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Decision

Matter of: WILL Technology, Inc.--Costs

File: B-419815.6

Date: February 3, 2022

Michelle A. Levin, Esq., Dentons Sirote PC, for the requester.
Marcela A. Liddick, Esq., Department of Justice, for the agency.
Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request that GAO recommend reimbursement of protester's costs of two protests is denied where the agency took prompt corrective action in response to each protest and the protester has not shown that the earlier protest was clearly meritorious.

DECISION

WILL Technology, Inc., of Huntsville, Alabama, a small business, requests that we recommend that the firm be reimbursed the costs of filing and pursuing two protests of the award of a contract to SNA International, LLC, of Alexandria, Virginia, under request for proposals (RFP) No. 15F06720R0000196, issued by the Department of Justice, Federal Bureau of Investigation (FBI), for forensic laboratory commercial support services. WILL argues that it should be reimbursed the costs of both protests because the FBI took corrective action in response to the first protest that failed to address a clearly meritorious issue, and thus required WILL to file a second protest raising the issue.

We deny the request.

BACKGROUND

The costs for which WILL is requesting reimbursement were incurred in two separate protests. The most recent one, filed on November 24, 2021, challenged the result of corrective action that the FBI had announced in the earlier protest, which WILL had filed on May 4. The May 4 protest challenged the original decision to award the contract to

SNA on several bases, including that the FBI had erroneously compared WILL's pricing for 6 years of services with SNA's pricing for 5 years.¹ Request at 2.

DISCUSSION

WILL contends that our Office should recommend that the FBI reimburse the costs of filing and pursuing both protests because the corrective action in response to the May 4 protest failed to address that clearly meritorious ground of protest, and WILL was therefore obliged to file its November 24 protest challenging the award to SNA on largely the same basis, after which the FBI announced that it would take corrective action a second time. *Id.* at 1 (citing *Louisiana Clearwater, Inc.--Recon. & Costs*, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209).

In support of its argument that its protest costs should be reimbursed, WILL notes that the FBI did not request revised proposals during the first corrective action, and the debriefing that WILL received after the FBI completed its corrective action showed that "[n]othing substantive" had changed, other than both WILL's and SNA's total evaluated prices "were slightly lowered by the Agency with no explanation as to why the changes were made or how the changes were calculated." Request at 2. Nevertheless, WILL also contends that the FBI still had not evaluated the firm's price correctly because the price should have been approximately \$[DELETED] million lower than the agency stated in the debriefing.² *Id.*

WILL then notes that, in response to the November 24 protest, the FBI stated that its corrective action will now include amending the RFP "to clarify the requirements of Volume III--Pricing," requesting and evaluating revised proposals, and making a new source selection decision. *Id.* at 3. WILL argues that the corrective action taken in response to the original protest should have included these steps, and that the FBI's conduct has been inefficient, confusing, and unexplained. The result, WILL argues, is that the FBI failed to make a good faith effort to address clearly meritorious issues raised in WILL's initial protest. *Id.* at 4. The requester contends that the alleged failure justifies our Office recommending that the FBI reimburse WILL's protest costs. *Id.* at 5.

The FBI argues that reimbursement of costs is not justified here because it announced corrective action before the due date for the respective agency reports in both protests, and because there is no evidence in the record that either protest was meritorious, much less clearly meritorious. Agency Response at 3. Further, the FBI asserts that the

¹ WILL now refers to its challenge to the pricing evaluation as the primary issue in its May 4 protest. *Id.*

² In WILL's view, the alleged miscalculation occurred when the FBI directed offerors to provide pricing in two electronic spreadsheets, one of which was entitled "Task Order pricing (six (6) year period)," while the RFP specified that evaluated prices would be "the total price of all the task orders 1 through 12 for the five year period." Protest (May 4, 2021) at 3, 8, 24.

limited records in both protests do not support WILL's claims regarding the merits of the protests. *Id.* at 7.

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 the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. *Palmetto Isotopes*, B-410268.2, Jan. 5, 2015, 2015 CPD ¶ 26 at 1. As a general rule, if an agency takes corrective action on or before the due date for its protest report, we will not grant a request for reimbursement. *Id.* at 1-2. WILL does not appear to dispute that the corrective action in both protests was announced by the due date of the respective agency reports; rather, WILL argues that the same issues were raised in both protests and the FBI failed to act on clearly meritorious grounds of protest, thereby necessitating the second protest. Request at 5.

We have recommended that an agency reimburse protest costs despite taking corrective action where, in taking corrective action, the agency fails to "address a meritorious issue" that was raised in the protest that prompted the corrective action, and thereby compels the protester to incur the added expense of protesting the very same procurement deficiency a second time. *Louisiana Clearwater, Inc.--Recon. & Costs*, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209 at 6. Our decision in *Louisiana Clearwater* does not require the agency to make a new decision that favors the protester, nor does it stand for the proposition that a protester is entitled to a recommendation for reimbursement merely because it files the same protest arguments. *Xcellent Tech. Sols., LLC--Costs*, B-412591.3, Nov. 14, 2016, 2016 CPD ¶ 332 at 5. Instead, the principles set forth in *Louisiana Clearwater* address a narrow range of circumstances: where an agency fails to implement corrective action in good faith in response to a clearly meritorious protest. *Ace Info Sols., Inc.--Costs*, B-414650.27, May 14, 2019, 2019 CPD ¶ 179 at 6. A protest is clearly meritorious where the argument provides sufficient facts such that a reasonable agency inquiry into the protester's allegations would reveal facts showing the absence of a defensible legal position. *Id.*

In WILL's view, its protests were both clearly meritorious because there was only a minor change in the evaluated prices after the FBI took corrective action. Will asserts that the first corrective action merely perpetuated the alleged misevaluation rather than resolving it, and resulted in WILL's evaluated price continuing to be inflated by approximately \$[DELETED] million. Request at 2-3, 5. By now announcing as part of the current corrective action that the FBI will amend the RFP "to clarify the requirements of Volume III—Pricing," WILL contends that the agency has recognized the merit of the original challenge to the pricing evaluation. *Id.* at 3. WILL also asserts that the absence of documentation--which it believes would confirm its price misevaluation arguments--should be viewed as supporting the request for costs because the limited record is the result of the FBI's decisions to take corrective action before producing an agency report. Comments at 3.

Our review of the record does not support WILL's claim that its May 4 protest was clearly meritorious. Despite WILL's assertion that its price was evaluated as almost

\$(DELETED) million higher than it believes should have been the case, WILL has not shown that the evaluation of its proposal was inconsistent with the RFP.

As an initial matter, we acknowledge that the record does not include any documentation of the agency's price evaluation, due to the fact that both of WILL's protests were dismissed before the agency would have been required to produce such documentation as part of its agency report on the record. Even so, we see no sound basis to adopt WILL's premise that the FBI's decision to take corrective action before it filed the protest record should lead our Office to infer that the facts would have supported WILL's claims, had they been developed. Such an unfavorable inference is justified only in limited circumstances where a participant in a protest has not produced documentation that our Office has requested, e.g., 4 C.F.R. § 21.7(f) (failure to provide testimony requested at protest hearing), whereas the FBI was not required to produce an agency report when these protests were dismissed as academic. See also *Johnson Tech.--Claim for Costs*, B-252595.3, Aug. 9, 1993, 93-2 CPD ¶ 88 at 3 (declining to recommend reimbursement of costs as punitive sanction for agency's alleged bad faith or inadvertent conduct during protest).

While WILL's speculation about how its pricing spreadsheet was miscalculated is plausible, there is no basis for Office to conclude that the protest was clearly meritorious. We have noted, albeit in other contexts, that our Office will not find improper agency action based on conjecture or inference. *International Ctr. for Language Studies, Inc.--Recon.*, B-418916.2, Sept. 9, 2020, 2020 CPD ¶ 294 at 4.

The request for a recommendation that the agency reimburse the cost of WILL's protests is denied.

Edda Emmanuelli Perez
General Counsel