulted in a "little confidence" rating that caused the selection of another firm for award. The parties were informed of the GAO attorney's view that the likely outcome of the protest was that it would be sustained, and that the likely protest recommendation would be that the agency reopen negotiations, conduct further discussions with T Square and the other offerors, request revised proposals, and make a new source selection decision, fully documenting the basis for that decision.

On March 3, the Air Force informed our Office and the parties that the agency had decided to take corrective action in response to the outcome-prediction ADR, consisting of the following: (1) assign a new evaluator, (2) re-evaluate all offerors that received a "Go" in the "Go/NoGo" technical proposal evaluation for past performance relevance and performance risk, (3) assign a "neutral" performance risk rating for those functional areas in which an offeror lacks past performance experience, (4) re-assess the confidence assessment, (5) prepare a new past performance/cost trade-off analysis and best value determination, (6) prepare a new source selection document, and (7) if any offeror other than the current awardee is determined to be the best value, then terminate the award to Data Monitor, and make award to that offeror. The agency also advised that it would continue to stay performance until the proposed corrective action was completed. Given that T Square could receive the award as a result of the corrective action, on March 14, our Office dismissed T Square's protests as premature and academic.²

T Square now requests that we recommend, pursuant to section to section 21.8(e) of our Bid Protest Regulations, the reimbursement of its costs of filing and pursuing its initial protest and two supplemental protests. 4 C.F.R. § 21.8(e) (2006). The Air Force did not agree to reimburse these costs, but "has decided not to reply to" the request for reimbursement. Facsimile Transmittal from Air Force to GAO and Parties (Apr. 10, 2006).

Where a procuring agency takes corrective action in response to a protest, our Office may recommend under 4 C.F.R. § 21.8(e) that the agency reimburse the protester its

² In dismissing the protest, we observed, "In the event that it does not receive the award, the protester may protest this decision, including the nature of the corrective action." T Square Logistics Servs. Corp., B-297790 et al., Mar. 14, 2006, at 2.

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 protesters to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Pemco Aeroplex, Inc.--Recon. and Costs, B-275587.5, Oct. 14, 1997, 97-2 CPD ¶ 102 at 5. A protest is clearly meritorious when a reasonable agency inquiry into the protest allegations would show facts disclosing the absence of a defensible legal position. The Real Estate Ctr.--Costs, B-274081.7, Mar. 30, 1998, 98-1 CPD ¶ 105 at 3. A GAO attorney will inform the parties through outcome prediction that a protest is likely to be sustained only if he or she has a high degree of confidence regarding the outcome; therefore, the willingness to do so is generally an indication that the protest is viewed as clearly meritorious, and satisfies the “clearly meritorious” requirement for purposes of recommending reimbursement of protest costs. National Opinion Research Center--Costs, B-289044.3, March 6, 2002, 2002 CPD ¶ 55 at 3; Inter-Con Sec. Sys., Inc.; CASS, a Joint Venture--Costs, B-284534.7, B-284534.8, Mar. 14, 2001, 2001 CPD ¶ 54 at 3.

Here, the Air Force does not dispute that the protests were clearly meritorious and that the agency unduly delayed taking corrective action.³ In our view, where, as here, the agency corrective action is taken in response to outcome-prediction ADR conducted after the agency report has been filed, the standard for cost reimbursement is presumed to have been met, absent persuasive evidence to the contrary. National Opinion Research Center--Costs, *supra*. Accordingly, we recommend that T Square be reimbursed the reasonable costs of filing and pursuing its protests, including those incurred here for requesting a recommendation for costs. T Square should file its claim for costs with the Air Force, detailing and certifying the time expended and costs incurred within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

Anthony H. Gamboa
General Counsel

³ We generally do not consider corrective action to be prompt where, as here, it is taken after the due date for the agency report. York Bldg. Servs., Inc.; Olympus Bldg. Servs., Inc.--Costs, B-282887.10, B-282887.11, Aug. 29, 2000, 2000 CPD ¶ 141 at 5.