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Decision

Matter of: Discover Technologies LLC--Costs

File: B-413861.3

Date: March 29, 2017

Robert J. Symon, Esq., and Aron C. Beezley, Esq., Bradley Arant Boult Cummings LLP, for the protester.

Anthony E. Marrone, Esq., Department of Health and Human Services, for the agency.

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DIGEST

Request for reimbursement of protest costs is denied where the initial protest grounds were not clearly meritorious and where the agency took prompt corrective action in response to the supplemental protest.

DECISION

Discover Technologies LLC (Discover Tech) of Reston, Virginia, requests that we recommend that the firm be reimbursed the costs of filing and pursuing its protest of the establishment of a blanket purchase agreement (BPA) with Aurotech, Inc., under request for quotations (RFQ) No. FDA-16-RFQ-1151397, issued by the Department of Health and Human Services (HHS), Food and Drug Administration (FDA), for various information technology support services.

We deny the request.

BACKGROUND

The RFQ was issued on May 26, 2016, and provided for the issuance of a Federal Supply Schedule BPA on a best-value basis, considering the following evaluation factors: technical understanding and approach; management approach; relevant experience; and price. RFQ at 25-33; Contracting Officer's Statement (COS)

at 2.¹ The technical understanding and approach evaluation factor included two subfactors: call order one understanding and approach; and technical understanding and approach to technical scenario. Id. at 26. The management approach factor included two subfactors: management approach to BPA and call order one; and key personnel. Id. The relevant experience and price evaluation factors did not include subfactors. Id. at 26-33.

After evaluating timely quotations received from Discover Tech, Aurotech, and other vendors, HHS made award to Aurotech on September 19. COS at 2, 6.

On September 29, Discover Tech filed a timely protest with our Office challenging the award based on the following protest allegations: (1) that Aurotech engaged in an improper “bait and switch” with respect to most of its proposed key personnel; (2) that HHS unreasonably evaluated Aurotech’s quotation in this respect under the RFQ’s management approach factor, key personnel subfactor, and price factor; (3) that HHS unreasonably evaluated Discover Tech’s quotation under the management approach and relevant experience factors; and (4) that HHS’ best-value determination was unreasonable insofar as it was based on these allegedly flawed evaluations. See Protest at 8-14.

On October 28, HHS filed an agency report asserting defensible legal positions to each of Discover Tech’s (initial) protest grounds and providing evidence to support the agency’s positions. See Memorandum of Law at 10-29; COS at 4-11.

On November 10, Discover Tech filed comments on the agency report and raised the following supplemental protest allegations: (1) that HHS engaged in unequal discussions regarding the vendors’ proposed prices and labor rates; (2) that HHS evaluated Aurotech’s price quotation based on outdated and inaccurate information regarding the vendor’s labor rates; (3) that HHS’ price evaluations for call order one were based on an unreasonable comparison of labor rates; and (4) that HHS unequally evaluated quotations under the technical understanding and approach evaluation factor, including the subfactor for technical understanding and approach to technical scenario. Protester’s Comments at 1-9. Discover Tech also raised new arguments related to its initial protest grounds challenging HHS’ evaluation of Aurotech’s proposal under the management approach factor and key personnel subfactor. Id. at 9-11.

On November 17, HHS advised the parties that it intended to take corrective action based on the issues raised in Discover Tech’s supplemental protest. Notice of Corrective Action. The agency stated that it would, at a minimum, reevaluate

¹ Our references are to the COS and agency report filed by HHS on October 28 in response to Discover Tech’s September 29 protest (B-413861).

post-communication quotations, enter into further communications if necessary, and prepare a new award determination. Id.

On November 28, our Office dismissed Discover Tech's protests as academic based on HHS' proposed corrective action. Thereafter, Discover Tech timely filed the instant request that our Office recommend reimbursement of the firm's protest costs because, in Discover Tech's view, HHS unduly delayed taking corrective action in the face of a clearly meritorious protest.

DISCUSSION

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs, 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. Bid Protest Regulations, 4 C.F.R. § 21.8(e); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 5. As we discuss below, reimbursement of Discover Tech's protest costs is not appropriate in this case, because HHS took prompt corrective action in response to Discover Tech's supplemental protest, and because Discover Tech's initial protest grounds were not clearly meritorious and required further development of the record.

With respect to the supplemental protest grounds and new arguments raised for the first time in Discover Tech's comments on HHS' agency report, we find that the agency's corrective action prior to submitting a report in response to these grounds of protest was not unduly delayed. As our Office has explained, an agency's corrective action is prompt when it is taken in response to a supplemental protest argument prior to providing the agency's response to that newly-raised argument. See KNAPP Logistics Automation, Inc.--Protest & Costs, B-404887.2, B-404887.3, July 27, 2011, 2011 CPD ¶ 141 at 5.

With respect to the protest grounds and allegations raised in Discover Tech's initial protest filing, we find that those protest grounds were not clearly meritorious because they were legally insufficient and/or required further record development. As a prerequisite to our recommending that costs be reimbursed where a protest has been settled 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. Apptis Inc.--Costs, B-402146.3, Mar. 31, 2010, 2010 CPD ¶ 123 at 4; Triple Canopy, Inc.--Costs, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 3.

For example, Discover Tech's bait and switch allegation was not clearly meritorious because it was based entirely on Aurotech's post-award recruitment efforts, including its publication of job announcements and efforts to hire Discover Tech's

incumbent personnel. The mere fact that Aurotech may have sought to hire additional personnel does not demonstrate that HHS improperly evaluated Aurotech's proposed key personnel. See, e.g., Alamo City Eng'g Servs., Inc., B-409072, B-409072.2, Jan. 16, 2014, 2014 CPD ¶ 32 at 6-7. Moreover, the fact that Aurotech was recruiting incumbent personnel after award does not establish that Aurotech's proposed key personnel were unavailable to perform work under the BPA. See Allied Tech. Grp., Inc., B-412434; B-412434.2, Feb. 10, 2016, 2016 CPD ¶ 74 at 13-14 (finding that it is neither unusual nor inherently improper for an awardee to recruit and hire personnel previously employed by an incumbent contractor). Discover Tech did not otherwise allege that Aurotech's proposed key personnel were unavailable, unwilling, or unlikely to perform under the BPA when Aurotech submitted its quotation.² See McConnell, Jones, Lanier & Murphy--Costs, B-407706.3, May 28, 2013, 2013 CPD ¶ 125 at 3 (denying request for protest costs because protester's bait and switch allegation based on awardee's post-award recruitment of personnel was not clearly meritorious).

Consequently, Discover Tech's challenge to its management approach evaluation was not clearly meritorious, because it was based entirely on the protester's meritless bait and switch allegation discussed above. See Protest at 12 (speculating, based on Discover Tech's bait and switch allegation, that FDA's assignment of adjectival ratings was unreasonable and reflected disparate treatment under the management approach evaluation factor and key personnel subfactor). Similarly, Discover Tech's protest of its relevant experience evaluation was based entirely on the protester's disagreement with its assigned evaluation ratings, which was not clearly meritorious. See id. at 13 ("The FDA's assignment of a mere Satisfactory rating--rather than a higher rating--is unreasonable and cannot stand."). Our Office has consistently explained that the essence of an agency's evaluation is reflected in the evaluation record itself, not adjectival ratings, and that ratings, be they numerical, adjectival, or color, are merely guides for intelligent decision-making in the procurement process. HK Consulting, Inc., B-408443, Sept. 18, 2013, 2013 CPD ¶ 224 at 3 n.4; Citywide Managing Servs. of Port Washington, Inc., B-281287.12, B-281287.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 11.

In any event, Discover Tech's initial protest of HHS' evaluations under the key personnel subfactor, as well as under the management approach and price evaluation factors, was not clearly meritorious, because further analysis and record development of the parties' positions was still needed in order to respond to Discover Tech's supplemental protest grounds and new arguments under those

² In fact, in its comments on the agency report, Discover Tech explicitly withdrew its allegation that Aurotech's quotation failed to provide letters of commitment for its proposed key personnel. Protester's Comments at 2 n.1.

evaluation factors.³ Further record development was also needed to resolve Discover Tech's protest of HHS' best-value determination, because the supplemental protest challenged--for the first time--the agency's evaluations under the technical understanding and approach evaluation factor. Ordinarily, we do not regard a protest as clearly meritorious where, as here, resolution of the protest required further record development to complete and clarify the record. Threat Mgmt. Grp., B-407766.5, Mar. 28, 2013, 2013 CPD ¶ 84 at 6 (arguments are not clearly meritorious where our Office required agency to provide additional explanation); Aptis Inc.--Costs, supra at 5 (noting that the need for additional development demonstrates that protest arguments are not clearly meritorious).

In short, Discover Tech provides no basis for our Office to recommend that HHS reimburse the firm for the costs of filing and pursuing its protests, because, as discussed above, HHS took prompt corrective action in response to Discover Tech's supplemental protest and Discover Tech's initial protest grounds were not clearly meritorious.

The request is denied.

Susan A. Poling
General Counsel

³ For example, in its comments on the agency report, Discover Tech challenged, for the first time, HHS' evaluation of two individuals in particular that Aurotech proposed as key personnel. See Protester's Comments at 9-10.