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Decision

Matter of: Odle Management Group, LLC

File: B-414952.4

Date: October 2, 2018

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participated in the preparation of the decision.

DIGEST

Protester's request for recommendation of reimbursement of protest costs is denied where the initial and first supplemental protests were not clearly meritorious and the agency did not unduly delay in taking corrective action in response to the second supplemental protest.

DECISION

Odle Management Group, LLC, a small business of Scottsdale, Arizona, requests that our Office recommend that it be reimbursed the costs of filing and pursuing its protests of the Department of Labor's (DOL) award of a contract to Horizons Youth Services, of Glassboro, New Jersey, under request for proposals (RFP) No. DOL-ETA-15-R-00056, for operation of a Job Corps center.

We deny the request.

BACKGROUND

The RFP, issued on April 30, 2015, provided for the award of a cost-reimbursement, incentive-fee contract for operation of the Whitney Young Job Corps Center in Simpsonville, Kentucky.¹ Agency Report (AR), Tab 1, RFP, at 1, 114. The RFP

¹ Job Corps is a national residential training and employment program administered by DOL to address the multiple barriers to employment faced by disadvantaged youth throughout the United States. RFP, Statement of Work, at 7.

contemplated a period of performance consisting of a transition period, a two-year base period, three option years, and a transition-out period. Id. at 3-5.

The RFP stated that award would be made to the responsible offeror whose proposal was determined to provide the best value to the government, considering (in descending order of importance): past performance, technical approach, staff resources, and cost. Id. at 130, 133. Past performance, technical approach, and staff resources, when combined, were to be significantly more important than cost. Id. at 133.

As relevant here, for the staff resources factor, offerors were to provide a detailed organization chart covering all staff for the center; staff schedules; a resume and position description of the proposed center director and other personnel; an explanation of corporate services and support; a narrative detailing efforts to develop, retain, and reward staff; and a transition-out plan. RFP at 122-123. The solicitation stated the agency would evaluate an offeror's staff resources in accordance with the following six elements, weighted in descending order of importance: adequacy of staffing, corporate oversight and support, center director, staff development and incentives, staff position descriptions, and transition-in and transition-out. Id. at 130, 132.

DOL received proposals from three offerors, including Odle and Horizons. AR, Tab 17, Competitive Range Memorandum, at 4. With respect to the staff resources factor, an evaluation team assigned Odle's proposal an acceptable rating. AR, Tab 18, Technical Evaluation Report, at 14. The evaluators assigned Odle a strength for its proposed center director and assessed the proposal a good rating under the center director element. Id. at 17. The evaluators assigned Odle acceptable ratings under the remaining staff resources elements. Id. at 15-17.

The evaluation team assigned Horizons' proposal an unacceptable rating for the center director element and for the staff resources factor because its proposed center director did not have Job Corps center experience or experience with youth in a group setting. Id. at 6, 9. The evaluators assigned Horizons' proposal a marginal rating under the adequacy of staffing element due to several weaknesses, and an acceptable rating under the remaining staff resources elements. Id. at 6-9. The evaluators also identified strengths in Horizons' proposal under the elements for corporate oversight and support, and staff development and incentives. Id. at 8.

In establishing the competitive range, the contracting officer, who also served as the source selection authority (SSA), reviewed the evaluations and accepted the evaluation team's ratings for Odle. The SSA noted that Odle's approach met the minimum requirements of the RFP, the Job Corps policy and requirements handbook, and demonstrated a sound understanding of the requirements. AR, Tab 17, Competitive Range Memorandum, at 13. The SSA disagreed, however, with the unacceptable rating the evaluation team assigned the Horizons proposal for the center director element under the staff resources factor. Id. at 11-12. The SSA determined that Horizons' proposed center director met the solicitation's requirements through his

volunteer experience working with youth in a variety of programs and changed the rating to acceptable for the center director element. Id. at 12. The SSA also concluded that the weaknesses identified in Horizons’ proposal with respect to the adequacy of staffing element were easily corrected with clarifications. Id. at 11. The SSA concluded that Horizons’ staff resources proposal demonstrated an adequate approach and understanding of the requirements, and changed Horizons’ marginal rating for the factor to an acceptable rating. Id. at 12.

The agency held discussions with both Odle and Horizons. After discussions, the SSA considered the following ratings and most probable costs:

	Past Performance	Technical Approach	Staff Resources	Cost
Horizons	Very Good	Good	Acceptable	\$47,482,231
Odle	Very Good	Good	Acceptable	\$48,480,978

AR, Tab 4, Source Selection Decision (SSD), at 11. The SSA concluded that the proposal submitted by Horizons had the lowest final proposed cost, which was approximately 2.1 percent lower than Odle’s. Id. at 13. The SSA also noted that while the overall technical approach ratings were equal, Horizons’ proposal was “slightly stronger” because it had more identifiable strengths surrounding programmatic innovation. Id. In comparison, Odle’s proposal mostly contained standard approaches and a significant weakness.² Id. The SSA also noted that Horizons’ staff resources proposal rating was acceptable, and the few weaknesses found were offset by its many strengths, including the staff’s Job Corps program experience, corporate oversight, and staff incentives. Id. at 11-12. The SSA concluded that Horizons’ proposal represented the best value to the government and made award to the firm on July 17, 2017. Id. at 12-13; Contracting Officer’s Statement/Memorandum of Law (COS/MOL) at 3.

After receiving notice of the award to Horizons, Odle requested a debriefing but subsequently withdrew its request. COS/MOL at 3. Odle then protested to our Office, challenging the evaluation of both its and Horizons’ past performance, the agency’s cost realism analysis and the best-value award decision. Protest at 2.

Odle filed a supplemental protest prior to the due date for the agency report, augmenting its challenges to the past performance evaluation and cost realism analysis. In addition, Odle alleged that Horizons failed to notify DOL of a change in the availability of Horizons’ proposed key personnel, the agency unreasonably evaluated proposals under the technical approach and staff resources factors, and the agency failed to investigate a reported Procurement Integrity Act violation. Supp. Protest, July 27, 2017, at 2. Our Office dismissed Odle’s allegation that the agency unreasonably evaluated

² The agency found that Odle’s proposal [DELETED]. Reply to Request for Costs, exh. 1, Discussions Letter, at 2.

proposals under the technical approach factor for failure to state a valid basis of protest. Email from GAO to Parties, Aug. 11, 2017. Our Office also dismissed the Procurement Integrity Act allegation as untimely. Id.

On August 21, DOL filed its report addressing Odle's initial and supplemental protest grounds. Odle filed a second supplemental protest with its comments, in which it argued that the agency failed to: credit Odle with innovative approaches proposed under the technical approach factor as the agency had done for Horizons; raise a significant weakness assessed against Odle's proposal during discussions; and properly evaluate Horizons' proposed key personnel because the center director did not meet the solicitation's minimum requirements. Comments & Supp. Protest, Aug. 31, 2017, at 1-2. The day before DOL's response to Odle's second supplemental protest was due, DOL advised our Office that it would take corrective action by reexamining the record of the procurement, reopening discussions with offerors within the competitive range, and making a new selection decision. Email from DOL to GAO, Sept. 11, 2017. As a result of the agency's proposed corrective action, we dismissed the protest as academic. Odle Mgmt. Grp., LLC, B-414952 et al., Sept. 15, 2017 (unpublished decision).

DISCUSSION

Odle requests that we recommend it be reimbursed for the costs of filing and pursuing its protests because the agency unduly delayed taking corrective action in response to clearly meritorious protest allegations. Specifically, Odle alleges that the agency: (1) conducted an unreasonable evaluation of proposals under the technical approach factor; (2) failed to conduct meaningful discussions relating to Odle's technical approach that affected the best-value determination; (3) performed an unreasonable cost realism analysis; and (4) unreasonably assigned Horizons a higher rating than Odle under the staff resources factor.³ DOL asserts that none of the protest grounds raised in Odle's initial and first supplemental protests were clearly meritorious and it did not unduly delay taking corrective action in response to the second supplemental protest.

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

³ Odle's initial and first supplemental protest also challenged the agency's past performance evaluation. Odle does not contend that this allegation was clearly meritorious; rather, Odle argues that it should be reimbursed for the costs incurred with respect to all of the issues pursued because they are intertwined and relate to the same legal theory. Request for Costs at 11. Since we deny this request for reimbursement, this argument fails. In any event, we have reviewed all of Odle's initial and first supplemental protest allegations and find none are clearly meritorious.

and resources to make further use of the protest process in order to obtain relief. 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.

Technical Evaluation and Best-Value Decision

Odle argues that its initial and supplemental protests concerning the agency's evaluation under the technical approach factor and its best-value decision were clearly meritorious. Request for Costs at 6. First, Odle argues that the agency's evaluation under the technical approach factor was unreasonable because it rated Odle's proven strategies the same or lower than Horizons' unproven strategies. *Id.* As noted above, our Office dismissed Odle's allegation, set forth in its first supplemental protest, that the agency unreasonably evaluated Odle's and Horizons' proposals under the technical approach factor for failure to state a valid basis of protest. Our Office stated that Odle's blanket statement that its proven strategies deserved a strength failed to identify the specific strengths or proven strategies for which Odle believed it deserved credit and Horizons did not offer. Email from GAO to Parties, Aug. 11, 2017. As such, we do not find this argument clearly meritorious. Facility Services Mgmt., Inc.--Costs, B-402757.5, Sept. 27, 2010, 2010 CPD ¶ 236 at 4-5 (dismissed issues are not clearly meritorious).

Second, Odle argues that the agency's evaluation under the technical approach factor was flawed because DOL failed to identify a significant weakness during discussions. Request for Costs at 6. Odle first raised this protest allegation in its second supplemental protest and comments to the agency report, and the agency subsequently took corrective action. The protester contends that this allegation directly challenges the reasonableness of the best-value decision, which it challenged in its initial protest, and therefore the agency unduly delayed taking corrective action on this clearly meritorious allegation. We find this argument unavailing.

As noted, in its initial filing, Odle challenged the evaluation of both its and Horizons' past performance, the agency's cost realism analysis and the best-value award decision. Protest at 2. Odle filed a supplemental protest prior to the due date for the agency report, alleging that Horizons failed to notify DOL of a change in the availability of Horizons' proposed key personnel, the agency unreasonably evaluated proposals under the technical approach and staff resources factors, and the agency failed to investigate a reported Procurement Integrity Act violation. Supp. Protest, July 27, 2017, at 2. Odle's initial and supplemental protests, however, did not set forth any argument relating to a lack of meaningful discussions.

Accordingly, there is no basis in the record here to conclude that the initial and first supplemental protests identified the issue on which the corrective action was based such that it would be appropriate to measure the promptness of the agency's corrective action from the filing date of the initial and first supplemental protests. See Diligent Consulting, Inc.--Cost, B-299556.3, June 26, 2007, 2007 CPD ¶ 125 at 5-6. In this regard, notwithstanding Odle's challenge to the best-value determination raised in its initial protest, Odle did not raise the allegation concerning a lack of meaningful discussions until its second supplemental protest. Further, the record is clear that the agency took prompt corrective action prior to filing its supplemental agency report. For these reasons, we do not recommend reimbursement of these protest costs.

Cost Realism Analysis

Odle argues that its initial and first supplemental protest allegations challenging the reasonableness of the agency's cost realism analysis are clearly meritorious. Request for Costs at 7-8. In its initial protest, Odle argued that Horizons intended to hire a number of Odle's staff but that Horizons' proposed costs were not realistic since they could not and did not reflect such an approach. Protest at 10-11. In its first supplemental protest, Odle further argued that DOL failed to assess the risks associated with Horizons' low cost, including whether Horizons understood and could perform the work. Supp. Protest, July 27, 2017, at 5.

The agency argued that Horizons was required to offer incumbent staff a right of first refusal of employment, consistent with Federal Acquisition Regulation part 22 and the solicitation. COS/MOL at 7. In this regard, the solicitation included a special contract requirement, Nondisplacement of Qualified Workers Under Service Contracts, which stated that the contractor will, in good faith, offer certain employees of the incumbent a right of first refusal of employment. RFP at 36-37.

In addition, the agency stated that Horizons did not know the rates of pay, benefits package or bonus structure of Odle, but used its knowledge of the local market and unique approach to propose estimated costs, which the agency found realistic. COS/MOL at 8. The agency also stated that it conducted a line-by-line review of offerors' costs, held discussions to resolve specific elements of costs that were in question, and allowed offerors to revise their cost proposals. Id. at 9; see AR, Tab 9, Horizons Final Revised Cost Proposal Evaluation (including responses to discussion questions). Further, the agency compared each offerors' proposed costs to the independent government cost estimate (IGCE) and each other's proposals and "in no single category did Horizons' costs vary in any significant fashion from Odle's proposal as to suggest that Horizons would be unable to perform at the proposed cost." COS/MOL at 9. The agency explained that in five of the nine personnel expense line items, Horizons' proposed costs for various labor categories were between 8-9 percent lower than Odle's proposed costs and in other labor categories, the offerors were within 1-5 percent of each other. Id. at 10. The SSA concluded that Horizons' final proposed cost was approximately 2.1 percent lower than Odle's and 4.6 percent less than the IGCE. AR, Tab 4, SSD, at 9, 13.

In response, in its comments and second supplemental protest, Odle argued that the agency failed to consider the realism of several specific line items relating to Horizons' operational and personnel line item costs. Comments and Supp. Protest, Aug. 31, 2017, at 20-24. Based on this record, the agency's argument regarding the relatively small difference between Horizons' and Odle's final proposed costs could be a defensible legal position for which we would need further development of the record to resolve. As such, because the resolution of these issues required further development, we cannot conclude that the protest allegations relating to the agency's cost realism analysis were clearly meritorious. Science Applications Int'l Corp.--Cost, B-410760.5, Nov. 24, 2015, 2015 CPD ¶ 370. We therefore decline to recommend reimbursement of these protest costs.

Staff Resources

Finally, Odle maintains that its challenge to the evaluation of proposals under the staff resources factor is clearly meritorious. Request for Costs at 8. In its supplemental protest, Odle argued that it should not have received lower ratings or fewer strengths than Horizons since Horizons proposed "nothing more than duplicating the staff resources approach of Odle."⁴ Supp. Protest, July 27, 2017, at 9.

In response, the agency stated that it assigned both offerors the same rating. COS/MOL at 12. In addition, the agency explained that Odle's argument is based on an incorrect assumption that Horizons proposed nothing more than duplicating Odle's staffing approach. Id. In this regard, the SSA noted the few weaknesses found in Horizons' proposal were offset by its many strengths, including that Horizons' staff has an abundance of Job Corps program experience, its corporate oversight is strongly defined, and its proposal highlighted **[DELETED]** incentives, "which go beyond the standard approach." AR, Tab 4, SSD, at 11-12. In contrast, the SSA found that Odle's staff resources proposal had a few identifiable strengths, but was standard for the program and offered little innovation beyond program requirements. Id. at 12.

The record here does not establish that Odle's challenge to the staff resources factor is clearly meritorious. While Odle disagrees with the source selection decision and argues that Horizons' proposal does not show its staff has an abundance of Job Corps experience, the record establishes that Horizons' proposal set forth its staffing

⁴ In its request for costs, Odle argues that the agency failed to properly evaluate Horizons under the staff resources factor because Horizons' proposed center director did not meet the solicitation's minimum requirements. Request for Costs at 9. However, Odle made this argument in its second supplement protest, see Comments & Supp. Protest, Aug. 31, 2017, at 11-13, and the agency took corrective action prior to filing its supplemental agency report. Therefore, the agency did not unduly delay taking corrective action on this issue. See Alsalam Aircraft Co.--Costs, supra.

experience for its corporate and major subcontractor's staff. AR, Tab 12, Horizons Staff Resources Proposal, at 3-6; AR, Tab 5, Horizons Past Performance Proposal, at 3-4. Here, Odle's disagreement with the agency's judgment, without more, does not demonstrate the protest was clearly meritorious. See Science Applications Int'l Corp.-- Costs, supra, at 5 (disagreement with agency's judgments under key personnel factor did not demonstrate clearly meritorious protest grounds).

Odle also argues that Horizons did not offer many staff incentives because they removed many of them after discussions. However, as the agency notes, Horizons' proposal included staff incentives such as **[DELETED]**. AR, Tab 18, Technical Evaluation Report, at 8. As the agency further notes, the only incentive Horizons removed after discussions was the **[DELETED]** and "some additional incentive items, which resulted in the reduction of an additional **[DELETED]** per year." AR, Tab 9, Final Revised Cost Proposal, at 5. Based on this record, we find no basis to recommend reimbursement of protest costs.

The request is denied.

Thomas H. Armstrong
General Counsel