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Decision

Matter of: Debcon, Inc.--Costs

File: B-412298.3

Date: April 26, 2016

Lynn Patton Thompson, Esq., and Christopher Solop, Esq., Biggs, Ingram & Solop, PLLC, for the protester.

Deena G. Braunstein, Esq., Department of the Army, Corps of Engineers, 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

1. Protester is entitled to reimbursement of protest costs where agency unduly delayed taking corrective action in response to clearly meritorious challenge to evaluation of the protester's proposal under small business participation plan factor.
 2. Recommendation for reimbursement of costs does not include severable protest issues challenging the evaluation of the awardee's proposal or other evaluation factors, which were not clearly intertwined with the clearly meritorious issue.
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DECISION

Debcon, Inc., of Ashland, Kentucky, a small business, requests that our Office recommend that the Department of the Army, Corps of Engineers, reimburse the reasonable costs of filing and pursuing a protest of the award of a contract to Atherton Construction, LLC, of Henderson, Nevada, under request for proposals (RFP) No. W912QR-15-R-0025 for construction of military family housing and amenities at Rock Island Arsenal, in Rock Island, Illinois. We dismissed the protest as academic based on agency corrective action. Debcon argues that the Corps failed to take prompt corrective action in response to a clearly meritorious protest.

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

The Corps issued the RFP on May 5, 2015. As amended, the RFP sought proposals for the construction of 21 houses, site work and utilities, excavation, and demolition of an existing building, plus options for additional excavation,

construction of up to 13 additional houses, fencing, a basketball court, and a playground. Agency Report (AR) at 1; RFP amend. 2 at 3-5; RFP amend. 3 at 2-3. The Corps received two proposals in response to the amended requirement, and announced the award of the contract to Atherton on September 30. Following a debriefing, Debcon filed its initial protest on October 8. The parties submitted an agency report and comments. Debcon's comments on the agency report included a supplemental protest based on information learned in the agency report. The parties submitted a supplemental agency report and comments on December 1 and 4, respectively. On December 10, the Corps announced corrective action by reevaluating the proposals and making a new source selection decision. Our Office dismissed the protest as academic on December 15.

Our Bid Protest Regulations, 4 C.F.R. § 21.8(e), provide that this Office may recommend that an agency pay protest costs where the agency decides to take corrective action in response to a protest. In general, however, we will make such a recommendation only where the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. CSL Birmingham Assocs.; IRS Partners-Birmingham--Costs, B-251931.4, B-251931.5, Aug. 29, 1994, 94-2 CPD ¶ 82 at 3. This principle is intended to prevent inordinate delay in investigating the merits of a protest and taking corrective action once an error is evident, so that a protester will not incur unnecessary effort and expense in pursuing its remedies before our Office. Professional Landscape Mgmt. Servs., Inc.--Costs, B-287728.2, Nov. 2, 2001, 2001 CPD ¶ 180 at 5.

Debcon's initial protest argued that the Corps had misevaluated Debcon's proposal under the past performance, technical, and small business participation plan factors, and had made an unreasonable best-value tradeoff decision. Protest at 4-6. With respect to the evaluation of Debcon's proposal under the small business participation plan factor, the protester argued that the Corps could not justify assessing a lower rating¹ of acceptable to Debcon as a small business prime

¹ The RFP provided that the Small Business Participation Plan would be

evaluated on the Offeror's best efforts and the level of small business commitment that is being demonstrated for the proposed acquisition and the prior level of commitment to utilizing small businesses in performance of prior contracts. The S[mall] B[usiness] Participation Proposal must meet the minimum Total Small Business Participation goal of 20% of the total contract value (through collective small business participation from any type of small business or sub-category small business).

RFP at 11. The provision then listed seven elements that would be considered in the evaluation. Id. In contrast to the small business subcontracting plan evaluation (which the Corps rated as either acceptable or unacceptable), the Corps argued
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contractor that proposed to be heavily involved in contract performance, in contrast to Atherton's rating of good. Protest at 3, 5-6. Debcon also argued that the RFP had expressly stated that the small business participation plan factor would only be rated acceptable or unacceptable. Id.

In its agency report, the Corps argued that the evaluation and source selection decision had been reasonable. AR at 6-12. With respect to the small business participation plan factor evaluation, the Corps noted that the RFP established a goal of 20 percent small business participation, and argued that it was reasonable to downgrade Debcon's proposal because the firm proposed to perform 25 percent of the contract itself as both manager and supplier of trades, and proposed to subcontract the remainder to other small businesses, which the Corps described as merely having "met the minimum requirements." Id. at 4, 9. As support, the Corps argued thus:

[A]s noted by the Contracting Officer in her statement, there are no rules or regulations that provide that an offeror shall be given a high rating, or any rating in particular, for its Small Business Participation Plan simply because it is a small business.

Id. at 9.

In its comments on the agency report, Debcon continued to challenge the reasonableness of the evaluation. In addition, the supplemental protest challenged the favorable evaluation of Atherton's proposal under the technical and past performance factors as unreasonable. Protester's Comments at 1, 7. In the supplemental agency report, the Corps argued again that the evaluation of Debcon's proposal under the small business participation plan factor had been proper. Supplemental AR at 4-6. Debcon's comments on the supplemental agency report again argued that the protester's proposal should have received the highest rating under the small business participation plan factor, regardless of whether Atherton might also receive the same rating in a reevaluation. Protester's Comments at 4-5; Protester's Supplemental Comments at 4-5.

During the development of the protest record, our Office asked the parties to address the application of Federal Acquisition Regulation (FAR) § 15.305(a)(5) and 13 C.F.R. § 125.3(g)(3) with respect to the evaluation of Debcon under the small

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that the small business participation plan factor evaluation properly used adjectival ratings set out in a table in the RFP: in descending order, outstanding, good, acceptable, marginal, and unacceptable. AR at 3 (citing RFP at 6 (§ 00112, ¶ 4.6 "technical assessment ratings" table)).

business participation plan factor.² Fax from GAO to Parties, Nov. 20, 2015, at 1; Fax from GAO to Parties, Dec. 7, 2015, at 1. As relevant here, 13 C.F.R. § 125.3(g)(3), states that where an evaluation factor is used to assess an offeror's proposed approach to small business subcontracting participation, a proposal from a small business offeror "shall receive the maximum score, credit or rating" under that evaluation.

In announcing that the Corps would take corrective action, the contracting officer stated that the agency viewed none of the grounds of protest as meritorious, but that a reevaluation of the relevance of Atherton's past performance was nevertheless warranted. Contracting Officer's Memorandum to File, Dec. 10, 2015, at 1-2. The contracting officer also stated that the Corps would seek internal guidance on the application of 13 C.F.R. § 125.3(g)(3), and would ultimately make a new source selection decision.³ Contracting Officer's Memorandum to File, Dec. 10, 2015, at 2. Counsel for the Corps subsequently clarified that the corrective action "include[d] re-evaluation of the proposals in their entirety, not one particular portion or portions of the proposals." Email from Counsel for the Corps to Parties, Dec. 11, 2015, at 1. Our Office dismissed the protest as academic based on the proposed corrective action, as clarified.

² The parties disagreed about whether FAR § 15.305(a)(5) was applicable to this procurement. Section 15.305(a)(5) of the FAR provides that a solicitation must be structured so that a small business offeror receives the highest rating for "the evaluation factor[] in . . . [FAR § 15.304](c)(4)." FAR § 15.305(a)(5). The cited provision, in turn, regards evaluation of "proposed small business subcontracting participation in the subcontracting plan." FAR § 15.304(c)(4). Despite the dispute over the application of FAR § 15.305(a)(5), there appears to be no dispute that 13 C.F.R. § 125.3(g)(3) applies in this case, so we need not resolve the scope of FAR § 15.305(a)(5) in this decision. We note also that our Office has considered the application of 13 C.F.R. § 125.3(g)(3) once before, but found that the regulation was inapplicable then because, at the time of that decision, the regulation expressly limited its applicability to federal supply schedule contracts, government-wide acquisition contracts, and multi-agency contracts. See Ocean Ships, Inc., B-401526.4, Apr. 21, 2010, 2010 CPD ¶ 106 at 6 n.4. The regulation no longer incorporates that restriction.

³ Following the corrective action, the Corps informed Debcon that the reevaluation had, among other things, increased both Atherton's and Debcon's small business participation plan factor ratings, and lowered Atherton's past performance factor rating. The Corps again selected Atherton for award. Debcon filed a protest. On March 15, 2016, the Corps announced that it would take corrective action by canceling the RFP. On March 18, our Office dismissed that protest as academic.

As noted above, our Office may recommend reimbursement of protest costs, including reasonable attorneys' fees, 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. Competition in Contracting Act of 1984, 31 U.S.C. § 3554(c)(1)(A); Bid Protest Regulations, 4 C.F.R. § 21.8(e). 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. First Fed. Corp.--Costs, B-293373.2, Apr. 21, 2004, 2004 CPD ¶ 94 at 2. 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. Alsalam Aircraft Co.--Costs, B-401298.3, Nov. 5, 2009, 2009 CPD ¶ 208 at 3.

In our view, Debcon raised a clearly meritorious challenge to the evaluation. Notwithstanding the Corps's position in the agency report and supplemental agency report, it was contrary to regulation for the agency to rate Debcon, as a small business, merely acceptable under the small business participation plan factor where higher ratings were available. Nevertheless, the Corps argues that any misevaluation under the small business participation plan factor was not prejudicial to Debcon either because Atherton was also a small business, or because the small business participation plan evaluation "did not figure in the overall decision to award to Atherton." Corps Opposition to Costs at 3. Our review of the record leads us to disagree. The RFP provided that the non-price factors, when combined, would be significantly more important than price in making the source selection decision, RFP amend. 1 at 4, and as noted above, Debcon's proposal offered a lower price than Atherton's. Although we cannot say whether the Corps would still have determined that Atherton's proposal justified the payment of its higher price if Debcon had been evaluated properly under the small business performance plan factor, in such circumstances, we resolve doubts regarding prejudice in favor of a protester. Raytheon Co., B-409651, B-409651.2, July 9, 2014, 2014, CPD ¶ 207 at 17.

As to Debcon's other evaluation challenges, however, the Corps presented a defensible legal position based on the factual record, so we cannot regard those issues as clearly meritorious. For example, Debcon argued that the Corps improperly imposed an unstated evaluation criterion and unreasonably evaluated the past performance factor by requiring offerors to have at least two very relevant past performance references in order to be eligible for the highest past performance rating. Our Office has held that such a requirement is reasonable, however, and need not be disclosed in the solicitation. See A&D Gen. Contracting, Inc., B-409296, Feb. 24, 2014, 2014 CPD ¶ 71 at 5 (protest denied where evaluation required a minimum of four relevant projects to be eligible for highest past performance rating, even though requirement was not disclosed in solicitation). Since Debcon had only one very relevant project as its past performance, the Corps

considered Debcon to be ineligible to receive the best past performance rating (substantial confidence). Thus, the Corps was not required to consider the project's greater complexity or Debcon's positive ratings for that work. Similarly, Debcon's argument that the past performance evaluation showed unequal treatment when compared to Atherton was also not clearly meritorious. The Corps presented a defensible legal position that the evaluation of Debcon and Atherton differed because Atherton submitted multiple past performance examples, making irrelevant Debcon's effort to compare its past performance with Atherton's on the basis of relevance and quality.⁴

Ultimately, Debcon presented one clearly meritorious evaluation challenge, while its other grounds of protest were either not clearly meritorious or the corrective action was prompt. Accordingly, we must consider whether the reimbursement of only a portion of the protester's costs is proper. As a general rule a successful protester should be reimbursed the costs incurred with respect to all the issues pursued, not merely those upon which it has prevailed. Salvation Army Cmty. Corr. Program--Costs, B-298866.3, Aug. 29, 2007, 2007 CPD ¶ 165 at 7 (recommending reimbursement of costs including those raised after receipt of agency report). In determining whether to limit the reimbursement of costs, our Office considers, among other things, whether the successful and unsuccessful arguments share a common core set of facts, are based on related legal theories, or are otherwise not readily severable. Burns & Roe Servs. Corp.--Costs, B-310828.2, Apr. 28, 2008, 2008 CPD ¶ 81 at 2-3.

In applying these principles, we have severed costs arising from allegations of misevaluation under separate evaluation factors on the basis that they are not clearly intertwined. For example, challenges to a past performance evaluation were not clearly intertwined with clearly meritorious challenges to the technical factor evaluation and the resulting tradeoff. Genesis Bus. Sys.--Costs, B-411264.11, Dec. 10, 2015, 2015 CPD ¶ 389 at 4; see also Carney, Inc.--Costs, B-408176.13, Feb. 14, 2014, 2014 CPD ¶ 82 at 5 (severing costs for alleged misevaluation of price from clearly meritorious challenge to technical capability factor evaluation); Loyal Source Gov't Servs., LLC--Costs, B-407791.4, Feb. 14, 2014, 2014 CPD ¶ 139 at 4 (severing costs for evaluation challenges from clearly meritorious challenge to adequacy of best value tradeoff rationale). In a similar fashion, we severed the costs for challenges to the evaluation of the awardee and to the agency's alleged failure to amend a solicitation because those issues were not

⁴ In comments on the supplemental agency report on December 4, Debcon argued that the Corps had failed to apply the past performance relevance criteria in the RFP accurately, when assessing Atherton's past performance as relevant. Protester's Supplemental Comments at 2-3. We do not regard the corrective action on those issues as unduly delayed because, as noted above, the Corps announced corrective action just 6 days later.

clearly intertwined with a clearly meritorious allegation of unequal discussions. VSE Corp.; Univ. of Hawaii--Costs, B-407164.11, B-407164.12, June 23, 2014, 2014 CPD ¶ 202 at 8.

On the record here, we regard none of the protester's challenges to the evaluation of its own proposal as intertwined with the clearly meritorious challenge to its evaluation under the small business performance plan factor. Accordingly, we do not recommend reimbursement of the costs of filing and pursuing any other issues.

RECOMMENDATION

We recommend that the Corps reimburse Debcon's reasonable costs of filing and pursuing its protest challenging the evaluation of its proposal under the small business performance plan factor, including reasonable attorneys' fees. Debcon should file its claims for costs, detailing and certifying the time expended and costs incurred, with the agency within 60 days of receipt of this recommendation. 4 C.F.R. § 21.8(f).

The request is granted in part and denied in part.

Susan A. Poling
General Counsel