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Decision

Matter of: Bhate Environmental Associates, Inc.

File: B-410210.2

Date: November 30, 2015

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Marvin Kent Gibbs, Esq., Department of the Air Force, for the agency.

Lois Hanshaw, 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 the record fails to establish a nexus between the basis of the protest raised by the protester and the basis for the agency's corrective action.

DECISION

Bhate Environmental Associates, Inc. (Bhate), of Birmingham, Alabama, requests that our Office recommend it be reimbursed the reasonable costs of filing and pursuing its protest challenging the award of a contract to Plexus Scientific Corporation (Plexus), under request for proposals (RFP) No. FA8903-14-R-0002, issued by the Department of the Air Force for environmental remediation at Scott Air Force Base, Illinois.

We deny the request.

BACKGROUND

The RFP contemplated the award of a fixed-price contract with a period of performance of 120 months from the date of contract award. RFP § L at 1.¹ The

¹ The Air Force used a Bates numbering system for individual tabs in preparing the agency report; our citations are to those numbers.

RFP stated that award would be made to the best overall offer based on an integrated assessment of the following evaluation factors, listed in descending order of importance: (1) technical/technical risk, (2) past performance, and (3) price. RFP § M at 1, 2. The RFP advised that offerors that failed to meet all solicitation requirements would be ineligible for award. RFP § L at 13.

The technical factor consisted of four subfactors. As relevant here, the most important subfactor was technical approach, for which the RFP required offerors to meet the minimum performance objective for 29 environmental cleanup sites identified in the Statement of Objectives (SOO). RFP § L at 1, 16; RFP § M at 2. For one of these, Site SS028, offerors were required to propose an approach to address oil/water separators (OWS) basewide, including OWS #3, #7 and #13, which would meet or exceed the minimum performance objective of site closure within two years.² SOO at 44. As relevant here, site closure signifies that: (1) the Air Force has completed all active management and monitoring at an environmental cleanup site, (2) no additional environmental cleanup funds will be expended at the site, and (3) the Air Force has obtained regulatory concurrence. SOO at 114.

The evaluation of the technical factors was to result in a technical rating, reflecting the quality of the offeror's solution, and a technical risk rating.³ RFP § M at 2-3. As relevant to the technical rating, if a proposal was determined to contain one or more deficiencies, it would be rated unacceptable and would be ineligible for award. Id. at 3. The technical risk rating reflected, among other things, whether a proposed technical approach had the potential to disrupt the schedule, increase costs, or require government monitoring.⁴ Id.

Six offerors submitted proposals by the RFP closing date. Legal Memorandum at 10. The Source Selection Authority (SSA), in consultation with the source selection evaluation board, identified a deficiency in Bhate's technical approach for Site SS028. Agency Report (AR), Tab 6, Source Selection Decision, at 1, 7. As relevant here, the source selection decision stated that Bhate's technical approach failed to demonstrate how or whether OWS #7 and OWS #13 would be addressed, beyond stating that they would be [deleted]. Id. at 7. Further, the decision noted that [deleted] fails to meet the three elements of site closure. Id. For the technical approach, the agency assigned Bhate a technical rating of unacceptable. Id. at 6. Bhate's proposal also received a high technical risk rating, based on a significant

² The minimum performance objective outlined in the SOO was different for each site.

³ The available technical ratings--from highest to lowest--were: blue/outstanding; purple/good; green/acceptable; yellow; marginal; red/unacceptable. RFP § M at 3.

⁴ Technical risk was rated from low to high. Id.

weakness and other identified weaknesses in its technical approach for sites other than SS028. Id. at 6-7. The Air Force selected Plexus's proposal as offering the best value. Id. at 1, 57. Following the notice of the award and a timely debriefing, Bhate protested to our Office.

The protester challenged the evaluation of its technical approach and the agency's best-value determination. Bhate contended that, in contradiction to the performance-based approach contemplated by the RFP, the agency imposed a non-performance based requirement to remove OWS #7 and #13 and improperly assessed Bhate a deficiency when its approach failed to include the removal. Protest at 8-11. Bhate also argued that it was improper for the agency to assign a high technical risk rating for sites other than SS028. Protest at 15.

In an agency report to our Office, the agency responded that Bhate's argument represented a "fundamental misunderstanding of the agency's reasons for deeming the proposal unacceptable." Legal Memorandum at 14. The agency explained that its assessment of the deficiency was reasonable because Bhate's proposed approach of [deleted] failed to achieve site closure, as required by the RFP. Id. at 13. The agency also asserted that the protester was not an interested party to challenge the risk assessment or award decision because its proposal was determined to be unacceptable. Id. at 15. In its comments on the agency report, the protester continued to challenge the grounds raised in the protest.

Fourteen days after the protester filed its comments, the agency determined that it was appropriate to take corrective action by amending the solicitation, conducting discussions with all offerors, and requesting and evaluating final proposal revisions. Our Office dismissed Bhate's protest as academic, based on the proposed corrective action. The protester's request for reimbursement of its costs followed thereafter. In its opposition to the protester's request for costs, the agency asserts for the first time that corrective action was taken because the agency determined that Site SS028 should not have been included in the solicitation. Agency Opposition to Request at 1.

DISCUSSION

Bhate 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 2, 4. The protester asserts that its protest was clearly meritorious and reimbursement is warranted because a reasonable inquiry by the agency would have shown that the protester's argument had merit. Protester's Request at 3. The agency contends that the protest was not clearly meritorious because it did not assert that Site SS028 should not have been included in and evaluated under the solicitation. Agency Opposition to Request at 1. As noted above, the agency recognized that Site SS028 should not have been included in the solicitation. Id.

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 of 1984, 31 U.S.C. § 3554(c)(1)(A) (2012); Bid Protest Regulations, 4 C.F.R. § 21.8(e). We will recommend reimbursement only where the agency action rendering the protest academic was taken in response to the protest and where the agency unduly delayed taking the action in response to a clearly meritorious protest. Talladega Machinery & Supply Co, Inc.--Costs, B-401049.3, July 6, 2009, 2009 CPD ¶ 147 at 4; DGR Assoc., Inc.--Costs, B-401791.5, Feb 16, 2010, 2010 CPD ¶ 51 at 2-3. 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.

Our review of the record does not lead us to conclude that the protest was clearly meritorious. The protest focused on the agency's assessment of a deficiency in Bhate's proposal addressing Site SS028. The agency report explained that, despite the protester's characterizations otherwise, Bhate's proposed approach failed to meet the RFP requirements for achieving site closure for Site SS028. Although the Air Force later took corrective action because it determined that Site SS028 should not have been included in the solicitation, the record fails to establish a nexus between the grounds of protest that were raised by Bhate and the agency's corrective action.

The request is denied.

Susan A. Poling
General Counsel