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Decision

Matter of: Chase Supply, Inc.--Costs
File: B-411059.3, B-411094.3, B-411127.3
Date: May 17, 2016

Tracye Winfrey Howard, Esq., Wiley Rein LLP, for the protester.
John R. Hart, Esq., Defense Logistics Agency, for the agency.
Stephanie B. Magnell, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's request that GAO recommend reimbursement of costs of filing and pursuing protests is granted, where the issue presented was clearly meritorious, yet the agency did not take corrective action until after filing the agency report.

DECISION

Chase Supply, Inc., of Hampton, Virginia, a small business, requests that our Office recommend that it be reimbursed the cost of filing and pursuing its protests challenging the agency's price evaluations and corresponding decisions to dissolve the small business set-aside under requests for quotations Nos. SPE7M4-14-T-4240 (RFQ-1); SPE7M4-14-T-4576 (RFQ-2); and SPE7M4-15-T-1171 (RFQ-3); which were issued by the Defense Logistics Agency-Land and Maritime (DLA) for air duct hoses. We dismissed the protests after the agency advised our Office that it would take corrective action by cancelling the awarded orders. Chase argues that its protests were clearly meritorious and that the agency's corrective action was unduly delayed.

We recommend that Chase be reimbursed its protest costs.

BACKGROUND

DLA issued RFQ-1 on September 2, 2014; RFQ-2 on September 26; and RFQ-3 on January 2, 2015; the solicitations were each set aside for small businesses. RFQ-1 at 1-2; RFQ-2 at 1-2; RFQ-3 at 1-2. The agency sought quotations to provide air duct hoses with national stock numbers (NSNs) and quantities as follows:

	NSN	Quantity
RFQ-1	4720-0859-1402	60 (reduced to 46)
RFQ-2	4720-1398-9929	250
RFQ-3	4720-1398-9929	135

RFQ-1 at 5, 7; RFQ-2 at 3, 5; RFQ-3 at 5, 6.

Each solicitation contained two contract line item numbers (CLINs): CLIN 0001 for the hoses and CLIN 0002 for costs to complete first article testing (FAT) of the hoses. RFQ-1 at 7-8; RFQ-2 at 5-6; RFQ-3 at 6-7. The RFQs included Federal Acquisition Regulation (FAR) clause 52.209-3, First Article Approval--Contractor Testing, which required here that the awardee successfully subject two hoses to FAT. RFQ-1 at 2-3; RFQ-2 at 2-3; RFQ-3 at 2-3. The agency was to reimburse the awardee for successful tests; unsuccessful tests would be at the awardee's expense. FAR clause 52.209-3(c), (g). FAR clause 52.209-3 provided for waiver of the CLIN 0002 FAT costs as follows:

The Government may waive the requirement for first article approval test where supplies identical or similar to those called for in the schedule have been previously furnished by the offeror/contractor and have been accepted by the Government. The offeror/contractor may request a waiver.

FAR clause 52.209-3(h). As a result, if the agency decided to waive FAT for a vendor, the price quoted by the vendor for CLIN 0002 would effectively be removed from the vendor's total quoted price.¹

The RFQs also incorporated the agency's master solicitation, which required DLA to "manually evaluate[]" simplified acquisitions containing a FAT line item. DLA Master Solicitation for eProcurement Simplified Acquisitions (Part 13), Rev. 24, Aug. 6, 2014 at 5.² In this regard, the master solicitation provided that "[i]f the requirement is evaluated manually, price, delivery, and past performance will be considered in accordance with the terms of the solicitation." Id. at 6.

¹ Given the costs for FAT as compared to the price for the hoses, the agency's decision to waive FAT for a vendor could render that vendor the lowest-priced vendor overall, even if that vendor did not propose the lowest per-hose price.

² RFQ-1 and RFQ-2 incorporated by reference DLA Master Solicitation, Revision 24, dated August 6, 2014. RFQ-1 at 1; RFQ-2 at 1. RFQ-3 incorporated by reference DLA Master Solicitation, Revision 25, dated October 25, 2014. RFQ-3 at 1. However, the master solicitations do not differ with respect to the evaluation requirements for procurement of items subject to FAT.

Chase submitted quotations in response to RFQ-1 and RFQ-2 and requested waiver of FAT; Chase submitted a quotation in response to RFQ-3 but did not request waiver of FAT. B-411059.2, AR, Tab 4, Chase's Quotation, at 1; B-411094.2, AR, Tab 4, Chase's Quotation, at 1; B-411127.2, AR, Tab 5, Chase's Quotation, at 1.

First Protests

For each RFQ, DLA evaluated Chase's prices and, after concluding that Chase had not quoted fair market prices, eliminated Chase from the competition. DLA then dissolved the small business set-asides in the solicitations on the basis of inadequate small business competition and made award to large businesses. In response to each dissolution, Chase filed an agency-level protest, contesting both the dissolution of the small business set-aside as well as the agency's failure to perform a price analysis in accordance with the solicitation. Specifically, the protester argued that the agency failed to reasonably consider its FAT waiver request, unreasonably considering only vendors' unit prices under CLIN 0001, and did not consider vendors' total prices under CLINs 0001 and 0002. DLA denied each of Chase's protests. Chase filed protests concerning each solicitation with our Office on the same grounds, specifically challenging DLA's refusal to consider Chase's FAT waiver requests and the agency's decision not to evaluate total price. B-411059, Protest, Jan. 22, 2015, at 1-2; B-411094, Protest, Feb. 5, 2015, at 1-2; B-411127, Protest, Feb. 12, 2015, at 2.

After reviewing the protests, DLA advised our Office that it would take corrective action by reevaluating Chase's quoted prices in accordance with the terms of the RFQs, to specifically include an evaluation of Chase's requests for waiver of FAT. B-411059.1, DLA Email, Mar. 2, 2015, 9:08 a.m., at 1; B-411094.1, Req. for Dismissal, Feb. 27, 2015, at 1; B-411127.1, DLA Email, Mar. 2, 2015, 9:01 a.m., at 1. On the basis of DLA's proposed corrective actions, Chase withdrew its protests.³

Reevaluation and Second Protests

After conducting price reevaluations, DLA again dissolved the small business set-asides in each RFQ on the basis that the prices Chase quoted for individual CLINs

³ DLA argues any request by Chase for costs from the first round of protests would be untimely. DLA Resp. to Protester's Req. for Costs, July 24, 2015, at 1, citing 4 C.F.R. § 21.8(e) (when the agency takes corrective action, the protester must file request for recommendation of cost reimbursement within 15 days after notice of protest dismissal). We agree that no timely request for reimbursement of costs was made with respect to protests B-411059, B-411094, and B-411127. Our decision here addresses only the costs incurred by Chase in protests B-411059.2, B-411094.2, and B-411127.2, as well as Chase's bid preparation costs.

were not fair market prices, and thus there was inadequate small business competition to support the small business set-asides. B-411059.2, AR, Tab 7, Reevaluation; B-411094.2, AR, Tab 8, Reevaluation; B-411127.2, AR, Tab 6, Reevaluation. Again, the agency did not evaluate Chase's requests for waiver of FAT, and as a result could not compare Chase's total price after FAT waiver with the total price of any other vendor. Chase timely protested DLA's price evaluations and decisions to dissolve the small business set-asides in these procurements.⁴

Hearing

After initial briefing, our Office conducted a hearing on May 14 to further develop the record. We asked the agency to provide witnesses to explain the solicitation requirements with respect to the evaluation of vendors' prices and how the agency's evaluation satisfied those requirements. B-411059.2 et al., GAO Amended Pre-Hearing Notice, May 13, 2015, at 2-3. Three days before the hearing, the agency disavowed its analysis of the price of Chase's FAT in RFQ-3. B-411059.2 et al., AR, Tab 15, Decl. of Director, Engineering & Technical Support Directorate, May 11, 2015. The agency explained that its estimated FAT cost, used as a basis for assessing whether Chase's proposed FAT costs could be viewed as a fair market price, was flawed because it "did not include many costs likely to be incurred" in FAT testing. Id. ¶ 6. Nevertheless, the agency chose not to take corrective action at that time.

At the hearing, the contracting officers for RFQ-1 and RFQ-2 testified on behalf of the agency, and Chase's president testified on behalf of Chase. The contracting officer for RFQ-3 did not testify.

The contracting officer for RFQ-2 testified that she was required to follow the agency's written guidance from 2011 in conducting her price evaluation.⁵ Hearing Transcript (Tr.) at 25:5-7 ("[I]t's an in-house policy that we have. It's one of the documents that's in our system that we have to use."). She also testified that DLA's 2011 guidance stated that, contrary to the terms of the RFQs and FAR clause 52.209-3, DLA would "no longer accept FA[T] waiver requests" for items previously

⁴ Protest B-411059.2 was filed on April 3, 2015; protest B-411094.2 was filed on April 6, 2015; and protest B-411127.2 was filed on March 24, 2015.

⁵ In advance of the hearing, our Office requested that the agency supplement the record with any internal documentation guidance regarding price evaluation related to the protest issues. GAO Email, May 6, 2015, at 1. During the hearing, the contracting officer testified that, in conducting her price evaluation, she relied on at least two other documents containing the agency's price evaluation guidance that were not in the record—one relating to the method for evaluating unit price, the other relating to the weight given to unit price as compared to the price for FAT. Tr. at 37:14-22.

furnished by the contractor and accepted by the agency. Tr. at 101:14-22. She stated that this 2011 guidance was first implemented in the agency's 2014 reevaluations of Chase's quotations at issue here. Tr. at 102:1-11 (confirming that the 2011 written price evaluation guidance "wasn't incorporated into any prior procurement, and...only affects, to the best of [her] knowledge, this re-evaluation").

Furthermore, she testified that she had not evaluated vendors' total prices and viewed DLA's internal guidance as barring such an evaluation. B-411059, DLA Email to Chase, Mar. 2, 2015, at 1; B-411094, Corrective Action Notice, Feb. 27, 2015, at 1; B-411127, DLA Email to Chase, Mar. 2, 2015, at 1; Tr. at 34:22 ("We can't combine them [the quoted unit and FAT prices] together."). See also Tr. at 66:6-7 ("[W]e do not base a[n award] decision on the total cost.").

The contracting officer for RFQ-1 similarly testified that he understood that he was not permitted to evaluate total price and was limited to evaluating the prices of individual CLINs. Tr. at 180:17-22, 181:1-8. He testified that he was therefore prohibited from making award to Chase if its per-hose unit price was determined to be too high, even if Chase had the lowest total price. Tr. at 181:1-8. As an example, if Chase's total price (after FAT waiver) were \$[DELETED], and the next lowest-priced vendor quoted \$[DELETED] (without FAT waiver), the contracting officer would be unable to make award to Chase if Chase's per-hose unit price were determined to be too high. Tr. at 181:1-8.

Post-Hearing

After the hearing and post-hearing briefing, the agency filed a request for dismissal, arguing that Chase was not an interested party because it was ineligible for award. Req. for Dismissal, June 9, 2015. Due to the nature of the challenge, we sought the guidance of the Small Business Administration (SBA). The SBA's submission was received on June 17, and the parties responded on June 19, with DLA simultaneously filing another request for dismissal. Second Req. for Dismissal, June 19, 2015.

On June 24, GAO held a conference call, during which our Office advised the agency that its pending requests for dismissal would be denied. Later on June 24, the agency notified our Office that it intended to take corrective action and requested dismissal on the basis that this would render the protests academic. Notice of Corrective Action, June 24, 2015. Specifically, DLA contended that:

Corrective action is required because the [requests for quotations] did not provide notice to potential offerors that DLA Land and Maritime's procedure for making a Fair Market Price (FMP) determination differed from the total price determination made for award. Additionally, the solicitations did not reflect DLA Land and Maritime's requirement that FAT waiver requests will only be processed for contractors that had previously passed a FAT on the same item. Accordingly, DLA Land

and Maritime will take the following corrective actions: (1) Review its current supply needs for two National Stock Number Items and issue new solicitations that provide proper notice on how pricing determinations will be made, (2) The new solicitations will also properly reflect DLA Land and Maritime's FAT waiver requirements, and (3) If applicable, provide proper notice under FAR [§] 19.506(a).

Id. at 1.

The protester opposed dismissal, arguing that the agency had not effectively acknowledged the errors in the underlying solicitation. Chase noted that "DLA ha[d] not cancelled any of the currently open procurements that contain the exact same errors" where DLA was procuring either the same or a similar item under the same terms as the solicitations protested here. Chase Resp. to Fourth Req. for Dismissal, June 25, 2015 at 3 (noting that "Solicitation No. SPE7M4-15-T-3628 is currently open for 159 units of the same-9929 ducts that are at issue in protests B-411094.2 and B-411127.2."). On this basis, Chase requested that we deny the agency's request for dismissal. Id. at 4. We subsequently granted the agency's request for dismissal on the basis that "the agency reasonably determined that the solicitations were inadequate in several respects and that the agency's evaluation was flawed." Chase Supply, Inc., B-411059.2 et al., June 26, 2015 (unpublished decision), at 3.

DISCUSSION

Chase seeks a recommendation from our Office that DLA reimburse Chase's costs of filing and pursuing its protests of the three RFQs, including reasonable attorneys' fees. Chase contends that its protests were clearly meritorious and that the agency unduly delayed taking corrective action. Chase Req. for Reimbursement, July 10, 2015, at 1. For the reasons discussed below, we agree.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs where, based on the record, 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. 4 C.F.R. § 21.8(e); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. 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. Triple Canopy, Inc.--Costs, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 3. 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. See Chant Eng'g Co., Inc.--Request for Costs, B-274871.2, Aug. 25, 1997, 97-2 CPD ¶ 58 at 4. While we usually consider corrective action to be prompt if 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. See CDIC, Inc.--Entitlement to Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 2.

Chase argues that reimbursement is appropriate here because:

[A] reasonable investigation of Chase's protests would have revealed that DLA violated a fundamental procurement principle by not evaluating Chase's proposed price and FAT waiver in accordance with the Solicitations. See FAR 13.106-2(a)(2) ("Quotations or offers shall be evaluated on the basis established in the solicitation."). It was not necessary for DLA to further develop the factual record through the protest process to reach that conclusion.

Chase Req. for Reimbursement, July 10, 2015, at 3.

DLA does not specifically dispute that the protests were meritorious and argues only that their merit was not evident at the time of filing.⁶ DLA Resp. to Protester's Req. for Costs, July 24, 2015, at 2 ("[A] reasonable inquiry into the protest facts would [not] have revealed to the agency the lack of a legally defensible position.") For this reason, the agency argues that its corrective action was prompt. We disagree.

The agency argues, in essence, that its decision to take corrective action was based on information outside of the agency records and thus "the protests were not clearly meritorious on their face at the time of filing." DLA Resp. to Protester's Req. for Costs at 2. DLA alleges that the protests are akin to two decisions by our Office where we did not recommend reimbursement of costs, even though the corrective action was taken after the filing of the agency's report. Id. at 2 (citing Alaska Structures, Inc.--Costs, B-298575.4, Jan. 22, 2007, 2007 CPD ¶ 15 at 7; Kingdomware Techs.--Costs, B-406228.2, May 10, 2012, 2012 CPD ¶ 157 at 2).

We do not find the agency's cases applicable to the facts here. In Kingdomware, although the agency took corrective action after submission of the agency report,

⁶ On the same day that DLA informed our Office that it was cancelling solicitations RFQ-1, RFQ-2 and RFQ-3 because the base solicitation was flawed, DLA used the same base solicitation to award a contract for 600 units of NSN 4720-1398-9929 (the same NSN at issue in the RFQ-2 and RFQ-3 protests) to HBD, an awardee in these protests. See B-411849.2, Req. for Dismissal, Oct. 16, 2015, at 2. Chase protested this concurrent award, and the agency ultimately took corrective action by cancelling the solicitation, confirming that "DLA Land and Maritime cannot defend the acquisition on its merits." Id. On this basis we dismissed the protest. Chase Supply, Inc., B-411849.2, Nov. 9, 2015, (unpublished decision). In a related decision issued today, we also recommended that the agency pay the protester's costs associated with that protest. See Chase Supply, Inc.--Costs, B-411849.3, May 17, 2016 CPD ¶ ____.

we denied the protester's request for reimbursement of its protest costs because the record "presented a close question" and did not demonstrate that the protest was clearly meritorious. Kingdomware, supra, at 2. Similarly, in Alaska Structures, we declined to recommend that the protester be reimbursed its protest costs when an agency waited until after the agency report to take corrective action, on the basis that the protest was not clearly meritorious.

In contrast, the question presented here was simply whether the agency had performed the price evaluation described in the solicitation. Considering that the documents in the agency report are responsive to that question, we find that the agency had ample time, prior to filing its agency reports, to consider the meaning of the terms of the solicitations and the agency's application thereof. The hearing testimony merely added the explanation that internal DLA guidance prohibited the contracting officers from performing the price evaluation presented in the RFQs. Indeed, the agency did not take corrective action on the basis of new information gleaned at hearing, and instead defended its evaluations through a post-hearing brief and two subsequent dismissal requests. DLA ultimately took corrective action on June 24, 76 days after filing its agency report in B-411127.2, and 8 days before the 100-day deadline for our decision established by the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3554(a)(1).⁷ This timeline does not demonstrate that the agency took appropriate and prompt steps to investigate and resolve the issue of whether it had followed the solicitations' stated evaluation criteria, a fact that was apparent from the documents included in the agency record. On this basis, we find that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. See PB&A, Inc.; Env'tl. Synectics, Inc.--Costs, B-410074.3, B-410074.4, Sept. 15, 2015, 2015 CPD ¶ 285.

RECOMMENDATION

We recommend that DLA reimburse Chase for its costs of filing and pursuing its protests, including reasonable attorneys' fees. See 31 U.S.C. § 3554(c)(2); 6K Sys., Inc.--Costs, B-408124.6, Dec. 16, 2014, 2015 CPD ¶ 10. Chase 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 that GAO recommend reimbursement of protest costs is granted.

Susan A. Poling
General Counsel

⁷ Although the protests were filed separately, they were consolidated as of the hearing; our Office intended to issue a decision in all three by the earliest CICA due date, July 2, 2015, which related to the protest docketed as B-411127.2.