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Decision

Matter of: EG Management Services Incorporated; Desbuild Incorporated--Costs

File: B-415797.3; B-415797.4

Date: October 25, 2018

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Dennis C. O'Connell, Esq., General Services Administration, for the agency.

Katherine I. Riback, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

GAO recommends reimbursement of the costs of filing and pursuing challenges against the agency's evaluation of proposals and the source selection decision, where the evaluation challenges were clearly meritorious, or intertwined with clearly meritorious issues, and the agency did not take corrective action to address the protests until late in the protest process, after the protesters had filed comments, supplemental protests, and comments on the agency responses prepared in answer to the supplemental protest issues.

DECISION

EG Management Services Incorporated, (EG) of Germantown, Maryland (MD), and Desbuild Incorporated, of Hyattsville, MD, each request that we recommend that it be reimbursed the costs associated with filing and pursuing its protest against the awards of multiple indefinite-delivery, indefinite-quantity contracts under solicitation No. GS-11-P-17-MK-D-0002, which was issued by the General Services Administration (GSA) for construction services in the District of Columbia.

We grant the requests.

BACKGROUND

On December 18, 2017, EG and Desbuild each protested GSA's awards under the solicitation, asserting that the agency unreasonably evaluated its proposal under the

prior experience factor.¹ On January 29, 2018, EG and Desbuild filed supplemental protests in which both protesters challenged the agency's source selection decision (SSD) alleging that the agency's SSD was not adequately documented and that the agency unreasonably failed to consider price in its evaluation of proposals. EG and Desbuild Supp. Protests at 2,7.

After development of the protest record, the cognizant Government Accountability Office (GAO) attorney conducted an "outcome prediction" alternative dispute resolution (ADR) conference. In the course of that ADR, the GAO attorney advised the parties that GAO would likely sustain EG and Desbuild's protests challenging the agency's source selection decision due to the fact that the decision failed to include any consideration of price and was not adequately documented. To the extent the agency argued that it considered price in its source selection process, the GAO attorney noted in the ADR that this aspect of its selection decision was not documented.

In response to the ADR, the agency informed our Office that it intended to take corrective action by reevaluating all proposals received in response to the solicitation and making a new selection decision. Based on the agency's proposed corrective action, GAO dismissed EG's and Desbuild's protests as academic. EG Management Services Incorporated; Desbuild Incorporated, B-415797; B-415797.2, Mar. 19, 2018 (unpublished decision). Following the dismissal of the protests, EG and Desbuild each filed a request that GAO recommend the reimbursement of its reasonable costs of filing and pursuing its protests, including attorneys' fees.

DISCUSSION

EG and Desbuild each ask our Office to recommend that GSA reimburse it for the reasonable costs associated with filing and pursuing its protest, including attorneys' fees. GSA was given an opportunity to respond to the protesters' requests for reimbursement of costs but did not provide any response.

When a procuring agency takes corrective action in response to a protest, our Office may recommend under 4 C.F.R. § 21.8(e) that the agency reimburse the protester its reasonable 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 protesters to expend unnecessary time and

¹ EG contested the agency's conclusion under the prior experience factor that EG failed to include examples of innovative cost savings, failed to describe the actual work completed and that the agency's best-value determination was flawed. EG Protest at 6-7. Desbuild contested the agency's determination that its proposal failed to include examples of achieving innovative cost savings on two of its three prior experience projects, failed to include examples of the use of small business subcontractors on two of its three prior experience contracts, and that the agency's best-value determination was flawed. Desbuild Protest at 4.

resources to make further use of the protest process in order to obtain relief. Pemco Aeroplex, Inc.--Recon. & Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 5. A protest is clearly meritorious when a reasonable agency inquiry into the protest allegations would show facts disclosing the absence of a defensible legal position. The Real Estate Ctr.--Costs, B-274081.7, Mar. 30, 1998, 98-1 CPD ¶ 105 at 3. A GAO attorney will inform the parties through outcome prediction ADR that a protest is likely to be sustained only if she or he has a high degree of confidence regarding the outcome; therefore, the willingness to do so is generally an indication that the protest is viewed as clearly meritorious, and satisfies the “clearly meritorious” requirement for the purpose of recommending reimbursement of protest costs. National Opinion Research Ctr.--Costs, B-289044.3, Mar. 6, 2002, 2002 CPD ¶ 55 at 3; Inter-Con Sec. Sys., Inc.; CASS, a Joint Venture--Costs, B-284534.7, B-284534.8, Mar. 14, 2001, 2001 CPD ¶ 54 at 3.

As stated above, the GAO attorney advised in the ADR session that our Office would likely sustain EG and Desbuild’s protests challenging the agency’s selection decision due to the fact that the decision failed to include any consideration of price. As a general matter, an agency must meaningfully consider price or cost to the government in making its selection decision. Coastal Int’l Sec., Inc., B-411756, B-411756.2, Oct. 19, 2015, 2015 CPD ¶ 340 at 14. GAO also stated in the ADR session that it would likely sustain the protests because the selection decision was not adequately documented. While GAO will not substitute our judgment for that of the agency, we will question the agency’s conclusions where they are inconsistent with the solicitation criteria and applicable procurement statutes and regulations, undocumented, or not reasonably based. Intercon Assocs., Inc., B-298282, B-298282.2, Aug. 10, 2006, 2006 CPD ¶ 121 at 5. As such, we find that this protest ground is “clearly meritorious” for the purposes of recommending reimbursement of costs. National Opinion Research Ctr.--Costs, *supra*.

As set forth above, our Office may recommend reimbursement of protest costs if we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. This principle is intended to prevent inordinate delay in investigating the merits of a protest and taking corrective action once an error is evident, so that a protester will not incur unnecessary effort and expense in pursuing its remedies before our Office. East Coast Nuclear Pharmacy--Costs, B-412053.5, Aug. 31, 2016, 2016 CPD ¶ 249 at 5. We generally consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest, but not prompt where it is taken after that date. Alsalam Aircraft Co.--Costs, B-401298.3, Nov. 5, 2009, 2009 CPD ¶ 208 at 3. Here, the agency did not take corrective action until after the protesters filed comments, supplemental protests, and comments on the agency’s submissions that addressed the supplemental protest issues, and after our Office subsequently held an ADR conference with the parties. Thus, we find that the agency unduly delayed in taking corrective action in the face of a clearly meritorious protest.

For the purpose of recommending reimbursement of protest costs, we generally consider all issues concerning the evaluation of proposals to be intertwined--and thus

not severable--and therefore generally will recommend reimbursement of the costs associated with both successful and unsuccessful challenges to the evaluation. Coulson Aviation (USA) Inc.; 10 Tanker Air Carrier, LLC--Costs, B-406920.6, B-406920.7, Aug. 22, 2013, 2013 CPD ¶ 197 at 5. Absent an agency request with supporting evidence, we are unwilling to deviate from the general premise that a protester is entitled to all costs associated with both successful and unsuccessful allegations. Fluor Energy Technology Services, LLC--Costs, B-411466.3, 2016 CPD ¶ 160 at 3.

GSA did not respond to, or otherwise contest, the protesters' requests that we recommend reimbursement of costs associated with their grounds of protest. The agency presented no argument that EG's and Desbuild's other challenges should be severed from their clearly meritorious challenges to the agency's evaluation. Since a reasonable inquiry into EG and Desbuild's protests would have revealed that the protests were clearly meritorious--where the record showed that the agency's selection decision failed to include any consideration of price and was inadequately documented--we conclude that the agency unduly delayed taking corrective action in the face of clearly meritorious protests, thereby causing protesters to expend unnecessary time and resources to make further use of the protest process in order to obtain relief, including comments on the agency report. We therefore grant the requests for a recommendation for reimbursement of costs for all protest grounds.

RECOMMENDATION

We recommend that EG and Desbuild be reimbursed the costs associated with filing and pursuing their protests, including reasonable attorneys' fees. EG and Desbuild should each submit its certified claim detailing the time and costs incurred, directly to the agency within 60 days of its receipt of this decision. Bid Protest Regulations, 4 C.F.R. § 21.8(f)(1).

The requests are granted.

Thomas H. Armstrong
General Counsel