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Decision

Matter of: KWR Construction, Inc.--Costs

File: B-412914.2

Date: February 3, 2017

John A. MacKinnon, Esq., Law Office of John A. MacKinnon, for the protester.
Heather M. Mandelkehr, Esq., Department of the Air Force, for the agency.
Kenneth Kilgour, Esq., and Laura Eyester, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protester's request that GAO recommend the reimbursement of costs of filing and pursuing its protest is granted where the agency failed to take prompt corrective action in the face of a clearly meritorious protest.

DECISION

KWR Construction, Inc., of Sierra Vista, Arizona, requests that we recommend it be reimbursed the reasonable costs of filing and pursuing its protest of the award of four Multiple Award Construction Contracts (MACC) to four other offerors under request for proposals (RFP) No. FA4877-16-R-0002, issued by the Department of the Air Force for a variety of construction services at Davis-Monthan Air Force Base, Arizona.

We grant the request and recommend that KWR be reimbursed its protest costs.

BACKGROUND

The RFP, set aside for firms in the Small Business Administration's (SBA) 8(a) program, sought proposals for the selection of four vendors for MACCs to provide a variety of general construction services including, for example, maintenance, repair, mechanical, electrical, heating and air conditioning, demolition, painting, and paving. RFP at 3. The RFP advised that each successful vendor would receive a design-build indefinite-delivery, indefinite-quantity (ID/IQ) contract, the requirements for which would be further defined with individual delivery orders. Id. at 1. The ordering period would be five years. Id. at 3. The total estimated construction cost for all of the awards under this RFP was not to exceed \$45,000,000. Id. at 4.

The solicitation identified the initial project, called the seed project; offerors were required to propose on the seed project to be eligible for award of an ID/IQ contract. RFP at 43. The RFP advised offerors that a “competitive best value source selection” would be conducted in accordance with Federal Acquisition Regulation (FAR) Part 15 “using the lowest price technically acceptable (LPTA) source selection process,” considering three evaluation factors: price, technical, and past performance. Id. at 50. The technical factor had two subfactors: written project/program management plan (PMP); and 10% design submission--seed project. Id. at 53. As relevant here, the technical factor would be evaluated as acceptable or unacceptable; an acceptable proposal clearly meets all specified technical requirements necessary for contract performance. Id. at 52. The firm with the lowest-priced technically acceptable proposal would be awarded a MACC and a task order for the seed project; the firms with the next three lowest-priced acceptable proposals would receive MACC awards. Id. at 43.

Under the PMP subfactor, the RFP required the submission of a construction schedule, to include:

a comprehensive PMP developed specifically for implementation of this MACC. The PMP shall demonstrate the offeror[']s ability to meet the requirements stipulated within the MACC Statement of Work (SOW). The PMP shall be suitable for the scope and complexity of the MACC SOW and Seed Project identified within the solicitation. It shall include and address each of the following criteria:

1. Management Approach (IAW MACC SOW Section 11 &14)
2. Schedule Development and Adherence (IAW MACC SOW Section 6 & Seed Project Section 01011 – 1.5.)

RFP § L at 48. The RFP advised offerors that their “[p]roject schedule[s]” would be evaluated on whether they “incorporate[d] all the work throughout the design, construction and close-out phase of the ‘seed’ project within the government’s stated maximum performance period.” Id. § M at 53.

Proposals were to be submitted in three volumes: volume I, administrative, including, for example, representations and certifications and bonding information; volume II, price proposal; volume III, the technical proposal, including the PMP (which included management approach and schedule development and adherence), and the 10% design submission--seed project (which included the construction narrative and drawings); and volume IV, past performance. RFP at 46-49. The administrative and price volumes had no page limitations. The technical and past performance volumes had page limitations of 20 and 8 single-sided pages, respectively. Id. at 46.

The agency received six proposals that, for anonymity in the evaluation process, the agency labeled as Vendor A through F; KWR was Vendor F. In its technical volume, KWR provided a description of the required progress schedule and a reference to the actual schedule, which was included in its pricing volume. Vendor C submitted the required schedule in its technical volume. However, Vendor C's schedule contained the following five columns: task number, task mode, task name, task duration, and predecessors. Agency Report (AR), Tab 20, Vendor C Technical Volume at 3-6.¹ Although the project was slated to last 480 days, Vendor's C's proposed chart, which indicated when tasks would be performed, showed only the schedule's first five weeks--from the week of December 13, 2015, to the week of January 10, 2016. Id.

The agency ranked offerors from lowest to highest price as follows: Vendor F, C, B, E, A, and D. AR, Tab 12, Source Selection Decision Document (SSDD) at 3. The agency evaluated the proposals from Vendors F (KWR) and A as technically unacceptable. AR, Tab 10, Abstract of Offerors. Award was made to the four offerors whose proposals were evaluated as technically acceptable. See AR, Tab 13, Notice of Award.

KWR protested the awards on two grounds: the evaluation of KWR's proposal was unreasonable; and the decision to reject KWR's proposal from consideration for award should have been referred to the SBA for a determination of responsibility. Protest at 2-10. The agency filed its report and included portions of the awardees' proposals that addressed the scheduling requirement. In its comments on the agency report, the protester for the first time alleged that the agency engaged in unequal treatment of offerors when it evaluated the schedules and drawings. Comments at 10-15. In particular, the protester asserted the following with respect to the agency's alleged disparate evaluation of proposals under the scheduling requirement:

There is apparent disparate treatment between the manner in which KWR's proposed construction schedule has been evaluated and the manner in which the scheduling information provided by Vendor C, the designated awardee for the Seed Project, has been evaluated. Vendor C's proposed construction schedule is located at AR Tab 20, pp. 3-6. These four pages from the AR reproduce the oversize pages 8 and 9 from the Vendor C proposal, providing the construction scheduling information for the period from December 13, 2015, through January 17, 2016, or the first five weeks of the proposed 480-day/68-week project. If the remaining portion of this schedule was included in the Volume III

¹ As noted below in the protester's comments on the agency report, these four pages in the agency report reproduce two over-sized pages from Vendor C's technical proposal.

document submitted by Vendor C, presented in this same manner, at two pages for each five-week period, this would have required at least twenty-four (24) additional pages for the complete construction schedule over the full sixty-eight-week period for the project. That would greatly exceed the page limitation which has been applied to KWR.

On the other hand, it may be the case that Vendor C did not include the remainder of its construction schedule at all.

Id. at 11. The remainder of the protester's disparate treatment argument concerned the agency's evaluation of other vendors' schedules. See id. at 11-15.

On May 17, the GAO attorney sent the parties an email and requested the agency respond to each of the protester's substantive allegations set forth in the comments, and provide less redacted versions of previously produced documents, as well as additional documents. Email from GAO to Parties, May 17, 2016. The GAO's email to the parties specifically stated that "given the page limitation in Volume III" the agency should provide the entire project schedule that was included in each of the offeror's proposals. Id.

In its response to the protester's comments, the agency confirmed that the entirety of Vendor C's schedule was, in fact, included in the agency report. Agency Reply to Protester's Comments, May 20, 2016 at 3. The agency asserted that "Vendor C was not required to finish the calendar date-based chart to meet the standard of acceptability--its list of tasks and their durations rendered it acceptable." Id. at 4.

KWR next challenged the agency's assertion that Vendor C was not required to complete the calendar date-based chart in order for its proposal to be evaluated as acceptable. Protester's Reply to Agency's Reply to Comments on AR, May 24, 2016 at 4. KWR asserted that Vendor C's schedule was "devoid of any information upon which the evaluators could conclude that the proposed work would be performed as required, beyond the mere assertion of Vendor C itself." Id. The protester argued that a "list of tasks with designated days for each task, yielding a total number of days significantly in excess of the maximum allowed time period, cannot be reasonably equated with a project schedule that fulfills the purposes described in the Specifications." Id.

On May 24, the GAO requested that the agency produce the complete unredacted technical proposals of the successful offerors and the unredacted source selection decision document. Email from GAO to Parties, May 24, 2016. Also on May 24, the GAO attorney convened a teleconference, during which the parties discussed the agency's evaluation with respect to project schedules.

On May 25, 2016, the agency advised this Office that it would cancel the solicitation, terminate the awards, and review its current requirements to determine

the best acquisition strategy. Agency Notice of Corrective Action, May 25, 2016 at 1. We dismissed the protest. KWR Constr., Inc., B-412914, May 26, 2016 (unpublished decision). This request for reimbursement of costs followed.

DISCUSSION

The protester requests that our Office recommend that the agency reimburse KWR the reasonable costs of filing and pursuing its protest. Request at 3-4. KWR argues that its protest allegations were clearly meritorious, the agency delayed in taking corrective action, and the agency delayed in granting access to key portions of the record. The Air Force asserts that the protest was not clearly meritorious because there was additional record development after the filing of the protester's comments on the agency report. Agency Reply to Protester's Request for Costs at 2-3. The agency also argues that it did not unduly delay in taking corrective action because it was not until its comments on the agency report that KWR "raised with specificity its allegations regarding disparate treatment of offeror's technical proposals." Id. at 2. Further, the agency argues that its corrective action occurred one day after a GAO-initiated teleconference. Id.

Under the Competition in Contracting Act of 1984, our Office may recommend that protest costs be reimbursed where we find that an agency's action violated a procurement statute or regulation. 31 U.S.C. § 3554(c)(1). Our Bid Protest Regulations further provide that where the contracting agency decides to take corrective action in response to a protest, we may recommend that the protester be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(e). Our Regulations do not contemplate a recommendation for the reimbursement of protest costs in every case in which an agency takes corrective action, but rather only where an agency unduly delays 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. Chase Supply, Inc.--Costs, B-411849.3, May 17, 2016, 2016 CPD ¶ 134 at 4-5; AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6.

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. Overlook Sys. Techs., Inc.--Costs, B-298099.3, Oct. 5, 2006, 2006 CPD ¶ 184 at 6. With respect to the promptness of the agency's corrective action under the circumstances, 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. CDIC, Inc.--Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 2. Where a new protest allegation is raised in the

comments to the agency report, corrective action is prompt if taken prior to the deadline set by our Office for the agency's response to the protester's comments. See Alliant SB CTA, LLC--Costs, B-411842.5, Nov. 4, 2016, 2016 CPD ¶ 323 at 2-3.

Clearly Meritorious

In its protest, the protester asserted that the agency's evaluation of KWR's proposal was unreasonable. After receipt of the agency report, KWR argued that the agency, in its evaluation, engaged in unequal treatment of the offerors with respect to the project schedules and drawings provided. With respect to the unequal treatment protest allegation, the agency argues that the allegation could not be clearly meritorious because GAO conducted further record development. Agency Reply to Protester's Request for Costs at 2. As explained below, we consider the allegation concerning unequal treatment of offerors to have been clearly meritorious.

The protester asserted for the first time in its comments on the agency report that the agency must have engaged in unequal treatment of the offerors when the agency either accepted an incomplete proposal from Vendor C or permitted that offeror to exceed the technical proposal volume page limitation; it was not clear to the protester from the agency's redactions whether the record contained the entirety of Vendor C's schedule. In response, the agency asserted that Vendor C was not required to complete the schedule. Agency's Reply to Protester's Comments on the AR at 4. As noted above, the RFP required that schedules "incorporate all the work throughout the design, construction and close-out phase of the 'seed' project within the government's stated maximum performance period." RFP § M at 53. In our view, given the plain language of the RFP, the agency's assertion that Vendor C was not required to offer a complete schedule was not a legally defensible response to the protest allegation.

The agency's argument that the allegation could not be clearly meritorious because GAO conducted further record development is unavailing. Agency Reply to Protester's Request for Costs at 2, citing Am. Sys. Corp.; BAE Sys. Info. Solutions, Inc.--Costs, B-408386.5, B-408386.7, Dec. 9, 2015, 2015 CPD ¶ 387 at 3 (arguing that "GAO does not 'regard a protest as clearly meritorious when further record development, such as a hearing, is necessary to complete and clarify the record'"). While the decisions of our Office have stated that "as a general rule," a protest is not clearly meritorious where further record development was contemplated, the decisions also explain that where warranted by the record, we will grant a request for recommendation of the reimbursement of costs even where further record development was contemplated. See URS Fed. Servs., Inc.--Costs, B-406140.4, July 17, 2012, 2012 CPD ¶ 223 at 4 (granting request for reimbursement of costs where agency took corrective action after the scheduling of a hearing); Basic Commerce and Indus., Inc.--Costs, B-401702.3, Feb. 22, 2010, 2010 CPD ¶ 258

at 4 (same); Eagle Home Med. Corp.--Costs, B-299821.3, Feb. 4, 2008, 2008 CPD ¶ 41 at 4 n.4 (same).

As discussed above, the record provided prior to the agency taking corrective action established that the agency's assertion that one offeror was not required to provide a complete schedule was not a legally defensible response to KWR's protest allegation.² Therefore, we conclude that the protest is clearly meritorious where, as here, that conclusion is otherwise established by the record. URS Fed. Servs., Inc.--Costs, supra at 4.

Unduly Delayed

The agency argues that it did not unduly delay taking corrective action because it was not until its comments on the agency report that KWR first raised its allegations regarding disparate treatment of offeror's technical proposals, and the agency took corrective action one day after a GAO-initiated teleconference in which this issue was discussed. Agency Reply to Protester's Request for Costs at 2-3. Here, the protester raised its clearly meritorious allegation in its comments on the agency report. Rather than take prompt corrective action, the agency responded to the comments, putting the protester to the further expense of replying to the agency's response. Under the circumstances, we do not consider the agency's corrective action to have been prompt. See Alliant SB CTA, LLC--Costs, supra.

² As explained below, we find the protester an interested party to challenge the agency's evaluation of proposals under the schedule requirement, even though we do not address the protester's assertion that the agency unreasonably found its proposal unacceptable for failing to provide the required drawings. At the time that the agency took corrective action, the record was unclear as to the merit of that allegation. Nevertheless, because the agency's intent was to award up to four MACCs, and there were only four proposals found to be technically acceptable, the protester was an interested party to challenge the technical acceptability of the four proposals eligible for award--asserting disparate treatment--because if those proposals were found to be technically unacceptable, then the agency would have to resolicit the requirement, giving the protester another chance to compete. See Baltimore Gas & Elec. Co., B-406057, et al., Feb. 1, 2012, 2012 CPD ¶ 34 at 15 n.15; DOER Marine, B-295087, Dec. 21, 2004, 2004 CPD ¶ 252 at 2 n.2; Infrared Techs. Corp., B-255709, Mar. 23, 1994, 94-1 CPD ¶ 212 at 3 n.2. While the discussion focused on the agency's evaluation of Offeror C's proposal, the protest record suggested that all of the successful offerors benefited from disparate treatment in the schedule evaluation.

RECOMMENDATION

We recommend that the Air Force reimburse KWR the reasonable costs of filing and pursuing its challenges to the agency's evaluation. KWR should file its claim for costs, detailing and certifying the time expended and costs incurred, with the agency within 60 days of receipt of this recommendation. 4 C.F.R. § 21.8(f)(1).

The request is granted.

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General Counsel