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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: Diligent Consulting, Inc.--Costs

File: B-299556.3

Date: June 26, 2007

Gerald H. Werfel, Esq., Pompan, Murray & Werfel, PLC, for the protester.
Gary R. Allen, Esq., Department of the Air Force, for the agency.
Kenneth Kilgour, Esq., and Christine S. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Request that Government Accountability Office recommend reimbursement of the costs of filing and pursuing an initial and a supplemental protest is denied where the initial protest grounds were not clearly meritorious and the agency took prompt corrective action in response to the supplemental protest.

DECISION

Diligent Consulting, Inc. requests that we recommend that it be reimbursed the costs of filing and pursuing its protest and supplemental protest challenging the agency's evaluation of proposals submitted in response to request for proposals (RFP) No. FA3300-06-R-0013, issued by the Department of the Air Force for software support services for the Air University Directorate of Communications and Information at Maxwell Air Force Base, Alabama. We dismissed both protests after the agency advised our Office that it would be taking corrective action by reevaluating the proposals. Diligent argues that its initial protest was clearly meritorious and that the agency unduly delayed taking corrective action until after the due date for the agency report and the protester had filed both comments on the agency report and a supplemental protest.

We deny the request.

On September 14, 2006, the Air Force issued the RFP as part of a competition under Office of Management and Budget Circular A-76 (Revised) to determine whether to contract out--rather than continue to have performed in-house by the Air Force--certain software support services. The RFP called for award of a fixed-price contract to the responsible service provider with the lowest-priced technically

acceptable proposal that met or exceeded all the minimum mandatory criteria in the solicitation.

The RFP required that private sector offers include at least one but not more than three “of the most recent (within 3 Years from the date of issuance of the solicitation) and relevant contract or project references (. . . for the prime service provider, and significant subcontractors).” RFP at 9. Past performance of subcontractors proposed to perform major or critical aspects of the requirement would be considered “as highly as” past performance information for the offeror. Id. at 13.

Amendment 1 to the RFP stated that the agency would conduct a price realism analysis as follows:

Realism -- Realism will be based on evaluation of proposed prices to determine if they are compatible with the scope of effort, reflect a clear understanding of the requirement, and are neither excessive nor insufficient for the effort to be accomplished.

RFP, Amend. 1 at 2.

By the RFP’s closing date of October 20, the agency received proposals from two private sector offerors, the protester, who was the incumbent contractor, and Software Engineering Services (SES), as well as an agency tender based upon the government’s most efficient organization. The protester’s proposal included past performance information for itself and two subcontractors. With regard to the price realism analysis called for by the RFP, the final price competition memorandum Agency Report, Tab 13, at 4-5, states as follows:

A realism analysis was conducted by the technical team to assess the compatibility of each service provider’s proposed labor category descriptions and qualifications and projected annual man-hours for each labor category in their cost proposals to their technical proposals. The technical evaluation team reviewed each service provider’s price proposal and validated the personnel and costs cited to reasonably perform their technical approach and processes. Each service provider’s proposed labor category descriptions and qualifications, and projected annual man hours for each labor category were consistent with the scope of work in [the performance work statement]. Each service provider’s technical proposal adequately described their recruiting, hiring, training, security limitations, and any other special considerations to accommodate a phase-in period consistent with CLIN 0001. As a result, the proposed prices of each service provider were determined to be realistic; compatible with the scope of effort,

reflected a clear understanding of the requirement, and were neither excessive nor insufficient for the effort to be accomplished.

Diligent was advised by letter dated March 6, 2007, that award had been made to SES. Diligent requested a debriefing and received it on March 13. The protester alleges that during the debriefing an agency official remarked that “no ‘methodology’ was utilized to determine price realism.”¹ Protest at 5. In its protest, filed with our Office on March 16, the protester alleged that the agency failed to conduct the required price realism analysis and that the awardee “does not possess the necessary corporate experience to satisfy the past performance standard established by the RFP.”² Id. at 6.

The agency submitted its agency report, due April 16, on April 5. On April 16, the protester filed a supplemental protest arguing that, when adjustments to its price required by the RFP were made, SES had not submitted the low priced offer, and that the agency failed to properly document the source selection decision. The protester filed its comments to the agency report on April 17, having been granted a 1-day extension for that filing.

By letter dated April 17, the agency indicated that it was taking corrective action by reevaluating the proposals and that the corrective action was prompted solely by the issues raised in the supplemental protest. We concluded that the reevaluation of proposals rendered Diligent’s protests academic, and on April 20 we dismissed the protests.

Diligent now requests that our Office recommend that the agency reimburse the protester’s costs of filing and pursuing both protests. Diligent argues that the agency unduly delayed in taking corrective action, as evidenced by its failure to do so until after the filing of the agency report on its initial protest and the submission of comments by the protester, and that the protest was clearly meritorious. The agency

¹ The agency denies that any official made such a statement, and, as discussed above, the record shows that the agency had in fact performed and documented a price realism analysis.

² The protester also challenged the agency’s decision not to include in the evaluation of SES’s proposal the expense to the agency of having the protester continue performance during the phase-in period. As it makes clear in its protest, the protester was on notice as early as October 17, 2006, that the agency would not consider the cost of transition services provided by the protester as part of its price evaluation. Protest at 4. To be timely, this challenge to the terms of the solicitation should have been raised prior to the time set for receipt of initial proposals (2 p.m. on October 20, 2006). See 4 C.F.R. § 21.2(a)(1) (2007). Since the protest was not filed until March 16, 2007, this issue clearly was untimely.

opposes the protester's request, arguing that the initial protest was not clearly meritorious. With regard to the supplemental protest, the agency asserts that it acted promptly given that it informed our Office and the parties of its decision to take corrective action within 1 day after the supplemental protest was filed. The protester disagrees, arguing that the relevant time for measuring whether the agency acted promptly is the filing date of the initial protest. As explained below, we see no basis to conclude that the protester should be reimbursed its costs for either protest.

Under the Competition in Contracting Act of 1984 (CICA), 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) (2000). Our Bid Protest Regulations further provide that where the contracting agency decides to take corrective action in response to a protest, we may recommend that the protester be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(e). Our Regulations do not contemplate a recommendation for the reimbursement of protest costs in every case in which an agency takes corrective action, but rather only where an agency unduly delays taking corrective action in the face of a clearly meritorious protest.³ 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 settled 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. PADCO, Inc.—Costs, B-289096.3, May 3, 2002, 2002 CPD ¶ 135 at 3. 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. Yardney Technical Prods., Inc., B-297648.3, Mar. 28, 2006, 2006 CPD ¶ 65 at 4. The mere fact that an agency decides to take corrective action does not also establish that a statute or regulation clearly has been violated. Id.

In its initial protest, Diligent argued that the agency failed to conduct the required price realism analysis and that SES lacked the relevant experience to satisfy the past performance standard established by the RFP. In our view, the record here does not show that the allegation that the agency failed to conduct a price realism analysis is clearly meritorious. As noted above, the agency produced in its report a contemporaneous price realism analysis. The alleged comment by an agency official at the protester's debriefing notwithstanding, the agency has a colorable legal

³ As a general rule, so long as an agency takes corrective action in response to a protest by the due date of its protest report, we regard such action as prompt and decline to consider favorably a request to recommend reimbursement of protests costs. The Sandi-Sterling Consortium-Costs, B-296246.2, Sept. 20, 2005, 2005 CPD ¶ 173 at 2-3. Here, as noted above, the agency did not advise our Office of its intent to take corrective action until after the due date for the agency report and after the protester had submitted comments on the report.

defense to this allegation--the record of its price realism analysis--and it produced that analysis in the agency report.

The other timely issue raised in the initial protest--that the awardee lacked the relevant experience necessary to satisfy the past performance requirement of the RFP--likewise is not clearly meritorious. As an initial matter, the allegation is not legally sufficient to form the basis of a protest. Our Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) and (f), require that a protest include a detailed statement of the legal and factual grounds for protest, and that the grounds stated be legally sufficient. These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. *Id.* In this case, because the RFP states that an offeror may submit past performance of its own and/or its qualifying subcontractors, the protester's allegation that the awardee itself lacks the requisite experience to be rated acceptable for past performance, even if correct, does not state a valid basis of protest. Moreover, even assuming that the allegation was legally sufficient, it is not clearly meritorious. The agency's colorable legal defense, to reiterate, is that even an offeror that does not itself have sufficient past performance may be rated acceptable for past performance on the strength of its subcontractors' past performance. In fact, the protester itself offered just such subcontractor experience to satisfy the past performance requirement.

With respect to the supplemental protest, the protester argues that in view of its decision to take corrective action, the agency "apparently concedes" that the supplemental protest raised clearly meritorious grounds. We disagree. As noted above, the fact that the agency decided to take corrective action does not also establish that a statute or regulation clearly has been violated, Yardney Technical Prods., Inc., *supra*, let alone that a protest ground was clearly meritorious.

With respect to timing, Diligent asserts that our Office will recognize the filing date of the initial protest as "the appropriate date for determining whether subsequent corrective action was taken promptly, if 'there is a nexus between the protest grounds set forth and the corrective action.'" Protester's Response, May 16, 2007 at 4-5 (citations omitted). In this regard, while, as Diligent points out, both protests raised issues relating to the price evaluation of the awardee's proposal, the arguments raised in the two protests are clearly distinct. As noted above, the initial protest raised a general argument that the agency had failed to perform any price realism analysis. In contrast, in the supplemental protest Diligent asserted that the agency had failed to take into account certain health benefits costs when evaluating the awardee's price and argued that the awardee did not in fact offer a fixed price because its proposal stated that it would charge the government at cost for any travel, material, and other direct costs incurred. Accordingly, there is no basis in the record here to conclude that the initial protest identified the issue on which the corrective action was based, such that it would be appropriate to measure the

promptness of the agency's corrective action from the filing date of the initial protest. See J. A. Jones Mgmt. Servs., Inc.—Costs, B-284909.4, July 31, 2000, 2000 CPD ¶ 123 at 3.

The request that we recommend reimbursement of costs is denied.

Gary L. Kepplinger
General Counsel