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Decision

Matter of: East Coast Nuclear Pharmacy--Costs

File: B-412053.5

Date: August 31, 2016

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DIGEST

Protester's request that GAO recommend reimbursement of protest costs is granted where the agency unduly delayed taking corrective action in response to clearly meritorious challenge to evaluation of awardee's technical proposal.

DECISION

East Coast Nuclear Pharmacy, LLC (ECNP), a small business of Palm Beach Gardens, Florida, requests that we recommend reimbursement from the Department of Veterans Affairs (VA) for the reasonable costs of filing and pursuing its protests of the award of a contract to Medi-Physics Inc., of Marlborough, Massachusetts, under request for proposals (RFP) No. VA248-15-R-1322, for radiopharmaceuticals for the West Palm Beach VA Medical Center (VAMC). We dismissed the protests as academic based on the agency's decision to cancel the award and the solicitation, and to reconsider its needs, including re-soliciting the requirement. ECNP argues that the VA failed to take prompt corrective action in response to clearly meritorious protests.

We grant the request.

BACKGROUND

On August 13, 2015, the VA posted the RFP on the Federal Business Opportunities (FedBizOps) website, under the procedures of Federal Acquisition Regulation (FAR) parts 12 and 15. RFP at 42. The solicitation sought daily and emergency routine deliveries of radiopharmaceuticals for the West Palm Beach VAMC. Id. at 6. The solicitation provided for the award of a fixed-price contract to the lowest-priced

offeror whose proposal was technically acceptable considering three evaluation factors: (1) price, (2) technical, and (3) past performance. Id. at 42-45, 47. Proposals that were not considered technically acceptable could not be selected, regardless of price. Id. at 42.

The VA received five proposals, including ones from ECNP and Medi-Physics. Agency Report (AR), Tab 4, Source Selection Decision Document (SSDD), at 1. The VA sent the lowest-priced proposal, which was from Medi-Physics, to the source selection evaluation team (SSET) for a technical evaluation. AR, Tab 4, SSDD, at 1. The SSET found Medi-Physics to be technically acceptable, recommended it for award, and conducted no further reviews of proposals. Id. The source selection authority adopted the SSET's recommendation. AR, Tab 4, SSDD, at 1.

On December 23, 2015, the VA notified ECNP that it issued the award to Medi-Physics in the amount of \$3,768,441.97. AR, Tab 6, Notice of Award. On December 31, ECNP filed a timely protest with this Office arguing, among other things, that the agency's evaluation of the awardee as technically acceptable was flawed because Medi-Physics could not meet the solicitation's delivery deadlines. Protest at 12. On February 1, 2016, the agency submitted a report responding to the protest and included the awardee's proposal and the one page SSDD. AR, Tab 4, SSDD. The SSDD referred to the SSET report, which was not included in the record. Id.

Upon review of the agency report, ECNP supplemented its initial protest on February 10. ECNP Comments at 13-29. On February 19, the agency filed a supplemental report and produced the SSET report, Supplemental AR, Tab 10, SSET Report, which led ECNP to file a second supplemental protest on February 24. Supplemental Comments at 29-33.

In both of its supplemental protests, ECNP argued that the agency failed to provide the documents requested in its protests and that the documents were being provided in a piecemeal fashion.¹ On February 29, 2016, our Office requested that the VA provide, by March 2, all documents supporting the agency's evaluation of the awardee's proposal, and a response addressing each of ECNP's supplemental protest grounds. On March 2, the VA notified our Office that it would take corrective action by cancelling both the award to Medi-Physics and the underlying solicitation, and reconsidering its needs and how best to meet them, including potentially re-soliciting the requirement. Agency Notice of Corrective Action at 2. This Office

¹ The VA admits that "there was a delay in providing complete documents to the Protester however the Agency's delay in production of documents was inadvertent and largely due to the lack of knowledge and experience by the contracting officer." Agency Opp. at 6.

dismissed the protest as academic and ECNP subsequently filed a request for reimbursement of its costs of pursuing a protest.

DISCUSSION

ECNP requests that our Office recommend that the VA reimburse the company the costs associated with filing its protest because its initial and supplemental protests were clearly meritorious and the VA unduly delayed taking corrective action. The agency asserts that ECNP was the highest-priced offeror and that this “demonstrates on its face that the protest was not clearly meritorious.” Agency Opp. at 3. Further, the agency argues that ECNP’s allegations are speculative and matters of contract administration, and that since several “ancillary issues” arose during the course of the protest and GAO requested additional information regarding those issues,² the protests were not clearly meritorious. Id. at 3-6. For the reasons discussed below, we grant the protester’s request in part because, given the record provided to our Office, one of the protest allegations was clearly meritorious and the agency unduly delayed taking corrective action in response to this protest allegation.

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. Triple Canopy, Inc.--Costs, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 3.

Clearly Meritorious Protest Allegation

ECNP’s initial protest argued that Medi-Physics could not deliver radiopharmaceuticals within the solicitation’s time constraints, and especially could not deliver emergency doses because Medi-Physics did not have a licensed radiopharmacy near the VAMC. Protest at 12-14. As a result, ECNP argued that Medi-Physics’ proposal was technically unacceptable. Id. In reviewing protests of an agency’s evaluation, our Office does not reevaluate proposals; rather, we review

² Contrary to the agency’s argument, we may conclude that a protest was clearly meritorious even where the GAO requested an agency report or further responses, and provided guidance to the agency on the issues to be addressed in the response. See CACI Technologies, Inc.--Costs, B-407923.3, Aug. 13, 2014, 2014 CPD ¶ 321 at 4.

the evaluation to determine if it was reasonable, consistent with the solicitation's evaluation scheme and procurement statutes and regulations, and adequately documented. Triad Logistics Servs. Corp., B-407842.2, April 22, 2013, 2013 CPD ¶ 106 at 3.

With respect to the delivery of the radiopharmaceuticals, the RFP stated:

Contractor must provide daily routine deliveries as well as emergen[cy] deliveries However, VA may require Emergency orders within one hour during business hours and two hours after hours of receiving the order by phone or electronic order (web ordering). Contractor must be able to provide emergency orders placed during regular work hours (Monday through Friday 6:00 am to 4:30 pm) within 60 minutes after receipt of phoned or faxed orders from the West Palm Beach VAMC.

RFP at 6. In response to this solicitation requirement, Medi-Physics "propose[d] providing [Deleted] radiopharmaceutical doses of products commonly used by the nuclear medicine department [Deleted], which would [Deleted] in the event that emergency procedures arise [Deleted]." AR, Tab 3, Medi-Physics Proposal, at 4.

In evaluating proposals, the source selection authority relied on the SSET's determination that Medi-Physics was technically acceptable. AR, Tab 4, SSDD, at 1. The SSET evaluation for Medi-Physics consisted of a form document that showed the evaluation team checked the box "Acceptable" under "Technical Capability" and "Neutral" for "Past Performance." AR, Tab 10, SSET Report, at 1.³ There was nothing else in the SSET report concerning the awardee or its proposal. See id. In its report, the agency explained that it found Medi-Physics' proposal "technically acceptable in all aspects of the solicitation, including emergency compliance" because the company "affirmatively identified in [its] proposal their intent and ability to respond to emergencies in accordance with the timeline" specified in the solicitation. AR at 5. Further, the agency states that the "intent to provide [Deleted] in the event of an emergency . . . completely alleviates the need for [Deleted]" because in the event of an emergency, [Deleted]. Id. at 5-6. If there was a need for more radiopharmaceuticals, the VA would expect the pharmacy to deliver within the time constraints since Medi-Physics agreed in their proposal to meet the solicitation requirements and prior past performance suggested "no reason to believe that Medi-Physics is unwilling or incapable of performance." Supplemental AR at 8; see also CO Supplemental Statement at 2.

³ The RFP stated that a rating of acceptable meant the proposal met the solicitation requirements and a rating of unacceptable meant the proposal did not meet the solicitation requirements. RFP at 44.

We find clearly meritorious ECNP's protest challenging the agency's conclusion that the proposal submitted by Medi-Physics was acceptable with regard to meeting the solicitation's time constraints for delivery of radiopharmaceuticals. Specifically, the VA failed to reasonably determine, or to document its determination, that Medi-Physics could provide emergency doses within the time specified in the solicitation if the [Deleted], especially since the agency does not dispute that Medi-Physics has no local radiopharmacy in which to prepare and provide the emergency doses.⁴ Although the agency argues in its report that it relied on Medi-Physics past performance and statements in the proposal that the company will perform, the record contained no supporting information or evidence of this past performance (which the agency rated as neutral under the past performance factor).⁵ In addition, there were no contemporaneous documents in the record showing this matter was considered during the evaluation. See IBM U.S. Fed., a division of IBM Corp.; Presidio Networked Solutions, Inc., B-409806 et al., Aug. 15, 2014, 2014 CPD ¶ 241 at 15-16 (protest sustained where source selection authority's determination was not properly documented and failed to explain the basis for the decision).

Consequently, based upon the record presented, the protester's allegation--that the agency's evaluation of the awardee as technically acceptable was flawed because Medi-Physics could not meet the solicitation's deadlines for delivery of radiopharmaceuticals--was clearly meritorious. The protest allegation is viewed as clearly meritorious because a reasonable agency inquiry into the protest allegations would have disclosed the absence of a defensible legal position. See Triple Canopy, Inc.--Costs, supra, at 3.

Undue Delay

As set forth above, our Office may recommend reimbursement of protest costs if we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. 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. We generally

⁴ The RFP makes it clear that the quantities "expressed in the schedule are best estimated quantities based on historical usage for one year [and the] quantities and types of radiopharmaceuticals may vary based on patient demand" and "radiopharmaceutical items, possibly including some not listed [in the RFP], shall be ordered as needed by the Nuclear Medicine staff and delivered with daily routine deliveries." RFP at 6 (emphasis added).

⁵ The RFP stated that a rating of neutral for past performance meant that the offeror "submitted no relevant past performance information." RFP at 45.

consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest but not prompt where it is taken after that date. Alsalam Aircraft Co.--Costs, B-401298.3, Nov. 5, 2009, 2009 CPD ¶ 208 at 3.

With regard to ECNP's clearly meritorious protest ground, we find that the agency unduly delayed taking corrective action in response to this allegation. Specifically, ECNP first raised this allegation in its December 31 protest. The VA then filed its agency report, ECNP filed two supplemental protests, and the agency filed one additional agency report before taking corrective action on March 2, 2016. As a result, we find that the agency's corrective action was unduly delayed.

Severance of Costs

Ultimately, we find that the agency unduly delayed taking corrective action in response to one clearly meritorious protest allegation, while ECNP's other grounds of protest were either not clearly meritorious or the agency's corrective action in response to the allegation was prompt.⁶ 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. The Salvation Army Cmty. Corr. Program--Costs, B-298866.3, Aug. 29, 2007, 2007 CPD ¶ 165 at 7. 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 essentially constitute a separate protest. Burns & Roe Servs. Corp.--Costs, B-310828.2, Apr. 28, 2008, 2008 CPD ¶ 81 at 3. In determining whether protest issues are so clearly severable as to essentially constitute separate protests, 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. Id.

Here, we recommend that ECNP be reimbursed for its costs of pursuing all of its challenges relating to its initial and first supplemental protest. We find that the protester's challenges all relate to the agency's evaluation that the awardee was technically acceptable (e.g., awardee's ability to supply certain radiopharmaceuticals; awardee's submission of incorrect price schedules;

⁶ For example, ECNP filed a second supplemental protest on February 24, arguing that the agency engaged in unequal discussions. ECNP Second Supplemental Protest at 29-32. Rather than file a supplemental agency report addressing this protest ground, the agency provided this Office with its notice of corrective action.

awardee's taking exception to certain solicitation requirements) and are intertwined with this clearly meritorious protest issue.

RECOMMENDATION

We recommend that the VA reimburse ECNP the reasonable costs of filing and pursuing its initial and first supplemental protest challenging the agency's evaluation of the awardee's proposal. ECNP should file its claim 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)(1).

The request is granted.

Susan A. Poling
General Counsel