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Decision

Matter of: Rex Eiserer d/b/a RAEKOR--Costs

File: B-422453.2

Date: July 29, 2024

Alan M. Apple, Esq., The Apple Law Firm, PLLC, for the requester.
Nicholas T. Iliff, Jr., Esq., Department of the Air Force, for the agency.
Michael P. Price, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation that the procuring agency reimburse the requester's costs of filing and pursuing its protest is denied where the agency took corrective action prior to the due date for the agency report.

DECISION

Rex Eiserer, doing business as RAEKOR, a small business of Austin, Texas, 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 commercial solutions opening (CSO) topic No. AFX244-DPCS01. The procurement at issue involved a Small Business Innovation Research (SBIR) program. We dismissed the protest as academic on April 9, 2024, based upon the agency's notice of corrective action, wherein the agency pledged to rescind the non-awardable notification sent to the requester, and make a new award decision consistent with the terms of the CSO.

We deny the request.

BACKGROUND

This request concerns RAEKOR's protest before our Office filed on March 22, 2024. RAEKOR's protest challenged the Air Force's determination that RAEKOR's proposal, submitted pursuant to CSO AFX244-DPCS01, was unawardable, on the basis that the proposal contemplated essentially equivalent work to that proposed by RAEKOR as part

of a separate SBIR proposal it had previously submitted.¹ *Rex Eiserer d/b/a RAEKOR*, B-422453, Apr. 9, 2024 at 1 (unpublished decision).

On April 1, 21 days prior to the agency report due date, the Air Force filed a notice of corrective action and request for dismissal in response to the protest. The agency pledged to “rescind[] the Non-Awardable Notification [sent to RAEKOR]” and “mak[e] a new award decision in accordance with the terms set forth in the [CSO].” *Id.* After concluding the proposed corrective action rendered the protest academic, our Office subsequently dismissed RAEKOR’s protest. *Id.* RAEKOR then filed this request, seeking a recommendation that the Air Force reimburse the firm its costs of filing and pursuing its protest consistent with our Bid Protest Regulations. Req. for Reimbursement at 1; 4 C.F.R. § 21.8(e).

DISCUSSION

RAEKOR argues that its protest costs should be reimbursed because its protest was clearly meritorious. Req. for Reimbursement at 2. Though the requester acknowledges that “GAO has normally not awarded protest costs if the [a]gency takes timely corrective action, as the Air Force has done here,” the requester argues that our Office should nonetheless recommend protest costs be reimbursed. *Id.* at 1-2. In this regard, RAEKOR reasserts that its protest was clearly meritorious, and additionally contends that the financial burden of pursuing the protest should be placed on the agency. RAEKOR explains that it had attempted to resolve the matter with the Air Force prior to filing its protest, but the agency failed to respond or otherwise provide feedback regarding its determination that RAEKOR’s proposal was non-awardable. Resp. to Req. for Dismissal at 4-5, 7.

RAEKOR further argues that because the SBIR program’s goal is to help the government meet its needs through the development and use of small business research, development, test, and evaluation solutions, it would be improper to place the financial burden of pursuing a meritorious protest on a small business protester. Req. for Reimbursement at 2; Resp. to Req. for Dismissal at 7. The requester contends that such a financial burden “may negatively and disproportionately impact RAEKOR and its research and development efforts.” Req. for Reimbursement at 2.

The Air Force argues our Office should dismiss or deny the request, maintaining that it “took corrective action promptly and well before the [a]gency [r]eport due date,” and that because it “did not delay in taking corrective action,” the time and resources the requester expended in pursuit of the protest were limited. Req. for Dismissal at 2. The

¹ The SBIR program is conducted pursuant to the Small Business Innovation Development Act. 15 U.S.C. § 638. The statute requires certain federal agencies to reserve a portion of their research and development funding for awards to small business concerns. *Id.* §§ 638(e)(4), (f); see *EH Grp., Inc.*, B-419946.2, Mar. 25, 2022, 2022 CPD ¶ 91 at 2.

agency also disputes the requester's contention that the protest was clearly meritorious, arguing that "[t]he mere fact that [it] undertook corrective action is not an indication that the protest was meritorious." *Id.*

Our regulations provide we may recommend that a protester be reimbursed the costs of filing and pursuing a protest where the agency decides to take corrective action in response to the protest. 4 C.F.R. § 21.8(e). We will make such a recommendation, however, only where the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. *Logic Gate, LLC--Costs*, B-421342.5, Jan. 31, 2024, 2024 CPD ¶ 44 at 3. Conversely, our Office will generally not recommend that an agency reimburse a protester its protest costs where, under the facts and circumstances of a given case, the agency has taken reasonably prompt corrective action. *TRS Research & Transp. Planning & Servs., Inc.--Costs*, B-290122.2, July 25, 2002, 2002 CPD ¶ 126 at 1-2.

In general, so long as an agency takes corrective action in response to a protest by the due date of its protest report, we consider the action as prompt, and will not recommend reimbursement of protest costs. *CDIC, Inc.--Entitlement to Costs*, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 2. Additionally, the purpose of section 21.8(e) of our regulations is to encourage agencies to take corrective action in response to meritorious protests before protesters have expended additional unnecessary time and resources pursuing their claims. *Logic Gate, LLC--Costs, supra.*

We find that RAEKOR has not demonstrated that the circumstances here warrant a departure from our previous decisions and general practice not to recommend reimbursement of protest costs where the agency has promptly taken corrective action. Despite the requester's argument that it attempted to resolve the issue with the Air Force prior to filing its protest with our Office, 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. See *Aircraft & Turbine Support Corp.--Costs*, B-417145.2, Feb. 12, 2019, 2019 CPD ¶ 78 at 2 (concluding agency's pre-agency report corrective action was prompt and denying request for costs where the requester argued it had raised similar procurement deficiencies in a previous agency-level protest).

Even if we were to assume that RAEKOR raised clearly meritorious protest grounds, the Air Force took prompt corrective action three weeks before the agency report due date. Therefore, RAEKOR's request does not meet our standard for recommending reimbursement of protest costs.² *Id.*

The request is denied.

Edda Emmanuelli Perez
General Counsel

² RAEKOR submitted a supplemental filing while our Office's resolution of this request was pending, explaining that the Air Force had completed its corrective action, "reversed their non-award decision" and determined that RAEKOR was eligible for negotiations and award. Supp. Comments at 1. The requester argues that "[t]his action also shows that RAEKOR's protest was clearly meritorious" and further supports its request that it be reimbursed protest costs. *Id.* However, for the same reasons as those explained above, *i.e.*, the agency did not unduly delay in taking corrective action, we find the requester has not met the standard required by our Office for a recommendation of reimbursement of protest costs.