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Decision

Matter of: Oready, LLC--Costs

File: B-418297.2

Date: March 30, 2020

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DIGEST

Protester is not entitled to reimbursement of protest costs where the agency took corrective action after receipt of the protester's comments because the initial protest was not clearly meritorious; thus, we cannot conclude that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest.

DECISION

Oready, LLC, a small business of Las Vegas, Nevada, requests that our Office recommend the Government Publishing Office (GPO) reimburse Oready's reasonable costs of filing and pursuing its protest challenging the technical evaluation conducted by the agency under request for quotations (RFQ) No. 040ADV-19-Q-0124b, which was issued for Gigamon system engineer support. Oready argues that its protest was clearly meritorious and that the agency unduly delayed taking corrective action.

We deny the request.

BACKGROUND

On September 21, 2019, the agency issued the RFQ pursuant to the procedures of Federal Acquisition Regulation (FAR) part 12, Acquisition of Commercial Items, and FAR part 13, Simplified Acquisition Procedures. Agency Report (AR), Tab 11, RFQ,

at 129; Contracting Officer's Statement (COS) at 4.¹ The RFQ contemplated the award of a fixed-price contract with a period of performance of twelve months after the date of contract award. RFQ at 114. The RFQ sought quotations for specialized engineering professional services for onsite support in Gigamon system administration, configuration, and operations.² Id. at 126.

The RFQ provided that award would be made on a lowest-priced, technically acceptable basis. Id. at 153. Only the lowest priced quotation would be evaluated for technical acceptability, and if found to be unacceptable, then the next lowest priced quotation would be evaluated. Id. The evaluation process would continue until a technically acceptable quotation was identified. Id. The RFQ instructed offerors to "set forth full, accurate and complete information as required" by the RFQ. Id. at 151. The RFQ warned offerors that if the RFQ's instructions are not followed, the quotation "may be eliminated from further consideration." Id.

Regarding the technical evaluation, the agency would assign a rating of acceptable or unacceptable for each proposal based on meeting the minimum standard for professional qualifications. Id. at 153. Relevant to this request, the RFQ stated that the minimum standard of acceptability for professional qualifications is for the offeror to propose an individual who "must have demonstrated experience and skills in Gigamon system administration, which is evidenced by the Offeror supplying the Gigamon part number (SKU) GPS-GOS-RSE" in its quotation.³ Id. at 154.

The agency received four timely quotations in response to the RFQ, including Oready's. COS at 3-4. On September 28, the agency awarded the contract to Blackwood Associates, Inc. in the amount of \$296,700. AR, Tab 22, Contract Award, at 279, 282. On November 14, the agency provided Oready with a written debrief, which notified the protester that its quotation was one of the lowest-priced, but that it was technically

¹ Citations are to the agency report, COS, Memorandum of Law (MOL), and comments in the underlying protest (B-418297). References to page numbers in this decision are to the Bates numbering provided by GPO in the agency report.

² According to a data sheet provided by the GPO, Gigamon Professional Services provides subject matter experts to help customers get the greatest value from "[d]esigning, deploying and expanding network visibility solutions into existing infrastructure" by applying best practices. AR, Tab 3, Gigamon Data Sheet, at 7. Gigamon Professional Services provides 16 different design and deployment assistance packages based on the client's need. Id. at 9-10.

³ While described as a part number, GPS-GOS-RSE is one of 16 different Gigamon professional services a customer can order. AR, Tab 3, Gigamon Data Sheet, at 8-10. GPS-GOS-RSE specifically refers to a "Gigamon Onsite Resident Support Engineer," providing 50 weeks of on-site support. Id. at 10.

unacceptable because it “did not provide Gigamon part number GPS-GOS-RSE, which was required in the solicitation.”⁴ AR, Tab 21, Debrief to Oready, at 277.

On November 19, Oready filed a protest with our Office, which we docketed as B-418297. In its protest, Oready asserted that the agency’s technical evaluation was unreasonable and that it should have been awarded the contract. Protest at 3. In this regard, the protester argued that its quotation explicitly referred to the required Gigamon part number, GPS-GOS-RSE, and that its submitted resumes demonstrated experience providing that part number by describing experience in Gigamon system administration and engineering services. Id.

The agency responded on December 19, defending its technical evaluation and award decision. See generally MOL; COS. In its comments to the agency report, Oready reasserted its challenges to the technical evaluation and argued that the RFQ did not provide limitations on where or how the part number should be listed. Comments at 2-3.

On December 31, the agency notified our Office of its intent to take corrective action by terminating the contract awarded to Blackwood and issuing a new solicitation for the Gigamon system administration requirement. Notice of Corrective Action, Dec. 31, 2019 at 1. We subsequently dismissed the protest as academic. Oready, LLC, B-418297, Jan. 3, 2020 (unpublished decision). This request followed.

DISCUSSION

Oready 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 action in the face of a clearly meritorious protest. Req. for Reimbursement at 1-3. The agency counters that Oready’s protest was not clearly meritorious as initially filed, and that the agency had a defensible legal position for its response. Opp’n to Req. for Reimbursement at 1-2.

Under the Competition in Contracting Act of 1984, our Office may recommend that protest costs be reimbursed only where we find that an agency’s action violated a procurement statute or regulation. 31 U.S.C. § 3554(c)(1). 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

⁴ Another vendor proposed the lowest priced quotation, but GPO also determined that its quotation was technically unacceptable for not supplying the required Gigamon part number. AR, Tab 20, Award Decision, at 271-272; COS at 3. Oready’s quotation proposed the second lowest price. Id. Blackwood Associates’ quotation was the third lowest-priced and the only quotation that GPO found technically acceptable. Id.

Protest Regulations, 4 C.F.R. § 21.8(e); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 5.

This does not mean that costs should be reimbursed in every case in which an agency decides to take corrective action; rather, a protester should be reimbursed its costs only where an agency unduly delayed its decision to take corrective action in the face of a clearly meritorious protest. Aircraft & Turbine Support Corp.--Costs, B-417145.2, Feb. 12, 2019, 2019 CPD ¶ 78 at 2. The mere fact that an agency decides to take corrective action does not necessarily establish that the protest was clearly meritorious, that the agency had no defensible legal position, nor that a statute or regulation has clearly been violated. Triple Canopy, Inc.--Costs, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 3. 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.

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. 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. Procinctu Grp. Inc.--Costs, B-416247.4, Sept. 21, 2018, 2019 CPD ¶ 36 at 4. The existence of any defensible legal position or close question is sufficient to show that a protest allegation was not clearly meritorious so as to warrant reimbursement of protest costs. *Id.*

We conclude that it is not appropriate to recommend that Oready recover its protest costs because the protest was not clearly meritorious. In its protest, Oready argued that it offered the lowest priced quotation and “plainly” met the minimum standards of acceptability. Protest at 3. Oready argued that its quotation “explicitly referred to and offered the Gigamon part number GPS-GOS-RSE” and that the GPO acted improperly by determining that its quotation was technically unacceptable. *Id.* However, the only reference to the required Gigamon part number in the quotation was in the following sentence fragments: “The skills and system administration as demonstrated by those provided in Gigamon GPS-GOS-RSE. Company accordingly is providing two personnel resumes specialized and qualified for tasks in this project.” *Id.* at 7 (quoting AR, Tab 14, Oready Quotation, at 191). The agency found that it “could not reasonably conclude that the offeror unequivocally intended to offer” to meet the RFQ’s requirements based on Oready’s “passing and confusing reference” to the part number. MOL at 7. We agree.

A vendor has the responsibility to submit an adequately written quotation that includes sufficiently detailed information to affirmatively demonstrate that the vendor will comply with the solicitation requirements. See FedResults, Inc., B-414641, Aug. 8, 2017, 2017 CPD ¶ 271 at 6. Vendors bear the burden for failing to submit an adequately written quotation, and contracting agencies are not obligated to go in search of needed

information which the vendor has omitted or failed adequately to present. Id.; see also The Severson Grp., B-298195, June 9, 2006, 2006 CPD ¶ 94 at 3.

Here, the RFQ defined the minimum standard of acceptability in terms of a vendor “supplying the Gigamon part number (SKU) GPS-GOS-RSE” in its quotation. RFQ at 154. We disagree with Oready’s characterization of its quotation as having “explicitly” offered to supply the part number. In our view, it was unclear whether Oready was proposing to provide the actual Gigamon part number or merely a service that would provide similar, but not identical, attributes. Faced with an ambiguity as to what the protester was proposing to furnish (and thus an ambiguity as to whether it was proposing to furnish a service meeting the requirements of the RFQ), we think the agency’s rejection of Oready’s quotation was reasonable. See RANA Tech.--Costs, B-400471.2, Feb. 3, 2009, 2009 CPD ¶ 38 at 4 (finding that it was reasonable for the agency to reject RANA’s proposal because it was ambiguous about whether it was offering to furnish the items).

As a result, in light of Oready’s ambiguously written quotation regarding the part number, we are not persuaded that Oready’s protest was meritorious, let alone clearly meritorious. See Triple Canopy, supra at 4 (holding that we need not definitely resolve whether the protest grounds were meritorious, only whether the protest was clearly meritorious). The allegations raised by Oready in its protest allegations do not meet the high bar set by the clearly meritorious standard. Northrop Grumman Sys. Corp.--Costs, B-412278.6, Feb. 7, 2017, 2017 CPD ¶ 68 at 5. Because Oready’s initial protest was not clearly meritorious, it follows that there is no basis for recommending reimbursement of Oready’s protest costs. Intercontinental Constr. Contracting, Inc.--Costs, B-400729.3, Mar. 4, 2009, 2009 CPD ¶ 44 at 4.

The request that we recommend reimbursement of costs is denied.

Thomas H. Armstrong
General Counsel