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Decision

Matter of: CSRA LLC--Costs

File: B-415171.3

Date: August 27, 2018

David M. Hibey, Esq., and Nathaniel Castellano, Esq., Arnold & Porter Kaye Scholer LLP, for the protester.

Lisa L. Baker, Esq., United States Marine Corps, for the agency.

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DIGEST

1. Request that GAO recommend reimbursement of protest costs is granted where the agency unduly delayed taking corrective action in response to a clearly meritorious challenge to the agency's earlier corrective action.
 2. Protester's request that GAO recommend reimbursement of protest costs is denied where the protester's argument that the agency's earlier corrective action was an improper pretext to avoid a decision by GAO was not clearly meritorious.
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DECISION

CSRA LLC, of San Diego, California, requests that our Office recommend that it be reimbursed the costs associated with filing and pursuing its protest (B-415171.2), which challenged the terms of the corrective action undertaken by the Marine Corps Tactical Systems Support Activity. The corrective action was in response to CSRA's earlier protest (B-415171), which challenged the award of a contract by the Corps to C4Planning Solutions LLC (C4PS), of Blythe, Georgia, under request for proposals (RFP) No. M68909-17-R-7602, for technical support services. The protester argues that the protest, challenging the terms of the corrective action and the agency's motives for taking corrective action, was clearly meritorious and that the agency failed to take timely corrective action in response to that protest.

We grant in part and deny in part the request.

BACKGROUND

The Corps issued the solicitation on May 19, 2017, seeking proposals to provide technical systems support for the Marine Corps Tactical Systems Support Activity (MCTSSA). Agency Report (AR) (B-415171.2), Tab 1, RFP, at 1; Performance Work Statement (PWS), at 2. The contractor will be required to provide support for MCTSSA's command, control, communications, computer, and intelligence (C4I) systems in the field in the areas of troubleshooting, issue resolution, tactical communications network analysis and diagnostics, maintenance, system engineering, technical support, configuration management, and over-the-shoulder training. PWS at 2-3. CSRA is the incumbent contractor for these requirements. Protest (B-415171) at 3.

The RFP anticipated the award of an indefinite-delivery, indefinite-quantity contract, with fixed-price orders, for a base period of 6 months and four 1-year options. RFP at 3, 32. The RFP advised offerors that proposals would be evaluated based on the following three factors, listed in descending order of importance: (1) technical, (2) past performance, and (3) price. Id. at 52. The technical factor had the following five equally-weighted elements: (1) understanding and approach, (2) staffing, (3) transition plan, (4) technical approach scenario, and (5) small business management. Id. For purposes of award, the RFP stated that the non-price factors were "significantly more important" than price. Id.

The Corps received proposals from three offerors, including CSRA and C4PS, by the closing date of June 21. The Corps notified CSRA on August 18 that C4PS had been selected for award of the contract.¹ Contracting Officer's Statement (COS) (B-415171.2) at 3. On August 28, CSRA filed a protest with our Office (B-415171) challenging the award to C4PS. The protester raised three primary arguments: (1) the agency unreasonably evaluated the awardee's technical proposal, (2) the agency unreasonably evaluated the offerors' price proposals, and (3) the agency made an unreasonable best-value award decision. Protest (B-415171) at 1. As relevant here, CSRA's first argument alleged that C4PS's proposal contained a material misrepresentation because it identified three CSRA personnel who were performing on the incumbent contract. Id. at 5-6. The protester argued that the awardee did not have a basis to identify these individuals in its proposal because, the protester contended, they did not give C4PS permission to use their names. Id.

¹ The source selection authority (SSA) concluded that C4PS's proposal was "superior" to CSRA's under the technical capability evaluation factor, and that past performance "was not a distinguishing factor for award." Source Selection Decision Document, at 6, 8. Based on C4PS's technical proposal and its lower evaluated price (\$18,741,619) as compared to CSRA (\$20,110,687), the SSA selected C4PS's proposal for award. Id. at 1, 8.

On September 21, the Corps advised our Office that it would take corrective action in response to the protest by “enter[ing] into discussions with both CSRA and C4PS regarding their respective staffing plans.” Agency Notice of Corrective Action, Sept. 21, 2017, at 1. The agency subsequently clarified that the agency would “confine its corrective action to receiving and evaluating new staffing proposals.” Agency Supp. Notice of Corrective Action, Sept. 26, 2017, at 1. In this regard, the agency stated that it would request revised staffing proposals that do not identify specific individuals to perform the work, but would not permit offerors to make changes to other parts of their technical proposals or to propose revised prices. Id. at 1-3.

On October 6, CSRA filed a protest challenging the terms of the corrective action, arguing that the agency had amended the terms of the solicitation, but had improperly restricted the scope of revisions to offerors’ revised proposals. Protest (B-415171.2) at 14-31. On November 6, the agency filed its agency report and argued that contracting officers, in negotiated procurements, have broad discretion to take corrective action. Memorandum of Law (MOL) (B-415171.2) at 1. On November 16, CSRA filed its comments on the agency report.

On December 15, the Corps again advised that it would take corrective action in response to the protest by “allowing both parties to revise other aspects of their proposals.” Agency Notice of Corrective Action, Dec. 15, 2017, at 6. The agency also stated that “[a]s part of its corrective action, and in an effort to level the playing field and remedy any potential competitive advantage, in that C4PS’s evaluation ratings and price have been exposed, the Agency will release, to C4PS, CSRA’s evaluation ratings and price.” Id. On January 2, 2018, CSRA filed this request.

DISCUSSION

CSRA requests that our Office recommend that the Corps reimburse its costs of filing and pursuing its protest (B-415171.2) challenging the terms of the corrective action undertaken by the agency in response to the initial challenge of the award to C4PS (B-415171). CSRA’s challenge to the corrective action raised the following two primary arguments: (1) the agency’s decision to limit proposal revisions was unreasonable; and (2) the agency’s decision to take corrective action in response to the initial protest (B-415171) was an improper attempt to avoid a decision by our Office on the merits of the protester’s allegations regarding material misrepresentations by C4PS concerning its proposed personnel. Protest (B-415171.2) at 10-30.

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. Bid Protest Regulations, 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.

As a general rule, a successful protester should be reimbursed its incurred costs with respect to all the issues pursued, not merely those upon which it has prevailed. The Salvation Army Cmty. Corr. Program--Costs, B-298866.3, Aug. 29, 2007, 2007 CPD ¶ 165 at 7. In appropriate cases, we have limited our recommendation for the award of protest costs where a part of those costs is allocable to an unsuccessful protest issue that is so clearly severable from the successful issues as to essentially constitute a separate protest. Burns & Roe Servs. Corp.--Costs, B-310828.2, Apr. 28, 2008, 2008 CPD ¶ 81 at 3.

For the reasons discussed below, we agree that the protest was clearly meritorious with regard to the first protest argument identified above. Because the agency took corrective action after submitting its agency report, and after CSRA was required to file comments on the agency report, we conclude that the corrective action was not prompt. We conclude that the second protest argument was not clearly meritorious because the decisions cited by the protester in support of its argument were not clearly applicable, and because the record was not sufficient for our Office to resolve this issue at the time the agency took corrective action. We also conclude that the second argument is severable from the first argument, and therefore do not recommend reimbursement of protest costs for this issue.

Limitation on Proposal Revisions

CSRA argued that the Corps' corrective action (B-415171.2) in response to the initial protest (B-415171) unreasonably limited offerors' proposal revisions to revising the staffing approach, in particular deleting references to specifically-named personnel. CSRA argued that the proposal changes directed by the agency affected other areas of the protester's proposal, and that the agency did not have a reasonable basis for the limitations imposed on the proposal revisions. For the reasons discussed below, we conclude that this issue was clearly meritorious and that the agency unreasonably delayed in taking corrective action to the protest.

Agencies have broad discretion to take corrective action in a negotiated procurement where the agency determines that such action is necessary to ensure a fair and impartial competition. SMS Data Prods. Grp., Inc., B-280970.4, Jan. 29, 1999, 99-1 CPD ¶ 26 at 2. As a general matter, the details of a corrective action are within the sound discretion and judgment of the contracting agency. Rockwell Elec. Commerce Corp., B-286201.6, Aug. 30, 2001, 2001 CPD ¶ 162 at 4. An agency's discretion in the area of corrective action extends to deciding the scope of proposal revisions, and there

are circumstances where an agency reasonably may decide to limit the revisions offerors may make to their proposals. Computer Assocs. Int'l Inc., B-292077.2, Sept. 4, 2003, 2003 CPD ¶ 157 at 5.

Our Office has explained, however, that where an agency as part of its corrective action amends a solicitation and permits offerors to revise their proposals in response, offerors should be permitted to revise any aspect of their proposals, including those that were not the subject of the amendment, unless the agency offers evidence that the amendment could not reasonably have any effect on other aspects of proposals, or that allowing such revisions would have a detrimental impact on the competitive process. Lockheed Martin Sys. Integration-Owego; Sikorsky Aircraft Co., B-299145.5, B-299145.6, Aug. 30, 2007, 2007 CPD ¶ 155 at 5. Similarly, where an agency's corrective action in response to a protest does not involve the amendment of the solicitation, but instead involves discussions and a request for revised proposals, we will review an agency's decision to restrict the scope of proposal revisions to determine whether the revisions are reasonably expected to have a material impact on other areas of the offeror's proposal. Deloitte Consulting, LLP, B-412125.6, Nov. 28, 2016, 2016 CPD ¶ 355 at 6.

Here, the staffing element of the technical evaluation factor required offerors to explain how they will provide and maintain personnel who will perform the solicitation requirements, as follows:

1.2 ELEMENT B - STAFFING

The Offeror must:

- (a) Explain and demonstrate how it will provide and maintain qualified technical and management personnel with the required experience (in terms of years and expertise) to perform the requirements and tasks described in the PWS at the locations identified in Addendum 1. Resumes of proposed personnel are not required.
- (b) Provide a matrix that lists the proposed labor categories for supporting each identified C4I system in the PWS, Table 3-1 and Addendum 1, and explain how the proposed personnel can support all of the currently fielded C4I tactical systems listed in Table 3.1 of the PWS. The matrix shall also contain an explanation of their capability to support other currently deployed systems and additional or new C4I systems when fielded.
- (c) Discuss their capacity and ability to meet increased contract requirements associated with planned or unplanned surges and deployments.

RFP at 46-47. The RFP's evaluation criteria stated that the agency would evaluate the three areas of offerors' staffing proposals as follows:

1.2 ELEMENT B - STAFFING

The Government will evaluate the Offeror's narrative:

(a) Explaining and demonstrating how it will provide and maintain qualified technical and management personnel with the required experience (in terms of years and expertise) to perform the requirements and tasks described in the PWS at the locations identified in Addendum 1.

(b) Explaining how the proposed personnel can support all of the currently fielded C4I tactical systems listed in Table 3.1 of the PWS, their capability to support other currently deployed systems and additional or new C4I systems when fielded, and including a matrix that lists the proposed labor categories for supporting each identified C4I system in the PWS, Table 3-1.

(c) Describing their capacity and ability to meet increased contract requirements associated with planned or unplanned surges and deployments.

Id. at 54.

As discussed above, CSRA's initial protest (B-415171) argued that C4PS's proposal contained a material misrepresentation regarding its proposed personnel because, the protester contended, the awardee's proposal stated that it would utilize individuals who worked for CSRA on the incumbent contract, without obtaining permission from these individuals to be named in the proposal. The protester argued, therefore, that the awardee had no basis to represent in its proposal that these individuals would be available to perform for C4PS. The agency took corrective action in response to this protest by instructing offerors to submit revised staffing plans that removed references to the names of individuals. Agency Supp. Notice of Corrective Action, Sept. 26, 2017, at 3. In response to the protester's challenge to this limitation, the agency again took corrective action and advised that offerors would be allowed to make any changes to their proposals. Agency Notice of Corrective Action, Dec. 15, 2017, at 6.

The Corps argues in response to this request for a recommendation for reimbursement of protest costs that CSRA's second protest (B-415171.2) was not clearly meritorious because the corrective action did not constitute an amendment to the solicitation. In addition, the agency contends that the direction to remove the names of proposed personnel in the offerors' proposals did not affect any other part of the offerors' proposals. According to the agency, its initial decision to limit proposal revisions was reasonable. We conclude that the agency's response to the second protest was not based on legally-defensible arguments, and that the protest was clearly meritorious.

First, the Corps' response to CRSA's second protest (B-415171.2) argued that the corrective action merely clarified the terms of the RFP, rather than amending the

solicitation. MOL (B-415171.2) at 7-9. In support of its argument, the agency contends that the RFP did not specifically require offerors to identify the names of proposed personnel, and instead stated that the agency would evaluate how offerors would meet the solicitation requirements. Id. at 8-9. The agency argued, therefore, that because the RFP's requirements did not materially change, the clarification of its requirements with regard to staffing was not a solicitation amendment that triggered the obligation to permit offerors to make unlimited changes to their proposals. Id. at 8.

The Corps correctly notes that when an agency's requirements materially change after the issuance of a solicitation, the agency must issue a solicitation amendment and provide offerors an opportunity to submit revised proposals. See Federal Acquisition Regulations (FAR) § 15.206(a); Northrop Grumman Sys. Corp., B-412278.7, B-412278.8, Oct. 4, 2017, 2017 CPD ¶ 312 at 14. The agency, however, confuses the circumstances under which an agency must issue a solicitation amendment with the circumstances under which an agency may, within its discretion, issue a solicitation amendment. In this regard, nothing prohibits an agency from issuing a solicitation amendment where its requirements have not materially changed--for example, to clarify an ambiguous solicitation provision. See FAR § 15.206(a).

The RFP's proposal instructions stated that offerors were required to "[p]rovide a matrix that lists the proposed labor categories for supporting each . . . system in the PWS," and to "explain how the proposed personnel can support" all of the systems identified in the PWS. RFP at 47. The instructions also stated that "[r]esumes of proposed personnel are not required." Id. The record shows that both CSRA and C4PS interpreted the RFP as permitting offerors to name specific individuals, and that each offeror provided information concerning those individuals' intended roles and their qualifications and experience. See AR, Tab 12, CSRA Technical Proposal, at 1-7, 1-17, 1-20-23, 1-30, 3-38, 3-44, 4-47; Tab 19, C4PS Technical Proposal, at 16-17, 20-22, 24-25, 27, 47-50, 53, 57. We think it was reasonable to interpret the RFP to mean--as the protester and awardee apparently did--that, for offerors' "proposed personnel," a resume was not required. RFP at 47. Nothing in the RFP, however, expressly prohibited offerors from submitting the names of specific individuals, or from providing information regarding their qualifications or experiences. See id. at 47, 52.

We find that the corrective action here was a solicitation amendment that resolved a potential ambiguity with regard to whether offerors could demonstrate the merits of their technical approaches by identifying specific individuals and their qualifications and experience. The agency's corrective action instructed offerors to submit revised proposals following this clarification of the RFP's proposal requirements for offerors' staffing approaches. See Agency Notice of Corrective Action, Dec. 15, 2017, at 6; Agency Supp. Notice of Corrective Action, Sept. 26, 2017. As a result, the agency was required to allow offerors to revise all areas of their proposals, absent a reasonable expectation that the revisions would not have a material impact on other parts of the offerors' proposals. Lockheed Martin Sys. Integration-Owego; Sikorsky Aircraft Co., supra.

In addition, even if the Corps had not issued a solicitation amendment, the agency acknowledges that its corrective action involved discussions with offerors for the purpose of submitting revised staffing plans. See Agency Notice of Corrective Action, Sept. 21, 2017, at 1 (“[T]he agency has decided to take corrective action and enter into discussions with both CSRA and C4PS regarding their respective staffing plans.”). Under these circumstances, the agency was obligated to allow offerors to make revisions to any aspect of their proposal, absent a reasonable expectation that the revisions would not have a material impact on other parts of the offerors’ proposals. See Deloitte Consulting, LLP, supra. We next address whether the required revisions to offerors’ proposals to remove the names of personnel could have had a material impact on other parts of offerors’ proposals.

CSRA argues that the direction to remove all references to individuals will affect how its proposal addresses the RFP requirements. The protester stated that it relied on the qualifications and experience of its proposed personnel--particularly experienced incumbent personnel--as set forth in the staffing plan, to bolster the credibility of its proposed approach under the other elements of the technical evaluation factor. Protester’s Comments (B-415171.2) at 16-17; see AR, Tab 12, CSRA Technical Proposal, at 1-20, 1-21, 3-38, 4-47. The protester contends that because it cannot rely on descriptions of the qualifications and experiences of its proposed personnel, it must revise its entire proposal to account for a different approach to explaining how it will meet the solicitation’s requirements.

The Corps argues that the requirement to remove the names of personnel affected only the staffing plan element of the technical evaluation factor, and therefore could not have affected the offerors’ proposals with regard to the other areas of the technical evaluation factor. MOL (B-415171.2) at 9. In this regard, the agency argues that because its prior evaluation of offerors’ proposals under the technical evaluation factor did not specifically cite or rely on the qualifications of specifically-named individuals, the requirement to remove the names of individuals could not have any effect on the proposals or the agency’s evaluation of those proposals. See id. at 9-15.

The agency does not establish, however, that the proposal revisions required by its corrective action are so narrow that there would not be an effect on other aspects of the protester’s proposal. As discussed above, we agree with the protester that although the solicitation did not require offerors to identify specific individuals for positions, it did not expressly preclude offerors from doing so. The absence of express language on this point was, in part, the basis for the agency’s decision to take corrective action in response to the initial protest. See Agency Notice of Corrective Action, Sept. 21, 2017, at 1; Agency Supp. Notice of Corrective Action, Sept. 26, 2017, at 1.

Additionally, the protester explains that it prepared its proposal based on the assumption that the identification of specific individuals and their capabilities would enhance the merit of its proposal. Protester’s Comments (B-415171.2) at 16-17. For this reason, we agree with the protester that the agency’s corrective action regarding removal of the names of specific individuals from offerors’ staffing plans is “inextricably

linked” to other parts of the offerors’ proposals, and that the agency therefore should have permitted revision to these parts of the proposals as well. See Deloitte Consulting, LLP, supra.

In sum, we conclude that the record available to the agency at the time the corrective action protest (B-415171.2) was filed should have shown the absence of a defensible legal position. We also conclude that the agency’s corrective action, which took place after the filing of the agency’s report responding to the protest and the filing of the protester’s comments, was not timely. See Alsalam Aircraft Co.--Costs, supra. We therefore grant the request for a recommendation for reimbursement of protest costs based on this argument.

Pretext to Avoid a Decision on the Merits

Next, CSRA argues that the Corps’ corrective action was a pretext to avoid a decision by our Office on a meritorious protest. In this regard, the protester contends that the agency’s corrective action sought to avoid a ruling on the merits by our Office as to whether the awardee’s proposal misrepresented that it would be able to provide three individuals identified who worked for CSRA at the time of proposal submission. Protest (B-415171.2) at 10-11. We do not find that this argument was clearly meritorious; we also conclude that this argument is severable from CSRA’s clearly meritorious argument concerning the scope of proposal revisions.

The issue of whether personnel identified in an offeror’s proposal, in fact, perform under the subsequently-awarded contract is generally a matter of contract administration that our Office does not review. See 4 C.F.R. § 21.5(a); Future-Tec Mgmt. Sys., Inc.; Computer & Hi-Tech Mgmt., Inc., B-283793.5, B-283793.6, Mar. 20, 2000, 2000 CPD ¶ 59 at 14-15. Nonetheless, our Office will consider allegations that an offeror proposed personnel that it did not have a reasonable basis to expect to provide during contract performance in order to obtain a more favorable evaluation, as such a material misrepresentation has an adverse effect on the integrity of the competitive procurement system. Ryan Assocs., Inc., B-274194 et al., Nov. 26, 1996, 97-1 CPD ¶ 2 at 6. Our decisions frequently refer to such circumstances as a “bait and switch.” Id. In order to establish an impermissible “bait and switch,” a protester must show that: (1) the awardee either knowingly or negligently represented that it would rely on specific personnel that it did not have a reasonable basis to expect to furnish during contract performance, (2) the misrepresentation was relied on by the agency, and (3) the agency’s reliance on the misrepresentation had a material effect on the evaluation results. Patricio Enters. Inc., B-412738, B-412738.2, May 26, 2016, 2016 CPD ¶ 145 at 4-5. An offeror may not represent the commitment of incumbent employees based only on a hope or belief that the offeror will ultimately be able to make good on its representation. Id.

First, CSRA does not demonstrate that an agency’s decision to reopen discussions constitutes an improper pretext to avoid the issuance of a decision by our Office. Contracting agencies have broad discretion in negotiated procurements to decide

whether to cancel a solicitation, and need only establish a reasonable basis for doing so. KNAPP Logistics Automation, Inc.--Protest & Costs, B-404887.2, B-404887.3, July 27, 2011, 2011 CPD ¶ 141 at 3. As CSRA notes, however, where a protester alleges that the agency's rationale for cancellation is a pretext, that is, that the agency's actual motivation is to avoid awarding a contract on a competitive basis or to avoid the issuance of a decision by our Office on the merits of the protest, we will closely examine the reasonableness of the agency's actions in canceling the acquisition. See Social Impact, Inc., B-412655.3, June 29, 2016, 2016 CPD ¶ 176 at 3.

Here, however, the agency's corrective action did not involve the cancellation of a solicitation. Instead, it involved reopening discussions to resolve what the agency contends was a misunderstanding by the offerors as to the requirements for the staffing plan. Because our decisions regarding pretexts to avoid the issuance of a decision involve cancellations of solicitations, rather than a reopening of discussions, we do not find this a basis to conclude that the protester's argument was clearly meritorious, *i.e.*, that the agency lacked a legally-defensible position.² See First Fed. Corp.--Costs, *supra*.

We also find that CSRA's argument that the agency's corrective action was a pretext to avoid a decision by our Office is severable from its argument concerning proposal revisions. In this regard, the protester's argument that the corrective action was a pretext concerns not only whether C4PS's proposal contained a material misrepresentation regarding its proposed personnel, but the agency's evaluation of the awardee's proposal. See Protest (B-415171.2) at 10-14; Patricio Enters. Inc., *supra*. We therefore do not recommend reimbursement of protest costs associated with this argument.

CONCLUSION AND RECOMMENDATION

For the reasons discussed above, we conclude that CSRA's argument concerning the limitations of the scope of proposal revisions was clearly meritorious and that the agency failed to take timely corrective action in response to this argument. We recommend that the Corps reimburse CSRA's costs for filing and pursuing its protest of the agency's corrective action (B-415171.2) associated with this argument. We also recommend the agency reimburse the protester the reasonable costs of filing and pursuing this request for reimbursement with regard to its challenge to the scope of proposal revisions. CSRA should submit its certified claim, detailing the time spent and

² Our decision here does not conclude that an agency's decision to take corrective action could never be the basis of a pretext argument. Instead, we conclude that this is not an argument that meets the clearly meritorious standard for a recommendation for reimbursement of protest costs.

costs incurred, directly to the agency within 60 days of its receipt of this decision.
4 C.F.R. § 21.8(f)(1).

The request is granted.

Thomas H. Armstrong
General Counsel