



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Apptis Inc.--Costs

File: B-402146.3

Date: March 31, 2010

Patricia H. Wittie, Esq., Karla J. Letsche, Esq., and Kathryn E. Swisher, Esq., Oldaker Belair & Wittie LLP, for the protester.

Maj. Carla T. Peters, Department of the Army, for the agency.

Jonathan L. Kang, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for a determination of entitlement based on agency's decision to take corrective action is denied where the corrective action was prompt with respect to supplemental protest arguments, and the initial protest arguments were not clearly meritorious.

DECISION

Apptis Inc., of Chantilly, Virginia, requests that our Office recommend that the Department of the Army, Army Medical Research Acquisition Activity, reimburse its costs of filing and pursuing its protest of the issuance of a task order to Electronic Data Systems, LLC (EDS), of Herndon, Virginia, under task order proposal request (TOPR) No. VAP 09-13200, for support services for the Military Health System Services Desk.

We deny the request.

BACKGROUND

The TOPR was issued on August 10, 2009, and sought quotes for information technology support services. The TOPR was limited to vendors under a multiple-award indefinite-delivery/indefinite-quantity contract for Defense Medical Information Systems/Systems Integration, Design, Development, Operation and Maintenance Services. The solicitation anticipated award of a fixed-price task order, with a 1-month transition period, an 11-month base period, and three 12-month options. The solicitation stated that offerors would be evaluated on the basis of

price, and the following non-price evaluation factors, which were listed in descending order of importance: information technology service management (ITSM) technical approach;¹ past performance; service desk/ITSM management approach; service desk/ITSM experience; and quality control approach towards continual service improvement. The TOPR advised offerors that the technical factors were “significantly more important” than price, and that “[o]nly proposals receiving an overall rating of ‘Acceptable’ or higher will be considered for award.” TOPR at 6.

The Army received proposals from four offerors, including Apptis and EDS. The Army convened a technical evaluation panel (TEP) to evaluate the offerors’ technical proposals. After the TEP completed its evaluation, the contracting officer (CO), who also served as the source selection authority (SSA) for this procurement, revised the TEP’s ratings for Apptis’ proposal. The CO lowered the protester’s rating under the ITSM technical approach from acceptable to marginal, raised its rating under the past performance factor from moderate to low risk, and lowered its overall technical rating from acceptable to marginal.² Compare Agency Report (AR), Tab 8, TEP Report at 4-6 with Tab 10, Award Decision Memorandum (ADM), at 7.

The Army’s final ratings of the firms’ proposals were as follows:

	APPTIS	EDS
OVERALL TECHNICAL	MARGINAL	GOOD
ITSM technical approach	Marginal	Good
Past performance	Low risk	Low risk
Service desk/ITSM management approach	Marginal	Good
Service desk/ITSM experience	Marginal	Good
Quality control approach	Acceptable	Good
PRICE	\$97,025,632	\$114,326,058

AR, Tab 10, ADM, at 7, 13.

Because Apptis did not receive an overall technical score of “acceptable” or higher, it was not considered for award. Id. at 15. The Army conducted a price-technical tradeoff evaluation of the three remaining offerors, and selected EDS for award.

¹ This evaluation factor had four subfactors.

² For the non-past performance factors, the TOPR used an evaluation scheme of exceptional, good, acceptable, marginal, and unacceptable. For past performance, the TOPR used an evaluation scheme of low, moderate, high, and unknown risk.

Apptis requested a debriefing regarding the award, which was provided on October 6.

On, October 16, Apptis filed a protest challenging the award to EDS. The protester raised a number of arguments, including, as relevant here, challenges to its ratings under the technical approach, service desk/ITSM management approach, and service desk/ITSM experience evaluation factors. The protester also argued that the agency did not evaluate EDS's proposal for price reasonableness, and that the selection decision did not adequately justify award to EDS in light of its higher proposed price as compared to Apptis.

On November 27, Apptis filed a supplemental protest which raised the following arguments: (1) the CO improperly revised the TEP's ratings for Apptis' proposal; (2) the evaluation deviated from the stated weights of the factors identified in the TOPR; (3) the agency failed to consider Apptis' past performance in its overall technical evaluation rating; (4) the agency's evaluation of EDS's proposal under the technical approach factor was flawed; (5) the agency treated EDS and Apptis differently with regard to the evaluation of similar areas of the technical approach and service desk/ITSM management approach factors; and (6) the agency's evaluations of Apptis' and EDS's price proposals were flawed. On November 30, Apptis submitted comments on the agency report regarding its initial protest arguments.³

On December 2, our Office requested that the Army provide a report addressing the supplemental protest issues by December 8. We also requested that the agency provide more information concerning the following initial and supplemental protest issues: (1) the CO's revisions to the TEP's evaluation ratings; (2) the evaluation of Apptis' discussion of the Blade Operations Center (BOC) requirements under the technical approach factor; (3) the evaluation of Apptis' proposed transition approach; and (4) the indication by the Army that past performance was not considered in offerors' overall technical ratings. GAO Email, Dec. 2, 2009, at 1.

On December 8, prior to submitting its supplemental report, the Army advised that it would take corrective action by re-evaluating offerors' proposals and making a new selection decision. In its notice, the agency stated that it was not taking corrective action in response to any of the initial protest issues, but instead explained that "the supplemental protest indicated that the Government should have more clearly explained the basis for the source selection decision." Army Notice of Corrective

³ Our Office granted an extension to the parties to file comments regarding the Army's report on the initial protest issues, but advised Apptis that we could not extend the time for filing supplemental protest issues arising from the documents that were provided by the agency 1 day prior to the production of the agency's legal memorandum.

Action, Dec. 8, 2009, at 1. In response to the request for costs, the Army further explained that its decision was based on issues raised by our Office's December 2 request for more information. Agency Reponse to Request for Costs at 3.

DISCUSSION

Apptis requests that we recommend that the agency reimburse its costs of pursuing its initial and supplemental protests. For the reasons discussed below, we agree with the Army that reimbursement is not warranted here because the agency's corrective action was prompt with regard to the supplemental protest arguments, and because the initial protest arguments were not clearly meritorious.

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. 31 U.S.C. § 3554(c)(1)(A) (2006); Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2009); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. The mere fact that an agency decides to take corrective action does not also establish that a statute or regulation clearly has been violated. Id. Thus, as a prerequisite to our recommending the reimbursement of costs 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. PADCO, Inc.--Costs, B-289096.3, May 3, 2002, 2002 CPD ¶ 135 at 3. A protest is clearly meritorious where a reasonable agency inquiry into the protester's allegations would reveal facts showing the absence of a defensible legal position. Yardney Technical Prods., Inc., B-297648.3, Mar. 28, 2006, 2006 CPD ¶ 65 at 4. Additionally, 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. AGFA HealthCare Corp.--Costs, B-400733.6, Apr. 22, 2009, 2009 CPD ¶ 90 at 3-4.

We conclude that the Army's corrective action was prompt with regard to Apptis' supplemental protest arguments. As discussed above, the protester raised a number of supplemental arguments on November 27. Because the agency's corrective action took place prior to the submission of its supplemental agency report responding to these arguments, such that Apptis did not need to expend unnecessary time or resources responding to the report, we view the corrective action as prompt.⁴ See AGFA HealthCare Corp.--Costs, *supra*.

⁴ Apptis also argues that its challenge to the CO's revisions to the TEP's evaluation ratings should be considered as part of the protester's initial challenge to the agency's failure to conduct a reasonable selection decision, and that the agency's corrective action was therefore not prompt with regard to this issue. Specifically,

(continued...)

With regard to the initial protest arguments cited by the protester in its request for reimbursement, we conclude, as explained below, that none of them are clearly meritorious. As discussed above, our Office requested additional information from the agency in order to further develop the record with respect to these issues. In our view, the need for such additional development demonstrates that the protest arguments were not clearly meritorious. See Alaska Structures, Inc.-Costs, B-298575.4, Jan. 22, 2007, 2007 CPD ¶ 15 at 6 (requesting additional record development by the agency in response to protester's comments demonstrates that a protest issue is a "close question," that is, not clearly meritorious).

First, Apptis contends that the Army improperly failed to consider its proposal in the price-technical tradeoff analysis for award. As discussed above, however, the agency did not consider the protester's proposal for award because the solicitation stated that only offerors whose proposals received an overall technical score of acceptable or better would be eligible for award. In light of the protester's overall technical rating of marginal, we think that the agency's decision here was consistent with the solicitation and provides no basis to conclude that this protest ground was clearly meritorious. Instead, for us to conclude that this ground of the protest was clearly meritorious, Apptis must demonstrate that its proposal should have received an overall rating of acceptable or better. As discussed below, we do not find Apptis' challenges to the evaluation of its technical proposal—which received marginal ratings under three of the five evaluation factors—to be clearly meritorious.

Next, Apptis argues that the Army unreasonably rated its proposal as marginal under the technical approach factor. The overall marginal rating for this factor was based on one weakness and two significant weaknesses regarding the protester's transition approach, which was one of four equally-weighted subfactors under the technical approach factor.⁵ AR, Tab 10, ADM, at 7. The agency concluded that these

(...continued)

the protester contends that the challenge to the best value decision should have put the agency on notice that its entire evaluation scheme—including the CO's revisions to Apptis' evaluation ratings—was flawed. We do not think that these two arguments are sufficiently related to warrant reimbursement of the supplemental argument. In any event, we think that the challenge to the CO's revisions is not clearly meritorious given that a selection official may make an independent evaluation of offerors' proposals, and may disagree with or expand upon the findings of lower-level evaluators, provided the evaluation is reasonable and documented in the contemporaneous record. KPMG Consulting LLP, B-290716, B-290716.2, Sept. 23, 2002, 2002 CPD ¶ 196 at 13.

⁵ Although the protester refers to four subfactors for the technical approach factor, the TOPR did not explicitly identify the evaluation criteria as separately-scored subfactors. Instead, the solicitation stated that the evaluation factor would assess technical approach in four areas: (1) understanding information technology

(continued...)

weaknesses outweighed the single significant strength that related to its understanding of ITSM and incident and problem management requirements. Id.

Apptis argues that the weaknesses assessed for its transition approach were not reasonable. As discussed above, we asked the agency to provide more information concerning its evaluation of Apptis' proposed transition. GAO Email, Dec. 2, 2009, at 1. Because the agency took corrective action before providing this information, the record is not complete, and provides no basis to find that this protest argument is clearly meritorious. See Alaska Structures, Inc.--Costs, supra.

The protester also contends that because the overall factor rating of marginal was based on weaknesses under a single subfactor, the agency unreasonably did not accord equal weight to all of the four subfactors. Our Office has recognized that where, as here, a solicitation does not disclose the relative weight of evaluation factors or subfactors in a FAR Part 15 procurement, they should be considered approximately equal in importance or weight. Bio-Rad Labs., Inc., B-297553, Feb. 15, 2006, 2007 CPD ¶ 58 at 6. The Army does not dispute that the subfactors should have been equally weighted, but argues that it reasonably concluded that the weaknesses regarding transition outweighed a single strength relating to the first two subfactors, and that the overall rating of marginal was reasonable. See AR, Tab 10, ADM, at 7. In our view, the protester incorrectly assumes that an assessment of weaknesses under one of four equally-weighted subfactors precludes an overall rating of marginal. The TOPR stated that a "marginal" rating reflects a proposal that "does not demonstrate a full understanding of all the requirements and may pose a risk that the offeror might fail to perform satisfactorily without significant Government oversight or participation." TOPR at 9. We think that, under the evaluation standards announced in the solicitation, weaknesses relating to an offeror's understanding of the requirements could have reasonably resulted in an overall rating of marginal for the technical approach factor--assuming the agency's assessment of the weaknesses was reasonable.

Next, Apptis argues that the Army failed to identify or give credit to Apptis for its experience or knowledge of the BOC requirements for the solicitation. Here also, our Office asked the agency for additional information regarding its evaluation of Apptis' proposal. For the reasons discussed above, we think that the record here was not adequately developed, and thus does not provide a basis for us to conclude that the initial protest argument was clearly meritorious.

(...continued)

infrastructure library best practices, (2) approach to incident and problem management, (3) transition, and (4) government furnished information and property. TOPR at 6. The Army did not separately score these areas, but instead identified strengths or weaknesses for each offeror's proposal in determining an overall rating for the evaluation factor.

Finally, Apptis argues that the agency unreasonably evaluated its proposal under the service desk/ITSM experience factor. Specifically, the protester contends that although the TOPR stated that offerors would be evaluated on the basis of either corporate or proposed staff experience, see TOPR at 6, the agency assessed weaknesses in the protester's proposal based on an alleged lack of staff experience, to the disregard of its demonstrated corporate experience. AR, Tab 10, ADM, at 8. The protester also contends that the agency unreasonably concluded that its proposed staff did demonstrate the required experience. In its response to the protest, the Army acknowledged that Apptis' proposal demonstrated corporate experience, but argues that the agency viewed the experience as insufficiently related to the requirements of the solicitation. CO Statement at 16. As the protester notes in its comments on the AR, however, the agency's position is not reflected in the contemporaneous record; in fact, the protester's corporate experience is not discussed. See AR, Tab 8, TEP Evaluation, at 5; Tab 10, ADM, at 8.

Although we did not request an additional response from the agency on this issue, we now view the record as requiring additional development concerning whether the agency's evaluation reflects contemporaneous judgments regarding Apptis' corporate experience, as well as other areas of the agency's evaluation. For this reason, do not think that this issue meets our requirement that a protest argument be clearly meritorious, i.e. not a close question.⁶

The request for entitlement to protest costs is denied.

Lynn H. Gibson
Acting General Counsel

⁶ Apptis also argues that the Army failed to evaluate EDS's proposal for price reasonableness. We do not think that Apptis is an interested party to challenge the evaluation of the awardee's price because, as discussed above, we do not think that any of the protester's arguments concerning the evaluation of its technical proposal are clearly meritorious, and because there were other offerors whose proposals were technically acceptable, and therefore eligible for award. 4 C.F.R. § 21.0(a)(1); Allenhurst Indus., Inc., B-256836, B-256836.2, July 8, 1994, 94-2 CPD ¶ 14 at 5.