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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: The Arora Group, Inc.

File: B-288127

Date: September 14, 2001

Edward J. Tolchin, Esq., Fettmann, Tolchin & Majors, for the protester.
Devon E. Hewitt, Esq., John E. Jensen, Esq., and Daniel S. Herzfeld, Esq., Shaw Pittman, for CRAssociates, Inc., an intervenor.
Col. Michael R. Neds, and Maj. Karl W. Kuhn, Department of the Army, for the agency.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. In a negotiated procurement in which award was made to the offer representing the best value to the government, a protester is an interested party under the General Accounting Office Bid Protest Regulations to protest the award and evaluation of proposals, even where the protester's offer is ranked fifth of seven offers, since, if its protest were sustained, it could be in line for award.

2. Terms incorporated into solicitation for designing outpatient clinics are latently ambiguous and resulted in unequal competition where the record shows that offerors prepared their proposals based on different, yet reasonable, assumptions.

DECISION

The Arora Group, Inc. (TAG) protests the award of a contract to CRAssociates, Inc. (CRA) under request for proposals (RFP) No. DADA10-00-R-0056, issued by the Department of the Army to operate two primary outpatient care clinics supporting the DeWitt Army Community Hospital, Fort Belvoir, Virginia. The protester primarily argues that the agency failed to consider whether proposals met a solicitation provision establishing mandatory minimum room sizes for offices and various other areas of the facilities.

We sustain the protest.

BACKGROUND

Fort Belvoir's DeWitt Army Community Hospital is the central facility of a comprehensive health care system serving active duty and retired military personnel and beneficiaries in the Northern Virginia area. In addition to the central facility, DeWitt operates four community-based primary care clinics. These centers provide a wide array of routine and acute care, including radiology, laboratory, immunization, and pharmacy services. The RFP at issue here is for operating two of these centers in Virginia, one in Woodbridge, the other in Fairfax/Burke.

The agency issued the RFP on December 13, 2000, as a total small business set-aside, contemplating the award of a fixed-price, indefinite-delivery/indefinite-quantity contract for a base period with up to four 1-year options. For each contract period, offerors were required to submit unit and extended prices for providing various services at each of the two facilities, and a total price. Offerors were to submit written proposals in six separate volumes covering the following areas: administrative; facility drawings and service procedures; past/present performance questionnaire; contractor quality control plan; cost/price; and financial capability. RFP amend. No. 1, § L at L-1. In addition to written proposals, offerors were required to make an oral presentation. Id. at L.5-L.8.

The RFP stated that proposals were to be evaluated in three general areas--technical, price, and past/present performance. Under the technical area, proposals were to be evaluated by applying three factors--management, approach to satisfying requirements, and quality control--each worth 30 points, for a total maximum score of 90 points. Within each factor, the RFP listed subfactors as shown below (percentage weights for each subfactor shown in parentheses were not provided in the RFP):

A. Management

1. Management Capabilities	[DELETED]
2. Recruitment	[DELETED]
3. Employee/Subcontractor Qualifications	[DELETED]
4. Employee relations	[DELETED]
5. Retention	[DELETED]
6. Training	[DELETED]

B. Approach to Satisfying Requirements

1. Site Location	[DELETED]
2. Clinic Design/Facilities/Equipment	[DELETED]
3. Radiology Services	[DELETED]
4. Laboratory Services	[DELETED]
5. Wellness Services	[DELETED]
6. Appointment Services	[DELETED]
7. Nurse Triage Services	[DELETED]

C. Quality Control[1]

1. Identification/Documentation of Problems
2. Resolution/Prevention of Problems

Id. at M.2-M.3.

In addition to factors A, B, and C, the RFP listed past/present performance and performance risk, financial capability, and price as factors D, E, and F, respectively. The RFP stated that technical factors A, B, and C would be numerically scored, and factors D and E would be evaluated for performance risk.[2] The RFP further explained that technical factors A, B, and C were of equal importance and combined were more important than price, which was more important that factors D (past/present performance) and E (financial capability). Id. § M.2. Price was to be evaluated for realism and adequacy. Id. § M.6. The RFP stated that "to be considered for award, an offeror must be determined to be acceptable in the technical portion" of the solicitation. Id. Amend. No. 1, § M.2. Award was to be made on the basis of the proposal deemed to represent the "best overall value" for the government. Id. § M.6.

A technical evaluation team (TET) rated proposals with the following results:

[DELETED]

Based on these results, the source selection authority selected CRA as the firm whose proposal represented the best value to the government. This protest followed a debriefing by the agency.[3]

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[1] The agency states that due to their close interrelationship, the subfactors within this area were not separately evaluated. Agency Report (AR), July 24, 2001, at 4 n.3.

[2] Initially, the evaluators assigned 10 points to factor D--past/present performance and performance risk. In response to TAG's argument that this factor was to be evaluated only for risk, the agency deleted the numerical ratings assigned factor D, making 90 points the maximum number of technical points available. The agency's recalculations are reflected in the table below. The Army pointed out that the revised scores do not materially affect the relative standing of TAG's technical proposal. TAG did not take issue with the agency's conclusion in this regard and did not pursue this issue in its comments.

[3] The head of the contracting activity determined that contract performance was in the best interest of the government notwithstanding the protest, pursuant to the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(d)(3)(C)(i)(I) (1994).

PROTEST ISSUES

TAG argues that the agency should have rejected CRA's proposal as technically unacceptable because it failed to meet solicitation requirements related to the minimum amount of space for physician offices, exam rooms, and other areas of the Fairfax facility. TAG makes similar arguments with respect to Offeror A. Alternatively, TAG contends that the Army failed to consider room sizes in the evaluation.[4]

DISCUSSION

Interested Party

The Army argues that the protest should be dismissed because, under our Bid Protest Regulations, TAG is not an interested party to maintain the protest. 4 C.F.R. § 21.0(a) (2001). In this regard, the Army points out since TAG's proposal was ranked fifth, and the protest does not challenge the evaluation of the proposals of Offerors B and C, it would not be in line for award even if its challenge to the evaluation of CRA's and Offeror A's proposals were sustained.

We think the Army's argument fails to take into account the substance of TAG's protest. In addition to specifically challenging the technical acceptability of CRA's and Offeror A's proposals, TAG alleged that the agency improperly evaluated its own proposal with respect to the number of offered examination rooms. Since an upward adjustment to TAG's own score, together with success on its other protest grounds, might place TAG's proposal in line for award, we consider TAG an interested party to maintain this protest. See Pan Am World Servs., Inc., et al., B-231840 et al., Nov. 7, 1988, 88-2 CPD ¶ 446 at 6.

Analysis

At the center of this protest is the following RFP provision:

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[4] TAG also argued that the Army improperly downgraded its proposal with respect to the number of examination rooms the firm proposed. During the course of the protest, the Army conceded this issue and recalculated TAG's proposal's score by assigning the protester's proposal all available points under the applicable subfactor, resulting in an increase of four weighted points to TAG's score, from [DELETED] to [DELETED] points. The change in the technical score does not affect TAG's proposal's relative standing to CRA's and Offeror A's proposals, but supports our conclusion, discussed below, that if TAG prevailed in its assertion that the RFP included mandatory minimum room sizes, it might be in line for award. Since TAG agreed with the Army's calculations and did not pursue this issue in its comments, we need not address it further.

> The contractor shall comply with [Department of Defense (DOD)] Space Planning Criteria and Medical Guide Plates as they relate to the primary and the specialty care areas identified in this Statement of Work. This information can be located at:
>
> http://hfpa.otsg.amedd.army.mil/ref.html
>
> The contractor shall submit the following:
>
> (a) A concept of operation that addresses population to be served and specialty services to be provided.
> (b) Program for Design (architectural tool that outlines the number, type and size of each room and provides conversion factor from net to gross).
> (c) Equipment Plan (summarizing the quantity and type of equipment and furniture to be utilized).
> (d) Single Line Architectural Design or S2 (room by room layout).

RFP § C.4.1.1, amendment No. 1 ¶ E.11, at 3 (the word "shall" was underlined in the original). The referenced website is maintained by the U.S. Army Health Facility Planning Agency.

The referenced DOD Space Planning Criteria and Medical Guide Plates (hereinafter referred to as Guide Plates) listed numerous functions associated with a medical facility, with corresponding required staff offices and space criteria for each. For example, for offices for physicians, physician assistants, and nurses, the Guide Plates listed 100 net square feet (NSF). The Guide Plates contained similarly specific dimensions for numerous other clinic areas (e.g, conference rooms--280 NSF; scientists--140 NSF).

The protester argues that the Army should have rejected CRA's proposal as technically unacceptable because it failed to meet the RFP's minimum space criteria as contained in the Guide Plates. For instance, TAG contends that at the Fairfax facility, CRA proposed only cubicles, rather than private physician offices as the RFP required, and that these cubicles are substantially smaller than the required minimum space. TAG also questions whether the agency even considered in the evaluation whether proposals met these requirements.

The agency and the intervenor take the position that the Guide Plates did not establish minimum space requirements, maintaining that the criteria listed in the Guide Plates are discretionary in nature. According to the agency, the Guide Plates and accompanying materials were provided merely as tools for planning and budgeting purposes, and allow offerors considerable flexibility to rely on their experience in determining the appropriate physical layout of the facilities. The CO further explains that the Guide Plates were intended to provide guidance in planning and designing new facilities, not retrofitting an existing building. The CO maintains

that this interpretation is particularly reasonable here because the Army had informed offerors during the preproposal conference that only one of the two current clinic facilities would be acceptable. The agency and the intervenor further maintain that the RFP's "shall comply" language was intended to mean that offerors were to use only the computer-assisted design (CAD) software and net-to-gross conversion factors provided with the Guide Plates in planning their proposed clinics.

We have reviewed the entire solicitation, including the website containing the Guide Plates, and conclude that the RFP contained a latent ambiguity that materially affected how offerors prepared their proposals, and resulted in an unequal competition. An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible. Moreover, a party's particular interpretation need not be the most reasonable to support a finding of ambiguity; rather, a party need only show that its reading of the solicitation provisions is reasonable and susceptible of the understanding that it reached. Aerospace Design & Fabrication, Inc., B-278896.2 et al., May 4, 1998, 98-1 CPD ¶ 139 at 13. Below we describe in greater detail the basis for our conclusion that some RFP provisions provide support for the Army's and the intervenor's position, while other provisions reasonably support TAG's interpretation of the RFP. While the Army may have intended to clarify the RFP by responding to offerors' questions, the Army's responses did not eliminate the ambiguities. In fact, as explained further below, we conclude that latent ambiguities remained.

There are two levels of ambiguity at issue here: first, whether the Guide Plates are mandatory or merely discretionary; and second, what the Guide Plates require, if they are mandatory. As to the first question, the parties dispute whether compliance with the Guide Plates was discretionary (the agency's and intervenor's position) or mandatory (the protester's view). As already noted, amendment No. 1 stated that "[t]he contractor shall comply with DOD space Planning Criteria and Medical Guide Plates . . . ." The use of the term "shall" in amendment No. 1 is mandatory, not permissive in nature. See Development Assocs., Inc., B-233221, Feb. 10, 1989, 89-1 CPD ¶ 140 at 4-5; Corbetta Constr. Co. of Ill., Inc. B-182979, Sept. 12, 1975, 75-2 CPD ¶ 144 at 13, recon. denied, Apr. 9, 1976, 76-1 CPD ¶ 240. In addition, the language of the amendment requires that offerors comply with the Guide Plates specifically "as they relate to the primary and specialty care areas identified in the statement of work." Thus, TAG's view that the RFP required offerors to comply with the specifications contained in the Guide Plates, including space requirements, is a reasonable interpretation of the provision.

Given the RFP's direction that the offerors "shall comply" with the Guide Plates and the specificity of the space criteria listed there, it is logically inconsistent to conclude that offerors "complied" by simply "inputting their design ideas or plans into the tools contained in the Guide Plates" (e.g., CAD software and space conversion ratios), as the agency contends, and were free to disregard other aspects

of the Guide Plates, such as the specific space criteria at issue here. If that was the agency's intent, it was not clearly spelled out in the solicitation.

Accepting the agency's position suggests the improbable conclusion that the Army was not concerned with a proposed clinic's space design. In fact, the following exchange between the CO and an offeror during the preproposal conference shows the contrary. In particular, in response to an offerors' question regarding the adequacy of the current Woodbridge facility, the CO responded:

> The Fairfax Clinic is adequate. The Woodbridge Clinic was the original facility back in 1985/86. We have renovated that clinic extensively and [it] is not laid out well. Space is cramped. Parking is not adequate. Because of the population growth, it's not sufficient at all.

Amendment No. 1, Pre-Proposal Conference Minutes, Jan. 4, 2001, item No. 14. The CO's response suggests that the Army was indeed concerned that the facilities' design and size of rooms accommodate all of the services contemplated to be provided at the clinics, which again supports the reasonableness of the protester's reading of the RFP.

CRA and the Army also argue that the use of "should" instead of "shall" in response to an offeror's question during the preproposal conference regarding the solicitation requirements, shows that the agency did not intend for offerors to comply with all of the "standards"--to use CRA's term--in the Guide Plates, implying that some aspects of the Guide Plates could be disregarded. While the Army may have intended to clarify the RFP by responding to offerors' questions, the Army's responses did not eliminate the ambiguity. In fact, as explained further below, we conclude that ambiguities remained.[5]

Prior to the submission of initial proposals, the agency issued several amendments to the RFP, including written responses to questions from prospective offerors. On January 29, 2001, the agency issued amendment No. 1 with the following prospective offeror's questions (Q) and the agency's answers (A):

> Q. No. 17: Section C [¶] C.4.1.1. This section states that '[t]he government will review and approve proposed primary care, mental health, and special care clinic designs submitted with proposals for ease of access, patient flow, and a provider team concept of patient

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[5] It is significant that the ambiguities that remained in the RFP were latent, since, if they were patent (i.e, obvious from the face of the solicitation) they would have had to be protested prior to proposal submission date. See Motorola, Inc., B-277862, Dec. 3, 1997, 97-2 CPD ¶ 155 at 7.

care.' However, there is no requirement in Section L to submit this information or a written technical proposal. Please clarify.

A. Section L will be revised to require this information be submitted as part of the proposal. The following information should assist in preparation:

(a) The contractors should comply with DOD Space Planning Criteria and Medical Guideplates at

http://hfpa.otsg.amedd.army.mil/ref.html.

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Q. No. 84. Is [the current Fairfax facility] large enough to handle the additional clinics as outlined in the RFP?

A. Yes. However, reference question 17 above. It requires the contractor to submit specifications regarding the facilities it intends to build/use as part of their proposal.

Amendment No. 1 at 3 and at 12.

In some contexts, the use of "should" (as in response to question No. 17) expresses a requirement, see All Star Maint., Inc., B-244143, Sept. 26, 1991, 91-2 CPD ¶ 294 at 5 ("should" considered mandatory), while, in other contexts, "should" indicates a preference or discretionary characteristic. See Steelcase Inc., B-260781, July 21, 1995, 95-2 CPD ¶ 41 at 4 ("should" not considered mandatory). Here, particularly in light of the use of the words "shall comply" in the amendment incorporating the Guide Plates into the RFP, it is not clear whether the Army intended to indicate a preference for offerors to use the Guide Plates as a reference and guidance, or whether the Army intended the Guide Plates to be mandatory. Whatever the agency's intent, the CO's responses did little to clearly convey the agency's position.

In this regard, we note that section M of the RFP stated that "to be considered for award, an offeror must be determined to be acceptable in the technical portion" of the solicitation. Amendment No. 1, § M.2. Reading the "shall comply" amendment language consistent with the quoted evaluation provision suggests that the agency intended to first determine which proposals complied with the specifications contained in the Guide Plates on a "pass/fail" basis, and then evaluate acceptable proposals qualitatively. The minutes of the preproposal conference, which were provided to all offerors as an attachment to amendment No. 1, provide some support for this interpretation. Specifically, in his introductory remarks explaining that the current Woodbridge facility was not acceptable, the CO explained as follows:

The main point is that you provide us the location you want to use as replacement for the Woodbridge Clinic and you provide us some sort of blue print or sketch or representation of what that building and

> surrounding area looks like as far as your parking lot so we may get an idea. This portion of the evaluation will probably be a 'go or no-go' type of situation. We're not going to rank it numerically as far as the alternate sites, but look at it to determine if it is acceptable or not.

Preproposal Conference Minutes, Ft. Belvoir Community Hospital, Jan 4, 2001 at 1.

While the CO's comments suggest that the agency would first review proposals for technical acceptability, neither the RFP nor the CO's comments at the preproposal conference explain what "portion" would be subjected to a "go/no-go" evaluation, what criteria the agency would apply in its determination, or how it would determine technical acceptability. In addition, the evaluation record is devoid of any indication that the TET reviewed any portion of the proposals for technical acceptability.

Similarly, the Army's response to question No. 84 during the preproposal conference regarding the adequacy of the current Fairfax facility did not eliminate the ambiguity. Although responding that the current Fairfax facility was large enough to accommodate the required clinics, the CO qualified his response by referring offerors to question No. 17, emphasizing that "it requires the contractor to submit specifications regarding the facilities it intends to build/use . . . ." The agency states that its response meant that the current Fairfax facility was acceptable. The protester maintains, however, that it interpreted the Army's response as allowing offerors to propose the current Fairfax facility, as long as it was designed in accordance with the minimum space requirements contained in the Guide Plates. In light of the "shall comply" language in the solicitation and the repeated references to minimum square footage in the Guide Plates, (discussed further below) we conclude that TAG's interpretation is not unreasonable.

As noted above, the parties also dispute what the Guide Plates require, if they are viewed as mandatory. Some of the provisions appear to establish mandatory dimensions for various locations. For instance, the space criteria for physician and other staff offices are listed under the heading "Clinic Space Requirements," indicating that the criteria listed were the Army's requirements, not merely guidelines. Id. § 5.0 SPACE CRITERIA. Under this particular section, the Guide Plates listed dimensions for physician offices, assistants, and other facility staff, and stated as follows:

> **Physician's Offices**--Each physician, Physician's assistant, clinical nurse practitioner, and allied scientist on the staff will be provided a private office based on the following criteria: (excluded offices are

provided under other criteria, such as Radiologists, Pathologists, Anesthesiologists, Commanders, etc.).[6]

Chiefs of major departments in teaching hospitals	150 NSF
Conference Room	280 NSF
Chiefs of specialty services in teaching hospitals/Dental activities	140 NSF
Chiefs of major services in other hospitals/Dental activities	140 NSF
All other physicians, physician assistants and clinical nurse practitioners who do not require a combination office-exam room	100 NSF/office
Allied scientists who require a combination office-exam room	140/NSF office/exam
Conference Area--Provided in each clinic for group teaching	200-250 NSF as required

AR exh. K, Guide Plates, § J.5.0 Space Criteria.

We think that except for the last item (conference area), offerors could reasonably understand this chart as establishing minimum space requirements for each area listed; even the conference area item could be interpreted as requiring a conference room of a size not less than 200 NSF, and not to exceed 250 NSF.

This same section contained specific space criteria for various functions such as administrative offices, cardiology, dermatology, infectious diseases, obstetrics and gynecology, pediatric clinics, and numerous other areas and specialties in outpatient clinics. Each of these different functions and medical specialties was further broken

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[6] We also note an inconsistency in the solicitation which apparently caused CRA and TAG to make different assumptions regarding clinic design. On the one hand, the RFP required that, at a minimum, clinic design support "adequate writing area(s) to allow [health care professionals] to annotate findings on patient medical records." RFP, § C.4.1.3. On the other hand, the "Space Criteria" section of the Guide Plates quoted clearly required that health care professionals be provided private offices. It is not clear whether the agency intended that private offices would be acceptable in lieu of writing areas, as TAG apparently believed, or whether [DELETED] would be acceptable, as apparently CRA concluded.

down by areas generally found in a clinic (e.g., reception, waiting area, bathrooms, and exam rooms, to name a few). Next to each of these functions the Guide Plates listed specific space criteria and comments indicating that some of the specifications listed were relatively flexible. Some examples are shown below:

FUNCTION	NSF AUTHORIZED	PLANNING RANGE/COMMENTS
Central Clinic Lobby	150	Minimum or 16 NSF per seat. Maximum 500 NSF.
ADP terminal	20	Per terminal device.
Appointment Clerk Lounge	110	May be provided with 3 or more clerks. Add 10 NSF per clerk greater than 10. Maximum 150 NSF.
Doctor's Office	100	1 per doctor programmed
Exam Room	100	2 per doctor programmed
Immunization Area	200	Minimum. If immunizations are administered, see the immunization criteria. 140 NSF per station

AR exh. K, Guide Plates § J.5.0, Space Criteria.

The agency argues that since the space criteria are listed under the heading "NSF AUTHORIZED," the only reasonable interpretation is that the NSF figures are flexible, may be adjusted depending on the circumstances, and do not establish minimum space requirements. Essentially, the Army's position seems to be that the criteria for the functions listed under the "NSF AUTHORIZED" heading reflect, if anything, a maximum authorized space. While the Army's position may not be unreasonable, it is not the only reasonable interpretation of the figures under this column heading. Another at least equally reasonable interpretation, is that the amounts listed establish the minimum space required for that category.

For some functions, the language in the third column makes this latter reading more reasonable. For instance, for the central clinic lobby area, for which the second column lists 150 NSF, the third column states "minimum or 16 NSF per seat. Maximum 500 NSF." Id. Those comments could reasonably be interpreted to mean that planners have authorized the minimum space dedicated for a clinic lobby to be 150 NSF, but lobby space could be increased to a maximum of 500 NSF. Similarly, the comments in the third column for other functions and areas clearly indicate that

the NSF figures establish minimum space requirements which could be exceeded under certain circumstances by applying formulas described in the comments. See, e.g., Outpatient records clerk, 80 NSF "minimum. 80 NSF per station, 1 for each clerk programmed"; reception, "100 NSF minimum. 1 per clinic"; dressing cubicle, "60 NSF minimum, 40 NSF per cubicle;" specimen toilets, "50 NSF minimum."

Overall, based on our review of the record, we think that TAG's position that compliance with the Guide Plates was mandatory and that the Guide Plates establish minimum square footage requirements, as well as the Army's and the intervenor's view that the Guide Plates were discretionary and provided mere guidance for planning and budgeting purposes, are both reasonable interpretations of the RFP. We thus conclude that the RFP was not sufficiently clear, leading offerors to make different, yet reasonable, assumptions with respect to the Army's requirements, particularly with respect to the specifications contained in the Guide Plates and, thus, did not permit competition on an equal basis. Sciaky, Inc. B-261787.2, Nov. 8, 1995, 95-2 CPD ¶ 269 at 6-7. Under these circumstances, the requirement should be resolicited. See Allied Signal, Inc., Electronic Sys., B-275032, B-275032.2, Jan. 17, 1997, 97-1 CPD ¶ 136 at 11.

RECOMMENDATION

Where, as here, an agency determines that it is in the best interest of the government to proceed with contract performance in the face of a protest in our Office, and we sustain the protest, we are required by CICA, 31 U.S.C. § 3554(b)(2) (Supp. IV 1998), to make our recommendation for corrective action without regard to any cost or disruption from termination, recompeting or reawarding the contract.

We recommend that the agency amend the RFP to clearly state its requirements, particularly with respect to the Guide Plates incorporated into the RFP by amendment No. 1; clarify which aspect, if any, of the proposals will be subjected to a "pass/fail" type evaluation; and clearly state which factors will determine technical acceptability. The Army should then request new revised proposals based on the amended RFP, reevaluate proposals and determine which proposal represents the best value to the government. If, upon reevaluation, the agency determines that CRA's proposal no longer represents the best value, we recommend that the Army terminate CRA's contract for the convenience of the government, and make award to the offeror whose proposal is found to offer the best value.

We further recommend that TAG be reimbursed the reasonable costs of filing and pursuing its protest, including reasonable attorney's fees. 4 C.F.R. § 21.8(d)(1). TAG's certified claim for costs, detailing the time spent and cost incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Anthony H. Gamboa
General Counsel