Decision

Matter of: BAI, Inc.--Costs

File: B-416681.7

Date: August 30, 2019


DIGEST

Request that GAO recommend that agency reimburse the protester’s costs of filing and pursuing its earlier protests, of preparing its proposal, and of the request itself, is denied where the initial protest was not clearly meritorious and where the agency took prompt corrective action in response to a supplemental protest.

DECISION

BAI, Inc., of Alexandria, Virginia, a small business, requests that our Office recommend that the Department of Homeland Security (DHS) reimburse the firm for the reasonable costs of filing and pursuing its protest, of preparing its quotation, and of pursuing this cost claim, with respect to request for quotations (RFQ) No. 70LGLY18RSSB00003, for commercial information technology support services for the Federal Law Enforcement Training Center in Glynco, Georgia. We dismissed the protest as academic on June 21, 2019, based on the agency’s announced corrective action that included terminating the award and resoliciting the procurement.

We deny the request.

Our Bid Protest Regulations, 4 C.F.R. § 21.8(e), provide that we may recommend that an agency pay protest costs where the agency decides to take corrective action in response to the protest. We will make such a recommendation only where the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. CSL Birmingham Assocs.; IRS Partners-Birmingham--Entitlement to Costs, B-251931.4, B-251931.5, Aug. 29, 1994, 94-2 CPD ¶ 82 at 3. As a general rule, so long as an agency takes corrective action by the due date of its agency report, we regard the action as prompt, and will not consider a request to recommend reimbursement of
protest costs.  CDIC, Inc.--Entitlement to Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52.  Where corrective action is unduly delayed, we will recommend reimbursement only where the underlying protest is also clearly meritorious; i.e., not a close question.  Odle Mgmt. Group, LLC, B-414952.4, Oct. 2, 2018, 2019 CPD ¶ 37 at 5.  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.  Id.

The RFQ, issued May 21, 2018,¹ provided that DHS would award the contract to the vendor who submitted the lowest-priced technically acceptable quotation.  DHS initially notified BAI that the agency had awarded the contract to Creek on August 6, 2018.  Following debriefings, BAI and another vendor filed protests challenging that award, which our Office dismissed when DHS took corrective action.  Abacus Sols. Group, LLC; BAI, Inc., B-416681, B-416681.2, Aug. 28, 2018 (unpublished decision).  On December 19, DHS notified BAI that the agency had again awarded the contract to Creek.  After a second debriefing, BAI filed another protest, which our Office dismissed when DHS took corrective action.  BAI, Inc., B-416681.4, Feb. 5, 2019 (unpublished decision).  On April 10, 2019, DHS notified BAI for a third time that the agency had awarded the contract to Creek.  After another debriefing, BAI filed its third protest,² in which it argued that DHS had misvaluated quotations under the technical factor when it evaluated BAI’s quotation as unacceptable, and Creek’s as acceptable.  Additionally, BAI argued that DHS had permitted Creek to improperly substitute key personnel, or “bait-and-switch” key personnel, from those identified in the firm’s quotation.

With respect to the evaluation of its own quotation, BAI’s protest argued that DHS unreasonably assessed multiple deficiencies regarding its proposed staffing.  In its agency report, DHS contended that the evaluation was reasonable.  Specifically, DHS argued that BAI’s proposed staffing was inadequate to perform the tasks required in the RFQ’s performance work statement (PWS).  Memorandum of Law (MOL) at 7-16.  For example, DHS argued that in response to optional task 7 (which, if exercised, would require the contractor to provide services for an additional 2 hours daily for PWS tasks 2, 3, 4, 5, and 23), BAI’s quotation failed to address the additional staffing for task 5 (after-action reviews).  Id. at 7.  DHS argued that even though BAI stated that it would provide “additional staffing to support this increase of PPS [principle period of service] . . . in support of task 5,” the additional staffing listed in an accompanying table was designated to perform only tasks 1, 2, and 3.  Id. at 8.  As a result, DHS argued that its assessment of a deficiency in the technical evaluation BAI’s quotation was reasonable.  Contracting Officer’s Statement at 6.

¹ BAI explains that the RFQ consolidates the requirements from three contracts, of which BAI is the incumbent on one, and a subcontractor on a second.

² The issues in this request relate to BAI’s third protest, filed on April 22, including the supplemental protest that it raised in its June 3 comments on the agency report (referred to together as BAI’s “third protest”).
In seeking reimbursement for its costs, BAI argues that its protest was clearly meritorious and that corrective action was unduly delayed because DHS took corrective action after it had filed its agency report in response to the protest. Comments on Agency Response to Request for Costs at 3. Specifically, BAI argues that its third protest challenged the evaluation of BAI's and Creek's quotations as inconsistent and unequal, and that DHS took corrective action to review that aspect of its evaluation. Id. at 5. BAI also argues that Creek's proposal contained “blatant deficiencies” that DHS failed to identify through multiple reviews and reevaluations. Id.

DHS argues that it took corrective action only because of a separate ground of protest, in which BAI alleged that Creek's quotation exceeded the RFQ's page limit. Agency Opposition to Request at 2. BAI raised that specific issue as a supplemental ground of protest alongside its comments on the agency report. The agency thus contends that its corrective action was prompt (or not unduly delayed) because it was taken before the due date for the supplemental report to address the page limits issue, and that the issues in BAI's third protest lacked merit (or at least were not clearly meritorious). Id. at 2-3.

We agree with DHS that BAI's third protest was not clearly meritorious. A contracting agency’s evaluation of quotations is a matter within the agency’s discretion. Technatomy Corp., B-411583, Sept. 4, 2015, 2015 CPD ¶ 282 at 4. In reviewing an agency’s evaluation, our Office will examine the evaluation to ensure that it was reasonable and consistent with the solicitation’s stated evaluation criteria and with procurement statutes and regulations. Id. at 4–5. With regard to the example of optional task 7 staffing described above, we think the agency’s argument defending its assessment of a deficiency for BAI's failure to provide sufficient staffing of the task was a defensible legal position. Furthermore, the assessment of a valid deficiency would render the quotation unacceptable overall, so DHS also had a defensible legal position that BAI was not competitively prejudiced even if its other challenges to the evaluation of its quotation in the third protest had merit.

Next, regarding BAI’s challenges to the evaluation of Creek’s quotation, BAI argued in its third protest that the RFQ required each vendor to submit “Key Personnel Resumes . . . for the individual(s) to fill each of the key positions . . . demonstrating that the individual meets the minimum qualifications for the appropriate position.” Protest at 5 (quoting RFQ at 104). BAI argues that Creek’s quotation provided résumés for key personnel that the firm did not intend to supply. BAI alleged that Creek’s intention was revealed because upon award Creek was actively seeking to hire new personnel through advertisements, and through help from DHS in soliciting for Creek BAI’s employees on the incumbent contracts. Protest at 14. BAI alleged that Creek’s actions constituted an improper bait-and-switch because Creek intended to supply different employees in place of those whose résumés had been submitted with its quotation. Id. at 15.
In response, DHS argued that the RFQ required only résumés, and did not require other documentation of each individual’s commitment to the contract, such as a letter of commitment. MOL at 3. At the same time, DHS maintained that for 7 of the 9 key personnel positions, Creek had supplied the personnel named in its quotation and, with respect to two remaining positions, Creek had filled both with qualified replacements. Id. at 4, 16. DHS argued that its approval of Creek’s actual personnel was a matter of contract administration, and that Creek’s personnel recruiting efforts were a matter of proactive planning, rather than evidence that it had misrepresented the personnel it intended to provide. Id. at 17.

In our view, BAI’s protest on these issues was likewise not clearly meritorious. Where a protester alleges that an awardee misrepresented the availability of personnel whose qualifications were provided for evaluation, our Office recognizes that whether personnel identified in an offeror's proposal, in fact, perform under the contract is generally a matter of contract administration that our Office does not review. 4 C.F.R. § 21.5(a); Insight Tech. Sols., Inc., B-417388, B-417388.2, June 19, 2019, 2019 CPD ¶ 239 at 5. Here, BAI has not shown that DHS lacked a defensible legal position to argue that Creek had proposed personnel that it expected to provide, and that the agency’s actions in approving replacements for 2 of the 9 positions were matters of contract administration. As a result, BAI’s protest was not clearly meritorious on this issue.

Finally, although BAI argues that DHS should have recognized that Creek’s quotation exceeded the page limit when it undertook previous corrective action, or at least before it submitted the initial agency report, that contention is insufficient to demonstrate undue delay. In this regard, the purpose of awarding costs is not to reward the protester or to punish the agency, but to encourage agencies to take corrective action in response to meritorious protests before protesters have expended additional unnecessary time and resources pursuing their claims. Goode Constr., Inc.--Protests & Costs, B-288655.4 et al., Jan. 28, 2002, 2002 CPD ¶ 25 at 3. Here, neither a supplemental report nor the protester’s supplemental comments was filed, so BAI was not required to expend additional time or resources preparing supplemental comments, and thus the purpose of section 21.8(e) of our Regulations was served. BAI argues that our standard takes into account the circumstances of this protest, which included reviews of Creek’s quotation by DHS as it first withheld and later produced additional pages of the quotation on multiple occasions, which BAI argues provided the agency at least four separate opportunities to identify the fault in Creek’s quotation. Comments on Agency Response to Request for Costs at 5. So, while BAI argues that DHS should have noticed during its earlier corrective action that Creek’s quotation exceeded the page limit in the RFQ, and that the quotation should have been rejected, the agency’s decision to take corrective action on that issue was taken before the due date for its agency report responding to BAI’s supplemental protest that raised the issue. Id. at 6.

Under these circumstances, our Office cannot conclude that the corrective action was unduly delayed. Career Sys. Dev. Corp.--Costs, B-411346.10, July 18, 2018, 2018 CPD ¶ 249 at 5-6 (corrective action was prompt even though the agency learned
of the flaw that motivated its corrective action before the protester filed a supplemental protest raising the issue).

The request is denied.

Thomas H. Armstrong  
General Counsel