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Decision

Matter of: Xcellent Technology Solutions, LLC--Costs

File: B-412591.3

Date: November 14, 2016

Ron R. Hutchinson, Esq., and Scott W. Woehr, Esq., Doyle & Bachman LLP, for the protester.

William B. Blake, Esq., Department of the Interior, for the agency.

Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request that GAO recommend reimbursement of the protester's costs of filing and pursuing its initial protest, which resulted in corrective action, and its second protest, which also resulted in corrective action, is denied where the agency did not unduly delay in taking corrective action in response to the protests and where the protests were not clearly meritorious.

DECISION

Xcellent Technology Solutions (XTS), LLC, a service-disabled veteran-owned small business, of Haymarket, Virginia, requests that our Office recommend that it be reimbursed the costs associated with filing and pursuing its first protest (B-412591) and second protest (B-412591.2), which challenged the award of a contract to Cherokee Nation Technologies, Inc., a tribally-owned concern, of Catoosa, Oklahoma, by the Department of the Interior, United States Geological Survey (USGS), under request for proposals (RFP) No. G14PS00135, for science and technological support services. The protester argues that both protests were clearly meritorious and that the agency's corrective action in response to the first protest failed to address the issues raised in that protest, which required the protester to file its second protest.

We deny the request.

BACKGROUND

The RFP was issued on October 7, 2014, and sought proposals to provide science and technological support services for USGS science centers. Contracting Officer's Statement at 1-2; RFP at 6.¹ The solicitation was a set-aside under the Small Business Administration's 8(a) program. RFP at 1. The RFP anticipated the award of up to six multiple-award indefinite-delivery, indefinite quantity contracts, one for each of six service areas, for a base period of 1 year and four 1-year options. Id. at 2-3, 6-13. The RFP stated award would be made on a best-value basis considering five evaluation factors, one of which included price. The price evaluation was to consider the realism and reasonableness of offerors' prices. Id. at 69. Offerors were to propose loaded labor rates for each labor category identified in RFP attachment A, and labor rates and hours for tasks in response to three performance work statements (PWSs) in RFP attachment B. Id.

USGS received 23 proposals by the closing date of November 26. Agency Report (AR), Tab 17, Price Negotiation Memorandum, at 3-4. The agency established a competitive range of four offerors, including Cherokee and XTS, and conducted discussions with those offerors and received revised proposals. Id. at 19. As relevant here, the agency found that Cherokee's proposal was higher-rated under the non-price factors and had a lower evaluated price as compared to XTS's proposal. Id. at 28. USGS selected Cherokee's proposal for award of all six service areas on November 25, 2015. XTS requested a debriefing, which was provided on December 21.

On December 28, XTS filed its first protest (B-412591) challenging the award to Cherokee. The protester raised 5 primary arguments: (1) the agency unreasonably evaluated offerors' prices; (2) the agency unreasonably evaluated offerors' technical proposals; (3) the agency conducted inadequate and misleading discussions with XTS, (4) the award to Cherokee was tainted by an organizational conflict of interest (OCI), and (5) the award decision was unreasonable. Protest (B-412591) at 10-17. On January 27, 2016, prior to the due date for filing the agency report, USGS advised our Office that it would take corrective action by evaluating the protester's OCI allegations, and that it would "further review all other allegations of [XTS] and take appropriate remedial actions if necessary." Agency Notice of Corrective Action (Jan. 27, 2016) at 2. Based on the agency's proposed corrective action, we dismissed the protest.

¹ Citations to the RFP and the AR are to the record provided by USGS in response to XTS's third protest (B-412591.4), which challenged the terms of the corrective action implemented by the agency following the corrective action in response to XTS's second protest (B-412591.2).

USGS conducted an investigation of the alleged OCIs concerning Cherokee and also reviewed the other four protest arguments raised by XTS. AR, Tab 19, OCI Determination and Findings; Tab 18, Negotiation Memorandum Amend. 1. The agency concluded that there were no OCIs that barred award to Cherokee, and that the protester's other arguments did not have merit. For these reasons, the agency concluded that award had been properly made to Cherokee. AR, Tab 18, Negotiation Memorandum Amend. 1, at 5.

On April 25, XTS filed a second protest with our Office (B-412591.2) challenging the award to Cherokee. The protester raised the same five arguments that were raised in the first protest. On May 26, prior to the due date for the agency report, the agency advised our Office that it would take corrective action in response to XTS's second protest. Agency Notice of Corrective Action (May 26, 2016) at 1. The agency stated that the corrective action would consist of the following actions:

- USGS will amend the solicitation to both clarify the method of price analysis and provide for a more accurate analysis of the price that USGS will incur on task orders awarded under the indefinite delivery - indefinite quantity contract. USGS is cognizant of the fact that pricing information has been released through required debriefings of the unsuccessful offerors. Therefore, the amended solicitation will be structured so that competitive advantages arising from information gained in the debriefings are mitigated to the maximum extent practicable or are eliminated completely.
- Having amended the solicitation, USGS will allow for the submission of best and final offers from those offerors previously included in the competitive range, including Cherokee and [XTS]. USGS may also perform an additional competitive range determination and/or engage offerors in an additional round of discussions if later determined to be necessary.
- USGS will perform a new evaluation in accordance with the amended solicitation based upon the existing and additional proposal information submitted by the offerors and make a new award determination.
- USGS may take other actions if later determined to be necessary.

Id. at 2.

On May 27, XTS filed a response to USGS's notice of corrective action. The protester did not object to dismissal of the protest based on the agency's proposed corrective action, but requested that we recommend that the agency reimburse its costs of filing and pursuing its first and second protests. Our Office docketed this

request as B-412591.3. Based on the agency's proposed corrective action, we dismissed the second protest (B-412591.2).

On June 6, XTS filed a third protest (B-412591.4) challenging the terms of the agency's proposed corrective action. The agency filed its report responding to the protest and the protester filed comments. On August 5, our Office dismissed the protest of the terms of the corrective action as premature because the agency had not at that time issued an amendment to the solicitation.

DISCUSSION

XTS requests that our Office recommend that USGS reimburse the protester's costs of filing and pursuing its first (B-412591) and second (B-412591.2) protests. Specifically, the protester argues that although the agency took prompt corrective action in response to the first protest, the agency's corrective action failed to address the protester's arguments, which required the protester to file the second protest. For the reasons discussed below, we find no merit to the protester's request.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs where, based on the record, 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 6. 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. We will recommend reimbursement only where the underlying protest is 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 protester's allegations would reveal facts showing the absence of a defensible legal position. First Fed. Corp.--Costs, B-293373.2, Apr. 21, 2004, 2004 CPD ¶ 94 at 2.

XTS does not dispute that USGS took corrective action prior to the time for filing the agency reports in response to the first and second protests. Instead, the protester argues that the agency's corrective action in response to the first protest failed to address the issues raised by the protester, thereby requiring the protester to challenge the same grounds in its second protest. The protester contends that the circumstances here are similar to those in Louisiana Clearwater, Inc.--Recon. & Costs, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209, where our Office recommended reimbursement of protester's costs of pursuing a protest even

though the agency took prompt corrective action. For the reasons discussed below, we do not agree that the circumstances in Louisiana Clearwater are present here.

In Louisiana Clearwater, we addressed a protester's argument that the agency had failed to implement the corrective action it proposed to resolve the initial protest, thereby requiring the protester to file a second protest based on the same arguments. The protester initially argued, among other issues, that the agency failed to apply the evaluation factors based on the weighting specified in the solicitation. Louisiana Clearwater, *supra*, at 2. In response to the first protest, the agency proposed corrective action to reevaluate offerors' proposals in a manner consistent with the solicitation. *Id.* Following the corrective action, the agency affirmed the award. *Id.* at 3. The protester filed a second protest, arguing that the new award had again failed to weight the evaluation factors in the manner specified in the solicitation. *Id.* at 3-4. In response to the second protest, the agency advised our Office that it would take corrective action because the second award had not correctly applied the evaluation factors. *Id.* at 4.

Our decision in Louisiana Clearwater explained that "[w]hen an agency proposes corrective action, we consider it implicit that it will undertake a good faith effort to address all issues raised by the protester that are meritorious." *Id.* at 6. We concluded, based on the agency's concession that it did not apply the evaluation factors in the manner specified in the solicitation, that the protester's argument was "meritorious on its face." *Id.* at 6. We recommended that the agency reimburse the protester's costs of pursuing its initial protest because the agency did not act in good faith to implement the proposed corrective action, which had the effect of requiring the protester to file its second protest. *Id.* at 5. We also recommended that the agency reimburse the protester's costs of pursuing the second protest, even though the agency proposed the second corrective action prior to filing its report on the protest, because the agency's second corrective action could not be considered prompt in light of the fact that it was the same corrective action that the agency previously failed to implement. *Id.*

Our Office has explained in several decisions, however, that the principles set forth in Louisiana Clearwater address a narrow range of circumstances, namely, those where an agency fails to implement corrective action in good faith in response to a clearly meritorious protest. For example, our Office has held that a recommendation for reimbursement is not appropriate where the agency implemented its proposed corrective action by reevaluating proposals; the fact that the protester disagreed with the result of the reevaluation, and filed a protest based on the same arguments, does not demonstrate that the agency failed to act in good faith to implement the proposed corrective action. *See Taylor Consultants, Inc.--Costs*, B-400324.3, Feb. 2, 2009, 2009 CPD ¶ 37 at 3. Additionally, we have held that even where an agency fails to implement its proposed corrective action, we will only recommend reimbursement of protest costs where the issues raised were

clearly meritorious. See A1C Partners, LLC--Costs, B-409189.3, Sept. 30, 2014, 2014 CPD ¶ 295 at 3-4.

Here, XTS contends that it was required to file a second protest challenging the award to Cherokee, based on the same arguments raised in the first protest, *i.e.*, potential OCI of Cherokee, unreasonable price and technical evaluation, misleading discussions. The protester notes that in response to the second protest, the agency proposed to revise the solicitation's price evaluation criteria; the protester contends this proposed corrective action was, in effect, a concession that the protester's challenge to the evaluation of the offerors' proposed prices was clearly meritorious.

As discussed above, offerors were to propose loaded labor rates for each labor category identified in RFP attachment A. RFP at 69. The RFP also required offerors to propose prices for PWS tasks in price attachment B of the solicitation, based on labor categories that the offeror selected for those tasks. Id. USGS's price evaluation relied on both the task order prices as well as a calculation of the rates for all of the labor categories. See AR, Tab 17, Price Negotiation Memorandum, at 22-23; Tab 18, Negotiation Memorandum Amend. 1, at 2. The protester contends that the evaluation of all labor rates, rather than only the rates selected by the offeror in RFP attachment B, was an undisclosed criterion that rendered the evaluation inconsistent with the solicitation and therefore unreasonable.

The record in USGS's report responding to the third protest (B-412591.4) shows that the agency's corrective action in response to the first protest addressed each of the protester's allegations. With regard to the OCI allegations concerning Cherokee, the agency conducted an investigation and prepared a 5-page memorandum detailing the contracting officer's findings. AR, Tab 19, OCI Determination and Findings. The agency also prepared an amended price negotiation memorandum which addressed each of the protester's remaining arguments concerning the price evaluation, technical evaluation, discussions, and the award decision. AR, Tab 18, Negotiation Memorandum Amend. 1. The contracting officer concluded that there was no merit to any of the protester's arguments, and thus no basis to revise the evaluation of the offerors' proposals. Id. at 2-5.

With regard to the pricing issue, the agency disagreed with the protester that the price evaluation was inconsistent with the solicitation. Id. at 2-3. The contracting officer acknowledged that although "the calculation of a total labor category price as a method of price evaluation was not disclosed in the solicitation," there was nonetheless a requirement for "some method of comparing the labor rates of offerors . . . as these rates directly relate to future task order prices and will become ceiling rates included in the IDIQ contract." Id. at 3. As discussed above, the agency's corrective action in response to the second protest proposed to amend the price evaluation criteria to "clarify the method of price analysis and provide for a

more accurate analysis of the price that USGS will incur on task orders awarded under the indefinite delivery-indefinite quantity contract.” Agency Notice of Corrective Action (May 26, 2016) at 2.

On this record, we find no basis to conclude that the agency’s corrective action in response to the first protest failed to undertake a good faith effort to address all issues raised by the protester that were clearly meritorious. Our decision in Louisiana Clearwater does not require the agency to make a new decision that favors the protester, nor does it hold that a protester is entitled to a recommendation for reimbursement merely because it files the same protest arguments. The record here shows that the agency made a good-faith effort to address each of the protester’s arguments during corrective action and documented those findings in its amended negotiation memorandum. AR, Tab 18, Negotiation Memorandum Amend. 1, at 2-5. We therefore conclude that the circumstances here are not similar to those in Louisiana Clearwater.

Additionally, we conclude that the protests were not clearly meritorious.² Although the agency amended the solicitation to revise the price evaluation criteria, the agency contends that the revision was not a concession that XTS’s argument concerning the evaluation of offerors’ prices was meritorious. As discussed above, USGS took corrective action in response to both the first and second protests prior to the time for filing its agency report; thus the parties never fully briefed the issue of the reasonableness of the agency’s price evaluation. As also discussed above, the agency’s report in response to the third protest (B-412591.4) concerning the corrective action in response to the second protest included the amended negotiation memorandum, which was prepared during the corrective action in response to the first protest. Although the amended negotiation memorandum provided in the report responding to the third protest (B-412591.4) addresses a summary of the price evaluation, the reasonableness of the price evaluation was never fully briefed by the parties because the price evaluation was not the subject of the third protest.

In contrast, the issue raised by the protester in Louisiana Clearwater was clearly meritorious because the agency did not dispute that it failed to apply the evaluation factors based on the weights specified by the solicitation. Louisiana Clearwater, supra at 6. The issue there--weighting the evaluation factors on an equal basis or in descending order of importance--was plain on the face of the limited record provided and thus susceptible to resolution without the full record. Here, we conclude that there is not an adequate record for our Office to conclude that the price evaluation challenges in the first and second protests were clearly

² XTS’s request for reimbursement primarily addressed the price evaluation issues; the protester did not specifically argue that the other issues were clearly meritorious. See Request for Recommendation (May 27, 2016) at 3-5.

meritorious.³ See A1C Partners, LLC--Costs, B-409189.3, Sept. 30, 2014, 2014 CPD ¶ 295 at 3-4 (finding that a protest issue was not clearly meritorious where additional analysis of the record and briefing by the parties would have been required to address the issue).

The request is denied.

Susan A. Poling
General Counsel

³ We also note that although USGS responded to XTS's request for a recommendation of reimbursement of costs, arguing that the price evaluation issue was not clearly meritorious, the protester did not file comments on the agency's response. Our Bid Protest Regulations do not require a protester to file comments on an agency's response to a request for recommendation of reimbursement; however, where the agency files a substantive response and the protester does not comment, we have no basis to question the agency's response.