



Decision

Matter of: Innovative Technologies, Inc.--Costs

File: B-415810.3

Date: March 12, 2018

Robert G. Hanseman, Esq., Sebaly Shillito & Dyer, for the protester.
Colonel C. Taylor Smith and Lieutenant Colonel Damund E. Williams, Department of the Air Force, for the agency.
Pedro E. Briones, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reimbursement of protest costs is denied where the agency did not unduly delay taking corrective action in the face of a clearly meritorious protest.

DECISION

Innovative Technologies, Inc. (ITC), a woman-owned small business located in Dayton, Ohio, requests that our Office recommend that the Department of the Air Force reimburse the firm the reasonable costs of filing and pursuing its protest with respect to request for proposals (RFP) No. EPASS-RFP-38, issued by the agency to procure advisory and assistance services for its Life Cycle Management Center Business Enterprise Systems Directorate.

We deny the request.

BACKGROUND

On December 20, 2017, ITC, through counsel, filed a protest challenging the evaluation of its proposal and its elimination from the competitive range. Prior to submitting an agency report in response to the protest, the Air Force informed the parties that it intended to take corrective action by voiding the competitive range determination, reevaluating all proposals received (including from ITC), and making a new competitive range determination if necessary. On January 24, 2018, our Office dismissed the protest because the Air Force's corrective action rendered the protest academic. Innovative Techs., Inc., B-415810.2, Jan. 24, 2018 (unpublished decision).

ITC now requests that our Office recommend the protester be reimbursed its attorney's fees, because "it should not have been necessary for ITC to retain counsel as part of seeking an award" under the RFP. Req. at 1. In this respect, ITC asserts it is entitled to recover the initial costs by counsel of "assessing the facts and getting up to speed" on the procurement, representing ITC during the debriefing process, and preparing and filing the protest. Response to Air Force Opp'n to Req. (Response) at 1. According to ITC, a protester should be able to recover the initial costs of "filing" a protest under our Bid Protest Regulations, regardless of whether the protester incurred any additional costs for "pursuing" the protest in the face of objection or undue delay. Id. at 1-2, citing 4 C.F.R. § 21.8(e). ITC also claims that its protest was clearly meritorious because "the speed with which the Air Force" decided to take corrective action after the protest was filed, suggests the agency's source selection decision was "flagrantly erroneous" and "fundamentally and obviously wrong and contrary to law" ¹ Id. at 2-3.

DISCUSSION

Under our Bid Protest Regulations, if an agency decides to take corrective action in response to a protest, our Office may recommend that the agency pay the protester the reasonable costs of filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees. 4 C.F.R. § 21.8(e). This does not mean that costs should be reimbursed in every case in which an agency decides to take corrective action; rather, a protester should be reimbursed its costs where an agency unduly delayed its decision to take corrective action in the face of a clearly meritorious protest. NxGen Process Grp. LLC--Costs, B-406650.2, May 24, 2012, 2012 CPD ¶ 163 at 2.

When an agency takes corrective action on or before the due date set for receipt of the agency report, our Office views such action as prompt and will not recommend the reimbursement of costs. The Sandi--Sterling Consortium--Costs, B-296246.2, Sept. 20, 2005, 2005 CPD ¶ 173 at 2-3; HSQ Tech.--Costs, B-276050.2, June 25, 1997, 97-1 CPD ¶ 228 at 2. As stated above, the Air Force took corrective action in response to ITC's protest before submitting an agency report. Therefore, ITC's request does not meet our standard for recommending reimbursement of protest costs and we agree with the Air Force that ITC is not entitled to such costs. See NxGen Process Grp. LLC--Costs, supra; Air Force Opp'n to Req. at 1-3.

ITC's myriad arguments to the contrary provide no basis for recommending reimbursement of protest cost. First, contrary to ITC's mistaken belief, it is not entitled to recover costs for retaining counsel to represent ITC during the debriefing. A protester's actions taken prior to filing its protest with our Office do not establish that an agency unduly delayed its decision to take corrective action in the face of a clearly meritorious protest. See LORS Med. Corp.--Entitlement to Costs, B-270269.2, Apr. 2, 1996, 96-1 CPD ¶ 171 at 2-3. The provisions in our Bid Protest Regulations providing

¹ ITC essentially concedes that the Air Force did not unduly delay taking corrective action. See Response at 1-4.

for the possibility of a recommendation that costs be reimbursed where an agency takes corrective action in response to a protest with our Office, are not intended to ensure the fairness of agency-level processes occurring prior to the protest filing; rather, those provisions are intended to ensure fair treatment of protesters who make substantial investments of time and resources to pursue clearly meritorious protests in this forum.² Dellew Corp., B-410159.4, Feb. 26, 2016, 2016 CPD ¶ 114 at 2, citing Innovative Logistics Techniques, Inc.--Costs, B-289031.3, Feb. 4, 2002, 2002 CPD ¶ 34 at 5.

In this respect, even were we to assume that it raised clearly meritorious protest grounds, ITC would not be entitled to reimbursement of protest costs here because it was not required to expend unnecessary costs preparing comments on a report since none was filed.³ See Singleton Enters.--GMT Mech., Joint Venture--Costs, B-310454.3, Mar. 27, 2008, 2008 CPD ¶ 61 at 3-4 (denying request for costs, even though the protester presented a clearly meritorious protest, where the agency did not unduly delay taking corrective action since it did not submit an agency report and the protester was thus not required to expend unnecessary costs preparing comments on a report); Neal R. Gross & Co., Inc.--Entitlement to Costs, B-254033.4, Sept. 30, 1993, 93-2 CPD ¶ 199 at 4 (denying protest where the protester conceded that the corrective action was not unduly delayed and the record shows that the protester was not required to incur costs other than those associated with its initial filing). In any event, the Air Force's decision to take corrective action does not, as ITC insists, suggest that the protest was clearly meritorious or that the agency violated procurement laws or regulations. As our Office has frequently stated, the mere fact that an agency decides to take corrective action does not establish that a protest was clearly meritorious, let alone that a statute or regulation has clearly been violated. See SpectrumS4, LLC--Costs, B-408227.4, Aug. 26, 2013, 2013 CPD ¶ 200 at 3; Diligent Consulting, Inc.--Costs, B-299556.3, June 26, 2007, 2007 CPD ¶ 125 at 5.

As for ITC's position that it should be able to recover the initial costs of preparing and filing the protest, regardless of whether the Air Force unduly delayed taking corrective action, we have consistently denied requests for costs based on such misguided arguments. Instrumentation Lab. Co.--Req. for Decl. of Entitlement to Costs,

² Contrary to ITC's suggestion, an attorney is not required for purposes of filing and pursuing a protest at GAO. See Bid Protests at GAO: A Descriptive Guide, GAO-09-471SP (9th ed. 2009), at 5, 8, available at <http://www.gao.gov/products/GAO-09-471SP> ("Although protesters may be represented by counsel, filing a bid protest with GAO is easy and inexpensive and does not require the services of an attorney."); 4 C.F.R. § 21.1(f) ("No formal briefs or other technical forms of pleading or motion are required" to file a protest with GAO.).

³ ITC acknowledges that it did not have to expend time and resources reviewing, or preparing comments on, an agency report. See Response at 2 (stating that ITC did not have to review the record because the Air Force took corrective action mooted the protest).

B-246819.2, June 15, 1992, 92-1 CPD ¶ 517 at 3. As we have explained in a number of decisions, such an approach would result in contracting agencies having to pay protest costs in a large number of cases and have the effect of discouraging agencies from taking corrective action. Id.; LORS Med. Corp.--Entitlement to Costs, *supra* (denying request for costs of initial protest filing, despite the protester's argument that the agency's improper actions "gave rise to the 'protest process,' leaving [the protester] no other choice but to incur the cost of filing a protest in order to vindicate its right to a proper evaluation and reasonable opportunity for award."); Purdy Corp.--Claim for Costs, B-249067.2, Aug. 13, 1992, 92-2 CPD ¶ 105 at 2-3 (denying request for costs where the protester did not assert that the agency delayed taking corrective action, but claimed that the agency only took corrective action as a result of the protest). The imposition of costs is not intended as an award to prevailing protesters or as a penalty to the agency, but rather, is designed to encourage agencies to take prompt action to correct apparent defects in competitive procurements. Evergreen Flying Servs., Inc.--Costs, B-414238.10, Oct. 2, 2017, 2017 CPD ¶ 299 at 5.

In sum, since the Air Force took prompt corrective action in response to ITC's protest and the protest was not clearly meritorious, ITC has not met the standard required by our Office for a recommendation to reimburse its protest costs.

The request is denied.

Thomas H. Armstrong
General Counsel