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**Comptroller General
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**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Cape Environmental Management, Inc.

File: B-412046.3

Date: September 29, 2016

Kevin P. Mullen, Esq., and Rachel K. Plymale, Esq., Morrison & Foerster LLP; and Carrie F. Apfel, Esq., Jenner & Block LLP, for the protester.

William E. Franczek, Esq., and Patrick Genzler, Esq., Vandeventer Black LLP, for MEB General Contractors, Inc., an intervenor.

Connie L. Baran, Esq., Department of the Army, Corps of Engineers, for the agency.

Young H. Cho, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reimbursement of costs of filing and pursuing a protest is denied where protest was not clearly meritorious, notwithstanding the agency's decision to take corrective action.

DECISION

Cape Environmental Management, Inc. (Cape), of Norcross, Georgia, requests that our Office recommend it be reimbursed the reasonable costs of filing and pursuing its protest challenging the award of a contract to MEB General Contractors, Inc.

(MEB), of Savannah, Georgia, under request for proposals (RFP) No.

W912HN-15-R-0003, issued by the Department of the Army, Corps of Engineers

(Corps), for construction to replace hydrant fuel systems at Robins Air Force Base, Georgia.

We deny the request.

BACKGROUND

The RFP, issued on March 12, 2015, under Federal Acquisition Regulation (FAR) part 15, contemplated the award of a fixed-price contract on a best-value basis,

considering the following evaluation factors: past performance, relevant specialized experience, small business participation plan, and price. RFP¹ at 2, 15. Relevant specialized experience was stated to be more important than past performance and the small business participation plan was less important than the other two factors. Id. at 15. The solicitation stated that all non-cost factors, when combined, were approximately equal in importance to price. Id.

The solicitation advised that the past performance evaluation would consider each offeror's demonstrated record of performance on recent and relevant projects that involved a similar scope, magnitude of effort, and level of complexity as this solicitation. Id. at 8. The solicitation advised that one performance confidence assessment rating (substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown confidence (neutral)) would be assigned for each offeror, with a focus on performance that was relevant to the contract requirements. Id. at 8, 11. In this regard, the solicitation stated under paragraph 4.2.2 that "[a]spects of relevant projects include similarity of scope, type of work, complexity, contract type, and the degree of subcontracting or teaming proposed by the [o]fferor." Id. The solicitation further advised that projects would be evaluated using a list of "[p]roject [c]haracteristics" (paragraph 4.2.2.1) that was "not intended to be a comprehensive list," and similar types of experience areas that are considered "especially relevant" (paragraph 4.2.2.2).² Id. As relevant here, the solicitation stated that the agency would assign relevancy ratings (e.g., very relevant, relevant, somewhat relevant, not relevant) to the projects submitted by the offerors "[u]sing the criteria described in paragraph 4.2.2 above." Id. at 9-10.

For the relevant specialized experience factor, the solicitation stated that the projects considered in the evaluation of the past performance factor that were determined to be at least somewhat relevant would be utilized to "evaluate and rate the recent, relevant specialized experience of the [o]fferor in performing similar projects." Id. at 12. The solicitation also stated in paragraph 5.1.1 that the government would "evaluate and rate the recent, relevant specialized experience of the [o]fferor in performing similar projects. Specialized experience is considered construction of fuel/[petroleum, oil, and lubricants] system projects which include work such as or similar to replacing hydrant fuel systems." Id. The RFP also provided a list of characteristics of the hydrant fuel system.³ Id. The solicitation

¹ The RFP was amended five times. All citations to the RFP are to the final version, as amended on July 13, 2015.

² The types of experience listed in 4.2.2.2, were generally captured in paragraph 4.2.2.1, however paragraph 4.2.2.1 provided additional characteristics that were not listed in paragraph 4.2.2.2. See RFP at 9.

³ Similarly, the characteristics provided in paragraph 5.1.1, were generally captured in paragraphs 4.2.2.1 and 4.2.2.2. Compare id. at 9 with 12.

stated that “[t]he [g]overnment will evaluate whether the [o]fferor has performed projects similar to those described in [paragraph] 4.2 and its sub paragraphs and 5.1.1,” and that “the relevance, quality and amount of the [o]fferor’s experience” would be evaluated. Id. The solicitation also provided that an adjectival rating (outstanding, good, acceptable, marginal, and unacceptable) would be assigned for this factor. Id. at 12-13.

The agency received three timely proposals, including those submitted by Cape and MEB, which were evaluated by a source selection evaluation board (SSEB). The SSEB submitted a consensus report to the contracting officer, who served as the source selection authority (SSA). See Agency Report (AR), Tab 6, Source Selection Evaluation Report (SSER) at 2; Tab 7, Source Selection Decision (SSD) (Pre-Corrective Action) at 1. The results of the SSEB’s evaluation for Cape’s and MEB’s proposals were as follows:

	Cape	MEB
Past Performance	Satisfactory Confidence	Substantial Confidence
Relevant Specialized Experience	Acceptable	Good
Small Business Participation Plan	Good	Good
Price	\$14,904,786	\$15,971,700

AR, Tab 7, SSD (Pre-Corrective Action) at 2.

As relevant here, the SSEB used worksheets for the past performance and relevant specialized experience factors as a tool to facilitate and document the evaluators’ consensus about the features contained in the projects submitted by the offerors. See generally AR, Tab 12, SSEB Chairman Affidavit; AR, Tab 11, Evaluation Worksheets. In this regard, the SSEB utilized 20 project characteristics⁴ for both factors. See generally AR, Tab 11, Evaluation Worksheets. The worksheets also documented the SSEB’s relevancy determination (very relevant, relevant, somewhat relevant, and not relevant) for the projects submitted for both factors. Id. The SSEB subsequently documented in the SSER the relevancy determinations and assignment of consensus strengths and weaknesses, and the overall rating for the past performance and relevant specialized experience factors. See AR, Tab 6, SSER at 7-15 (Cape), 19-27 (MEB).

Using the SSER, the SSA performed a tradeoff analysis between the offerors’ proposals in which the SSA documented and compared the strengths and weaknesses underlying the overall adjectival ratings received by the offerors, in

⁴ The project characteristics utilized by the SSEB were essentially identical to those listed in paragraph 4.2.2.1. Compare RFP at 9 with AR, Tab 11, Evaluation Worksheets.

terms of both quantity and quality, and found that as between Cape and MEB, “MEB’s superior technical ratings outweigh the 7.16% premium over Cape’s lowest priced offer,” and selected MEB for award. AR, Tab 7, SSD (Pre-Corrective Action) at 2-4.

On September 7, 2015, following a debriefing, Cape filed a protest with our Office, challenging the agency’s evaluation of the proposals under the past performance and relevant specialized experience factors. With regard to its own proposal, the protester argued that the agency failed to consider information provided in its proposal for both factors, and gave disproportionate weight to a single weakness assessed under the relevant specialized experience factor, resulting in a merely acceptable rating. See Protest at 8-14. With regard to the awardee’s proposal, Cape argued that the agency’s evaluation under both factors was flawed because, based on publicly available information, the awardee could not have submitted more than one project. Id. at 14. Cape also argued that the best-value determination was flawed because of the alleged errors in the underlying evaluation. Id. at 14-15.

On October 6, 2015, the agency filed a report with our Office responding to the arguments raised in Cape’s protest. On October 16, 2015, after receiving the evaluation record in the agency report, Cape filed a supplemental protest abandoning its initial protest grounds and now arguing that the agency’s evaluation of the proposals under the past performance and relevant specialized experience factors was flawed. Cape argued that these aspects of the evaluation were inconsistent with the RFP’s stated evaluation criteria and unsupported by the record; the agency’s evaluation of the awardee’s proposal was flawed because it failed to recognize that the majority of the awardee’s specialized experience was actually performed by subcontractors. Moreover, Cape argued that the best-value determination was flawed by the underlying evaluation errors and because the SSA allegedly engaged in a mechanical comparison of the number of strengths and weaknesses in the proposals. On October 26, 2015, the agency filed its report responding to the arguments raised in Cape’s supplemental protest. Cape filed its comments on the agency’s report on October 30, 2015.

On November 13, 2015, after receiving the protester’s comments on the agency’s supplemental report, our Office requested that the agency provide additional information, including aspects of the SSEB’s evaluation and the SSD, and respond to a number of questions about the record. GAO Email of Nov. 13, 2015. Prior to submitting a response to our inquiries, the agency informed our Office that it intended to take corrective action by reevaluating the proposals and making a new source selection decision based on the reevaluation. Agency Email of Nov. 17, 2015. Based on the agency’s corrective action, our Office dismissed Cape’s protest as academic.

DISCUSSION

Cape asks our Office to recommend that it be reimbursed the costs associated with filing and pursuing its protest, including reasonable attorneys' fees. Protester's Request at 1. The protester asserts that the agency unreasonably delayed taking corrective action despite clearly meritorious protest grounds set forth in its initial and supplemental protests. Id. The agency contends that the initial protest was not clearly meritorious, since the protester ultimately abandoned its initial protest grounds. Response to Request for Costs at 1-2. The agency further contends that the supplemental protest was not clearly meritorious because additional development of the record was required. Id. at 2.

When a procuring agency takes corrective action in response to a protest, 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. 31 U.S.C. § 3554(c)(1)(A); 4 C.F.R. § 21.8(e); Bhate Envtl. Assocs., Inc., B-410210.2, Nov. 30, 2015, 2016 CPD ¶ 69 at 4. Thus, as a prerequisite to our recommending the reimbursement of costs where a protest has been resolved by corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious, *i.e.*, not a close question. Science Applications Int'l Corp.--Costs, B-410760.5, Nov. 24, 2015, 2015 CPD ¶ 370 at 3; InfraMap Corp.--Costs, B-405167.3, Mar. 26, 2012, 2012 CPD ¶ 123 at 3. 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. Carney, Inc.--Costs, B-408176.13, Feb. 14, 2014, 2014 CPD ¶ 82 at 3.

Here, based on the record presented, we cannot conclude that the protester's argument that the agency's evaluation of the proposals under the past performance and relevant specialized experience factor was inconsistent with the stated evaluation criteria or unsupported by the record. In its supplemental protest, Cape essentially argued that for the past performance factor, the agency should have utilized the project characteristics and areas of experience considered to be "especially relevant" to determine relevancy of the offerors' referenced projects; and then separately should have utilized only the "specialized experience" listed in paragraph 5.1.1 to evaluate those projects determined to be at least somewhat relevant, for the evaluation of relevant specialized experience factor. See Supplemental (Supp.) Protest at 2-13. In this regard, the protester asserted that the criteria for the two factors were "separate and distinct," and the agency's use of 20 characteristics for both factors was improper. Id. at 6. The protester further argued that had the agency utilized the proper criteria, Cape would have received higher ratings for both factors while MEB would have received lower ratings, based on the number of criteria their projects satisfied. See id. at 7-8, 10-13.

The agency responded that its evaluation was in accordance with the solicitation. In this regard, the agency stated that for the relevant specialized experience factor, the RFP provided that “[t]he [g]overnment [would] evaluate whether the [o]fferor ha[d] performed projects similar to those described in [paragraph] 4.2 and its subparagraphs and 5.1.1,” and that therefore, it was proper to not limit its evaluation to the “specialized experience” listed for that factor. Supp. Memorandum of Law (MOL) at 1-2; RFP at 12. Further, the agency stated that it was interested in the degree to which the offerors had performed similar work, and while the characteristics listed under both factors were mostly similar and overlapping, to the extent that any single paragraph did not include characteristics that were in another paragraph, all of the characteristics were considered. See Supp. MOL at 2-3. The agency also stated that the SSEB did not tally the number of characteristics in its evaluation of either factor, but instead looked at the characteristics themselves and reached a subjective determination of how similar in scope, magnitude of effort, and complexity the project was to this procurement, based on those characteristics. Id. at 5-9.

After receipt of the protester’s comments on these supplemental protest grounds, our Office requested that the agency provide additional information, including with regard to the SSEB’s subjective determination. GAO Email of Nov. 13, 2015. Prior to submitting a response to our inquiries, the agency informed our Office that it intended to take corrective action by reevaluating the proposals and making a new source selection decision. Agency Email of Nov. 17, 2015. In its response to the protester’s request for costs, the agency explains that the subjective determination was documented during consensus discussions, but that this documentation had inadvertently been destroyed. Response to Request for Costs at 3. Because the ultimate resolution of the protest claims would have required further development of the record before us, we cannot conclude that the protester’s arguments were clearly meritorious. In our view, these arguments presented a close question, and therefore were not clearly meritorious. See Systems Research and Applications Corp.--Costs, B-406775.3, Apr. 10, 2013, 2013 CPD ¶ 99 at 5.

The request is denied.

Susan A. Poling
General Counsel