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Decision

Matter of: Wyle Laboratories, Inc.

File: B-408112.2

Date: December 27, 2013

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DIGEST

Protest is sustained where the awardee's proposal, and the agency's evaluation thereof, failed to reasonably reflect the manner in which the contract will be performed, the level of costs likely associated with performance, and the corporate entity that will perform the contract.

DECISION

Wyle Laboratories, Inc., of Houston, Texas, protests the National Aeronautics and Space Administration's (NASA) award of the human health and performance contract (HHPG) to Science Applications International Corporation (SAIC), of McLean, Virginia, pursuant to request for proposals (RFP) No. NNJ12399614R for medical, biomedical, and health services supporting NASA's human spaceflight programs. Wyle asserts, among other things, that SAIC's proposal, and the agency's evaluation thereof, failed to reasonably reflect the manner in which the contract will be performed, the level of costs likely associated with performance, and the corporate entity that will perform the contract.

We sustain the protest.

BACKGROUND

In July 2012, NASA published the solicitation at issue, seeking proposals to perform a broad range of services related to NASA's spaceflight programs.¹ AR, Tab 50, RFP, at 2026-3089.² The solicitation contemplated award of an indefinite-delivery indefinite-quantity contract with a 5-year base period, a 3-year option period, and a 2-year option period, during which the agency will issue cost-plus-award-fee task/delivery orders. The maximum value of this contract is \$1.76 billion. Id. at 2052. The solicitation provided for a "best value" award, taking into consideration the following evaluation factors: mission suitability,³ past performance,⁴ and cost/price.⁵ RFP at 3083.

¹ The range of activities the contractor will support include: fundamental and applied biomedical research; biotechnology development; operational space medicine; occupational health and medicine; clinical, biomedical, space food, and environmental laboratories management; behavioral sciences, human factors engineering; spacecraft environment monitoring and management; biomedical engineering; biomedical flight hardware requirements, design, fabrication, testing, and operation; and payload and hardware integration with the International Space Station and other space flight platforms. Agency Report (AR), Tab 132, Source Selection Statement, at 32820. This contract is a follow-on acquisition to a contract Wyle is currently performing, referred to as the bioastronautics contract. Id.

² The agency report was submitted with Bates numbering; this decision's citations to the record include references to the appropriate Bates numbers.

³ The mission suitability factor was identified as the most important evaluation factor (with an associated point score of 1000 points) and divided into four subfactors: technical approach (500 points); management approach (250 points); safety and health approach (150 points); and small business participation (100 points). RFP at 3083. In evaluating proposals under the mission suitability factor, the agency identified strengths, significant strengths, weaknesses, significant weaknesses, and deficiencies. AR, Tab 41, Evaluation Plan, at 2010.

⁴ In evaluating past performance, the agency considered the relevance of offerors' past performance, along with the quality of such performance, assigning confidence ratings of very high, high, moderate, low, very low, or neutral/unknown. RFP at 3087-88.

⁵ The solicitation included 7 sample task orders, for which offerors were required to submit detailed proposals; each offeror's evaluated cost reflected the aggregate costs associated with its proposed performance of these task orders. (For task orders 2 through 7, the solicitation advised offerors that proposed costs would be multiplied by a factor of 2.5 to reflect "the full annual magnitude of future work currently envisioned by the Government.") RFP at 2895-2901; see also RFP at

(continued...)

Of relevance to this protest, in August 2012, SAIC issued a press release stating that its board of directors had authorized SAIC's management to "pursue a plan to separate [SAIC] into two independent, publicly traded companies." Wyle Protest, Sept. 3, 2013, exh. 14, SAIC Press Release, at 1. In that release, SAIC elaborated that the separation was intended to "eliminate the burden of organizational conflicts of interest (OCI)." Id.

In September 2012, Wyle and SAIC submitted their initial proposals.⁶ Thereafter, the agency conducted several rounds of discussions, requesting and receiving various proposal revisions which it evaluated. On March 4, 2013, the agency selected Wyle for contract award. On March 20, SAIC filed a protest with this Office challenging that award. In preparing its response to SAIC's protest, the agency determined that errors in the source selection process had occurred. On April 9, the agency advised this Office that it intended to take corrective action by canceling the initial award, amending the RFP, conducting another round of discussions, obtaining another round of final proposal revisions (FPR), and making a new source selection decision. On April 12, we dismissed SAIC's protest, pending completion of the agency's corrective action.

On May 1, the agency reopened discussions with both offerors. In preparing discussion questions for SAIC, the agency noted that a prior SAIC proposal submission had referred to the potential company separation. Contracting Officer's Statement, Oct. 21, 2013, at 23; see AR, Tab 64a, SAIC Proposal, Jan. 24, 2013, at 17919. Accordingly, the agency's discussions with SAIC included a request that SAIC "explain the potential separation of SAIC into two companies," and asked SAIC to discuss how such separation "will . . . affect the direct and indirect rates proposed." AR, Tab 125, Discussion Letter to SAIC, at 24636.

On May 7, SAIC responded by confirming that SAIC was pursuing a plan to change SAIC from a single corporation into "two new companies," stating that these new companies would be referred to as "new" SAIC and Leidos, and further stating that the separation "is expected to occur in the latter half of this calendar year." AR, Tab 126, SAIC Response to Discussion Questions, at 24840. The response described "new" SAIC as a "technical services company," estimated the "pro forma" revenue for that company during the fiscal year ending January 31, 2013 to be

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3088-89. In evaluating cost, the RFP provided that the agency "will perform a price analysis and will also perform a cost analysis to include a cost realism analysis." Id. at 3088.

⁶ Wyle and SAIC were the only offerors.

\$4 billion,⁷ and stated that “once the split occurs . . . [new] SAIC, the technical services company, will be the prime contractor.” AR, Tab 126, SAIC Response to Discussion Questions, at 24640. The response also described Leidos as “a solutions-focused business,” estimated that company’s revenue to be \$7 billion, and stated that Leidos would “provid[e] approximately [redacted] of the direct labor [for performance of the HHPC] as a subcontractor.” Id. Finally, the response stated: “These two new companies (SAIC and Leidos) will be separate legal entities, not affiliated or legally connected in any way once the split occurs.” Id.

In responding to the agency’s question regarding how the separation would “affect the direct and indirect rates proposed,” SAIC stated that it had proposed an “overall rate cap,” recognizing that, as a “new or recently reorganized company . . . there is some risk to the Government that rates could fluctuate and by proposing a limit on the composite percentage for the indirect rates that the Government will pay, SAIC has mitigated that risk.” Id. at 24878. Nevertheless, the contracting officer subsequently concluded that the rate cap was “not necessary,” and directed SAIC not to include the cap in its final proposal submission. AR, Tab 126, Letter from Contracting Officer to SAIC, at 25000-01.

On June 25, Wyle and SAIC each submitted FPRs. In its proposal, SAIC repeated its prior response to the agency’s discussion questions about the pending separation, including the statement that “[t]he separation is expected to occur in the latter half of this calendar year.” AR, Tab 129, SAIC FPR, at 26413. Nonetheless, SAIC’s proposed costs and its technical approach were based on “old” SAIC’s then-existing organizational structure, its assets, and its resources. Among other things, SAIC’s proposal stated that it “is a leading provider of research and development support services, with over 40,000 employees and \$10.6 billion in annual revenue.” AR, Tab 129, SAIC FPR, at 25051. More specifically, SAIC’s proposal did not provide any meaningful information regarding the impact of the “expected” separation on SAIC’s proposed technical approach, nor did it meaningfully discuss the cost implications flowing from the creation of the two new companies that, in SAIC’s words, “will be separate legal entities, not affiliated or legally connected in any way.” Id.

Despite SAIC’s various statements regarding the pending corporate separation, the record contains no documentation indicating that the agency considered any data reflecting the impact of the pending corporate restructuring. Rather, the agency expressly defends its reliance on “old” SAIC’s proposal in considering that firm for award, describing the pending corporate action as “speculative,” and expressly acknowledging that it “set aside the matter [of the corporate restructuring] during the

⁷ The record establishes that “old” SAIC had annual revenues of approximately \$11 billion during the period ending January 31, 2013. Wyle Supp. Protest, Oct. 31, 2013, exh. 1, SAIC Sept. 9, 2013 Press Release, at 4.

course of evaluation,” maintaining that consideration of that matter was “not necessary.” Contracting Officer’s Statement, Oct. 21, 2013, at 23-24; Agency’s Supplemental Memorandum of Law, Nov. 12, 2013, at 6.

Overall, the agency’s agency’s source evaluation board (SEB) evaluated the two FPRs as follows.

	Mission Suitability (1000 max. score)	Past Performance	Evaluated Cost
SAIC	876	Very High	\$ 974.8 million
Wyle	925	Very High	\$1,076.8 million

AR, Tab 131, Source Selection Presentation, at 32702.

On July 23, the SEB presented its conclusions to the source selection authority (SSA). AR, Tab 132, Source Selection Statement, at 32820. On July 29, the SSA met with “senior JSC [Johnson Space Center] officials.” Id.

On August 14, the SSA selected SAIC for award. In explaining the basis for her selection, the SSA specifically referenced various aspects of “old” SAIC’s proposed technical approach, along with the lower evaluated costs associated with that approach, stating, among other things:

Having noted the [SEB’s] conclusion that Wyle’s proposal on technical approach scored higher quantitatively than SAIC, I proceeded with an assessment of the underlying qualitative factors of the two proposals. . . . The first element of SAIC’s approach provides extremely valuable opportunities for external collaboration focused on human health and performance Research & Technology Development (R&TD) with current SAIC partners. . . . The second element of SAIC’s comprehensive strategic approach involves their data and knowledge management system. . . . The third key element of SAIC’s approach [is] to identify external customers for Human Health and Performance Directorate (HHPD) services, which will offset HHPD costs and open new avenues for collaboration on human health R&TD. . . .

I was also influenced by SAIC’s three previously assessed strengths in the technical approach subfactor. SAIC’s first strength involves their proposed interactive working relationship, cross-training between the Tier 1 and Tier 2 information technology help desks. . . . SAIC’s second strength involves their proposed integration of training, research, and operations across the biomedical laboratories. . . . I was very pleased with SAIC’s third strength attributed to their use of an integrated clinical services approach that includes the use of a Clinical Operations Manager to oversee and integrate all clinical

services across the contract at contract start, which will immediately result in efficiencies in this area. . . . This integrated approach will provide more efficient, effective operations, thereby resulting in a lower cost to the Government. . . .

Both Offerors proposed extensive consolidation and cross-training across the contract to improve efficiency and cut costs as a part of their technical approach. . . . I was compelled by the specificity provided in SAIC's proposed technical approach to innovation through external collaboration with existing SAIC partners who are currently working on pressing human health and performance R&TD issues. These proposed external collaborations will address high priority issues facing the human spaceflight program in the area of human health and performance. I have a high level of confidence that SAIC's technical approach significantly enhances the likelihood to develop solutions critical to mission activities. For this reason, I determined that SAIC's final proposal was qualitatively and quantitatively much closer to Wyle's final proposal than the Board's assessment in the technical approach subfactor. . . .

In looking at the Cost/Price factor, SAIC has a strikingly lower probable cost in contrast to Wyle. . . . The most apparent explanation for the difference in probable cost was the difference in approaches to accomplish the requirements of the HHPC. . . .

Although Mission Suitability and Past Performance are significantly more important than cost when combined, SAIC's advantage in Cost/Price is of such magnitude that it overpowers any slight differences [favoring Wyle] in Mission Suitability and Past Performance. My decision is that the proposal submitted by SAIC represents the best value to the Government to fulfill the needs for the HHPC solicitation.

AR, Tab 132, Source Selection Statement, at 10-14.

The contract was awarded to SAIC on August 21. Wyle filed this protest on September 3.

On September 9, SAIC announced that its board of directors had "approved the separation of its technical, engineering and enterprise information technology services business," transferring those resources to "SAIC Gemini, Inc.," an entity that had previously been registered with the Securities & Exchange Commission

(SEC).⁸ Wyle Supp. Protest, Oct. 31, 2013, exh. 1, SAIC Press Release (Sept. 9, 2013), at 1. The press release further stated that SAIC Gemini, Inc. “will hold the spun-off business and be renamed Science Applications International Corporation,” and that “old” SAIC “will change its name to Leidos Holdings, Inc.” Id. Finally, the press release stated that the separation would be effective on September 27--four days before the base period of contract performance was scheduled to begin.⁹

Following the award, “old” SAIC (now Leidos) sought to novate a number of contracts, including the contract at issue here, from Leidos to “new” SAIC. Intevenor’s Comments, Nov. 18, 2013, at 5. Notwithstanding SAIC’s express statement that “new” SAIC “will be the prime contractor” along with all of the other facts discussed above, the agency asserts, “there is no evidence that NASA made the award to SAIC with the intention of entering into a novation agreement.”¹⁰

⁸ On March 7, 2013, SAIC filed Form 10, General Form for Registration of Securities, for SAIC Gemini, Inc. with the SEC. Wyle Supp. Comments, Nov. 18, 2013, exh. 1, General Form for Registration of Securities. In that filing, SAIC Gemini, Inc. was defined as “New SAIC,” an “independent publicly traded technical, engineering and enterprise information technology services company.” Id. at 5. This filing further defined “old” SAIC as “Parent,” and stated that, following the separation, “[p]arent will be renamed Leidos Holdings, Inc.” Id. at 7. Finally, the SEC filing stated, “[f]ollowing the spin-off, New SAIC will be a separate company from Parent, and Parent will not retain any ownership interest in New SAIC.” Id. at 13.

⁹ The base performance period was scheduled to begin on October 1. SAIC’s performance has been suspended pending resolution of this protest.

¹⁰ With regard to transferring and/or novating federal contracts, section 42.1204 of the Federal Acquisition Regulation (FAR), titled “Applicability of Novation Agreements,” states:

(a) 41 U.S.C. 15 prohibits transfer of Government contracts from the contractor to a third party. The Government may, when in its interest, recognize a third party as the successor in interest to a Government contract when the third party’s interest in the contract arises out of the transfer of--

(1) All the contractor’s assets; or

(2) The entire portion of the assets involved in performing the contract.

FAR § 42.1204.

Agency Supp. Memorandum of Law, Nov. 12, 2013, at 9. Overall, the agency maintains that its evaluation and source selection decision were proper. We disagree.

DISCUSSION

Wyle protests the agency's award decision, noting that it was based on the proposal submitted by "old" SAIC, which reflected the technical approach, resources, and associated costs of a 40,000 employee, \$11 billion per year organization. Further, Wyle protests that both the offeror and the agency knew that the offeror/awardee did not intend to perform as the prime contractor in this matter, but rather intended that a then non-existent entity, to be formed at some later point from approximately one-third of the offeror's resources, and that was not "affiliated or legally connected in any way" with the offeror, would perform the contract as the prime contractor. Finally, Wyle maintains that, while knowing of the offeror's intent, the agency did not meaningfully consider any information regarding the technical approach, resources, and associated costs that the intended prime contractor would actually employ and/or incur. Accordingly, Wyle maintains that the award was improper.

It is a fundamental principal of federal procurement law that an agency's evaluation of proposals must reflect a reasonable assessment of each offeror's ability to successfully perform the contract requirements, and that the evaluation and the agency's source selection decision must be adequately documented. FAR §§ 15.305(a), 15.308; Savvee Consulting, Inc., B-408416, B-408416.2, Sept. 18, 2013, 2013 CPD ¶ 231 at 7-8. In evaluating proposals to perform cost reimbursement contracts, the agency's assessment must, further, include a cost realism analysis to determine what the government should realistically expect to pay for each offeror's proposed effort. FAR § 15.404-1(d); KPMG LLP, B-406409 et al., May 21, 2012, 2012 CPD ¶ 175 at 12-13. Where an offeror's proposal represents that it will perform the contract in a manner materially different from the offeror's actual intent, an award based on such proposal cannot stand, since both the offeror's representations, and the agency's reliance on such, have an adverse impact on the integrity of the procurement process. See Greenleaf Constr. Co., B-293105.18, B-293105.19, Jan. 17, 2006, 2006 CPD ¶ 19 at 8-10; AdapTech Gen. Scientific, LLC, B-293867, June 4, 2004, 2004 CPD ¶ 126 at 5; CBIS Fed. Inc., B-245844.2, Mar. 27, 1992, 92-1 CPD ¶ 308 at 5.

Here, there is no dispute that SAIC's proposal, and the agency's evaluation thereof, was based on the technical approach, resources, and costs associated with "old" SAIC. Indeed, in responding to Wyle's protest, the agency acknowledges such, stating that it reviewed SAIC's status up to the time of award, "investigat[ing] the SAIC website," "perform[ing] internet media searches," and contacting the Defense Contract Management Agency to determine whether there was "any change in the status of SAIC [that] could be considered, evaluated, and included in the SEB's evaluation." Contracting Officer's Statement, Oct. 21, 2013, at 23. Because "there

was no publicly available information” and “all of the SAIC rate agreements remain[ed] in place,” the agency concluded that “changes in the SEB evaluation [to reflect the corporate restructuring] were not necessary.” Id. at 23-24. Further, as noted above, the SSA’s source selection statement expressly relied on multiple aspects of “old” SAIC’s proposed technical approach and the evaluated costs associated with that approach. AR, Tab 132, Source Selection Statement, at 10-14. Specifically, in making her source selection decision, the SSA referenced SAIC’s proposed “innovation through external collaboration” with “current SAIC partners”; its “cross-training” of personnel and “integration of training, research, and operations across the biomedical laboratories”; its proposal to “integrate all clinical services across the contract”; as well as its lower evaluated costs associated with its proposed technical approach. Id.

Additionally, there is no dispute that “old” SAIC--the offeror and awardee--did not intend to perform as the prime contractor in this matter, but rather intended that a smaller entity with substantially fewer resources, that was completely separate from “old” SAIC, would perform the contract as the prime contractor. Indeed, “old” SAIC expressly disclosed this in response to the agency’s discussion questions, and in its FPR, stating in both that “once the split occurs. . . . [new] SAIC. . . will be the prime contractor.” AR, Tab 126, SAIC Response to Discussions Questions, at 24640; Tab 129, SAIC FPR, at 26413.

There can also be no dispute that the substitution of a new prime contractor, in place of the original offeror, may well have a material effect on both the costs incurred and technical approach employed during contract performance. With regard to the potentially differing costs, SAIC, itself, acknowledged this risk during discussions, stating, “[as a] new or recently reorganized company . . . there is some risk to the Government that rates could fluctuate.”¹¹ AR, Tab 126, SAIC Response to Discussions Questions, at 24878. Similarly, the agency’s response to Wyle’s protest addresses its own internal discussions, which referred to “Disclosure Statements, Accounting Systems status, and Forward Pricing rates, all of which would be impacted [by the separation].” Supp. Agency Memorandum of Law, Nov. 12, 2013, at 28.

In addition to the potential cost impact, the record indicates that the technical approach employed by “new” SAIC may differ from that proposed by “old” SAIC. First, as noted above, “new” SAIC has approximately one-third of “old” SAIC’s resources. Further, in defending the award, the agency repeatedly refers to “old” SAIC’s “unique” technical approach, referencing, for example, its “unique approach

¹¹ As noted above, notwithstanding SAIC’s own description of the potential risk, the agency thereafter concluded that the rate cap proposed by SAIC to address this risk was “not necessary.” AR, Tab 126, Letter from Contracting Officer to SAIC, at 2500.

to [redacted],” Agency’s Supp. Memorandum of Law, Nov. 12, 2013, at 31; its “unique technical approach,” for [redacted] (under which SAIC’s evaluated cost was [redacted] than Wyle’s), id. at 27, 32; and, most significantly, SAIC’s “strikingly lower probable cost” which the SSA attributed to “the difference in [the offerors’] approaches to accomplish[ing] the [contract] requirements.” AR, Tab 132, Source Selection Statement, at 13. The record is clear that “new” SAIC is a “separate legal entity” and is “not affiliated or legally connected in any way” with “old” SAIC;¹² as such, it appears clear that “new” SAIC is not currently bound by the terms of “old” SAIC’s proposal. Accordingly, even if this new, substantially smaller, organization were capable of performing the contract using the technical approach proposed by “old” SAIC, the record currently reflects no legal basis for requiring “new” SAIC to perform in the manner proposed.¹³

Finally, the record establishes that the agency gave no meaningful consideration to the technical approach “new” SAIC will actually employ, nor the probable costs associated with that approach. As noted above, the agency expressly defends its consideration of only “old” SAIC’s approach and its associated costs on the basis that the pending substitution of “new” SAIC was “speculative” and therefore, an “unsuitable topic for . . . evaluation.” Agency’s Supp. Memorandum of Law, Nov. 12, 2013, at 6. More specifically, the agency states that its evaluation did not reflect any meaningful consideration or evaluation of the technical approach and potential costs associated with performance by “new” SAIC because, in the

¹² This complete separation is consistent with, and necessitated by, the stated objective of “eliminat[ing] the burden of organizational conflicts of interest.” See Wyle Protest, Sept. 3, 2013, exh. 14, SAIC Press Release, at 1.

¹³ As noted above, under the heading “Applicability of Novation Agreements,” the FAR provides that “[t]he Government may . . . recognize a third party as the successor in interest to a Government contract when the third party’s interest in the contract arises out of the transfer of (1) [a]ll the contractor’s assets; or (2) [t]he entire portion of the assets involved in performing the contract.” FAR § 42.1204(a). It does not appear that either one of these requirements have been met with regard to “new” SAIC. Specifically, regarding the first requirement, all of “old” SAIC’s assets have not been transferred to “new” SAIC; rather, a majority of such assets are held by Leidos. Regarding the second requirement, “the entire portion of assets involved in performing this contract” have not been transferred to “new” SAIC. As noted above, the FPR on which award was based expressly stated that “approximately [redacted] of the direct labor” for performing this contract will be provided by Leidos. See AR, Tab 129, SAIC FPR, at 26413; cf. Consortium HSG Technischer Serv. GmbH and GeBe Gebäude-und Betriebstechnik GmbH Südwest Co., Mgmt. KG, B-292699.6, June 24, 2004, 2004 CPD ¶ 134 at 3 (awardee to whom contract was novated remained a “fully intact” entity under new owner).

agency's words "there was no definitive information to consider."¹⁴ Id. at 5; see also Contracting Officer's Statement, Oct. 21, 2013, at 23-24; Agency's Supp. Memorandum of Law, Nov. 12, 2013, at 6.

CONCLUSION

In summary, the record here establishes that: (1) SAIC's proposal, and the agency's evaluation thereof, was based on the technical approach, resources, and costs associated with "old" SAIC; (2) "old" SAIC did not intend to perform as the prime contractor, but rather intended that another entity, with substantially fewer resources, that was completely separate from "old" SAIC, would be the prime contractor; (3) notwithstanding all of the evidence indicating that "old" SAIC would not be the entity performing this contract, the SSA relied on "old" SAIC's "strikingly lower probable cost," which it attributed to its proposed technical approach; (4) the substitution of "new" SAIC as the prime contractor may well have a material effect on both the costs incurred and the technical approach employed during contract performance; and (5) the agency gave no meaningful consideration to either the technical approach or probable costs associated with "new" SAIC's performance of the contract because, in the agency's words, "there was no definitive information to consider." On this record, the awardee's proposal, and the agency's evaluation thereof, failed to reasonably reflect the manner in which the contract will be performed, the level of costs likely associated with performance, and the corporate entity that will perform the contract. Accordingly, there is inadequate support for the agency's assessment of projected cost savings and, similarly, no reasonable basis for award.

The protest is sustained.

RECOMMENDATION

We recommend that the agency either award the contract to Wyle, if otherwise appropriate, or reopen the procurement, obtain new or revised proposals and, thereafter, make a new source selection decision. In the event the agency determines that award to Wyle is appropriate under either alternative, the agency should terminate the contract awarded to SAIC and make award consistent with that determination. We also recommend that the agency reimburse Wyle for its costs

¹⁴ Notwithstanding its express acknowledgement that it did not consider matters related to performance by "new" SAIC, the agency inconsistently asserts that it "gave due consideration" to the pending separation, including SAIC's general assertion that the pending restructuring would result in a "leaner and more efficient cost structure." See Agency's Supp. Memorandum of Law, Nov. 12, 2013, at 4-6; AR, Tab 129, SAIC's FPR, at 26413. The agency record is devoid of any support for either the agency's assertion of "due consideration" or SAIC's assertion regarding costs.

associated with filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d) (2013). The protester's certified claims for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after receipt of this decision. Id. § 21.8(f).

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