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Decision

Matter of: CACI Technologies, Inc.--Costs

File: B-407923.3

Date: August 13, 2014

Daniel J. Donohue, Esq., Polsinelli PC, for the protester.
Marvin D. Rampey, Esq., Department of the Navy, for the agency.
Cherie J. Owen, Esq., Kenneth Kilgour, Esq., and David A. Ashen, 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 filing and pursuing its protest is granted, where the issues presented clearly had merit, yet the agency delayed taking corrective action until after submitting an agency report, the protester filed comments, and GAO convened an alternative dispute resolution conference to advise the agency that the protest would be sustained.

DECISION

CACI Technologies, Inc., of Chantilly, Virginia, requests that our Office recommend that it be reimbursed the costs of filing and pursuing its protest challenging the terms of request for proposals (RFP) No. N00024-12-R-3327, issued by the Department of the Navy for systems, software, engineering, and logistics technical services for the Ship Defense and Expeditionary Warfare Department of the Naval Surface Warfare Center, Port Hueneme Division. CACI challenged the sufficiency of the agency's corrective action following an earlier protest.

We grant the request.

BACKGROUND

CACI's first protest (B-407923), filed on January 7, 2013, challenged the award of a contract to another offeror under solicitation No. N00024-12-R-3327. In response to

the protest, the agency informed our Office that it was taking corrective action, and we dismissed that first protest as academic.¹

On February 15, 2013, the agency informed offerors that, due to a “material flaw” in the solicitation, the agency would cancel the solicitation and resolicit for its needs. The agency later rescinded its plan to cancel the solicitation, and instead e-mailed offerors a 22-page document containing revised security requirements under the solicitation, requesting that offerors answer “yes” or “no” as to whether the changes impacted their proposals. Offerors were also to answer “yes” or “no” as to whether they had a plan in place to comply with the solicitation’s new requirements. On March 1, 2013, CACI filed a second protest with our Office, B-407923.2, asserting that the agency’s corrective action was improper and that the revisions to the solicitation constituted a material amendment to which offerors should have been permitted to respond by revising their proposals. Protest at 4-8.

In response to the protest, the agency submitted a dismissal request, arguing that CACI was not an interested party to protest the agency’s actions. Agency Opp., Exh. I, Dismissal Request at 1. The cognizant GAO attorney denied the agency’s request to dismiss CACI as not an interested party.² In addition, the GAO attorney provided guidance to the parties regarding issues they should address in their scheduled filings. Specifically, GAO requested that the upcoming agency report

¹ The Navy stated that it would reevaluate proposals and make a new award decision.

² Due to the passage of time during the initial protest, offerors’ proposals had expired. After sending the above-referenced e-mail (which contained updated requirements and asked offerors to respond “yes or no” regarding whether they could meet the new requirements), the agency requested offerors to extend their original proposals. In answering the agency’s inquiries, CACI responded that the changed requirements would impact its proposal, but that it had a plan to comply with the new requirements. Protest at 4. CACI also informed the agency that it was extending its proposal for an additional 90 days, subject to the changes required to implement the agency’s revised requirements. Agency Opp. to Cost Claim, Exh. I, Agency Dismissal Request, at 3. The agency argued that CACI’s conditional offer to extend its proposal meant that the firm was not an interested party to pursue the protest. GAO disagreed. As the GAO attorney made clear in the subsequent ADR, however, because the changes to the solicitation constituted a material amendment, CACI’s offer to extend its proposal subject to its right to respond to the amendment was reasonable. The GAO attorney, however, noted that, “to the extent that the protester is challenging the rescission of the cancellation (or the rescission of announcements of the intent to cancel at some point in the future) as an independent protest ground, this protest ground is dismissed.” GAO E-mail to Parties, March 15, 2013.

more fully address the issue of whether CACI was an interested party. In addition, GAO encouraged both parties to address the issue of whether Federal Acquisition Regulation (FAR) section 15, which states that, when the government's requirements change, the contracting officer "shall amend" the solicitation, was applicable to the protest. See FAR § 15.206. Parties were also asked to address whether the agency's notification of all offerors of the changed requirements constituted an oral amendment, and, if so, whether offerors were given the opportunity to respond to the amended solicitation, and whether the agency's communications with the offerors constituted clarifications or discussions. Id.

As explained below, after receiving the agency report and protester's comments, the GAO attorney reviewed the record and concluded that the revisions constituted material amendments, such that the agency was required to amend the solicitation to provide notice of the changes and to provide the offerors an opportunity to respond. See FAR § 15.206(a); AVL Books.Com, Inc., B-295780, Mar. 28, 2005, 2005 CPD ¶ 46. Specifically, the agency's changes modified the legal obligations imposed on the offerors. In this regard, the modification of the security requirements included the following changes: removing the Intelligence related language, deleting the need for Top Secret security clearances, removing information to which the contractor will require access, and removing contractor security handling requirements. AR at 9; AR, Tab K, E-mail to CACI Regarding Changes, at 1; AR, Tab S, DD Form 254, at 2. Although this modification consisted of deleting certain obligations (such as the contractors' obligations regarding top secret security clearances), rather than imposing additional ones, the offerors' resulting obligations under the revised solicitation differed from their legal obligations under the original solicitation terms. Further, because these amendments to the RFP changed certain legal obligations, the agency was unable to determine, based solely on initial proposals, whether the offerors' proposals met the requirements of the amended RFP. In this regard, in its report responding to the protest, the agency explained that its review of the proposals "revealed a lack of clarity as to whether any of the proposals . . . met the RFP's . . . mandatory requirements." Agency Report in B-407923.2 at 10-11.

The GAO attorney then offered to provide outcome prediction alternative dispute resolution (ADR) to the parties. See 4 C.F.R. § 21.10(e). During the May 28, 2013 outcome prediction ADR conference, the GAO attorney advised the parties that GAO likely would sustain the protest because the agency's e-mail to the parties informing them of changed security requirements constituted a material amendment to the solicitation, requiring the agency to amend the solicitation terms and to provide the offerors with an opportunity to respond. Thereafter, on March 31, 2013, ninety-one days after the protest was filed, the agency informed the parties and GAO that it planned to take corrective action. As a result of the agency's notice of corrective action, GAO dismissed the protest as academic. B-407923.2, June 3, 2013. CACI thereupon requested that our Office recommend that the agency reimburse the protester its reasonable costs of filing and pursuing the protest.

DISCUSSION

In its request, CACI asks our Office to recommend that the agency reimburse it for its reasonable costs of preparing and pursuing its protest, including reasonable attorneys' fees. 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, 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 a 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); Information Ventures, Inc.--Costs, B-294580.2 et al., Dec. 6, 2004, 2004 CPD ¶ 244 at 2-3; Georgia Power Co.; Savannah Elec. and Power Co.--Costs, B-289211.5, B-289211.6, May 2, 2002, 2002 CPD ¶ 81 at 5. The agency contends that CACI's protest was not clearly meritorious, and that the agency did not unduly delay taking corrective action. We address each of these issues below.

Clearly Meritorious

The agency contends that the protest was not clearly meritorious because the ultimate resolution required further development of the record, including the production of the agency report. Agency Opp. at 7.

We consider a protest to be clearly meritorious where a reasonable agency inquiry into the protester's allegations would reveal facts showing the absence of a defensible legal position. Triple Canopy, Inc.--Costs, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 3; Georgia Power Co.; Savannah Elec. and Power Co.--Costs, supra. A GAO attorney will inform the parties through outcome prediction ADR that a protest is likely to be sustained only if he or she has a high degree of confidence regarding the outcome; therefore, the willingness to do so is generally an indication that the protest is viewed as clearly meritorious and satisfies the clearly meritorious requirement for purposes of recommending reimbursement of protest costs. Sizewise Rentals, LLC--Costs, B-407566.2, July 3, 2013, 2013 CPD ¶ 166 at 5; JV Derichebourg-BMAR & Assoc., LLC--Costs, B-407562.3, May 3, 2013, 2013 CPD ¶ 108 at 3; Panacea Consulting, Inc.--Costs, B-299307.3, B-299308.3, July 24, 2007, 2007 CPD ¶ 133 at 3.

The agency asserts that, because GAO requested an agency report and provided guidance regarding issues to be addressed, the protest was not clearly meritorious. Agency Opp. at 7. This contention is without merit. Contrary to the agency's argument, we may conclude that a protest was clearly meritorious even where the GAO has provided guidance to the agency on the content of the agency report. See, e.g., Greentree Transp. Co., Inc.--Costs, B-403556.4, May 16, 2011, 2011 CPD ¶ 104 at 2 (recommending costs reimbursement when, after the submission of the agency report and the protester's comments on the agency report, the GAO attorney conducted outcome prediction ADR).

We conclude that CACI's challenge to the sufficiency of the agency's corrective action was clearly meritorious, given the record provided to our Office with the agency report. In this regard, as discussed above, after receipt of offerors' proposals, the agency's requirements changed. Specifically, the agency eliminated the intelligence related language, deleted the need for top secret security clearances, removed information to which the contractor will require access, and removed contractor security handling requirements from the solicitation. AR at 9; AR, Tab K, E-mail to CACI Regarding Changes, at 1; AR, Tab S, DD Form 254, at 2. These changed requirements modified the legal obligations imposed on the offerors. As noted above, where an agency's requirements materially change after a solicitation has been issued, it must issue an amendment to notify offerors of the changed requirements and afford them an opportunity to respond. Here, the agency was required to amend the solicitation to provide offerors an opportunity to submit revised proposals on a common basis that reflected the agency's actual needs. Global Computer Enters., Inc.; Savantage Financial Servs. Inc., B-404597, et al., March 9, 2011, 2011 CPD ¶ 69 at 8.

Undue Delay

The agency also contends that it did not unduly delay taking corrective action in response to the protest because the agency took corrective action within 3 days of the outcome prediction ADR conference. Agency Opp. at 9.

With respect to the promptness of the agency's corrective action, we review the record to determine whether the agency took appropriate and timely steps to investigate and resolve the impropriety without litigating the case; we do not review simply the promptness in taking action after the ADR. See Marine Design Dynamics, Inc.--Costs, B-407816.2, July 3, 2013, 2013 CPD ¶ 168 at 4. While we consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest, we generally do not consider it to be prompt where it is taken after that date. Id.; see also Burns & Roe Servs. Corp.--Costs, B-310828.2, April 28, 2008, 2008 CPD ¶ 81 at 2 n.2 (corrective action based upon outcome prediction ADR provided after the submission of an agency report is not considered to be prompt).

RECOMMENDATION

We recommend that CACI be reimbursed the reasonable costs of filing and pursuing its protest, including those costs incurred here for requesting a recommendation for costs. York Bldg. Servs., Inc.; Olympus Bldg. Servs., Inc.--Costs, B-282887.10, B-282887.11, Aug. 29, 2000, 2000 CPD ¶ 141 at 6. The

protester should file its certified claims for costs with the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

Susan A. Poling
General Counsel