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Decision

Matter of: ARP Sciences, LLC

File: B-415318.4

Date: February 7, 2019

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Frank A. March, Esq., Department of the Army, for the agency.
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DIGEST

Request for reimbursement of protest costs is denied where the initial protest grounds were not clearly meritorious and where the agency took prompt corrective action in response to the second supplemental protest.

DECISION

ARP Sciences, LLC, a small business, of Rockville, Maryland, requests that our Office recommend that the Department of the Army reimburse it for the reasonable costs of filing and pursuing a protest of the award of a contract to SNA International, LLC (SNA), of Alexandria, Virginia, under request for proposals (RFP) No. W81XWH-16-R-0021, for scientific, technical, administrative, and logistical support services.

We deny the request.

BACKGROUND

The RFP, issued on July 20, 2016 as a set-aside for small businesses, provided for the award of an indefinite-delivery, indefinite-quantity (IDIQ) contract for scientific, technical, administrative, and logistical support services for the Armed Forces Medical Examiner System (AFMES).¹ AR, Tab 3, RFP, at 2; Performance Work Statement (PWS) at 1.

¹ AFMES is a tri-service organization that has the overall mission to provide comprehensive and innovative “medico-legal” services worldwide. Agency Report (AR), Tab 3, Performance Work Statement (PWS), at 9. AFMES provides mission support to
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The RFP provided that award would be made on a best-value tradeoff basis, considering, in descending order of importance: management capabilities, experience, technical approach, past performance, and cost/price. RFP at 80.

The Army received four proposals by the deadline for receipt of proposals. Contracting Officer's Statement (COS) at 2. Only two proposals, those of ARP Sciences and SNA, were included in the competitive range. Id. After discussions were conducted and the source selection evaluation board evaluated final proposal revisions, the source selection authority (SSA) prepared a draft selection decision in which ARP Sciences was selected for award. AR, Tab 38, Decl. of SSA, at 1. The SSA's draft decision was subject to peer review pursuant to Army guidance.² Id. After receiving input from the peer reviewers, the SSA reconsidered her decision and selected SNA's proposal as presenting the best value to the government. Id. at 3. On September 14, 2017, the Army awarded the contract to SNA.

On September 21, ARP Sciences filed a protest with our Office challenging the evaluation of its and SNA's proposals under the management capabilities, experience, and technical approach factors. Protest (B-415318). More specifically, ARP Sciences argued that: (1) the Army unreasonably assigned a weakness to ARP Sciences' proposal under the management capabilities factor and should have assigned its proposal an outstanding rating; (2) the Army unreasonably assigned ARP Sciences' proposal a good instead of an outstanding rating under the experience factor, given that it is the incumbent; (3) the Army failed to consider SNA's lack of experience; (4) the Army unreasonably assigned two weaknesses to ARP Sciences' proposal under the technical approach factor, and failed to assign it the outstanding rating it deserved; (5) the Army failed to conduct meaningful discussions; and (6) the Army unreasonably concluded that SNA's proposal presented the best value to the government because of flaws in the underlying technical evaluation, and a failure to fully consider ARP Sciences' lower price. Id. at 13-26. Additionally, ARP Sciences asserted that, one week prior to the award announcement, the Defense Contract Audit Agency informed it that ARP Sciences was the awardee, which the protester contended suggested that the Army unreasonably reversed its award decision by awarding to SNA. Id. at 26-27.

On October 2, ARP Sciences filed a supplemental protest arguing that SNA was ineligible for award because SNA failed to satisfy the RFP requirement for a program

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the Department of Defense in the fields of human remains identification; forensic toxicology; "medico-legal" death investigations; forensic DNA analytical services; mass-fatality specimen collections and management services; and human reference specimen collection, cataloging, archival, and retrieval repository services. Id.

² Peer review is to be conducted by the contracting officer, SSA, quality/policy, legal and contract review board. AR, Tab 38, Decl. of SSA, at 2.

manager, and that the Army failed to consider the risks inherent in SNA's plan to hire the incumbent staff. Supp. Protest, Oct. 2, 2017, at 5-10.

The Army addressed ARP Sciences' protest grounds in its report on October 23. See Memorandum of Law (MOL). On November 1, the GAO attorney held a conference call to request an additional response from the Army with respect to the protester's challenges to the agency's evaluation of proposals under the experience and technical approach factors. Army Response, Dec. 13, 2017, at 4; Req. for Reimbursement at 3. In addition, GAO noted that the SSA's apparent change in awardee presented a unique set of circumstances that would require additional information. GAO advised the parties that it was considering holding a hearing to obtain testimony concerning the issues discussed in the conference call. Army Response, Dec. 13, 2017, at 4.

ARP Sciences filed a second supplemental protest with its comments on November 2. Comments & Supp. Protest, Nov. 2, 2017, at 2-10. ARP Sciences argued that the Army failed to justify its deviation from its initial selection of ARP Sciences for award, and that one of SNA's team members had an unmitigated organizational conflict of interest (OCI). Id. On November 3, the Army submitted its first supplemental report in response to GAO's conference call. See Supp. MOL; Supp. COS. On November 8, the Army advised our Office that it planned to set aside its selection decision, investigate the alleged OCI, conduct discussions if deemed necessary, and make a new source selection decision. Req. for Dismissal, Nov. 8, 2017, at 1. On November 13, we dismissed ARP Sciences' protests as academic.³ ARP Sciences, LLC, B-415318 et al., Nov. 13, 2017 (unpublished decision). ARP Sciences then filed this request for our recommendation that it be reimbursed for its protest costs.

DISCUSSION

ARP Sciences requests that we recommend that the Army reimburse it for the costs of filing and pursuing its initial and supplemental protests, arguing that the Army unduly delayed taking corrective action in response to ARP Sciences' clearly meritorious protests. Req. for Reimbursement at 1.

Where 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. 4 C.F.R. § 21.8(e); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. That is, as a prerequisite to our recommendation that protest costs be reimbursed, the protest must not only have been meritorious, but it also must have been clearly meritorious, i.e., not a close question.

³ After the Army completed its OCI investigation, reevaluated proposals, and again selected SNA for award, ARP Sciences again protested to our Office, raising some of the same issues it raised in its initial and supplemental protests. We denied this protest. See ARP Sciences, LLC, B-415318.5, B-415318.6, Aug. 9, 2018, 2018 CPD ¶ 302.

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.

We have reviewed all of ARP Sciences' protest allegations. Based on the record before us, we conclude that none of the allegations raised in the initial and first supplemental protests meet the clearly meritorious standard for our Office to recommend reimbursement of protest costs. In addition, we find that the agency did not unduly delay in taking corrective action in response to ARP Sciences' second supplemental protest. Below, we address a portion of ARP Sciences' arguments.⁴

Management Capabilities Factor

ARP Sciences argued in its underlying protest that the Army misevaluated its proposal under the management capabilities factor by failing to consider information provided in its revised proposal that addressed the company's understanding of IDIQ contracting. Req. for Reimbursement at 9-10; Protest at 13, 15. In this regard, the protester asserted that the evaluation document largely repeated the agency's previous criticism of its initial proposal without referencing the substantial improvements made to its final proposal. Protest at 15. ARP argued that if the Army had properly evaluated its revised proposal, the agency would not have assessed it a weakness and would have assigned ARP Sciences' proposal an outstanding rating. Id. The agency disagreed, and answered that the evaluators recognized an improvement in the revised proposal and as a result upgraded ARP Sciences' rating from a significant weakness to a weakness. Army Response, Dec. 13, 2017, at 11; COS at 3.

The record confirms that the Army initially assessed a significant weakness to ARP Sciences' initial proposal under the management capabilities factor for demonstrating a lack of understanding of IDIQ contracts. AR, Tab 9, ARP Sciences Consensus Evaluation Report, at 3. The Army included the text of the significant weakness in the discussions letter, as follows:

Significant Weakness: The Offeror's proposed approach to task management provided a description of [DELETED]. Further, the Offeror proposed [DELETED] Key Personnel positions on the base contract without identifying how the positions are critical to achieving the proposal objectives on the base contract even though the RFP only identified one Key Personnel position at the base contract level and indicated additional

⁴ With the agreement of the parties, we conducted outcome prediction alternative dispute resolution (ADR) conference to facilitate resolution of ARP Sciences' request for recommendation for reimbursement of its costs. Although GAO advised the parties that it found none of ARP Sciences' protest grounds to be clearly meritorious, the protester elected not to withdraw its request for reimbursement.

key personnel positions may be listed at the task order level when applicable. This demonstrates a lack of understanding [of] Indefinite Delivery Indefinite Quantity (IDIQ) contracts specifically, and of performance-based contracting in general. This failure to understand the nature of an IDIQ contract and performance based contracting is a flaw in the proposal that appreciably increases management and performance risk.

Point of Discussion: Offeror should refer to [Federal Acquisition Regulation (FAR)] 15.606-2(a)(5) in order to understand key personnel must be critical to achieving the proposal objectives and address their understanding of IDIQ contracts, performance based contracting, and key personnel.

AR, Tab 12, ARP Sciences Discussion Letter, at 1.

In response, ARP Sciences included additional information concerning IDIQ management processes and techniques in its revised proposal, and deleted [DELETED] from a table of key personnel qualifications. See AR, Tab 14, ARP Sciences' Revised Proposal, at 17-18, 36. However, ARP Sciences again included in its proposal an organizational chart that identified specific personnel to work in various divisions and reporting to the contract program manager, even though the agency did not provide a PWS for task orders. In addition, the organizational chart identified many of those staff as key personnel. Id. at 15. The organizational chart did not distinguish between personnel to be assigned to the base contract and those to be assigned under task orders. See id.

The Army states that, after the evaluators reviewed ARP Sciences' final proposal, a portion of the criticisms that formed the significant weakness with respect to the final proposal were eliminated and therefore were not included in the final evaluation report. COS at 3. The elimination of those issues resulted in the significant weakness being upgraded to a weakness. Id. The agency explains that ARP Sciences' revised proposal provided a large amount of information about the mix of resources it planned to use in performance of the contract, even though the government had not provided any task order performance work statements or historical staffing estimates by task order. Id. at 4-5.

Here, the record shows that the Army had a defensible legal position for continuing to support its position, which undercuts ARP Sciences' contention that its protest was clearly meritorious. ARP Sciences' revised proposal continued to identify key personnel in its organizational chart without differentiating between staffing for the base contract and staffing for the task orders. Thus, the agency could reasonably conclude that ARP Sciences' proposal did not demonstrate an understanding of IDIQ contracts and reasonably assess a weakness in this regard. Accordingly, we find this allegation was not clearly meritorious.

Discussions

ARP Sciences also argued that the Army failed to conduct meaningful discussions with respect to the significant weakness assigned to its initial proposal under the management capabilities factor. Req. for Reimbursement at 11-12; Protest at 24. ARP Sciences maintains that because it comprehensively addressed the Army's concern about a perceived lack of understanding of IDIQ contracting, any remaining weakness in its proposal was the result of the Army failing to conduct meaningful discussions. Req. for Reimbursement at 12; Protest at 24.

Discussions, when conducted, must be meaningful; that is, they may not mislead offerors and must identify proposal deficiencies and significant weaknesses that could reasonably be addressed in a manner to materially enhance the offeror's potential for receiving award. FAR § 15.306; Serco Inc., B-405280, Oct. 12, 2011, 2011 CPD ¶ 237 at 11. Although discussions must address deficiencies and significant weaknesses identified in proposals, the precise content of discussions is largely a matter of the contracting officer's judgment. FAR § 15.306(d)(3); American States Utilities Servs., Inc., B-291307.3, June 30, 2004, 2004 CPD ¶ 150 at 5. To satisfy the requirement for meaningful discussions, an agency need only lead an offeror into the areas of its proposal requiring amplification or revision; all-encompassing discussions are not required, nor is the agency obligated to "spoon-feed" an offeror as to each and every item that could be revised to improve its proposal. ITT Fed. Sys. Int'l Corp., B-285176.4, B-285176.5, Jan. 9, 2001, 2001 CPD ¶ 45 at 7.

We found no basis to conclude that the Army failed to conduct meaningful discussions which, again, undercuts ARP Sciences' assertion that its protest was clearly meritorious. As noted above, the Army's discussions letter identified elements of ARP Sciences' proposal that led the agency to believe that the proposal did not demonstrate an understanding of IDIQ contracting. AR, Tab 12, ARP Sciences Discussion Letter, at 1. For example, the discussions letter stated that ARP Sciences proposed staffing at the base contract level [DELETED], and that the proposal identified many key personnel positions for the base contract. Id. As a result, we conclude that the Army led ARP Sciences to the areas of concern, and we see no basis to conclude that this protest ground was clearly meritorious, or that ARP Sciences should be reimbursed its costs of raising this issue.

Selection Decision

Finally, ARP Sciences argues that members of the peer review overrode the SSA's initial selection of ARP Sciences, such that the SSA did not exercise her independent judgment. Req. for Reimbursement at 6-7; Comments & Supp. Protest, Nov. 2, 2017, at 2-3.

Here, the record in the earlier protest showed that the SSA prepared a draft selection decision and selected ARP Sciences as the awardee. AR, Tab 38, Decl. of SSA, at 1. The Army explains that, as a matter of policy, the agency requires peer review of

selection decisions based on the total dollar value of the contract. Id. at 1-2. In this regard, the SSA states that final review of the draft selection decision was performed by a contract review board, of which the SSA was a member.⁵ Id. at 2. The SSA also states that, after legal review was completed, the SSA participated in a teleconference in which various issues were discussed. Id. at 2-3. As a result of the discussion, the SSA revisited the source selection decision and selected SNA for award. Id. Additionally, the SSA stated that, although she did not have the authority to issue the selection decision until after the contract review board granted its approval, the source selection decision was independently drafted. Id. at 4.

As indicated to the protester's counsel during the ADR, we did not view this protest ground as clearly meritorious. We have often stated that while agency selection officials may rely on reports and analyses prepared by others, the ultimate selection decision reflects the selection official's independent judgment. See, e.g., Arctic Slope Tech. Servs., Inc., B-411776, B-411776.2, Oct. 20, 2015, 2017 CPD ¶ 6 at 7; Clark/Foulger-Pratt JV, B-406627, B-406627.2, July 23, 2012, 2012 CPD ¶ 213 at 13. Here, we were presented with the question of whether the SSA exercised independent judgment and considered, at a minimum, a hearing to obtain further information from, at a minimum, the SSA. In our view, because the agency took corrective action before providing any further information, the record is not complete, and provides no basis to find that these protest arguments were clearly meritorious. See Apptis Inc.-Costs, B-402146.3, Mar. 31, 2010, 2010 CPD ¶ 123 at 6; Alaska Structures, Inc.-Costs, B-298575.4, Jan. 22, 2007, 2007 CPD ¶ 15 at 6.

Undue Delay

In addition, we conclude that the Army did not unduly delay taking corrective action in response to ARP Sciences' second supplemental protest. As a general rule, when an agency takes corrective action before the due date set for receipt of an agency report, our Office views such action as prompt and will not recommend the reimbursement of costs. LGS Innovations LLC, B-405932.3, Apr. 26, 2012, 2012 CPD ¶ 147 at 2. Here, ARP Sciences raised the OCI allegation for the first time in its November 2 supplemental protest. Comments & Supp. Protest, Nov. 2, 2017, at 8-10. On November 8--the date GAO established for the agency's supplemental agency report--the Army filed a notice of corrective action in response to the OCI allegation. Req. for Dismissal, Nov. 8, 2017, at 1. Under these circumstances, we consider the corrective

⁵ The SSA states that each draft is signed before moving to the next level of review, but that the SSA's signature on early drafts does not constitute a final selection decision. AR, Tab 38, Decl. of SSA, at 2.

action to be prompt. Thus, we have no basis to recommend reimbursement of costs associated with ARP Sciences' second supplemental protest.

The request is denied.

Thomas H. Armstrong
General Counsel