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Decision

Matter of: Remote Diagnostic Technologies, LLC--Costs

File: B-413375.3

Date: February 6, 2017

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DIGEST

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

DECISION

Remote Diagnostic Technologies, LLC (RDT) of Basingstoke, England, requests that our Office recommend that it be reimbursed the reasonable costs of filing and pursuing its protest of the award of a contract to Zoll Medical Corporation, of Chelmsford, Massachusetts, under request for proposals (RFP) No. SPE2D1-15-R-0005, which was issued by the Defense Logistics Agency (DLA) for deployable vital patient monitors and related supplies and accessories.

We deny the request.

BACKGROUND

On September 11, 2015, DLA issued the request for proposals for a single fixed-price with economic price adjustment contract for an indefinite quantity of the monitors. RFP at 15. The resulting contract would have a one-year base term and five one-year option periods. *Id.* at 40. The solicitation stated that award would be based on the lowest-priced, technically acceptable proposal. *Id.* at 57. In order to be considered technically acceptable, an offeror's product had to meet 33 minimum

requirements and the offeror had to have a record of past performance that gave the agency a reasonable expectation of successful performance. Id. at 36-38, 57. After receiving and evaluating proposals, DLA concluded that Zoll's proposal was lowest-priced and technically acceptable, and awarded Zoll the contract on June 28, 2016. Agency Response to Req. for Costs, 1.

On July 8, RDT filed an initial protest with our Office, challenging the agency's evaluation of the awardee's product as technically acceptable (B-413375.1). Specifically, RDT alleged that Zoll's proposed monitor did not meet 5 of the 33 minimum requirements described in the RFP. Protest at 9, 11-24. In its August 8 report responding to the protest, DLA specifically responded to each of the protester's allegations and supported the agency's evaluation conclusions with citations to Zoll's proposal. Agency Report (AR) at 3-7. The agency also argued that RDT interpreted two requirements incorrectly and that the failure to protest any ambiguity in the solicitation's terms prior to the closing date precluded challenging the agency's interpretation of those requirements following award. Id. at 3-4.

On August 12, prior to filing its comments on the agency's report, RDT filed a supplemental protest (B-413375.2). RDT asserted for the first time that the agency engaged in misleading discussions with RDT; relied on information outside of Zoll's proposal for evaluation, in contravention of the RFP's guidelines; changed a minimum requirement after proposals were submitted; and converted the award basis from lowest-priced technically-acceptable to a best-value tradeoff. Supplemental Protest at 2-15. In addition to these allegations, the supplemental protest added two new challenges to Zoll's product's compliance with the solicitation's minimum requirements. Id. at 15-17.

GAO convened a conference call on August 19 to discuss outstanding document production questions. Later that day, DLA announced its intention to take corrective action by revising its requirements and making a new award. Email from Agency Counsel, Aug. 19, 2016. DLA clarified that it would permit offerors to update their proposals in response to the new requirements and would evaluate the revised proposals before making a new award decision. Email from Agency Counsel, Aug. 22, 2016. RDT filed its request for costs along with an initial response to the proposed corrective action on August 22. See Req. for Costs. Our Office dismissed the initial and supplemental protests as academic, based on the corrective action being taken. Remote Diagnostic Technologies, LLC, B-413375, B-413375.2, Aug. 29, 2016 (unpublished decision).

DISCUSSION

RDT contends that it should be reimbursed the costs of pursuing its protest and supplemental protest because DLA failed to take prompt corrective action in

response to its clearly meritorious protest grounds. Req. for Costs at 2. RDT asserts that DLA delayed taking corrective action on its initial protest grounds by waiting until after it filed its agency report. Id. The protester further contends that it is entitled to reimbursement of all costs incurred because the supplemental grounds of protest are intertwined with the initial grounds. Id.

Generally, DLA responds that it defended its position relative to the initial protest challenges because it did not regard those arguments as meritorious, and that its corrective action was based on protest issues first raised in RDT's supplemental protest. Agency Response at 3-8. We agree, and, as explained below, find no basis to recommend reimbursement of costs here.

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); TRAX International Corp.--Costs, B-410411.5, Aug. 28, 2015, 2015 CPD ¶ 276 at 3.

However, the mere fact that an agency decides to take corrective action does not necessarily establish that a protest is clearly meritorious, or that the protester is entitled to reimbursement of costs. Metalcraft, Inc.--Costs, B-402181.3, May 17, 2010, 2010 CPD ¶ 116 at 3. A protest is clearly meritorious where an agency's reasonable inquiry into the protester's allegations would reveal facts showing the absence of a defensible legal position. Coulson Aviation (USA) Inc.; 10 Tanker Air Carrier, LLC--Costs, B-406920.6, B-406920.7, Aug. 22, 2013, 2013 CPD ¶ 197 at 4. Further, we do not consider "close questions" to be clearly meritorious. See Systems Research & Applications Corp.--Costs, B-406775.3, April 10, 2013, 2013 CPD ¶ 99 at 4. 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. See Chant Eng'g Co., Inc.--Costs, B-274871.2, Aug. 25, 1997, 97-2 CPD ¶ 58 at 4.

With respect to RDT's supplemental challenges (those raised for the first time after the submission of the agency report), the agency announced it would take corrective action prior to the deadline for submitting its supplemental report, *i.e.*, without undue delay. Generally, our Office regards such action as prompt and will not recommend reimbursement of costs. TRAX International Corp.--Costs, *supra* at 5, *citing* The Sandi-Sterling Consortium--Costs, B-296246.2, Sept. 20, 2005, 2005 CPD ¶ 173 at 3. Because we find the agency responded to these allegations

without undue delay, we do not recommend reimbursement of costs incurred with regard to the supplemental protest.

As to the initially-filed protest grounds, we find none was clearly meritorious. As noted above, the initial protest grounds argued that the awardee's product failed to meet five required features of the solicited monitors. Protest at 11-24. Specifically, the protester alleged that Zoll's monitor lacked, as a main required feature, the ability to monitor and display certain electrocardiogram-related information known as the "ST" and "QT" values (RFP requirement #5).¹ Id. at 14-15. The protester argues that because of this alleged failure, the monitor would necessarily also fail to provide the following requirements: Food and Drug Administration (FDA) documentation noting the approved use of the device to monitor those segments (RFP requirement #1), full patient alarms, including those related to the two rhythm segments (RFP requirement #12), and viewable patient histories relative to the ST and QT segments (RFP requirement #23). Id. at 15-23. Unrelated to the ability of Zoll's product to monitor that information, RDT further alleged that the awardee's product lacks the ability to configure or silence audible alarms (RFP requirement #20). Id. at 23-24.

In its report, DLA points to the technical evaluation panel's findings, which included specific references to Zoll's proposal, to support the conclusion that Zoll's monitor was able to meet RFP requirement #5. AR at 5-6. Based on this conclusion, and separately supported by additional references to Zoll's proposal, the evaluators found Zoll's product met each related specification where RDT alleged it did not. Id. at 5-7. The agency also maintained that RDT's complaint arose not from a failing of Zoll's product, but rather on the protester's misinterpretation of the RFP's specifications. Id. The agency argued that, to the degree these requirements may have been ambiguous, RDT was required to seek clarification from the agency prior to the closing date for receipt of proposals. Id. at 3. DLA similarly defended the evaluators' conclusion regarding the ability of Zoll's monitor to meet RFP requirement #20 regarding silencing active alarms. Id. at 6.

On this record, we do not agree with RDT that the original protest issues are clearly meritorious. The agency's investigation into the initial allegations uncovered an apparently defensible legal position, as demonstrated by the report. At the time the agency elected to take corrective action, we did not have enough of a record to enable us to make a final decision regarding the merits of the protest. We did not have the benefit of the protester's comments or a fully developed record, and the

¹ While the record explains, generally, what an "ST segment" and "QT interval" represent in the context of monitoring phases of cardiac electrical activity, as well as stating the clinical importance of their measurements, an exact understanding of these terms is not necessary to resolve the underlying issue here.

filings we had received were not so conclusive as to reveal a clearly meritorious protest.²

The request that we recommend reimbursement of costs is denied.

Susan A. Poling
General Counsel

² Nonetheless, RDT, believing its initial protest grounds to be meritorious, argues that it should be entitled to reimbursement for costs associated with both its initial and supplemental protest because the issues are intertwined and not severable. Protester's Reply of Sept. 26, 2016, at 3, citing TRAX Int'l. Corp.--Costs, supra at 4. RDT's premise is incorrect. Given our conclusion, above, that none of RDT's arguments were successful (since the initial protest issues required further development when the agency elected to take corrective action, and were not clearly meritorious; and since the agency's response to the supplemental protest issues was prompt), the concept of severability has no application here.