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Decision

Matter of: Sabel Systems Technology Solutions, LLC--Costs

File: B-410537.3

Date: August 12, 2015

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DIGEST

GAO recommends partial reimbursement of protest costs where the record shows that the agency unduly delayed taking corrective action in response to a clearly meritorious protest ground; reimbursement is not recommended with regard to other allegations that are not clearly meritorious and not clearly intertwined with the clearly meritorious protest ground.

DECISION

Sabel Systems Technology Solutions, LLC, of Gainesville, Virginia, requests that our Office recommend it be reimbursed the costs of filing and pursuing its protest challenging the award of a contract to A-Team Solutions, LLC, (ATS) of Fulton, Maryland, by the United States Marine Corps (USMC) under request for quotations (RFQ) No. M00264-14-R-0019 for the provision of logistics management support to Marine Corps Headquarters at Quantico, Virginia.

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

BACKGROUND

The RFQ sought quotations to provide logistics management support to Marine Corps Headquarters at Quantico, Virginia. The contractor was to support the Logistics Distribution Policy Branch, including its management of passenger transportation programs and associated traffic management systems. RFQ Performance Work Statement §§ 1.1-2. The RFQ established a best value

evaluation scheme under which the non-price factors of technical capability, performance execution and management, and past performance were individually more important than price and, when combined, were significantly more important than price. RFQ § M-1. The agency made award to ATS, finding that its quotation represented the best value as it was considered technically equal with that of Sabel, and its price of \$6,057,757 was lower than Sabel's price.¹ Agency Report (AR), exh. S, Business Clearance Memorandum, at 7-8.

On October 2, 2014, Sabel filed a protest with our Office challenging the award to ATS. Sabel's protest alleged that the agency improperly failed to credit its proposal for various strengths under the non-price factors. Sabel also alleged that the agency improperly evaluated ATS's proposal under the non-price factors. Among other things, Sabel argued that any credit given to ATS's proposal on the basis that it would use the incumbent contractor's employees was irrational because ATS did not have signed offer/acceptance letters from any of those employees as required by the solicitation. Sabel finally argued that the agency made a defective best value determination in that the determination was based on a flawed evaluation. Protest at 11-15.

USMC filed its agency report with our Office on October 28. The agency generally contested each of Sabel's allegations, but neither the contracting officer's statement nor the agency's legal memorandum addressed Sabel's specific contention that ATS could not have submitted required signed offer/acceptance letters from the incumbent contractor's employees as required by the solicitation.

On November 10, Sabel submitted a consolidated filing comprised of both its comments to the agency report and several supplemental grounds of protest. In its supplemental protest, Sabel expanded on its initial allegation concerning ATS's failure to provide signed acceptance letters by arguing that ATS failed to include a signed offer/acceptance letter from a specific employee of the incumbent contractor which should have rendered its proposal ineligible for award.² Sabel also alleged that the agency unreasonably evaluated ATS's final business volume because ATS omitted the position of business manager, and failed to conduct a proper best value tradeoff in accordance with the RFQ's terms.

¹ Sabel requested, but did not receive a post-award debriefing. Since this procurement was conducted in accordance with the General Services Administration's Federal Supply Schedule, the agency provided Sabel with the basis upon which the award was made. Federal Acquisition Regulation § 8.405-2(d).

² Sabel also argued that ATS's technical evaluation was flawed due to the missing offer/acceptance letter. We note that, notwithstanding Sabel's placement of these arguments under the "supplemental protest" heading, as discussed herein, the record shows that the arguments expand upon arguments raised in its initial protest.

On November 18, the USMC notified our Office of its intent to take corrective action to reopen discussions, reevaluate proposals and make a new source selection decision, and asked us to dismiss the protest as academic. The agency's notice stated:

The corrective action is intended to address supplemental issues raised in both the supplemental protest and intervenor's response filed on November 10, 2014. This corrective action is being taken before USMC addresses the supplemental issues in an agency response.

USMC Corrective Action Notice to GAO, Nov. 18, 2014.³

We dismissed the protest because the agency's corrective action rendered it academic, and this request followed.

DISCUSSION

Sabel requests that our Office recommend that it be reimbursed the costs associated with filing and pursuing its protest, including reasonable attorneys' fees. Sabel argues that the agency unduly delayed taking corrective action in response to its protest because it waited 47 days after the initial protest was filed. Sabel contends that it should be reimbursed its protest costs for both the initial and the supplemental protests because all of the issues in both protests were connected by the same factual nexus and, thus, there were no severable grounds of protest. Request for Costs at 2.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs if, 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 the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Bid Protest Regulations 4 C.F.R. § 21.8(e); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 5. A protest is clearly meritorious where a reasonable agency inquiry into the protester's allegations would reveal facts showing the absence of a defensible legal position. Yardney Technical Prods., Inc.--Costs, B-297648.3, Mar. 28, 2006, 2006 CPD ¶ 65

³ In its response to the Protestor's Request for Reimbursement of Protest Costs (Agency Response), the USMC states that it decided to take corrective action for reasons unrelated to any issues raised in Sabel's supplemental protest, including a "perceived failure of the evaluators to clearly document [the] evaluation." Agency Response at 3. We assume that these reasons are in addition to the representation made by the agency to our Office in its November 18 notice of corrective action.

at 4. With respect to the promptness of the agency's corrective action under the circumstances, we review the record to determine whether the agency took appropriate and timely steps to investigate and resolve the impropriety. Chant Eng'g Co., Inc.--Costs, B-274207.2, Oct. 23, 1992, 92-2 CPD ¶ 274 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. CDIC, Inc.--Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 2.

Sabel alleged in its initial protest that ATS's proposal could not have included signed offer/acceptance letters from employees of the incumbent contractor. Specifically, Sabel's initial protest stated, "any credit given to [ATS] on the basis that it would use [the] incumbent employees is irrational as [ATS] does not have signed acceptance letters from any of those employees, as required by the Solicitation." Protest at 14.

Section L of the RFQ included a "completeness" paragraph informing offerors that specified areas "must be addressed." RFQ § L-7.6. One of these areas was, "[s]taff positions based upon contingency hires must include a signed letter of offer/acceptance in the Business Volume." Id. This was a mandatory requirement of the RFQ. In this regard, the solicitation stated proposals must be submitted in accordance with the instructions in section L; "[f]ailure to do so will result in the Offeror's submission being determined to be unacceptable and ineligible for award." RFQ § L-3.1.

As noted above, the agency report filed in response to the initial protest did not address this specific allegation. In its supplemental protest, Sabel expanded on its earlier allegation by arguing that ATS's proposal lacked a signed offer/acceptance letter from a specific employee of the incumbent contractor who was proposed by ATS as a Senior Logistics Analyst - Level 4. Supplemental Protest at 2. The record shows that, while ATS did, in fact, identify this individual in its proposal, it did not provide in the proposal a signed offer/acceptance letter from him in its proposal.⁴ AR, exh. I, ATS Technical Volume at 17; exh. J, ATS Business Volume at 16-22.

Since this individual was not an employee of ATS, and was offered to the agency as a contingency hire, the failure to provide a signed letter of commitment for this individual did not comply with the RFQ's instruction quoted above. It is a fundamental principle of government contracting that an agency may not award a contract on the basis of a proposal that fails to meet one or more of a solicitation's

⁴ As Sabel noted, its own proposal identified this same individual and included the required signed offer/acceptance letter. The letter clearly states that the individual is a current employee of the incumbent contractor. AR, exh. G, Sabel Proposal at 12.

material requirements. Contract Int'l, Inc., B-408945; B-408945.2, Dec. 27, 2013, 2013 CPD ¶ 300 at 4.

The agency argues that this protest ground was not clearly meritorious. The agency states that Sabel “changes focus” from the initial protest to the supplemental protest in that it alleged that different proposed personnel lacked the signed offer/acceptance letter in the two filings. Agency Response at 2. This response mischaracterizes Sabel’s initial protest, which clearly alleged that ATS’s proposal should not have been credited for proposing the incumbent contractor’s employees because it did not have signed offer/acceptance acceptance letters from those employees. Whether or not Sabel’s initial and supplemental protest focused on a specific missing offer/acceptance letter is immaterial to the overall issue of whether the initial protest should have put the agency on notice of the potential for this specific defect in ATS’s proposal.

The record shows that a reasonable inquiry into the merits of Sabel’s allegation prior to the submission of the agency report would have revealed that there was no signed offer/acceptance letter from the incumbent contractor’s employee included with the ATS proposal. The initial protest should have led the agency to examine an issue that was expanded upon in the supplemental protest, but there is no evidence in the record that the agency conducted any investigation at all into this matter. Accordingly, the promptness of the agency’s corrective action is measured from the date of the initial protest (October 2). As a consequence, we find corrective action to be unduly delayed where it was not taken until November 18, which was well after the date the agency provided its report (October 28) and after the protester filed its comments (November 10). Sysorex Fed., Inc.--Costs, B-310273.2, Mar. 27, 2008, 2008 CPD ¶ 104 at 5.

We recommend that Sabel be reimbursed its costs incurred in connection with these protest grounds.⁵ The record demonstrates that the agency unduly delayed corrective action in the face of a clearly meritorious protest ground which was advanced in Sabel’s initial protest.

As a general rule, a successful protester is entitled to be reimbursed costs incurred with respect to all issues pursued, not merely those upon which it prevails. Burns & Roe Servs. Corp.--Costs, B-310828.2, Apr. 28, 2008, 2008 CPD ¶ 81 at 2–3. Nevertheless, in appropriate cases, we have limited our recommendation for the

⁵ As stated above, Sabel’s Supplemental Protest alleged that ATS’s proposal was both ineligible for award and that its technical evaluation was flawed due to the missing signed commitment letter from the Paragon employee. Our recommendation for reimbursement covers both of these protest grounds as well as all protest grounds relating to the best value determination since they arise from the same operative fact.

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 essentially constitute a separate protest. See, e.g., BAE Tech. Servs., Inc.--Costs, B-296699.3, Aug. 11, 2006, 2006 CPD ¶ 122 at 3; Interface Flooring Sys., Inc.--Claim for Attorneys' Fees, B-225439.5, July 29, 1987, 87-2 CPD ¶106 at 2-3.

Here, we disagree with Sabel's contention that all of the protests grounds merit reimbursement since they arose from the same operative fact of the overall technical evaluation of proposals. Accordingly, we limit our recommendation for award of protest costs. Specifically, we deny the request for reimbursement of costs as it relates to Sabel's protest of its own evaluation and its protest of the evaluation of ATS's business proposal. The grounds raised by Sabel regarding the evaluation of its own proposal are not clearly meritorious given that the record shows that Sabel received the highest possible ratings under each of the three non-price factors and was assessed strengths for its own experience and ability to deliver continuity of operations.⁶

Further, the allegation regarding the evaluation of ATS's final business volume was raised for the first time in the supplemental protest in response to documentation provided in the agency report. The agency took corrective action prior to the deadline set for it to respond to this specific ground of supplemental protest and therefore, we are not concluding that the agency unduly delayed corrective action with regard to this specific allegation. Professional Security Corp.--Costs, B-407022.5, Mar. 10, 2014, 2014 CPD ¶ 96 at 3. We further find that Sabel's objections to the agency's evaluation of ATS's business proposal were not clearly intertwined with its objection to the lack of required letters of commitment as they rely on different facts and legal theories and are thus, severable. Marine Design Dynamics, Inc., B-407816.2, Jul. 3, 2013, 2013 CPD ¶ 168 at 6.

⁶ Moreover, Sabel failed to meaningfully address in its comments the agency's rebuttal to the original protest issues regarding its own evaluation and accordingly, these grounds properly should be viewed as abandoned. TPMC-Energy Solutions Env't'l Servs. 2009, LLC, B-408343.2 et al., Aug. 23, 2013, 2013 CPD ¶ 215 at 8.

RECOMMENDATION

We recommend that USMC reimburse Sabel for the costs of filing and pursuing its protest grounds related to ATS's failure to include commitment letters from contingency hires in its proposal as required by the solicitation. Sabel should submit its certified claim, detailing the time spent and costs incurred, directly to the agency within 60 days of its receipt of this decision. 4 C.F.R. § 21.8(f)(1).

This request is granted in part and denied in part.

Susan A. Poling
General Counsel