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Decision

Matter of: Bay West, LLC--Costs; Bhate Zapata LLC--Costs

File: B-418960.6; B-418960.7

Date: March 3, 2021

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DIGEST

Requests that GAO recommend reimbursement of protest costs are denied where the initial protest arguments were not clearly meritorious, and where the agency took prompt corrective action in response to supplemental arguments.

DECISION

Bay West, LLC, a small business, of Saint Paul, Minnesota, and Bhate Zapata LLC (BZJV), a small business, of Birmingham, Alabama, request that our Office recommend that they be reimbursed the reasonable costs of filing and pursuing their protests (B-417787.1, and B-417787.5; and B-417787.2, B-417787.3, and B-417787.4, respectively) challenging the issuance of a task order to 3E-QRI SBJV, LLC (3E-QRI), a small business of Orlando, Florida, by the Department of the Army, Army Corps of Engineers, under request for proposals (RFP) No. ERSM-14-R-M0002, which was issued for environmental remediation services. Both requesters argue that they are entitled to reimbursement of their protest costs because the agency unduly delayed taking corrective action in response to their clearly meritorious protests.

We deny the requests.

BACKGROUND

The Corps issued the solicitation on December 5, 2019, seeking proposals to provide environmental restoration services in Florida at Tyndall Air Force Base, Eglin Air Force

Base, and Hurlburt Field. RFP at 1, 9.¹ The agency issued the solicitation to small business firms holding indefinite-delivery, indefinite-quantity (IDIQ) contracts awarded by the Corps, known as Regional Acquisition Environmental Tool (REAT) contracts. *Id.* at 88. The successful vendor will be required to achieve performance objectives for 74 installation restoration program sites. *Id.* at 9. The RFP anticipated the issuance of a fixed-price task order with a performance period of 6 years. *Id.* at 3, 15-23, 103.

The RFP advised that proposals would be evaluated on the basis of price and the following three factors, which were listed in descending order of importance: (1) project technical approach, (2) project management approach, and (3) past performance. *Id.* at 104. For purpose of award, the non-price factors were “more important” than price. *Id.*

The Corps received proposals from three vendors, Bay West, BZJV, and 3E-QRI, by the closing date of March 18. Contracting Officer’s Statement (COS) (Bay West) at 1; COS (BZJV) at 1. The agency evaluated the vendors’ proposals as follows:²

	Bay West	BZJV	3E-QRI
Project Technical Approach	Unacceptable	Acceptable	Outstanding
Project Management Approach	Acceptable	Unacceptable	Outstanding
Past Performance	Satisfactory Confidence	Satisfactory Confidence	Satisfactory Confidence
Price	\$20,975,937	\$26,323,911	\$49,459,911

SSDD at 41-42.³

The contracting officer, who was also the source selection authority, concluded that 3E-QRI’s proposal merited award. *Id.* at 44. The contracting officer noted that 3E-QRI’s proposal was “acceptable to receive award,” proposed a fair and reasonable

¹ Citations to the RFP are to solicitation amendment No. 3, unless otherwise noted, which is found at Agency Report (AR) (Bay West), Tab 12, and AR (BZJV), Tab 9. Page citations are to the Adobe PDF document pages provided in the agency reports.

² For the project technical approach and project management approach factors, the agency assigned one of the following ratings: outstanding, good, acceptable, marginal, or unacceptable. Source Selection Decision Document (SSDD) at 4, 7. For the past performance factor, the agency assigned one of the following ratings: substantial confidence, satisfactory confidence, neutral confidence, limited confidence, or no confidence. *Id.* at 9-10.

³ The SSDD is found at AR (Bay West), Tab 54, and AR (BZJV), Tab 43.

price, and that the “risk of non-performance is low.” *Id.* The contracting officer also found that Bay West’s and BZJV’s proposals were not eligible for award due to the assignment of unacceptable ratings under the technical evaluation factors. COS (Bay West) at 13; COS (BZJV) at 13.

The agency provided debriefings to Bay West and BZJV, both of which concluded on July 21. COS (Bay West) at 1; COS (BZJV) at 1. On July 27, the disappointed vendors filed protests challenging the award to 3E-QRI.⁴

Bay West’s initial protest raised the following five primary arguments: (1) the agency failed to evaluate the reasonableness of the awardee’s proposed price; (2) the agency unreasonably evaluated Bay West’s proposal under the project technical approach factor; (3) the agency failed to conduct discussions in accordance with the terms of the RFP, and also failed to conduct meaningful discussions; (4) 3E-QRI was ineligible for award because it did not hold one of the REAT IDIQ contracts; and (5) the agency unreasonably evaluated 3E-QRI’s proposal under the past performance factor. Bay West Protest at 10-38. In its comments on the agency report, Bay West raised the following four primary supplemental arguments: (1) the agency improperly conducted a price realism analysis; (2) the agency’s evaluation of Bay West’s proposal under the project technical approach factor relied on an unreasonable interpretation of RFP amendment 0004; (3) the agency evaluated the vendors’ proposals on an unequal basis; and (4) the award decision did not reflect the contracting officer’s independent judgment. Bay West Comments & Supp. Protest at 2-14.

BZJV’s initial protest raised the following four primary arguments: (1) the agency unreasonably evaluated BZJV’s and 3E-QRI’s proposals under the project management approach factor; (2) the agency failed to conduct meaningful discussions; (3) the agency unreasonably evaluated BZJV’s proposal under the project management approach factor; and (4) the agency unreasonably evaluated BZJV’s and 3E-QRI’s proposals under the past performance factor. BZJV Protest at 16-49. In its comments on the agency report, BZJV raised the following three primary supplemental arguments: (1) the agency failed to identify deficiencies in 3E-QRI’s proposal under the project management approach factor; (2) the agency improperly conducted a price realism analysis; and (3) the agency evaluated the vendors’ proposals on an unequal basis. BZJV Comments & Supp. Protest at 35-50.

On September 15, the Corps advised our Office that it would take corrective action in response to the protests. On September 17, the agency provided updated notices clarifying the corrective action, as follows:

⁴ The protests challenged the issuance of a task order value in excess of \$25 million under an IDIQ contract awarded by a Department of Defense agency. The protest was therefore within our jurisdiction to hear protests of task order awards under multiple-award IDIQ contracts established within the Department of Defense. 10 U.S.C. § 2304c(e)(1)(B).

[The Corps] will terminate the current task order award, amend the solicitation in order to address issues raised in protests concerning the award, allow the offerors to submit revised proposals for the amended solicitation, reevaluate all proposals pursuant to the amended solicitation to include conducting additional discussions if necessary, and perform a new best-value tradeoff analysis. The results of this effort will be documented and a new task order will be awarded based on the results.

Agency Notice of Corrective Action (Bay West), Sept. 17, 2020, at 1; Agency Notice of Corrective Action (BZJV), Sept. 17, 2020, at 1.

Based on the agency's proposed corrective action, we concluded that the protests were rendered academic and therefore dismissed them on September 17. *Bay West, LLC*, B-418960.2 *et al.*, Sept. 17, 2020 (unpublished decision); *Bhate Zapata LLC*, B-418960.1, B-418960.5, Sept. 17, 2020 (unpublished decision). These requests followed.

DISCUSSION

Bay West and BZJV request that we recommend that the Corps reimburse their costs of filing and pursuing their initial and supplemental protests challenging the award to 3E-QRI. The Corps contends that reimbursement is not warranted because the initial protest arguments were not clearly meritorious, and because the agency took timely corrective action in response to the supplemental protest arguments. For the reasons discussed below, we find no basis to grant the requests.⁵

When an agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs if, based on the record, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. 4 C.F.R. § 21.8(e); *AAR Aircraft Servs.--Costs*, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 5-6. As a general rule, as long as an agency takes corrective action in response to a protest by the due date of the agency report, we regard such action as prompt and will not grant a request to recommend reimbursement of costs. *Alsalam Aircraft Co.--Costs*, B-401298.3, Nov. 5, 2009, 2009 CPD ¶ 208 at 3. A protest is clearly meritorious where it is not a "close question," *e.g.*, where a reasonable inquiry by the agency into the protest allegations would have revealed facts showing the absence of a defensible legal position. *InfraMap Corp.--Costs*, B-405167.3, Mar. 26, 2012, 2012 CPD ¶ 123 at 3; *First Fed. Corp.--Costs*, B-293373.2, Apr. 21, 2004, 2004 CPD ¶ 94 at 2. The fact that an agency decides to take corrective action does not necessarily establish that the protest was clearly meritorious, *i.e.*, that the agency did not have a defensible legal position.

⁵ Although we do not address every argument raised by the requesters, we have reviewed them all and find that none provides a basis to recommend that the agency reimburse protest costs.

Triple Canopy, Inc.--Costs, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 3.

In response to the requests, the Corps states that its decision to take corrective action was based on the arguments raised in the comments and supplemental protests. Agency Response (Bay West) at 2; Agency Response (BZJV) at 2. Specifically, the “primary concern underlying the decision” to take corrective action was “the supplemental protest grounds regarding inconsistent evaluation” of each requester and the awardee. *Id.* The agency also states that additional information raised by Bay West and BZJV in their comments and supplemental protests concerning the eligibility of 3E-QRI to receive the award, and the adequacy of the contemporaneous record, “contributed” to the decision to take corrective action. Agency Response (Bay West) at 2-3; Agency Response (BZJV) at 2-3.

Bay West’s Request

Bay West contends that the Corps’s decision to take corrective action was based on arguments raised in both its initial and supplemental protests. Bay West Request at 1-3. The requester further contends that the initial arguments were meritorious and that the corrective action was not prompt because it was taken after the agency filed its report in response to the initial protest. *Id.* For the reasons discussed below, we find no basis to recommend reimbursement of the protest costs.

First, Bay West argues that the Corps “does not dispute” that the firm’s initial protest arguments were clearly meritorious. *Id.* at 3. Bay West’s response to the agency’s initial notice of corrective action requested that our Office recommend that the agency reimburse Bay West for its costs. Bay West Response to Notice of Corrective Action, Sept. 16, 2020, at 1. The agency replied to the protester’s request as follows: “While the proposed corrective action will address issues raised in the initial protests, the additional information and allegations raised by the supplemental protests prompted the decision to take corrective action.” Agency Revised Notice of Corrective Action (Bay West), Sept. 17, 2020, at 1. Our decision dismissing the protest advised that the protester could file a request for a recommendation for reimbursement pursuant to 4 C.F.R. § 21.8(e). *Bay West, LLC*, B-418960.2 *et al.*, Sept. 17, 2020, at 2 (unpublished decision).

Bay West contends that the Corps’s statement that the proposed corrective action would address issues from the initial protest was a concession that the arguments were clearly meritorious. Bay West Request at 2-3. We do not view the agency’s revised notice of corrective action as conceding that the initial protest arguments were clearly meritorious. As discussed above, an agency’s decision to take corrective action, alone, does not necessarily establish that the protest was clearly meritorious. *Triple Canopy, Inc.--Costs*, *supra*. Moreover, the agency’s revised notice stated that although the corrective action would address issues from the first protest, the “additional information and allegations raised by the supplemental protests prompted the decision to take corrective action.” Agency Revised Notice of Corrective Action (Bay West), Sept. 17,

2020, at 1. For these reasons, we find no basis to conclude that the agency conceded that the initial protest arguments were clearly meritorious.

Additionally, the Corps's response to Bay West's request stated that the agency took corrective action in response to new arguments and information first identified in the comments on the agency report. Agency Response (Bay West) at 2-3. Our Bid Protest Regulations provide that a protester may request that we recommend that an agency reimburse a protester's reasonable costs of filing and pursuing a protest. 4 C.F.R. § 21.8(e). Our Regulations provide for this process after a protest has been dismissed based on corrective action, and further provide that we will review the matter after the agency files a response to the request and the protester files comments on the agency's response. *Id.* Thus, even if the agency's correspondence in connection with the corrective action suggested a concession, we do not find that the agency waived its ability to subsequently dispute arguments made in response to a request filed under 4 C.F.R. § 21.8(e).

Next, Bay West argues that all of its initial protest arguments were clearly meritorious and that the agency's corrective action was based, at least in part, on those arguments. Bay West Request at 2, 4. The requester does not specifically explain why the arguments were clearly meritorious, *i.e.*, why the agency did not have a defensible legal position. Instead, the requester argues that its comments on the agency report established that each of its initial protest arguments had merit and warranted sustaining the protest. We have reviewed the initial protest arguments and find that none were clearly meritorious. We address a representative example.

Bay West argued that the award to 3E-QRI was improper because that firm did not hold a REAT IDIQ contract, under which the competition was being conducted. Bay West Protest at 33-34. Bay West argued that 3E-QRI "novated its contract to another entity called MSE Group, LLC ("MSE"), and that "[t]he Agency apparently recognized MSE as [3E-QRI's] successor in interest." *Id.* at 33. Bay West therefore argued that only MSE was eligible to compete for the issuance of the task order, and that 3E-QRI was ineligible to receive the award.

In response to the protest, the Corps explained that the contract was originally awarded to 3E-QRI. COS (Bay West) at 12. The agency stated that on April 6, 2017, it "acknowledged a novation agreement that transferred all contracts of 3E, an original partner to the awardee joint venture, to MSE Group, LLC." *Id.* As a result of the novation, the agency stated that "3E-QRI[] is now a joint venture between MSE Group LLC and QRI." *Id.* The agency acknowledged that the novation resulted in the issuance of a contract action report that listed MSE Group as the firm that held the REAT IDIQ contract. *Id.* The agency stated, however, that the novation "did not result in Contract No. W912EP16D0006 with 3E-QRI[] being replaced by MSE Group LLC." *Id.* The agency explained that it viewed this matter as an "administrative error," and stated that the error was corrected via a contract action report issued after the award that identified 3E-QRI as the holder of the REAT IDIQ contract. *Id.*; see AR (Bay West), Tab 58, Contract Action Report at 1.

Bay West's comments on the agency report raised a new argument that, even if the agency reasonably believed that the "administrative error" regarding the identity of the firm that held the REAT IDIQ contract was a correctable error, "an award to 3E-QRI would still be inappropriate because there is no evidence in the record that MSE was actually able to legally substitute itself for 3E in the joint venture." Bay West Comments & Supp. Protest at 47. For example, Bay West argued that the record did not indicate whether the Small Business Administration had approved the substitution of MSE Group for 3E as a member of the small business joint venture. *Id.* The agency states that the new argument "raised concern regarding [3E-QRI's] eligibility that contributed to the decision to take corrective action." Agency Response (Bay West) at 2.

We find that the initial argument was not clearly meritorious, as the agency raised a defensible legal position concerning what it viewed as an administrative error concerning the identity of the firm that held the REAT IDIQ contract. In this regard, the agency identified what appeared to be an error in the administration of the REAT IDIQ contract, which resulted in the novation of 3E's contracts to be recorded as the novation of 3E-QRI's REAT IDIQ contract. As explained above, we will recommend reimbursement of protest costs only where an argument is clearly meritorious--a higher standard than merely correct or having merit sufficient to warrant sustaining the protest. *InfraMap Corp.--Costs, supra.*

We also find that the record supports the agency's representation that it decided to take corrective action in response to Bay West's supplemental arguments concerning the validity of the substitution of MSE for 3E in the 3E-QRI joint venture, rather than the argument as raised in the initial protest. Where an agency reviews an initial protest ground and reasonably concludes that it has a defensible legal position, but subsequently concludes that corrective action is required in response to different arguments concerning the same initial ground first raised in the comments or a supplemental protest argument, we will not conclude that the agency unreasonably delayed in taking corrective action. See *WiSC Enters., LLC--Costs*, B-415613.5, Aug. 28, 2018, 2019 CPD ¶ 189 at 7. In sum, we find no basis to grant the request.

BZJV's Request

BZJV argues that its initial protest challenging the evaluation of its proposal under the project management approach factor was clearly meritorious and that the agency failed to take prompt corrective action. BZJV Request at 2. For the reasons discussed below, we find no basis to recommend reimbursement of the protest costs.

BZJV's initial protest argued that the Corps unreasonably found its proposal unacceptable under the project management factor, based on an assigned deficiency concerning the milestone payment schedule (MPS). BZJV Protest at 16-22. The performance work statement (PWS) stated that the contractor will be required to "prepare and submit an MPS" and that the "MPS will be negotiated during development

of the [program management plan] and approved by the [program manager/contracting officer's representative]." RFP at 27.

The project management approach factor required proposals to include an MPS that "is organized and aligned with the [work breakdown structure] [contract line item number (CLIN)]/Sub-CLIN Structure provided with the RFP[.]" *Id.* at 91. The project management approach factor stated the MPS must meet the following criteria:

The MPS (without price information) shall present appropriate milestone payments considered integral and necessary for contract execution; include a reasonable number of milestone payments per CLIN/sub-CLIN based on the PWS; exclude unacceptable milestone payments representing a "progress" payment or a monthly payment for level of effort expended as well as management or overhead type costs; and include final CLIN/sub-CLIN milestone payments demonstrating achievement of the CLIN/sub-CLIN objective which is a minimum of 20% of the total CLIN/sub-CLIN value.

Id. The solicitation advised that the agency would evaluate whether proposals demonstrated a "comprehensive understanding" of the task order requirements based on, among things, the MPS. *Id.* at 104-05.

The Corps found that BZJV's proposed MPS merited the assignment of a deficiency because it anticipated the submission of "Draft" documents concerning the performance objectives in the final year of performance for three performance sites, rather than final documents. AR (BZJV), Tab 37, BZJV Technical Evaluation at 18; see COS (BZJV) at 2. The agency noted that "[t]he solicitation stated the MPS was to include a reasonable number of milestone payments per CLIN/Sub-CLIN based on the scope."

Id. The agency found that BZJV's MPS was unacceptable because, for those three performance sites, the MPS stated that "individual tasks end at a Draft, which deviated from the intent for the site and does not achieve the [performance objectives]." *Id.* The agency also found that the MPS "contained CLINs with minimal milestones and heavy [payment] percentages on the early actions (example [CLINs] 0011, 0021-0030, 0040, 0058)." *Id.*

BZJV's initial protest challenged the assignment of the deficiency, and the overall rating of unacceptable for the project management approach factor, based on two primary arguments: (1) the PWS permitted correction of errors in the MPS after award, and (2) regulatory provisions referenced in the PWS do not prohibit submission of draft documents. BZJV Protest at 16-22. With regard to the first argument, BZJV noted that the PWS anticipated that the MPS submitted in a proposal would be finalized after award, and that the "MPS will be further reviewed and negotiated with the Government to ensure weaknesses, errors, omissions, and other concerns are adequately addressed along with the [program management plan]." BZJV Protest at 17 (*quoting*

AR (BZJV), Tab 6, Initial RFP at 201, 204).⁶ BZJV further argued that because the PWS anticipated that the MPS could be corrected after award, the agency was required to evaluate any MPS, regardless of content, as acceptable: “[A]ny MPS that is submitted as part of the RFP necessarily complies with the PWS because the PWS requires a subsequent adoption of a mutually agreed upon MPS.” BZJV Protest at 17. In essence, BZJV contended that no error in the MPS, no matter how significant, could be the subject of a deficiency.

Even assuming the RFP anticipated that the MPS would be finalized after award, the RFP expressly required submission of an MPS in vendors’ proposals and provided for evaluation of whether the MPS demonstrated a “comprehensive understanding” of the task order requirements. RFP at 91, 104-05. To the extent BZJV contends that the agency was prohibited from evaluating the MPS or from concluding that defects in the MPS constituted deficiencies, we find that the RFP specifically contradicts this argument. We therefore conclude that this argument was not clearly meritorious.

Next, BZJV argues that the regulatory provisions cited in the solicitation permitted the submission of draft final documents to satisfy the performance requirements. BZJV Protest at 18-22. In this regard, BZJV contends that the RFP and “the operative regulatory documents, all of which are cited in the RFP,” show that draft documents are adequate to meet the PWS requirements. *Id.* at 20.

The Corps’s evaluation found that the BZJV MPS identified three sites where the final action would be submission of a “Draft” document. AR (BZJV), Tab 37, BZJV Technical Evaluation at 18. The RFP specified a performance standard for these sites that included a requirement for documentation and approval of reports, such as response complete reports, final remedial action completion reports, and long-term management reports. RFP at 21-22. For example, site LF006 required “[Air Force], [Army Corps], and regulatory approval of [response complete] documentation (e.g., Regulator approval of and Air Force signature on Final Remedial Action Completion Report).” *Id.* at 21. For these reasons, the agency’s response to the protest argued that the RFP required “regulatory approval of final document[s.]” and that the proposed submission of draft documents as the final step in the MPS was unacceptable. Memorandum of Law (BZJV) at 23.

Although BZJV contends that regulatory provisions referenced in the RFP permit the submission of draft reports for purposes of seeking approvals, the performance standards in the PWS clearly require “approval” by the Air Force, Corps, and other regulatory entities, and the submission of “Final” reports. RFP at 21-22. We therefore

⁶ Although the agency did not address this matter, it appears that the specific PWS language cited by BZJV in the initial version of the RFP was not included in subsequent amendments to the RFP. See AR (BZJV) Tab 6, Initial RFP at 201, 204; Tab 7, RFP amend. 1 at 27-29; Tab 8, RFP amend. 2 at 27-29; Tab 9, RFP amend. 3 at 27-29. Other areas of the amended RFP, however, refer to submission of draft and final MPS documents, and state that the final MPS will be approved after award. See RFP at 15.

do not conclude that this argument was clearly meritorious. In sum, we find no basis to grant the request.

The requests are denied.

Thomas H. Armstrong
General Counsel