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# Decision

**Matter of:** HESCO Bastion Ltd.--Costs

**File:** B-415526.3

**Date:** April 3, 2018

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## DIGEST

Protester's request that GAO recommend reimbursement of protest costs is granted where the agency unduly delayed taking corrective action in response to a clearly meritorious protest.

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## DECISION

HESCO Bastion Ltd., of Leeds, United Kingdom, requests that we recommend it be reimbursed the reasonable costs of filing and pursuing its protest of the issuance of a purchase order to JSF Systems, LLC (JSF), of Washington, DC, under request for proposals (RFP) No. W91QVN-17-R-0204, issued by the Department of the Army for earth-filled barriers.

We grant the request.

## BACKGROUND

The RFP, issued under Federal Acquisition Regulation (FAR) part 12, Acquisition of Commercial Items, and part 13, Simplified Acquisition Procedures, sought the issuance of a purchase order for HESCO brand name or equal earth-filled barriers to the responsible offeror submitting the lowest-priced proposal that satisfied all of the terms and conditions of the solicitation, considering the following evaluation factors: technical capability, price, and past performance. Agency Report (AR), Tab 4, RFP, at 5, 7-8. The technical capability factor contained five subfactors: training, prior experience, evidence of laboratory environmental and performance testing, documentation of testing, and an International Organization for Standardization (ISO) certification for

quality management systems (ISO 9001:2008). Id. All of the technical subfactors and past performance were evaluated as acceptable or unacceptable.<sup>1</sup> Id.

With respect to the prior experience subfactor, the RFP required offerors to demonstrate at least 2 years of experience, within the last 5 years, manufacturing earth-filled barriers for the government. Id. at 6. Offerors were required to include the following documentation of experience in their proposals: the title of the government project or contract, a brief description of the work completed, the client's name, the period of contract performance, and the value of the contract. Id.

The RFP advised offerors that past performance would be evaluated in accordance with FAR provision 52.212-1, Instruction to Offerors--Commercial Items, which provides that, where a solicitation contains past performance as an evaluation criterion, offers "must show" past performance information that "include[s] recent and relevant contracts for the same or similar items," as well as relevant information about the contract references. See RFP at 9. Offerors were required to provide the following documentation to demonstrate past performance manufacturing earth-filled barriers that have been delivered within the past 5 years: company name, contract number, total dollar value, contract award date, title of contract, description of project, and period of performance. Id. at 7.

The RFP required delivery of two types of HESCO brand name or equal earth-filled barriers--CART and RAID, as marketed by HESCO.<sup>2</sup> Id. at 5. For firms offering "or equal" products, the solicitation identified many salient characteristics, three of which are relevant to this protest. See id. at 5-6. Both products were required to be deployed in a maximum of 60 seconds. Id. at 5. The RAID or equal product was required to contain "[b]uilt rails inside for easy deployment." Id.

The agency received two proposals by the solicitation closing date of September 23, 2017. AR, Tab 11, Award Determination Summary, at 1. HESCO's proposal was evaluated as technically acceptable. Id. at 2.

The agency evaluated the awardee's proposed products as providing the required salient characteristics. With respect to the deployment of the RAID or equal product in a maximum of 60 seconds, the agency evaluated the awardee's offered product as "[r]apid deployment." AR, Tab 16, Salient Characteristics of Awardee's Proposed Products, referencing AR, Tab 16.a-01 REF a, Awardee Spec Sheet, at 2 (noting that the offered product is a "[r]apid deployment" unit). Similarly, the agency evaluated the awardee's offered CART or equal product as meeting the solicitation's requirement that

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<sup>1</sup> While the RFP did not specify how prior experience would be evaluated, the evaluation record demonstrates that it was assessed as acceptable or unacceptable. See AR, Tab 11, Award Determination Summary, at 2.

<sup>2</sup> See <https://www.hesco.com/products/mil-units/> (last visited Mar. 19, 2018).

deployment be accomplished in a maximum of 60 seconds, where the agency's evaluation and the awardee's proposal both described the proposed product as "[r]apid deployment." See AR, Tab 16, Salient Characteristics of Awardee's Proposed Products, referencing AR, Tab 16.a-01 REF a, Awardee Spec Sheet, at 1 (noting that the offered product is a "[r]apid deployment" unit). The agency's evaluation also found that the awardee's proposed RAID or equal product met the requirement for built rails for easy deployment, because the proposal specification sheet described the offered product as "easy to deploy by pulling open, positioning and filling." AR, Tab 16, Salient Characteristics of Awardee's Proposed Products, referencing AR, Tab 16.a-01 REF d, Awardee Spec Sheet, at 1 (agency emphasis added to awardee's proposal).

The agency issued the purchase order to JSF as the responsible offeror submitting the lowest-priced, technically-acceptable offer (although later, during the debriefing, the agency incorrectly informed HESCO that the awardee was J&S Franklin, Ltd, which is an affiliate of JSF). HESCO protested the issuance of the purchase order to this Office. After record development, discussed below, the agency notified the GAO that the Army would take corrective action, to include terminating the purchase order, amending the solicitation, evaluating any responses to the amended solicitation, and reissuing the purchase order. Email from Agency to GAO, Dec. 4, 2017. As a result, we dismissed the protest as academic, and the protester filed this request for reimbursement of protest costs. HESCO Bastion Ltd., B-415526, B-415526.2, Dec. 7, 2017 (unpublished decision).

## DISCUSSION

The protester requests that our Office recommend that the agency reimburse HESCO the reasonable costs of filing and pursuing its protest. Request for Costs at 1. The protester argues that its initial protest grounds were clearly meritorious and that the agency's corrective action was unduly delayed, because the notice of corrective action followed the protester's comments on the agency report. Id. at 1-3. The agency argues that the protest allegations were not clearly meritorious and that the agency did not unduly delay in taking corrective action. Opposition to Request for Costs at 1.

Before discussing the allegations, we observe that where a procuring agency takes corrective action in response to a protest, we may recommend that the agency reimburse the protester its 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 a protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. See 4 C.F.R. § 21.8(e); East Coast Nuclear Pharmacy--Costs, B-412053.5, Aug. 31, 2016, 2016 CPD ¶ 249 at 3. We consider a protest to be clearly meritorious where a reasonable agency inquiry into the protester's allegations would reveal facts showing the absence of a defensible legal position. See East Coast Nuclear Pharmacy--Costs, supra. We generally consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest, but not prompt where it is taken after that date. Id. at 5-6.

The protester asserted three initial protest grounds: the awardee's proposal did not demonstrate the requisite experience required by the solicitation; the agency improperly evaluated the awardee's proposal as acceptable for its past performance; and the agency unreasonably evaluated the awardee's proposal as technically acceptable, when the proposed products failed to meet salient characteristics of the solicitation.<sup>3</sup> Protest at 6-12. We consider below whether the three initial protest allegations were clearly meritorious and whether the agency unduly delayed taking corrective action.

When evaluating proposals using the simplified acquisition procedures of FAR part 13, an agency must conduct the procurement consistent with a concern for fair and equitable competition and evaluate proposals in accordance with the terms of the solicitation. Emergency Vehicle Installations Corp., B-408682, Nov. 27, 2013, 2013 CPD ¶ 273 at 4. In reviewing protests of allegedly improper simplified acquisition evaluations, we examine the record to determine whether the agency met this standard and exercised its discretion reasonably. Id.

## Clearly Meritorious

### The Awardee's Experience

HESCO argued that JSF (and the other firm named in the debriefing letter as the awardee) lacked the necessary experience. Protest at 6-7. Specifically, as noted above, the solicitation required the offeror to have at least 2 years of experience within the last 5 years manufacturing earth-filled barriers for the government. RFP at 6. HESCO argued that it had researched prior contracts of these two firms and found that neither had at least 2 years' experience with the government, within the last 5 years, of manufacturing earth-filled barriers, as required by the solicitation. Protest at 6-7.

In response, the agency noted that "all of the experience documented by JSF's quote concerns delivery of earth-filled barriers." Memorandum of Law (MOL) at 10 (citing AR Tabs 7g, JSF Past Performance Proposal, and 7k, JSF Subcontractor's Prior Contract). The agency concluded that "[c]onsequently, to some degree, all that experience concerns manufacture of those barriers." Id. The agency asserted, furthermore, that the awardee's proposal indicated that a subcontractor would be performing the production of the barriers, and that the agency report contained an ISO 9001-2008 certification for that subcontractor which "documents that [the subcontractor] produces

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<sup>3</sup> The protester's supplemental protest asserted that the awardee's proposal failed to include an ISO certification for quality management systems (ISO 9001:2008) for the subcontractor on whom the awardee depended to meet the prior experience and past performance requirements. Comments and Supp. Protest at 14. The ISO certification for the subcontractor expired in 2015. See AR, Tab 7A, ISO 9001-2008 Certification. In addition, the protester's comments on the agency report reinforced the three initial protest allegations. See Comments and Supp. Protest at 1-13.

barriers, fences, walls, and kits for welded gabions, among other products.” MOL at 10 (citing AR, Tab 7a, ISO 9001-2008 Certification). That certification, however, expired in 2015. AR, Tab 7a, ISO 9001-2008 Certification.

The record here shows that the awardee’s experience was with the delivery of, and not the manufacture of, earth-filled barriers. See MOL at 10 (noting that “all of the experience documented by JSF’s quote concerns the delivery of earth-filled barriers”). The proposed manufacturing subcontractor possessed an expired required certification. See AR, Tab 7A, ISO 9001-2008 Certification. The agency was therefore aware of the awardee’s lack of manufacturing experience, and the agency should have been aware that the awardee’s manufacturing subcontractor lacked a current, required ISO certification. Both of those facts were evident on the face of the documents produced by the agency to defend against this allegation. Because the agency lacked a defensible legal position, we find clearly meritorious the allegation that the agency’s unreasonably evaluated the awardee’s experience.

#### The Awardee’s Past Performance

The protester also argued that the agency’s evaluation of the awardee’s proposal under past performance was inconsistent with the terms of the solicitation, given the awardee’s minimal experience producing earth-filled barriers. Protest at 7-8. As noted above, the solicitation required offerors to provide the following documentation to demonstrate past performance manufacturing earth-filled barriers that have been delivered within the past 5 years: company name, contract number, total dollar value, contract award date, title of contract, description of project, and period of performance. RFP at 7. The protester asserted that the agency’s past performance evaluation was limited to a review of the offeror’s status in the System for Award Management (SAM). Protest at 8 (citing Protest Exh. A, Agency Debriefing, Oct. 6, 2017 (noting, under past performance, both the protester and the awardee’s proposals were evaluated as “SAM Check No Exclusion”)).

In response, the agency explained that the contracting officer directed the contract specialist to determine whether JSF had defaulted on any prior contracts or had any exclusions. Contracting Officer’s Statement (COS) at 4 (citing AR, Tab 8, SAM Report on Awardee). No exclusions were listed against JSF in SAM. Id. The agency also stated that it reviewed information JSF provided on the past performance of an affiliate and its subcontractor. MOL at 9. Further, the agency stated that it reviewed the past performance information for JSF’s proposed subcontractor that would be manufacturing the barriers, and concluded the subcontractor had satisfactory or better performance in the Past Performance Information Retrieval System. COS at 4 (citing AR, Tab 11, Award Determination Summary, at 3).

The RFP advised offerors that the past performance evaluation would be conducted in accordance with FAR provision 52.212-1, which requires offerors to include recent and relevant contracts for the same or similar items. RFP at 8. The only contemporaneous evaluation of the awardee’s past performance was an “A” notation next to the prior

experience requirement on the technical evaluation report and a statement on the award memorandum that the awardee “submitted past performance information.” See AR, Tab 9i, Technical Evaluation Report; Tab 11, Award Determination Summary, at 3. Nothing in the evaluation record suggests that the agency’s past performance evaluation was consistent with the FAR or solicitation.

Moreover, the record does not support the agency’s assertion that the awardee provided “detailed information on the contracts” of its affiliate or subcontractors. MOL at 13. Rather, the awardee’s proposal failed to include the information required under the RFP and instead included the following information in its list of contract references in the past performance portion of its proposal: contractor name, program title, dates of contract/order, customer, and total contract/order value. See AR, Tab 7g, Awardee’s Past Performance Proposal. Without the contract number and a brief description of the work completed, this list of contract references provided insufficient information on which to evaluate the awardee’s past performance and determine whether it was relevant.

The awardee also submitted copies of two delivery orders awarded to JSF’s proposed manufacturing subcontractor, which the agency states it used to assess JSF’s past performance. COS at 3. As noted above, that subcontractor’s ISO certification for manufacturing had expired--a factor that should have been known to the agency--but there is no evidence that the subcontractor’s lack of a current certification was considered in the evaluation. Nor is it clear from the face of the delivery orders that the products delivered were similar to the brand name or equal barrier being procured here. See AR, Tab 7j, SPE8E6-15-D-0001, Delivery Order 0005, and AR, Tab 7k, SPE8E6-15-D-0001, Delivery Order 0010. Where, as here, the awardee’s proposal fails to provide information sufficient for the agency to conclude that the awardee’s past performance was acceptable, and the contemporaneous agency evaluation provides no basis on which to ascertain the reasonableness of the evaluation, we find that the agency had no defensible legal position.

#### Agency Evaluation of Awardee’s Proposed Products

The protester also argued that it reviewed the awardee’s website and did not find any products that could meet the salient characteristics of the solicitation. Protest at 9-10. The agency stated that JSF’s proposal included many documents on product characteristics and that JSF’s products met the salient characteristics listed in the solicitation. COS at 5.

The RFP required the offeror to propose RAID or equal and CART or equal products, both of which could be deployed in a maximum of 60 seconds. RFP at 5. The awardee’s proposal did not specify that either of its proposed products could meet that requirement. Rather, the awardee described both products as “rapid deployment.” See AR, Tab 16.a-01 REF a, Awardee Spec Sheet at 1 (noting that the offered products meet the salient characteristic of deployment in no more than 60 seconds because they are “[r]apid deployment” units). Nevertheless, the agency found that both products

offered by the awardee met the solicitation's deployment requirements. The awardee's proposal offered no basis for this evaluation finding.

In addition, the RFP required offerors to propose a RAID or equal product that contained "[b]uilt rails inside for easy deployment." RFP at 5. The agency's evaluation found that the awardee's proposed RAID or equal product met this requirement where the proposal specification sheet described the offered product as "easy to deploy by pulling open, positioning and filling." AR, Tab 16.a-01 REF d, Awardee Spec Sheet, at 1 (agency emphasis added to awardee's proposal). Again, the awardee's proposal offered no basis for this evaluation finding. The agency lacks a defensible legal position where the awardee's proposal, on its face, fails to satisfy the objective solicitation requirement of built rails inside, and where the agency's evaluation nevertheless finds the proposal in conformance with the RFP's requirements. This protest allegation also was clearly meritorious.

The agency argues that the protester's allegations could not be clearly meritorious where GAO requested that the Army respond to the protester's comments. Opposition to Request for Costs at 20-22. The agency's reliance on additional record development to demonstrate that allegations were not clearly meritorious is misplaced. While the decisions of our Office have stated that, as a general rule, a protest is not clearly meritorious where further record development was contemplated, the decisions also explain that where warranted by the record, we will grant a request for recommendation of the reimbursement of costs even where further record development was contemplated. See URS Fed. Servs., Inc.--Costs, B-406140.4, July 17, 2012, 2012 CPD ¶ 223 at 4 (granting request for reimbursement of costs where agency took corrective action after the scheduling of a hearing); Basic Commerce and Indus., Inc.--Costs, B-401702.3, Feb. 22, 2010, 2010 CPD ¶ 258 at 4 (same); Eagle Home Med. Corp.--Costs, B-299821.3, Feb. 4, 2008, 2008 CPD ¶ 41 at 4 n.4 (same). Here, as discussed above, the agency had in its possession documents upon which it relied to defend against the initial protest allegations, and those documents did not provide a legally defensible basis for the agency's position.

#### Undue Delay

Finally, here, we find that the agency's corrective action, taken after the filing of the agency report, was unduly delayed. As noted, our Office generally considers corrective action to be prompt if it is taken before the due date for the agency report responding to the protest but not prompt where it is taken after that date. See East Coast Nuclear Pharmacy--Costs, supra, at 5-6. While the agency asserts that it promptly took corrective action before the agency's supplemental report was due, we find that a reasonable agency inquiry into the protester's initial protest would have led the agency to discover that it had unreasonably evaluated the awardee's proposal. Accordingly, we conclude that the agency unduly delayed taking corrective action in response to a clearly meritorious protest.

## RECOMMENDATION

We recommend that the Army reimburse HESCO the reasonable costs of filing and pursuing its challenges to the agency's evaluation. HESCO should file its claim for costs, detailing and certifying the time expended and costs incurred, with the agency within 60 days of receipt of this recommendation. 4 C.F.R. § 21.8(f)(1).

The request is granted.

Thomas H. Armstrong  
General Counsel