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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: EnviroSolve—Costs

File: B-294420.3

Date: February 17, 2005

Carolyn Callaway, Esq., for the protester.
James E. Hicks, Esq., Department of Justice, for the agency.
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester is not entitled to the costs of filing and pursuing its protest where the agency cancelled the solicitation shortly after the protester's filing of its supplemental protest, and the initial protest was not clearly meritorious.

DECISION

EnviroSolve requests that we recommend that it be reimbursed the costs of filing and pursuing its protest concerning request for proposals (RFP) No. DEA-04-R-0003, issued by Drug Enforcement Agency, Department of Justice, for the disposal and management of hazardous waste seized by law enforcement agencies at clandestine drug laboratories. The protest, filed on July 31, 2004, and supplemented on September 13, challenged the agency's exclusion of EnviroSolve's proposal from the competitive range.

We deny the request.

The RFP provided for the award of up to 18 time-and-materials contracts, based on contract areas, for the required services. The contract areas were either states, groups of states, or portions of states, chosen "based on the amount of waste-generating activity in those areas." Contracting Officer's Statement at 1. The RFP also listed for each contract area a "level of activity" derived from historical data, and a contract center or centers.

The agency received proposals from 10 offerors, including EnviroSolve, the incumbent contractor. The agency found EnviroSolve's proposal, which was submitted for each of the 18 contracts that could be awarded, deficient for a number

of reasons. In this regard, the agency determined that the proposal did not adequately describe Envirosolve's technical approach or propose adequate resources for accomplishing the required services. For example, the agency found that in a number of instances Envirosolve proposed response facilities that were not located in the contract centers set forth in the RFP, and downgraded Envirosolve's proposal accordingly. The agency also found that Envirosolve's proposal did not include a written protocol addressing Envirosolve's problem-solving capabilities as required by the RFP, that the proposal's small disadvantaged business plan was lacking, and that there was insufficient information provided in the proposal regarding certain of Envirosolve's proposed treatment, storage, and disposal facilities. The agency excluded Envirosolve's proposal from the competitive range, and provided the protester with a letter detailing the agency's rationale for eliminating the protester's proposal from the competition.

In its initial protest, filed with our Office on August 1, 2004, Envirosolve challenged the reasonableness of the agency's determinations as reflected in the agency's letter informing Envirosolve that its proposal had been excluded from the competitive range. Envirosolve's primary argument in its initial protest was that its proposal should not have been downgraded for failing to propose response facilities located in the contract centers listed in the solicitation.

On September 1, the agency submitted its report responding to Envirosolve's protest. In its report, the agency provided detailed explanations regarding each aspect of the agency's evaluation that had been challenged by Envirosolve in its protest letter. The report maintained that the agency's determinations were reasonably based, and that Envirosolve's protest should be denied. For example, the agency argued that its downgrading of Envirosolve's proposal because in a number of instances it failed to propose response facilities in the contract centers set forth in the RFP was reasonable and consistent with the terms of the solicitation. The agency noted that much of Envirosolve's protest effectively constituted a challenge to the agency's choice of contract centers, and that such arguments, raised for the first time after the protester's exclusion from the competitive range, were untimely. The agency included with its report relevant evaluation documents, such as the technical evaluation panel report and competitive range determination.

Envirosolve filed a supplemental protest with our Office based upon certain documents provided by the agency in its report. The protester conceded in its supplemental protest that its initial "protest filed on August 1 did not explicitly state the legal bases for Envirosolve's challenge," and explained that "[f]or convenience, the original protest grounds are restated here as well as the additional grounds recently identified." Supplemental Protest at 1. With regard to the supplemental protest grounds, Envirosolve argued, based upon the evaluation documents provided by the agency, that the evaluators had not followed the evaluation scheme as set forth in the solicitation. Specifically, the protester contended that proposals were evaluated against certain evaluation subfactors that were not listed in the solicitation, and that the relative weights applied to the subfactors considered were

inconsistent with the terms of the solicitation. Supplemental Protest at 2-5. The protester also argued that the agency had failed to adequately consider cost/price in determining which proposals to include and which to exclude from the competitive range. Id. at 7-8.

The agency informed our Office and the protester on September 17 that it was canceling the solicitation. Because the protester had received an extension of time to submit comments, it had not yet submitted comments on the agency report. Our Office dismissed Envirosolve's protest as academic on September 21, and this request followed.

Envirosolve requests that we recommend the reimbursement of its protest costs, including reasonable attorneys' fees. Our Bid Protest Regulations provide that where a contracting agency decides to take corrective action in response to a protest, we may recommend that the agency pay the protester the costs of filing and pursuing the protest, including reasonable attorney's fees. 4 C.F.R. § 21.8(e) (2004). We will make such a recommendation 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. A protest is clearly meritorious when a reasonable inquiry into the protester's allegations would show facts disclosing the absence of a defensible legal position (i.e., not a close question). 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 protest costs. Our rule is intended to prevent inordinate delay in investigating the merits of a protest and taking corrective action once an error is evident, so that a protester will not incur unnecessary effort and expense in pursuing its remedies before our Office. PADCO, Inc.—Costs, B-289096.3, May 3, 2002, 2002 CPD ¶ 135 at 3-4.

The protester, who, as noted above, never submitted comments on the agency's report, provides virtually no explanation as to why it views its initial protest as clearly meritorious. The protester does not substantively rebut, for example, the propriety of the agency's assertion that Envirosolve's proposal was reasonably downgraded for proposing response facilities that were not located in the RFP's designated contract centers. Based on our review of Envirosolve's initial protest, and documents provided with the agency report, including the report itself and the contracting officer's statement, we fail to see how the protester's initial protest can be considered clearly meritorious.

The protester nevertheless argues that when the agency reviewed the record in response to the initial protest, it should have realized that there were errors in the evaluation record that were later pointed out by the protester in its supplemental protest; that is, that the agency erroneously used "weighted subfactors which had not been disclosed to the offerors," had failed "to include cost in establishing the competitive range," and had failed "to request relevant past performance information." Protester's Comments at 2.

Where a protester raises different grounds in multiple submissions to our Office, the filing of the initial protest establishes the appropriate date for determining the promptness of the agency's subsequent corrective action only where there is a nexus between the protest grounds set forth at that time and the corrective action. J.A. Jones Mgmt. Servs., Inc.—Costs, B-284909.4, July 31, 2000, 2000 CPD ¶ 123 at 3.

Here, the initial protest, which as conceded by Envirosolve failed to “explicitly state the legal bases for Envirosolve’s challenge,” did not object to the weight given to certain subfactors during the evaluation of proposals, argue that the agency had improperly failed to consider cost when establishing the competitive range, or assert that the agency had failed to request relevant past performance information. It was not until Envirosolve’s counsel reviewed the underlying evaluation documents (that had been provided under a protective order issued by our Office) that the protester raised these bases of protest. Although we recognize that Envirosolve may not have been able to raise these bases of protest until it saw the evaluation documentation, the fact remains that the agency canceled the solicitation, rendering the protest academic, only 4 days after Envirosolve’s supplemental protest was filed, and well before the agency’s supplemental report was due. As such, we need not determine whether Envirosolve’s supplemental protest was clearly meritorious because, even if it were, the agency took prompt corrective action under the circumstances here.¹

Our conclusion is not changed by the protester’s apparent argument that the agency should have reviewed the underlying evaluation in response to the initial protest and discovered the errors alleged by the protester in its supplemental protest sooner. Although the filing of a protest should trigger the agency’s review of the procurement, the promptness of the agency’s corrective action cannot reasonably be measured from the time of the initial protest if the initial protest did not raise the issues that led to the corrective action. The existence of an error that an agency arguably should discover when an initial protest is filed does not mean that the agency has unduly delayed by not taking corrective action until after the alleged error is actually identified in a later protest.

The request for a recommendation that the agency reimburse Envirosolve’s protest costs is denied.

Anthony H. Gamboa
General Counsel

¹ DEA states that the other reason that it cancelled the solicitation was the lack of competition obtained, which may have been caused by various restrictive provisions included in the solicitation.