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Decision

Matter of: American Federal Contractors, Inc.--Costs

File: B-413314.4

Date: April 24, 2017

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DIGEST

Request for recommendation that protest costs be reimbursed is denied where the agency did not unduly delay taking corrective action and the protest grounds were not clearly meritorious.

DECISION

American Federal Contractors, Inc. (AFCI), of Reston, Virginia, requests that we recommend that it be reimbursed the reasonable costs of filing and pursuing its protest of the award of a contract to Beacon Associates, Inc., of Bel Air, Maryland, under request for proposals (RFP) No. HSFLAR-15-R-00001, issued by the Department of Homeland Security, Federal Law Enforcement Training Center (FLETC), for student support services at its Artesia, New Mexico location. We dismissed the protest after the agency advised our Office that it would take corrective action by canceling the solicitation and reissuing it after a review of its requirements. AFCI, the incumbent contractor for these services, argues its protest was clearly meritorious and the agency unduly delayed taking corrective action.

We deny the request.

BACKGROUND

The RFP was issued on August 20, 2015, and sought student support services including student transportation; vehicle support to include dispatching, scheduling, maintenance, and minor repair; driver training support; firearm training support; training equipment and uniform issue; provision of a recreation specialist; training and

administrative support; training record support; and provision of role players to support training scenarios. Agency Report (AR) at 2. The RFP, which was set aside for small businesses, contemplated the award of a fixed-price contract on a best-value basis considering the following factors: (1) method of operations; (2) quality control; (3) management and administration; (4) personnel qualification; (5) past performance; and (6) price. RFP at §§ L.3, M.7. The RFP provided that the non-price factors were considered approximately equal in importance, and, when combined, were approximately equal to price. Id. at § M.9. Possible ratings for the past performance factor ranged from excellent to unsatisfactory, and possible ratings for the other non-price factors were excellent, satisfactory, marginal, and unsatisfactory. Id.

The agency received seven proposals in response to the RFP. AR at 2. Only three proposals, including the protester’s proposal, were found eligible for award. AR, Tab J, Source Selection Decision Document (SSDD) at 3. The evaluation results for AFCI and Beacon were as follows:

	AFCI	Beacon
Overall Non-Price Rating	Excellent	Satisfactory
Method of Operation	Excellent	Satisfactory
Quality Control	Excellent	Satisfactory
Management and Administration	Excellent	Satisfactory
Personnel Qualifications	Excellent	Satisfactory
Past Performance	Satisfactory	Satisfactory
Evaluated Price	\$57,779,109	\$45,331,857

Id.

The source selection authority (SSA) determined that both AFCI and Beacon were capable of performing the requirements of the solicitation. Id. at 11. While the agency noted that the evaluation of AFCI’s proposal indicated that AFCI might perform at a higher level than Beacon, the SSA concluded that AFCI’s additional strengths would not be worth the 28 percent price premium. Id. at 12. Based on its comparison of the offerors, the SSA determined that Beacon’s proposal offered the best overall value. Id.

The agency first notified AFCI of its award to Beacon on June 7, 2016, and provided a written debriefing to AFCI on June 20. Protest at 6. AFCI filed a protest of that award with our Office, which was dismissed as academic on July 7, as a result of the agency’s decision to take corrective action.¹ See American Federal Contractors, Inc., B-413314, July 7, 2016 (unpublished decision). Following the agency’s corrective action, Beacon was again selected for award. Protest at 7. AFCI received a written debriefing on

¹ The agency indicated that it would review all the evaluations, make a new award decision, and prepare a new source selection decision document.

August 26, and filed a protest with our Office on August 30. In its protest, AFCI argued that the agency miscalculated Beacon's proposed staffing; improperly converted the source selection to a lowest-priced, technically acceptable procurement; miscalculated AFCI's past performance; and made an unreasonable selection decision. Protest at 2.

AFCI raised additional protest grounds on October 11, 2016, as part of its comments on the agency report. Specifically, AFCI argued that the awardee's proposal should have been found unacceptable because Beacon failed to propose a program manager who met minimum RFP requirements. Comments at 8. AFCI also argued that the agency treated offerors unequally in its evaluation by failing to account for inconsistent definitions of full-time equivalent (FTE) used by offerors. Comments at 13. In this regard, AFCI explained that it based one FTE on 2,080 hours of work, while Beacon based one FTE on 1,864 hours of work. Comments at 14. AFCI contends that the inconsistency as to what constituted an FTE prevented the agency from performing an apples-to-apples comparison of the proposals based on the number of FTEs proposed.

On October 18, 2016, the agency indicated that it intended to take corrective action, "specifically and solely" in response to the protester's supplemental allegation that the awardee's proposed project manager did not meet the solicitation's requirements. Notice of Corrective Action at 1. The agency indicated that it would cancel the solicitation and re-issue it after reviewing its requirements. Id. Based on the notice of corrective action, we dismissed AFCI's protest as academic on October 20, 2016. See American Federal Contractors, Inc., B-413314.2, B-413314.3, October 20, 2016 (unpublished decision). AFCI subsequently filed a timely request that our Office recommend that the agency reimburse the company the costs of filing its protest. AFCI's Request for Costs, November 4, 2016.

DISCUSSION

AFCI argues that its protest was clearly meritorious and the agency unduly delayed taking corrective action. The agency disputes the protester's claim, arguing that it took corrective action promptly after considering the supplemental protest grounds raised by the protester. In this regard, the agency argues that the protest grounds raised in AFCI's initial protest were not clearly meritorious, and contends that it had no basis for taking corrective action until the protester raised the argument regarding the program manager's qualifications in its supplemental protest.

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. Competition in Contracting Act (CICA) of 1984, 31 U.S.C. § 3553(c)(1)(A); Bid Protest Regulations, 4 C.F.R. § 21.8(e); East Coast Nuclear Pharmacy--Costs, B-412053.5, Aug. 31, 2016, 2016 CPD ¶ 249 at 3. 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. AGFA HealthCare Corp.--Costs, B-400733.6, April 22, 2009, 2009 CPD ¶ 90 at 2. 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. East Coast Nuclear Pharmacy--Costs, supra; Chase Supply, Inc.--Costs, B-411849.3, May 17, 2016, 2016 CPD ¶ 134 at 5.

Based on our review of the record here, we agree with the agency that none of the protester's initial arguments was clearly meritorious. For illustrative purposes, we discuss two of those allegations. First, AFCI objected to the agency's evaluation of Beacon's proposal, arguing that Beacon failed to propose sufficient staffing. Protest at 8. AFCI's argument is based on the premise that, as the incumbent, it proposed the correct staffing level, and that Beacon's lower proposed price must reflect a lower (and thus inadequate) staffing level. In response, the agency noted that the RFP did not require offerors to propose a specified number of hours or FTEs, and argued that the agency's evaluation was reasonable given that "offerors were free to propose their own technical approach and staffing levels to meet the requirements of the solicitation." AR at 6. Here, the record provides no evidence that the agency should have found that Beacon proposed inadequate staffing, simply because it proposed an approach that differed from that of AFCI. Thus, we disagree with the protester that this protest ground was clearly meritorious.

By way of a second example, the protester also argues that the agency deviated from the RFP by making award on a lowest-priced, technically acceptable basis, rather than on the best-value basis established by the RFP. The crux of the protester's argument is that it was improper for the agency to select Beacon, which had a lower rating for non-price evaluation factors and a lower price, instead of selecting AFCI which had a higher rating for non-price evaluation factors and a higher price. Protest at 11.

As the agency explained in its report, however, we have held that in a best-value procurement, such as this one, it is the function of the SSA to perform a price/technical tradeoff to determine whether one proposal's technical superiority is worth a higher price. Bahrain Mar. & Mercantile Int'l BSC, B-407575.6, July 29, 2014, 2014 CPD ¶ 320 at 7. Even where price is the least important evaluation factor, an agency properly may select a lower-priced, lower-rated proposal if the agency reasonably concludes, as it did here, that the price premium involved in selecting a higher-rated, higher-priced proposal is not justified in light of the acceptable level of technical competence available at a lower price. Id. The extent of such tradeoffs is governed only by the test of rationality and consistency with the evaluation criteria. Id. Thus, a protester's disagreement with an agency's determinations as to the relative merits of competing proposals, or disagreement with its judgment as to which proposal offers the best value to the agency, do not establish that the evaluation or source selection was unreasonable. As with the prior example, we do not find this ground or the other allegations raised in AFCI's initial protest to be clearly meritorious, and we decline to recommend reimbursement of costs associated with these allegations.

Next, with respect to the supplemental protest ground which formed the basis for the agency's corrective action--that Beacon's proposed project manager did not have the qualifications required by the RFP--we find that the agency's corrective action was not unduly delayed. An agency's corrective action is prompt when taken in response to a supplemental protest argument prior to providing the agency's response to the newly-raised argument. See KNAPP Logistics Automation, Inc.--Protest & Costs, B-404887.2, B-404887.3, July 27, 2011, 2011 CPD ¶ 141 at 5. Here, the protester's initial protest grounds primarily related to Beacon's proposed staffing levels, and not the qualifications of its proposed personnel. As such, the supplemental argument upon which the agency based its decision to take corrective action was first presented in AFCI's supplemental protest and was promptly addressed by the agency.

While the protester's second supplemental protest ground--i.e., that the agency treated the offerors unequally by failing to account for their differing definitions of FTE--is arguably somewhat related to the protester's initial complaint that Beacon failed to propose sufficient staff, based on the record before us, we are unable to conclude that the protester's argument was clearly meritorious. Comments at 13. For our Office to reach a decision about the merits of AFCI's argument, we would have to develop the record further including, at a minimum, requiring the agency to file a supplemental report and seeking supplemental comments, to weigh the merits of both parties' arguments. Following this further development of the record, we would have to conduct substantial further analysis of the parties' positions. Because the resolution of these issues requires further development, in our view, they present a close question and therefore we cannot conclude that they were clearly meritorious. See Science Applications Int'l Corp.--Costs, B-410760.5, November 24, 2015, 2015 CPD ¶ 370 at 7. We therefore decline to recommend reimbursement of AFCI's protest costs.

The request for costs is denied.

Susan A. Poling
General Counsel