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Decision

Matter of: Markit! Forestry Management, LLC--Costs

File: B-417910.3

Date: April 7, 2020

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DIGEST

GAO recommends reimbursement of the reasonable costs of filing and pursuing challenges against the agency's evaluation of the protester's price and the award decision, where the agency unduly delayed taking corrective action with respect to a clearly meritorious protest of the agency's price evaluation and best-value tradeoff determination.

DECISION

Markit! Forestry Management, LLC, a small business of Colorado Springs, Colorado, requests that our Office recommend that the U.S. Department of Agriculture (USDA) Forest Service, reimburse the firm for the reasonable costs of filing and pursuing its protest. In its protest, Markit! challenged USDA's price evaluation and best-value award decision under request for proposals (RFP) No. 1282BH-19-R-0001, which was issued for silviculture treatments. Markit! argues that its protest was clearly meritorious and that the agency unduly delayed taking corrective action.

We grant the request.

BACKGROUND

On February 22, 2019, the agency issued the RFP pursuant to the commercial item procedures of Federal Acquisition Regulation (FAR) part 12. Agency Report (AR),

Tab 4, RFP, at 1.¹ The RFP, which was set aside for small businesses, contemplated the award of multiple indefinite-delivery, indefinite-quantity (IDIQ) fixed-price contracts for vegetation removal and treatment to reduce the risk of wildfires and to meet silvicultural objectives at national forests located in, or adjacent to, five zones within the Rocky Mountain region. Id. at 1-2, 25, 49; COS at 1. Award was to be made on a best-value tradeoff basis considering price and the following non-price factors: past performance; experience/key personnel; performance of work plan and techniques; quality control plan; and utilization of biobased products. AR, Tab 5, RFP amend. 0001, at 51. When combined, the non-price factors were approximately equal to price. Id.

The RFP's performance period consisted of a base year and four 1-year option periods. Id. at 4-6, 48-49. For each year, the RFP contained nine contract line item numbers (CLINs) for different manual vegetation treatments, such as pruning or hazard tree felling, and seven CLINs for mechanical vegetation treatments, such as mowing or chipping. Id. at 4-6. Offerors were required to submit their unit price per acre² for each CLIN and indicate in which zones it wished to be considered for award.³ Id. at 49. While offerors were not required to propose on all zones, offerors were required to propose prices for all mechanical and manual CLINs to be considered for award. Id. As relevant to this request, the RFP stated that the agency would subjectively evaluate price proposals to determine the reasonableness and realism of each CLIN price. Id. at 51.

The agency received 21 proposals in response to the RFP, including Markit!'s proposal to provide manual and mechanical vegetation treatments in zones 1, 2, and 3. COS at 2. After the initial evaluation, the agency notified Markit! that its prices were determined to be extremely high and not fair and reasonable. Id. In response, Markit! timely submitted a revised proposal, which the agency evaluated. Id. at 2-3. While not expressly contemplated by the RFP, the agency awarded separate contracts for mechanical and manual vegetation treatment services. Id. at 3. On August 14, the agency awarded a contract to Markit! for only the manual CLINs in zone 1, 2, and 3. AR, Tab 23, Award Notice, at 1. The agency determined that Markit!'s unit prices for the mechanical CLINs were unacceptable, when evaluated together. AR, Tab 26,

¹ Citations are to the AR, contracting officer's statement (COS), memorandum of law (MOL), and comments in the underlying protest (B-417910, B-417910.2).

² All CLINs were to be priced by acre except for fireline construction, which was priced per linear foot.

³ The RFP only required firms to submit maximum unit prices for each CLIN. RFP at 6-8. Subsequent task orders would be competed among the IDIQ contract holders, who would then provide their best pricing in response to a request for task order proposals. Id. at 13. The agency's price evaluation here, however, examined the offerors' maximum prices.

Debrief, at 1-2. As a result, the agency did not award Markit! a contract for those services.⁴ Id.

On August 27, Markit! filed a protest with our Office, which we docketed as B-417910. The protester raised two grounds, both centering on the agency's evaluation of price. In the first, Markit! alleged that the agency failed to award the contracts on a best-value tradeoff basis, which would have required the agency to weigh "the value and benefits associated with a firm's approach against their associated cost to the government." Protest at 6, citing Glotech, Inc., B-406761, B-406761.2, Aug. 21, 2012, 2012 CPD ¶ 248 at 7. In the second, Markit! claimed that the agency did not evaluate price based on the terms of the RFP, but rather relied on unstated evaluation criteria. Id. at 9-10. Specifically, the protester argued that the agency improperly evaluated prices on an acceptable/unacceptable basis, which was not consistent with the RFP's terms that required the agency to evaluate the reasonableness and realism of the proposed price. Id.

The agency filed its agency report on September 26, defending its price evaluations and best-value tradeoff decision. See generally MOL; COS. In its comments to the agency report, Markit! reasserted its challenges to the agency's price evaluation and best-value tradeoff decision, and raised supplemental protest grounds regarding different aspects of the agency's price evaluation. Comments & Supp. Protest at 6-26. For example, the supplemental protest grounds challenged the reasonableness of the government's independent cost estimate and the agency's failure to evaluate probable cost to the government. Id. at 9-15.

On October 17, which was the deadline set by our Office for the USDA to submit the supplemental agency report, the agency notified our Office of its intent to take corrective action, stating that it had "concerns regarding the procurement" and would take corrective action to "cure any possible errors discussed in the supplemental protest" by reevaluating price proposals and making a new award decision. Notice of Corrective Action, Oct. 17, 2019 at 1. In response to a request for clarification from our Office, the agency confirmed that the corrective action was intended to render the original protest academic as well. Agency Clarification Response to Corrective Action Notice, Oct. 21, 2019. We subsequently dismissed the protest as academic. Markit! Forestry Mgmt., LLC, B-417910, B-417910.2, Oct. 25, 2019 (unpublished decision).

DISCUSSION

Markit! requests that our Office recommend that it be reimbursed the reasonable costs of filing and pursuing its protest because the agency unduly delayed taking corrective

⁴ Most of Markit!'s prices for the mechanical CLINs were considered to be too high, although at least one was considered to be too low. See AR, Tab 18, Markit Price Evaluation Schedule.

action in the face of a clearly meritorious protest.⁵ Req. for Reimbursement at 3-9. The agency counters that Markit!'s initial protest grounds fall short of our Office's standard for recommending reimbursement of protest costs. Opp'n to Req. for Reimbursement at 2-7. The USDA next contends that the protester abandoned its original protest grounds in its comments and submitted only supplemental protest grounds. Id. Based on our review of the record, we find Markit!'s initial challenges to the agency's price evaluation and resulting award decision to be clearly meritorious. Moreover, we find that the agency unduly delayed taking corrective action in response to these clearly meritorious protest grounds.

Undue Delay

Our decisions provide that, when a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs where, 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. 4 C.F.R. § 21.8(e); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 5. Therefore, as an initial matter, with respect to the promptness of the agency's corrective action, we review the record to determine whether the agency took appropriate and timely steps to investigate and resolve the impropriety. Chant Eng'g Co., Inc.--Costs, B-274871.2, Aug. 25, 1997, 97-2 CPD ¶ 58 at 4. While we consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest, we generally do not consider it to be prompt where it is taken after that date. Alsalam Aircraft Co.--Costs, B-401298.3, Nov. 5, 2009, 2009 CPD ¶ 208 at 3. In this case, the USDA submitted an agency report in response to the protest, causing the protester to expend unnecessary time and resources providing comments. Notice of Corr. Action, Oct. 17, 2019 at 1. By waiting until after submission of comments to announce its intent to take corrective action, the agency's corrective action was not prompt with respect to the initial protest grounds. Alsalam Aircraft Co.--Costs, supra. Accordingly, we conclude that the agency unduly delayed taking corrective action.

Clearly Meritorious

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. Valkyrie Enters., LLC--Costs, B-415633.2, Oct. 29, 2018, 2019 CPD ¶ 41 at 3. A protest is clearly meritorious where a reasonable agency inquiry into the protester's

⁵ Markit! concedes that the agency did not unduly delay taking corrective action in response to its supplemental protest grounds and only requests that our Office recommend the reimbursement of its costs related to its initial protest. Req. for Reimbursement at 3-4 n.2. Accordingly, our recommendation is limited to the costs that Markit! incurred filing its initial protest and comments.

allegations would reveal facts showing the absence of a defensible legal position. Deque Sys., Inc.--Costs, B-415965.5, Aug. 23, 2018, 2018 CPD ¶ 304 at 4.

Price Reasonableness

Markit!'s initial protest allegations centered on the reasonableness of the agency's price evaluation and the resulting award decision. In essence, the protester challenged the agency's determination that its prices for the mechanical vegetation treatment CLINs were unacceptable when considered together, and the protester argued that this finding was unreasonable and inconsistent with the terms of the RFP. The USDA argued that it was reasonable not to award the protester a contract for the mechanical CLINs because the protester's maximum prices were considered to be unacceptably high. COS at 3.

It is a fundamental principle of federal procurement law that procuring agencies must condition the award of a contract upon a finding that the contract contains "fair and reasonable prices." FAR §§ 15.402(a), 15.404-1(a); see also Cognosante, LLC, B-417111 et al., Feb. 21, 2019, 2019 CPD ¶ 93 at 5. The purpose of a price reasonableness analysis is to prevent the government from paying too high a price for a contract. Cognosante, LLC, supra. An agency may use various price analysis techniques and procedures to ensure a fair and reasonable price, including the comparison of proposed prices to each other, to prices found reasonable on previous purchases, or to an independent government estimate. FAR § 15.404-1(b)(2); Technatomy Corp., B-414672.5, Oct. 10, 2018, 2018 CPD ¶ 353 at 12. The manner and depth of an agency's price analysis is a matter committed to the discretion of the agency, which we will not disturb provided that it is reasonable and consistent with the solicitation's evaluation criteria and applicable procurement statutes and regulations. Id.

Based on our review, we conclude that the agency's price evaluation was fundamentally flawed and inconsistent with the RFP. We also find that a reasonable agency inquiry into the protester's price evaluation allegations should have revealed facts showing the absence of a defensible legal position.

In its award decision, the source selection authority (SSA) stated that the agency's overall price ratings were determined by comparing proposed maximum prices for each CLIN with the independent government estimate for that CLIN. AR, Tab 19, Source Selection Decision Memorandum (SSDM), at 4. The SSA asserted that all prices more than 15 percent higher or lower than the government estimate were deemed unreasonably high or unrealistically low and therefore "unacceptable."⁶ Id., see also COS at 2. The agency explained that Markit! "was eliminated because its price was found to be too high." MOL at 7.

⁶ Although the record varies as to whether prices within 15 or 16 percent of the independent government estimate were acceptable or unacceptable, and occasionally states the inverse, i.e., that prices at least 15 percent higher or lower than the government estimate were considered acceptable, these inconsistencies do not affect the analysis here.

As an initial matter, we find nothing improper about the agency's decision to compare proposed prices with an independent government cost estimate to ensure prices were fair and reasonable. The FAR sets forth several price analysis techniques that may be used to determine whether prices are reasonable and realistic, one of which is a comparison of the prices received with an independent government estimate. FAR § 15.404-1(b)(2)(v); Biospherics, Inc., B-285065, July 13, 2000, 2000 CPD ¶ 118 at 6. We have also previously found that there is nothing improper with an agency using a percentage range above and below the government estimate in conducting its price analysis. Biospherics, supra at 8. However, while the manner and depth of an agency's price analysis is within the agency's discretion, the application of the agency's pricing method must be reasonable and consistent with the terms of the RFP. Technatomy Corp., supra.

In this case, the SSA's award decision rests on the finding that the price evaluators considered proposed CLIN prices above or below 15 percent of the government estimate to be unacceptable; however, the price evaluation relied upon by the SSA did not follow that methodology. Compare AR, Tab 19, SSDM at 4, with Tab 20, SSDM Cost/Price Analysis. In this regard, although every offeror included certain CLIN prices that were at least 15 percent above or below the government estimate for these CLINs, those proposed prices were not assigned an overall rating of unacceptable.⁷ AR, Tab 20, SSDM Cost/Price Analysis, Base Year Price Evaluation.

Instead, after calculating that almost every proposed CLIN price was outside of the acceptable range, the price evaluators then assigned each proposed CLIN price one of the following ratings: acceptable, slightly low, low, extremely low, slightly high, high, or extremely high. AR, Tab 20, SSDM Cost/Price Analysis, Cost Comparison. The price evaluators then assigned each proposal separate consensus ratings of acceptable or unacceptable for the manual and mechanical CLINs. AR, Tab 20, SSDM Cost/Price Analysis, Consensus Price. In light of this, the SSA's assertion that CLIN prices above or below 15 percent of the government estimate were unacceptable is inconsistent with the price evaluation performed.

Furthermore, in the award decision, the SSA stated that an "overall price determination of acceptable or unacceptable was based on the average ratings of each line item for each proposal." AR, Tab 19, SSDM at 4. However, the contemporaneous record does not reflect how this average rating was determined when, under the agency's price evaluation, the majority of proposed maximum CLIN prices were outside the agency's benchmark for reasonable or realistic prices. Additionally, the RFP did not contemplate that the agency would average the adjectival ratings for unit items prices in evaluating

⁷ For example, the agency awarded a contract to GE Forestry, Inc. for both manual and mechanical CLINs, finding its proposed prices reasonable and realistic, even though every one of its proposed maximum CLIN prices was more than 15 percent above or below the government estimate for the base year. COS at 2; AR, Tab 20, SSDM Cost/Price Analysis, Base Year Price Evaluation.

proposals for price reasonableness. Instead, the plain language of the RFP required the agency to determine whether the proposed price of “[e]ach unit item” was “fair and reasonable.” RFP at 52. We believe that a reasonable agency inquiry into Markit!’s price allegations would have revealed facts showing the absence of a defensible legal position. Valkyrie Enters., LLC--Costs, *supra*. Accordingly, we find that the allegation that the agency’s price evaluation was unreasonable was clearly meritorious. *Id.*

Best-Value Tradeoff Decision

In its initial protest, Markit! alleged that the agency’s best-value tradeoff decision was unreasonable because the agency failed to “meaningfully consider cost or price to the government in making its selection decision.” Protest at 6-9. We agree that the agency failed to make a reasonable best-value tradeoff because the decision relied on a mistaken belief about the price evaluation. Importantly, the SSA failed to recognize that many of the vendor’s prices substantially exceeded the thresholds established by the agency’s acceptability baseline.

As a general matter, source selection officials enjoy broad discretion in making tradeoffs between the comparative merits of competing proposals in a best-value evaluation scheme; such tradeoffs are governed only by the test of rationality and consistency with the solicitation’s evaluation criteria. Coastal Int’l Sec., Inc., B-411756; B-411756.2, Oct. 19, 2015, 2015 CPD ¶ 340 at 14. In a tradeoff source selection process, an agency cannot eliminate a technically acceptable proposal from consideration for award without taking into account the relative cost of that proposal to the government. Technatomy Corp., *supra* at 23; Kathpal Techs., Inc.; Computer & Hi-Tech Mgmt., Inc., B-283137.3 *et al.*, Dec. 30, 1999, 2000 CPD ¶ 6 at 9 (agency cannot eliminate a technically acceptable proposal from consideration for award without taking into account the relative cost of that proposal to the government).

Here, the SSA’s decision to not award a contract to Markit! for the mechanical vegetation treatment services was based on an apparently mistaken belief that all proposals above or below 15 percent of the independent government estimate were considered unacceptable. AR, Tab 19, SSDM, at 4. As discussed above, the USDA’s award decision was based in part on an unreasonable price evaluation that was not consistent with the contemporaneous record. Consequently, we also find the protester’s allegation that the agency’s best-value decision was unreasonable to be clearly meritorious.

Abandonment

The USDA argues that Markit!’s initial protest arguments were based on “very specific fact-based justifications” that were abandoned in the comments. Opp’n to Req. for Reimbursement at 3. For example, the agency states that Markit! initially alleged that the agency relied on unstated evaluation criteria in conducting its price evaluation but that the protester raised “an entirely new argument” regarding the agency’s price evaluation in its comments. *Id.* at 5. Regarding the best-value tradeoff protest, the

USDA argues that Markit! alleged that the procurement was improperly converted to a lowest-price technically acceptable award basis but that the comments rely on “totally separate arguments” that the tradeoff was improper based on a flawed price analysis. Id. at 7. Markit! asserts that it did not abandon its initial protest grounds because its initial protest and comments “rely on the same set of operative facts and legal theories.” Response to Agency’s Opp’n to Req. for Recommendation of Reimbursement at 7.

The record does not reflect that that the protester abandoned the clearly meritorious protest grounds in its comments. A protest ground is abandoned where an agency provides a detailed response to a protester’s assertion and the protester fails to rebut or respond to the agency’s argument in its comments. See IntegriGuard, LLC d/b/a HMS Fed.--Protest and Recon., B-407691.3, B-407691.4, Sept. 30, 2013, 2013 CPD ¶ 241 at 5; see also 4 C.F.R. § 21.3(i) (“GAO will dismiss any protest allegation or argument where the agency’s report responds to the allegation or argument, but the protester’s comments fail to address that response.”).

Here, Markit! rebutted the agency’s defense of its price evaluation and best-value decision by providing examples drawn from the agency record that supported its original protest allegations. Comments at 7-9, 22-25. For example, Markit! cited portions of the contemporaneous price evaluation to demonstrate that the agency unreasonably averaged the adjectival price ratings for CLINs to determine acceptability, which was inconsistent with the terms of the RFP. Id. at 8-9. Accordingly, Markit! did not abandon its initial protest grounds by advancing legal theories and arguments that responded to the agency’s position and the new information in the record. United States Marine Corps--Recon., B-417830.2, Mar. 6, 2020, 2020 CPD ¶ 99 at 4-5 (finding that the protester’s comments were not supplemental protests because they “merely represented an amplification of its original argument in light of information in the agency report, which confirmed the protester’s contentions. . .”).

RECOMMENDATION

We recommend that Markit! be reimbursed the reasonable costs of filing and pursuing its initial protest and comments, including reasonable attorneys’ fees, because the agency unduly delayed taking corrective action in response to clearly meritorious protest allegations. In this regard, as a general rule, we recommend that a successful protester be reimbursed its incurred costs with respect to all issues pursued, and not merely those upon which it prevails. This is because limiting recovery of protest costs to only those issues on which the protester prevailed would be inconsistent with the broad remedial congressional purpose behind the cost reimbursement provisions of the bid protest provisions of the Competition in Contracting Act of 1984. See 31 U.S.C. § 3554(c)(1)(A); Fluor Energy Tech. Servs., LLC--Costs, B-411466.3, June 7, 2016,

2016 CPD ¶ 160 at 3. The protester should file its claim for costs, detailing and certifying the time expended and costs incurred, directly with the agency within 60 days of receipt of this recommendation. 4 C.F.R. § 21.8(f)(1).

The request for a recommendation for reimbursement of protest costs is granted.

Thomas H. Armstrong
General Counsel