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Decision

Matter of: Loyal Source Government Services, LLC--Costs

File: B-407791.4

Date: February 14, 2014

Isaias Alba IV, Esq., Alexander O. Levine, Esq., and Patrick T. Rothwell, Esq., PilieroMazza PLLC, for the protester.

Capt. Anthony F. Schiavetti, and Scott N. Flesch, Esq., Department of the Army, for the agency.

Peter D. Verchinski, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

GAO recommends reimbursement of protest costs where the agency unduly delayed taking corrective action in response to a clearly meritorious protest that objected to the agency's source selection determination as failing to adequately document consideration of the underlying merits of offerors' proposals; reimbursement is not recommended with regard to other protest grounds where those grounds are severable from the successful protest ground.

DECISION

Loyal Source Government Services, LLC, of Orlando, Florida, requests that our Office recommend reimbursement of the costs that Loyal Source incurred in filing and pursuing its protest challenging the award of contracts to five other firms under request for proposals (RFP) No. W81K04-11-R-0018, issued by the Department of the Army for physician services.

We grant the request in part and deny it in part.

BACKGROUND

The RFP provided for the award of multiple indefinite-delivery, indefinite-quantity contracts for physician services in all medical specialties for military treatment facilities within the U.S. Army Medical Command in the Southern Region of the United States. Offerors were informed that the awards would be made on a best value basis, considering price and the following two technical evaluation factors:

technical quality and performance risk (past and present performance). The technical quality evaluation factor included three subfactors: contractor quality control plan; management capabilities; and, recruitment and retention. RFP at 70. The RFP provided that the technical quality factor was equal in weight to the performance risk factor, and that the two factors combined were significantly more important than price. RFP at 69.

The Army received 27 proposals in response to the RFP, including Loyal Source's. Following the evaluation of proposals, the agency established a competitive range that included eight proposals, including Loyal Source's. Discussions were conducted, and revised proposals received. Loyal Source's revised proposal, which had the highest-evaluated price, received an outstanding technical quality factor rating and a substantial confidence past performance rating. The evaluation results were presented to the agency's source selection authority (SSA), who determined that the proposals of five firms (but not Loyal Source's) reflected the best value to the agency. The SSA's judgment was documented in a cursory selection decision that did no more than compare the firms' respective adjectival ratings and prices. In this regard, although the SSA noted that Loyal Service had higher adjectival ratings under the technical quality rating and past performance factors than some of the awardees, he nevertheless concluded without explanation that nothing in Loyal Source's proposal justified the firm's higher price.

Following a debriefing, Loyal Source protested to our Office, challenging the agency's selection decision and complaining that the agency had ignored the evaluation criteria which provided that technical merit was significantly more important than price. Loyal Source also argued that the agency misevaluated its proposal under the contractor quality control plan subfactor. The Army filed its agency report in response to the protest, in which the agency defended its evaluation and selection decision. Loyal Source timely filed comments on the agency's report and a supplemental protest, in which the protester argued that the agency had failed to consider that one of the awardees had significantly reduced its price during the competition, which Loyal Source argued could present performance and cost risks.

In response to the Army's request for alternative dispute resolution (ADR), the cognizant GAO attorney conducted a "litigation risk" ADR conference, in which he informed the parties that the Army bore significant litigation risk with respect to the adequacy of the SSA's selection decision. The following day, the Army informed our Office and the parties that it would take corrective action. Specifically, the Army stated that it would perform and document a new selection decision. We dismissed Loyal Source's protest as academic. Loyal Source Gov't Servs., LLC, B-407791, B-407791.2, July 25, 2013.

On August 8, pursuant to 4 C.F.R. § 21.8(e) (2013), Loyal Source requested that our Office recommend that the Army reimburse the protester its reasonable costs of filing and pursuing the protest.

DISCUSSION

Loyal Source contends that it should be reimbursed all its costs for filing and pursuing its initial and supplemental protests. The Army agrees that Loyal Source should be reimbursed its protest costs related to the selection decision, but argues that the firm should not be reimbursed those costs related to the evaluation of the firm's proposal under the contractor quality control plan subfactor and to the evaluation of one of the awardee's price. The Army states these grounds of protest are severable from the protester's arguments concerning the agency's selection decision. We agree with the Army.

Where a procuring agency takes corrective action in response to a protest, our Office may recommend under 4 C.F.R. § 21.8(e) that the agency reimburse the protester its protest costs where, based on the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing protesters to expend unnecessary time and resources to make further use of the protest process in order to obtain relief.¹ AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. Generally, we consider a successful protester entitled to costs incurred with respect to all issues pursued, not merely those upon which it prevails. In our view, limiting recovery of protest costs in all cases to only those issues on which the protester prevailed would be inconsistent with the broad, remedial Congressional purpose behind the cost reimbursement provisions of the Competition in Contracting Act. Id. at 9. Nevertheless, failing to limit the recovery of protest costs in all instances of partial or limited success by a protester may result in an unjustified windfall to the protester and cost to the government. As a consequence, in appropriate cases we have limited our recommendation for the award of protest costs where a part of those costs is allocable to an unsuccessful protest issue that is so clearly severable from the successful issues as to constitute an essentially separate protest. Focused Mgmt., Inc., B-404029.6, Oct. 3, 2011, 2011 CPD ¶ 204 at 4. In determining whether protest issues are so clearly severable as to constitute essentially separate protests, we consider, among other things, the extent to which the issues are interrelated or intertwined--i.e., the extent to which successful and unsuccessful arguments share a common core set of facts, are based on related legal theories, or

¹ A protest is clearly meritorious where a reasonable agency inquiry into the protest allegations would have shown facts disclosing the absence of a defensible legal position. AVIATE L.L.C., B-275058.6, B-275058.7, Apr. 14, 1997, 97-1 CPD ¶ 162 at 16.

are otherwise not readily severable. See Sodexho Mgmt., Inc.--Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 29.

Here, the ground of protest upon which we provided ADR (and which the agency agrees is clearly meritorious) is severable from the remaining protest grounds. That is, our litigation risk assessment focused upon the adequacy of the Army's selection decision, where the agency had failed to adequately document consideration of the underlying merits of offerors' proposals in light of the solicitation's evaluation criteria that provided that technical merit was significantly more important than price. The adequacy of the agency's selection decision is distinct from Loyal Source's remaining protest grounds that challenged the agency's evaluation of the protester's proposal under one subfactor and its evaluation of one of the awardee's price reductions. Resolution of these remaining grounds of protest would not involve a common set of facts or related legal theory such that they would be considered interrelated or intertwined with the ground of protest that was clearly meritorious.

We recommend that Loyal Source be reimbursed the costs associated with filing and pursuing its protest, including reasonable attorney's fees, to the extent those costs were incurred in connection with its challenge to the source selection decision.

As a result, the request is granted in part and denied in part.

Susan A. Poling
General Counsel