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Decision

Matter of: AECOM-Inquip Joint Venture--Costs

File: B-415907.3

Date: January 22, 2019

Giovanni Ruscitti, Esq., Berg Hill Greenleaf & Ruscitti LLP, for the protester.
Alfred L. Faustino, Esq., Corps of Engineers, for the agency.
Noah B. Bleicher, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

This Office will not recommend reimbursement of protest costs where the agency's cancellation of the solicitation, which rendered the protest academic, was not a corrective action taken as a result of the protest.

DECISION

AECOM-Inquip Joint Venture (AIJV), of Greenwood Village, Colorado, requests that our Office recommend that it be reimbursed the costs of filing and pursuing its protest of the termination of its contract, which was awarded by the Department of the Army, U.S. Army Corps of Engineers (Corps), under request for proposals (RFP) No. W91238-17-R-0049, for the construction of levee improvements, including cutoff wall construction and earthwork, to the Natomas East Main Drainage Canal levee at "Reach H" in Sacramento, California. AIJV maintains that the Corps unduly delayed taking corrective action in response to its clearly meritorious protest.

We deny the request.

BACKGROUND

On December 27, 2017, the Corps awarded the contract at issue to AIJV. Response to Req. for Costs at 1. After receiving a debriefing, Nordic/Great Lakes E & I Joint Venture (NGJV), the only other offeror in the competition, filed a protest on January 10, 2018

with our Office challenging the contract award.¹ NGJV Protest, (B-415907). NGJV raised numerous objections to the evaluation of proposals, and asserted that the award to AIJV was tainted by organizational conflicts of interest (OCIs).² See id. Prior to the due date for submitting an agency report, the Corps advised our Office that it was taking corrective action, which included suspending the contract award and, primarily, reevaluating the alleged OCIs.³ Notice of Corrective Action (B-415907), Jan. 26, 2018, at 1-2. Our Office subsequently dismissed NGJV's protest as academic. Nordic/Great Lakes E & I Joint Venture, B-415907, Feb. 1, 2018 (unpublished decision). Thereafter, in March and April 2018, the agency corresponded with AIJV regarding NGJV's OCI concerns. Response to Req. for Costs at 2.

Also in March, the agency represents that its project delivery team (PDT) discovered three previously unknown gas lines in the area of construction covered by the procurement.⁴ Id. The PDT determined that the issue, which was discovered after the development of the original specifications, could "affect the design, as well as change the real estate rights required for the project." Id. Through discussions with PG&E, the PDT determined that installing relief wells was a viable alternative to construction of cutoff walls.⁵ Id. The Corps further explains that this alternative would require the "approval or concurrence from the City of Sacramento because these wells would discharge into Sacramento's storm water drainage system." Id. In late May, the PDT received notice that the City of Sacramento had "tentatively agreed" to the proposed

¹ Pursuant to the RFP, the levee improvements were to include a soil bentonite cutoff wall, a slag-cement portland-cement bentonite cutoff wall, landside stability berm, landside seepage berm, landside levee patrol road, erosion site repair, modifications to the City of Sacramento Pump Station No. 102, modifications to an existing water main, and modifications to the RD 1000 Pumping Plant No. 8. NGJV Protest, exh. G, RFP Specifications, ¶ 1.1.1.

² NGJV based its OCI allegations, in part, on its concern that a company affiliated with AIJV was involved in designing the geotechnical specifications for the procurement. NGJV Protest at 5, 10-12, 16-24. Among a plethora of other concerns, NGJV cited section 36.209 of the Federal Acquisition Regulation (FAR), which precludes the award of a contract for construction projects to the firm (or affiliates) that designed the project, except with the approval of the head of agency or authorized representative. Id. at 17, citing FAR § 36.209.

³ The agency had previously concluded that award to AIJV was not impacted by an unequal access to information OCI or a biased ground rules OCI. Req. for Costs at 5.

⁴ The Corps' project manager states that "[t]he 20-inch gas line and the two gas mains," owned and operated by Pacific Gas and Electric (PG&E), "are not accounted for in the current design of Reach H." Response to Req. for Costs, attach. 4, at 1.

⁵ The construction of the cutoff wall encompassed at least 60 percent of the contract. NGJV Protest, exh. F, Conformed RFP, at 84.

construction of relief wells at this location at Reach H. Id. In August, the PDT geotechnical lead “formally determined” that the discovery of the gas lines would require a modification to the design of the project. Id. at 3. The agency represents that new specifications are being finalized for the widening of the adjacent waterside embankment and the installation of relief wells. Id. According to the Corps, the design changes will delay construction of the project until possibly 2020, and may also require additional permitting with the State Water Resources Control Board and the City of Sacramento. Id.

On August 3, the Corps terminated AIJV’s contract for the convenience of the government based on OCI-related findings.⁶ Id.; see AIJV Protest (B-415907.2), exh. A, Notice of Termination, Aug. 3, 2018, at 1-3. In response, AIJV filed a protest with our Office on August 13 challenging the termination. See AIJV Protest at 1-51. In its voluminous submission, AIJV requested as relief that our Office recommend that the Corps: (a) withdraw its notice of termination; (b) reinstate AIJV’s contract; and (c) seek an OCI waiver under FAR section 36.209. Id. at 51.

The agency submitted a request for dismissal on August 28, advising our Office that the procurement had been cancelled due to “necessary changes to the design of [the] Reach H [project] and the Agency’s adoption of a fundamentally different procurement strategy for slurry wall levee construction contracts.”⁷ Agency Req. for Dismissal (B-415907.2) at 1. The agency also submitted a D&F memorandum to support the cancellation of the procurement. Id., encl. 1, D&F with Attachments, at 1-32. Following conversations with counsel for AIJV, on August 30, the Corps issued the firm an amended termination notice to reflect that AIJV’s contract actually was being terminated due to “significant changes in the Reach H Project design and schedule along with the Sacramento District’s shift in its acquisition strategy for levee slurry wall construction contracts.” Req. for Costs, exh. B, Notice of Termination, Aug. 30, 2018, at 1.

⁶ Specifically, the contracting officer determined that “[DELETED] are affiliates pursuant to FAR 2.101 and the prohibition of FAR 36.209 applies,” and that there were still “ongoing and unresolved concerns relating to an apparent impaired objectivity Organizational Conflict of Interest.” AIJV Protest (B-415907.2), exh. A, Notice of Termination, Aug. 3, 2018, at 1.

⁷ With respect to the new procurement strategy, the Corps explains that due to “numerous challenges” in awarding levee-related construction contracts under the negotiated procurement procedures of FAR part 15, the Corps’ Sacramento District approved the use of “prequalification procedures” to establish a list of technically prequalified contractors who could be issued invitations for bid. Response to Req. for Costs at 2. According to the agency, the prequalification procedures were expected to “maximize competition, enhance transparency with the industry, and increase small business participation in an otherwise small and inelastic contractor pool with a high barrier to entry.” Id. In May 2018, the Corps’ Sacramento District approved the use of a prequalification of sources list (PSL) method of procurement. Id. at 3; encl. 1, Determination and Findings (D&F), attachs. 2-3, D&Fs for a PSL, at 1-20.

In light of the cancellation, our Office dismissed AIJV's protest as academic. AECOM-Inguip JV, B-415907.2, Sept. 5, 2018 (unpublished decision). On September 20, AIJV filed its request that our Office recommend that AIJV be reimbursed its protest costs.

DISCUSSION

AIJV contends that reimbursement is warranted because its protest was clearly meritorious, as evidenced by the Corps' cancellation of the procurement and revision of the OCI concerns as the basis for termination of the firm's contract. Req. for Costs at 11. AIJV further asserts that the agency did not act promptly in its "corrective actions" because it gave AIJV the "run around" throughout the procurement process. Id.

Where a procuring agency takes corrective action in response to a protest, we may recommend that it reimburse the protester its 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); A-Ability Med. Equip., Inc.--Costs, B-403256.3, Apr. 4, 2011, 2011 CPD ¶ 81 at 2. 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. Herren Assocs., Inc.--Costs, B-414792.4, Nov. 21, 2017, 2018 CPD ¶ 122. 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. Remote Diagnostics Techs., LLC--Costs, B-413375.3, Feb. 6, 2017, 2017 CPD ¶ 52 at 3.

As an initial matter, we conclude that the agency's cancellation of the procurement was not corrective action taken in response to AIJV's protest. In this respect, where, as here, the record reasonably supports the agency's cancellation of a protested procurement on the basis that the solicitation at issue no longer represents the procuring agency's actual requirements, we do not view cancellation as corrective action taken to remedy a meritorious protest. See RKR Joint Venture, LLC--Costs, B-299856.2, Dec. 7, 2007, 2007 CPD ¶ 222 at 3-4. The record here details the Corp's basis for cancelling the procurement.⁸ As highlighted above, the contracting officer's D&F cited the discovery of the PG&E gas lines, which required modification to a substantial portion of the project's design and would result in an open-ended delay, as well as the Corps' Sacramento District's transition to a PSL method of procurement for its levee improvement projects. See Response to Req. for Costs, encl. 1, D&F with Attachments, at 1-32. While the agency's OCI concerns were noted as background in the D&F, the record is clear that the cancellation of the procurement was not the result of any AIJV OCI. Thus, the cancellation was not a corrective action taken in response to AIJV's protest, and, consequently, any reimbursement of costs on this basis is not

⁸ For the record, AIJV does not protest the cancellation of the procurement.

warranted. See Erickson Helicopters, Inc.--Costs, B-410787.4, Sept. 4, 2015, 2015 CPD ¶ 281 at 4-5 (denying request for costs where protest was rendered academic for reasons unrelated to the underlying protest).

Next, we need not resolve whether the agency's modification of the basis for terminating AIJV's contract constituted corrective action, as AIJV asserts, because we do not agree that AIJV's protest of its termination was clearly meritorious, *i.e.*, not a close call. Here, based on our review of AIJV's multiple arguments objecting to the agency's OCI analysis, we disagree that the Corps was without a defensible legal position. In this regard, while the protester is convinced the agency's OCI concerns were without merit, the record does not support AIJV's contention that the agency's actions were contrary to law or regulation or otherwise improper, on their face. In fact, our Office would have had to conduct substantial further analysis of the parties' positions, following further development of the record, to reach a conclusion as to the merits of AIJV's arguments. Because the resolution of AIJV's protest required further development and analysis, including, at a minimum, the submission of an agency report, we view the firm's assertions as presenting a close question, and therefore we cannot conclude that the arguments were clearly meritorious. See Systems Research & Applications Corp.--Costs, B-406775.3, Apr. 10, 2013, 2013 CPD ¶ 99 at 5 (finding arguments not clearly meritorious where our Office required agency to provide additional explanation); A-Ability Med. Equip., Inc.--Costs, *supra*, at 3 n.3 (finding protest allegations not clearly meritorious where further record development and legal analysis was needed, but agency report was not submitted due to cancellation of the solicitation).

Lastly, we also disagree with AIJV's assessment that its protest was clearly meritorious simply because the agency ultimately revised its initial termination notice. More specifically, while AIJV contends that the agency's actions demonstrate the Corps' "express and implicit agreement with the merits of the [p]rotest," the record reflects otherwise. Req. for Costs at 12. In this regard, the record shows that the agency's decision to revise its rationale for terminating AIJV's contract was merely part of an agreement between counsel for AIJV and agency counsel in which AIJV would "not oppose the notice of dismissal." *Id.*, exh. A, Email from AIJV Counsel to Agency Counsel, Aug. 29, 2018 (4:17 p.m.)⁹ Nothing in the record suggests that the agency agreed fully with the protest arguments or otherwise stated it was without a defensible legal position. Indeed, the fact that an agency decides to take corrective action--assuming the revision to the termination notice can even be considered corrective action--does not establish that a statute or regulation has been violated.¹⁰ See Evergreen Flying Servs., Inc.--Costs, B-414238.10, Oct. 2, 2017, 2017 CPD ¶ 299 at 7.

⁹ In the same email, protester's counsel acknowledged that the agreement not to oppose the agency's dismissal request was "with the understanding that the AIJV will pursue its fees and bid costs once the protest is dismissed (and the [Corps] reserves all rights to object to those fees and costs)." *Id.*

¹⁰ Given that we conclude that AIJV's protest was not clearly meritorious, we need not entertain AIJV's assertion that the agency failed to act promptly.

The imposition of protest costs is not intended as an award to prevailing protesters or as a penalty to the agency, but rather, is designed to encourage agencies to take prompt action to correct apparent defects in competitive procurements. See Takota Corp.-- Costs, B-299600.2, Sept. 18, 2007, 2007 CPD ¶ 171 at 3. As discussed above, we conclude that the circumstances here do not warrant the reimbursement of AIJV's protest costs.

The request is denied.

Thomas H. Armstrong
General Counsel