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Decision

Matter of: Navarre Corporation

File: B-414962.6; B-414962.7

Date: October 22, 2018

William M. Weisberg, Esq., Law Offices of William Weisberg, PLLC, for the protester. Deborah K. Morrell, Esq., and Donald C. Mobly, Esq., Department of Veterans Affairs, for the agency.

Michael Willems, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging solicitation amendment clarifying that agency will not evaluate fixed prices for price realism is denied where the agency has wide discretion when deciding whether to include a realism evaluation provision in a solicitation for the award of a fixed-price contract.
 2. Protest filed following a dismissal without prejudice of prior, related protest by a court of competent jurisdiction is not dismissed under Bid Protest Regulation 4 C.F.R. § 21.11(b).
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DECISION

Navarre Corporation, of Navarre, Florida, protests the corrective action proposed by the Department of Veterans Affairs (VA) related to a prior protest filed by Owl, Inc., of St. Johns, Florida, in connection with request for proposals (RFP) No. VA247-17-R-0004 for non-emergency wheelchair transportation services. The protester contends that the agency's proposed corrective action is unreasonable.

We deny the protest.

BACKGROUND

The VA issued the RFP on June 7, 2017, as a service-disabled veteran-owned small business set-aside. Agency Report, Tab 3, RFP at 1. The RFP contemplated the award of a single fixed-price indefinite-delivery, indefinite-quantity contract for non-emergency wheelchair transportation services, on a lowest-priced, technically

acceptable basis. Id. at 6, 78. The agency received several proposals in response to the solicitation. Abstract of Offers at 1. On April 25, 2018, the agency made award to Navarre, the lowest-priced, technically-acceptable offeror. Memorandum of Law (MOL) at 1-2. Owl then filed protest with our Office.

Owl's protest alleged, among other things, that Navarre's price was unrealistic, and that the agency failed to conduct a reasonable price realism evaluation. Owl's Protest at 9-10. We dismissed Owl's protest on the grounds that Owl was not an interested party to challenge the award, both because it was not a small business at the time of award, and because it was not next in line for award in a procurement with a lowest-priced, technically-acceptable source selection scheme. Owl, Inc., B-414962.3, B-414962.5, June 11, 2018 (unpublished decision). In our dismissal, we noted that the solicitation in this case provided for a price realism analysis by advising offerors that the agency would assess whether proposed prices reflected a clear understanding of the requirements. Id. at 1 n.1.

Shortly following our dismissal, Owl filed a protest with the Court of Federal Claims (COFC). MOL at 2. The agency then notified Owl and the Court that it intended to take corrective action. Id. The agency subsequently explained that it was not aware that the solicitation included a price realism evaluation provision until the agency reviewed GAO's decision dismissing the case, and that the agency had not performed a price realism evaluation. Id. at 3-4. Accordingly, the agency represented that it intended to terminate its contract with Navarre for the convenience of the government, amend the solicitation to remove the price realism evaluation provision, and solicit new proposals. Id. at 6. Pursuant to Rule 41(a)(1)(A)(ii) of the Federal Rules of Civil Procedure, Owl's complaint was dismissed without prejudice by stipulation of the parties. Stipulation of Dismissal without Prejudice at 1. This protest of the corrective action followed.

DISCUSSION

Navarre challenges the agency's decision to amend the solicitation to remove the price realism evaluation. Specifically, Navarre argues that the agency either already conducted a reasonable price realism evaluation or could readily conduct such an evaluation on existing proposals without amending the solicitation.

As a preliminary matter, our Regulations provide that we will dismiss "any case where the matter involved is the subject of litigation before, or has been decided on the merits by, a court of competent jurisdiction." 4 C.F.R. § 21.11(b). We directed the parties to brief the issue of whether this protest should be dismissed under 4 C.F.R. § 21.11(b) on the basis of the prior proceedings at the COFC. Navarre contends that this protest should not be dismissed on that basis because the matter was not decided on the merits by the COFC. Protester's Response to Request for Briefing on 4 C.F.R. § 21.11 at 1-2. We agree.

Our cases have generally concluded that a decision from a court of competent jurisdiction dismissing a matter with prejudice constitutes a final adjudication on the

merits for purposes of 4 C.F.R. § 21.11. See, e.g., Sea-Land Service, Inc., B-208690.2, Feb. 10, 1983, 83-1 CPD ¶ 148; Warvel Prods. Inc., B-281051.5, July 7, 1999, 99-2 CPD ¶ 13 at 8. However, where, as here, the court dismisses a matter without prejudice and without otherwise placing restrictions on the parties, our decisions have concluded that such a dismissal does not constitute a decision on the merits for purposes of dismissal. See Optimum Systems Inc., B-187560, Aug. 31, 1977, 77-2 CPD ¶ 165 (court's dismissal without prejudice does not require dismissal at GAO); Decision Planning Corp., B-210423.2, Mar. 9, 1984, 84-1 CPD ¶ 280 (court's dismissal without prejudice does not ordinarily necessitate dismissal at GAO, but where the court's order was predicated on the protester's representation that it would not refile elsewhere, dismissal is appropriate).¹ Our decisions reached that conclusion, in part, because a dismissal without prejudice leaves the parties in the same position in which they would have been if no court action had been brought. Decision Planning Corp., *supra*. Accordingly, the fact that the matter was previously before the COFC does not necessitate dismissal in this case because the COFC dismissed the case without prejudice.

Turning to the merits, Navarre contends, first, that the agency conducted a reasonable price realism evaluation, and, accordingly, that the initial award to Navarre should not have been disturbed. Protest at 3. In the alternative, Navarre argues that, to the extent the agency failed to conduct a reasonable price realism evaluation, the agency could easily remedy that fault by conducting a price realism evaluation on the proposals it has already received. Comments & Supp. Protest at 2-3. According to Navarre, it would be unreasonable for the agency to resolicit the requirement without a price realism provision because Navarre's price has been disclosed. *Id.* Navarre notes that reevaluating the already-received proposals would resolve the issue identified by the agency while causing less competitive harm to Navarre. *Id.* Navarre also argues that the removal of the price realism provision would encourage other offerors to submit unrealistic pricing. *Id.*

The agency responds by noting that it never intended to include a price realism provision in the solicitation, and did not realize that the language included in the RFP provided for such an evaluation. MOL at 4-5. The agency additionally notes that, while certain statements in its award decision can be read as suggesting it conducted a price realism evaluation, it did not perform such an evaluation or any analysis that would support such an evaluation. MOL at 4-5; Supp. MOL at 4. The agency argues that, in light of its original intent not to perform a price realism analysis, revising the solicitation to clarify the intended scope of the price evaluation and allowing offerors to submit new proposals is appropriate to resolve the concern that it identified. MOL at 6; Supp. MOL at 3-5.

¹ While the regulatory provision construed in these decisions was a predecessor provision (then codified at 4 C.F.R. § 21.10), the relevant language is substantially similar to the current 4 C.F.R. § 21.11.

As a general rule, agencies have broad discretion to take corrective action where the agency has determined that such action is necessary to ensure fair and impartial competition. MSC Indus. Direct Co., Inc., B-411533.2, B-411533.4, Oct. 9, 2015, 2015 CPD ¶ 316 at 5; Bannum, Inc.--Protest and Recon., B-411074.2, B-411074.3, June 12, 2015, 2015 CPD ¶ 231 at 3. The details of implementing the corrective action are within the sound discretion and judgment of the contracting agency, and our Office will not object to any particular corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. DGC Int'l, B-410364.2, Nov. 26, 2014, 2014 CPD ¶ 343 at 3; Northrop Grumman Info. Tech., Inc., B-404263.6, Mar. 1, 2011, 2011 CPD ¶ 65 at 3. Additionally, agency acquisition officials have broad discretion in the selection of evaluation criteria that will be used in an acquisition, and we will not object to the absence or presence of a particular criterion as long as the method chosen reasonably relates to the agency's needs in choosing a contractor and is not otherwise contrary to law or regulation. CACI, Inc.-Federal; Booz Allen Hamilton, Inc., B-413028 et al., Aug. 3, 2016, 2016 CPD ¶ 238 at 13.

Here, we note that the agency's intended evaluation approach is consistent with the Federal Acquisition Regulation (FAR), which establishes that an agency "may ... in exceptional cases," provide for a price realism evaluation when awarding a fixed price contract, but is not required to do so. FAR § 15.404-1(d)(3); Ball Aerospace & Techs. Corp., B-402148, Jan. 25, 2010, 2010 CPD ¶ 37 at 8. An agency, accordingly, need not include a price realism evaluation factor in a solicitation such as this one, and our decisions have concluded that an agency has broad discretion concerning whether or not to include one. See, e.g., CRAssociates, Inc., B-414171, Mar. 16, 2017, 2017 CPD ¶ 92 at 5.

Navarre's core argument is that it is unreasonable for the agency to amend the solicitation, rather than reevaluate proposals, because a reevaluation of existing proposals would fully address the concerns identified by the agency, while resoliciting would cause Navarre competitive harm. Comments & Supp. Protest at 2-3. We do not agree that such a reevaluation would fully address the agency's concerns. The agency is clear that its concern is not only that it failed to perform a price realism evaluation, but also that it never intended to solicit on that basis to begin with. MOL at 4-5.

Accordingly, the solicitation as written does not reflect the agency's needs, and the agency's proposed solution reasonably relates to the issues it identified. See Ripple Effect Commc'ns, Inc., B-413722.2, Jan. 17, 2017, 2017 CPD ¶ 27 at 3-4 (protest of corrective action is denied where the agency proposed to amend a solicitation to remove language related to price realism, because the agency never intended to include a price realism evaluation). Given the agency's broad discretion to decide

whether to include a price realism provision in this instance, we have no basis to conclude that the agency's decision to amend the solicitation to remove the price realism provision is unreasonable.

The protest is denied.

Thomas H. Armstrong
General Counsel