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Decision

Matter of: Noble Supply & Logistics, Inc.--Costs

File: B-417472.2; B-417494.2; B-417527.2; B-417562.2

Date: February 25, 2020

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Stephanie B. Magnell, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation of reimbursement of protest costs is denied where the protest grounds were not clearly meritorious.

DECISION

Noble Supply & Logistics, Inc., a small business of Rockland, Massachusetts, requests that our Office recommend that the Department of the Air Force reimburse the firm for the reasonable costs of filing and pursuing four separate protests. Each protest challenged a request for quotations (RFQ) issued by the Air Force for the management of a contractor-operated civil engineer supply store (COCESS) at one of four locations: F.E. Warren Air Force Base (AFB), Wyoming; Altus AFB, Oklahoma; Hurlburt Field, Florida; and Barksdale AFB, Louisiana. Specifically, the protester seeks a recommendation for reimbursement of costs related to its challenges regarding unfair competitive advantage; improper use of brand names without justification; and errors in the pricing spreadsheet. Combined Reply to Opp'n to Requests for Partial Reimbursement of Costs at 1 n.1.¹ Because of the similarities in the solicitation structures and legal issues, we consider the requests together.

We deny the requests.

¹ The protester does not seek a recommendation for reimbursement of costs related to its protest grounds that the agency failed to include a mandatory economic price adjustment clause and failed to evaluate potential organizational conflicts of interest. Combined Reply to Opp'n to Requests for Partial Reimbursement of Costs at 1 n.1.

BACKGROUND

The four RFQs, issued under the commercial items acquisition procedures of Federal Acquisition Regulation (FAR) parts 12 and 13, each provided for the issuance of a fixed-price, indefinite-delivery, indefinite-quantity contract for the operation of COCESS facilities to the responsible firm whose proposal represented the best value to the agency, considering the factors of technical, past performance, and price. The non-price factors, when combined, were significantly more important than price. The period of performance consisted of one 1-year base period and four 1-year option periods. B-417472, Conformed RFQ at 3-5, 49-55; B-417494, Conformed RFQ at 3-5; B-417494, Agency Report (AR), Tab 11, Section M, Evaluation Factors for Award, at 1-2; B-417527, Conformed RFQ at 3-6, 56-58; B-417562, Conformed RFQ at 3-5, 54.²

The RFQs contained a single contract line item number (CLIN), CLIN 0001, for all potential COCESS items.³ B-417472, Conformed RFQ at 3; B-417494, Conformed RFQ at 3; B-417562, Conformed RFQ at 3; B-417527, Conformed RFQ at 3. Although the RFQs were characterized as fixed-price contracts, the prices of individual COCESS items were not fixed, but were instead calculated by multiplying two components: the item price published by a specific retailer on its retail website,⁴ and a fixed percentage premium (or discount) chosen by the vendor and applied to the reference retailer's online price. B-417472, RFQ amend. 0006 at Statement of Work (SOW) at 5-6; B-417494, RFQ, attach. 1, SOW at 6; B-417527, RFQ, attach. A, SOW at 5-6; B-417562, Conformed RFQ at 48. Thus, while the reference retailer and the vendor's premium or discount were fixed, the final COCESS item price floated in step with the reference retailer's online price, which was presumed to incorporate market fluctuations.⁵ See, e.g., B-417472, RFQ amend. 0006 at 65.

² For reference, provided below is a table with the RFQ number, COCESS location, and GAO docketing number.

RFQ No.	COCESS Location	GAO Docket No.
FA4613-19-R-A005	F.E. Warren Air Force Base, Wyoming	B-417472
FA4419-19-R-A003	Altus Air Force Base, Oklahoma	B-417494
FA4608-19-R-A003	Barksdale Air Force Base, Louisiana	B-417527
FA4417-19-R-A003	Hurlburt Field, Florida	B-417562

³ Not relevant to this decision are other CLINs for certain specialty items such as paving materials and insect infestation supplies. Id.

⁴ In this decision, these retailers are called "reference retailers" because their prices serve as the underlying reference for the final item price.

⁵ For example, if an offeror proposed a 5 percent discount on the reference retailer's prices, then the Air Force's price for an \$8.00 item would be \$7.60. If the reference retailer's price for that item rose to \$9.00, the Air Force's price would be \$8.55.

RFQ Item Categories and Reference Retailers

Each solicitation established between four and six categories of COCESS items from among the following categories: electrical; plumbing; heating, ventilation and air conditioning (HVAC); hardware; lawn and garden; and building supplies. B-417472, Protest, exh. 3, RFQ attach. K, Pricing Spreadsheet; B-417494, Protest, exh. 4, RFQ attach. K, Pricing Spreadsheet; B-417527, AR, Tab 14, RFQ attach. K, Pricing Spreadsheet; B-417562, Protest, exh. 4, RFQ attach. K, Pricing Spreadsheet.

For each item category, the RFQ listed the reference retailers whose online retail prices could be used for a vendor's baseline prices. B-417472, Protest, exh. 14, RFQ Questions & Answers (Q&A) 3, at 1-2; B-417494, AR, Tab 14, RFQ attach. Y, Pricing Discount Spreadsheet, Tab 1; B-417527, AR, Tab 22, RFQ attach. A, Barksdale AFB SOW at 6; B-417562, Protest, exh. 3, Hurlburt Field SOW at 6. As part of their quotations, vendors were required to specify their primary, secondary and, in some cases, tertiary choices for reference retailer by item category. Id. Vendors were not permitted to supplement or make substitutions to the lists of permitted reference retailers. However, the solicitations' pricing mechanism did not require the vendor to purchase the item from the reference retailer; rather, the contractor was permitted to obtain the item from any source. See, e.g., B-417472, RFQ amend. 0006 at 38 ("The utilization of online databases is for pricing purposes only. Contractors are not required to purchase items from any particular supplier or distributor, regardless of pricing database.").⁶

For the COCESS at F.E. Warren AFB, the reference retailers were as follows:

Item Category	Reference Retailers⁷		
Electrical	Cesco	Grainger	
Plumbing	Ferguson	Grainger	Home Depot
HVAC	Ferguson	Grainger	
Hardware & Building		Grainger	Home Depot

B-417472, RFQ amend. 0006 at 28, 37-38; AR, Tab 14, Q&A 3 at 2.

The solicitations for the COCESS stores at Altus AFB, Barksdale AFB, and Hurlburt Field were structured similarly, in that the lists of reference retailers each included

⁶ There was no separate CLIN for the operation of the COCESS store. Thus, the RFQs anticipated that the contractor would apply any profit from the sale of the COCESS items toward the store operating costs.

⁷ More complete names for the reference retailers identified in this table are: Crescent Electrical Supply Company (Cesco); Ferguson Enterprises (Ferguson); The Home Depot, store No. 6002, Cheyenne, Wyoming (Home Depot); and W. W. Grainger, Inc. (Grainger). B-417472, AR, Tab 14, Q&A 3 at 2.

Grainger as a reference retailer for every item category. B-417494, AR, Tab 8, Altus Air Force Base COCESS SOW at 6; B-417527, AR, Tab 24, RFP, attach. Y, Pricing Discount Spreadsheet; B-417527, AR, Tab 8, RFP SOW at 6; B-417562, AR, Tab 6, RFP at 63.

A vendor's ordered preference of reference retailers for each item category would be incorporated into the vendor's contract, such that the primary retailer's online price as of the sale date was the base item price. B-417472, Protest, exh. 2, F.E. Warren SOW at 6-7; B-417494, AR, Tab 8, Altus AFB COCESS SOW at 6-7; B-417527, AR, Tab 22, RFQ attach. A, Barksdale AFB COCESS SOW at 6-7; B-417562, Protest, exh. 3, Hurlburt Field COCESS SOW at 6. If an item was not offered for sale by the vendor's primary retailer, then the item price listed by the vendor's alternate reference retailer would serve as the baseline item price. Id.

Pricing Spreadsheet for the TEP

After a vendor rank-ordered the reference retailers for each item category, it proposed a discount or markup for each item category. B-417472, RFQ at 50; B-417494, AR, Tab 14, RFQ attach. Y, Pricing Discount Spreadsheet; B-417527, RFQ at 50; B-417562, RFQ at 48. Once a vendor selected the reference retailer and category discount or markup, it could complete its pricing spreadsheet with the sample basket of COCESS items. For each item on the solicitation's pricing spreadsheet, the RFQ listed the manufacturer, manufacturer's part number, item category (plumbing, HVAC, etc.), and the price published by each reference retailer (or none if the retailer did not sell that item). B-417472, Protest, exh. 3, RFQ attach. K, Pricing Spreadsheet; B-417494, Protest, exh. 4, RFQ attach. K, Pricing Spreadsheet; B-417527, AR, Tab 14, RFQ attach. K, Pricing Spreadsheet; B-417562, Protest, exh. 4, RFQ attach. K, Pricing Spreadsheet. Vendors calculated their COCESS price for each item by multiplying their primary (or if necessary, alternate) reference retailer's price for that item by their proposed item category markup or discount. B-417472, RFQ, amend. 0006, at 28; B-417494, RFQ attach. 3, Section L Instructions to Offerors at 4-5; B-417562, Conformed RFQ at 56; B-417527, Conformed RFQ at 55. The total evaluated price (TEP) for each vendor was the sum of the adjusted prices for all items, over all periods, including the potential 6-month extension. Id.

In the COCESS stores, vendors will offer for sale all items available from the reference retailers in the specified item categories. As noted above, in each solicitation, Grainger is a reference retailer for every item category. B-417472, RFQ amend. 0006 at 28, 37-38; B-417472, AR, Tab 14, Q&A 3 at 2; B-417494, AR, Tab 8, Altus Air Force Base COCESS SOW at 6; B-417527, AR, Tab 24, RFP, attach. Y, Pricing Discount Spreadsheet; B-417527, AR, Tab 8, RFP SOW at 6; B-417562, AR, Tab 6, RFP at 63. Among the items that a vendor would offer for sale through the COCESS store are Dayton-brand items, which Grainger manufactures and sells. See, e.g., B-417472, Comments at 14. Vendor are also required to offer for sale "Grainger-approved" items, which are exclusively approved and sold by Grainger. Id.

The agency included Dayton-brand items and Grainger-approved items on the spreadsheets used to calculate a vendor's TEP.⁸ See, e.g. B-417472, Protest, exh. 3, RFP attach. K, Pricing Spreadsheet, at 2; B-417494, Protest, exh. 3, RFP attach. K, Pricing Spreadsheet, at 1-2, 4, 6, 11, 16-17; B-417562, Protest, exh. 5, RFP attach. K, Pricing Spreadsheet at 3.

Noble filed its timely pre-award protests on April 11 (B-417472, Protest), April 16 (B-417494, Protest), April 30 (B-417527, Protest), and May 13 (B-417562, Protest). As relevant to this request, the protester argued that the solicitations created an unfair competitive advantage by allowing Grainger to be both a reference retailer and potential vendor; improperly required brand name products without justification; and that the pricing spreadsheets contained errors.⁹ B-417472, Protest at 8-21; B-417494, Protest at 9-18; B-417527, Protest at 8-16; B-417562, Protest at 13-28. The protester also argued that the agency failed to evaluate whether permitting reference retailers to compete for a contract created an organizational conflict of interest. See, e.g., B-417472, Protest at 13-14.

On July 8, after the protester submitted its comments on the agency reports, the GAO attorney assigned to the protests convened a conference call in protest B-417472 "to ask the parties a few clarification questions regarding the solicitation." GAO Email to Parties, July 3, 2019. On July 12, the GAO attorney convened a second conference call in protest B-417472 to further discuss the solicitation structure. B-417472, Electronic Protest Docket System Docket No. 19, July 11, 2019. Due to the similarities in protest grounds, the agency's counsel in the three other protests, B-417494, B-417527, and B-417562, requested and were allowed to participate in the July 12 call. Agency Email to Protester and GAO, July 12, 2019. In both calls, the parties were permitted to clarify and discuss their positions with the GAO attorney.

During the July 12 conference call, the GAO attorney expressed concerns that the F.E. Warren solicitation might treat vendors unequally with respect to the Grainger-approved items. Specifically, the GAO attorney noted that while there was a competitive market for most of the COCESS items, there did not appear to be a competitive market for

⁸ The TEP pricing calculation spreadsheet for the Barksdale AFB procurement did not contain any Dayton-brand or Grainger-approved items. B-417527, AR, Tab 14, RFQ attach. K. However, vendors would still be required to sell those items through the Barksdale AFB COCESS, as Grainger was a reference retailer in all item categories. B-417527, AR, Tab 24, RFP, attach. Y, Pricing Discount Spreadsheet; B-417527, AR, Tab 8, RFP SOW at 6.

⁹ Protest B-417527 did not allege that the item lists for the TEP calculation for the solicitation for the Barksdale AFB COCESS contained errors. Some challenges were resolved during the pendency of the protests, such as when the agency removed a list of items with brand name specifications from the F.E. Warren RFP. B-417527, AR, Tab 20, amend. 0006 (eliminating attachment S, common COCESS items price list).

items where Grainger was the sole retailer or restricted the distribution of the item, such as the Grainger-approved items.¹⁰ In particular, the GAO attorney noted that although the solicitation allowed vendors to purchase COCESS items at wholesale prices from any manufacturer, distributor or retailer, vendors did not have that option with the Grainger-approved items, which could only be purchased directly from Grainger at Grainger's retail prices. The GAO attorney noted for the Grainger-approved items that while other vendors' costs are fixed at Grainger's retail prices, Grainger can seek lower-cost items and then approve them. The GAO attorney also noted that a vendor proposing a category discount would always lose money on Grainger-approved items. Accordingly, the GAO attorney indicated that the solicitation's structure appeared to prevent vendors from competing on a relatively equal basis.

The agency notified our Office of its intent to take corrective action on July 15 (B-417472), July 18 (B-417494), July 17 (B-417527), and July 22 (B-417562). B-417472, Notice of Corrective Action, July 15, 2019; B-417494, Protest, Notice of Corrective Action, July 18, 2019; B-417527, Protest, Notice of Corrective Action, July 17, 2019; B-417562, Protest, Notice of Corrective Action, July 22, 2019. The agency represented that it would take various steps to address the protest grounds, including revising the solicitations to permit like-item substitutions for Dayton-brand and Grainger-approved items without advance approval from the contracting officer's representative, and allowing vendors to resubmit their quotations and resoliciting the procurement. Id.

We dismissed the protests as academic based on the agency's announced corrective actions. Noble Supply & Logistics, Inc., B-417472, July 17, 2019 (unpublished decision); Noble Supply & Logistics, Inc., B-417494, July 19, 2019 (unpublished decision); Noble Supply & Logistics, Inc., B-417527, July 19, 2019 (unpublished decision); Noble Supply & Logistics, Inc., B-417562, July 24, 2019 (unpublished decision). Noble then filed its requests that our Office recommend that it be reimbursed the reasonable costs of filing and pursuing these protests.

DISCUSSION

Noble requests that our Office recommend that it be reimbursed for the reasonable costs of filing and pursuing several protest grounds, including reasonable attorneys' fees, in each of its four protests. B-417472.2, Req. for Partial Reimbursement of Costs; B-417494.2, Req. for Partial Reimbursement of Costs; B-417527.2, Req. for Partial

¹⁰ Indeed, although the Grainger-approved items on Grainger's website contain salient item characteristics, vendors are not permitted to substitute another item with identical salient characteristics without prior approval from the contracting officer's representative. Without such item-by-item preapproval, vendors must instead purchase the item from Grainger. B-417472, Protest, exh. 2, RFQ SOW § 1.6.2.5; B-417494, AR, Tab 8, RFQ SOW § 1.6.2.5 (same); B-417527, AR, Tab 8, RFQ SOW § 1.6.2.5 (same); B-417562, Protest, exh. 3, RFQ SOW § 1.6.2.5 (same).

Reimbursement of Costs; B-417562.2, Req. for Partial Reimbursement of Costs. Specifically, the protester seeks a recommendation for reimbursement of costs related to the following three protest grounds: unfair competitive advantage; improper use of brand names without justification; and errors in the TEP pricing spreadsheet.¹¹ Combined Reply to Opp'n to Requests for Partial Reimbursement of Costs.

Under the Competition in Contracting Act of 1984, our Office may recommend that protest costs be reimbursed only where we find that an agency's action violated a procurement statute or regulation. 31 U.S.C. § 3554(c)(1). When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs if, 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. Bid Protest Regulations, 4 C.F.R. § 21.8(e); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 5. This does not mean that costs should be reimbursed in every case in which an agency decides to take corrective action; rather, a protester should be reimbursed its costs only where an agency unduly delayed its decision to take corrective action in the face of a clearly meritorious protest. Aircraft & Turbine Support Corp.--Costs, B-417145.2, Feb. 12, 2019, 2019 CPD ¶ 78 at 2.

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.

As a prerequisite to our recommending that costs be reimbursed where a protest has been settled by corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious, i.e., not a close question. InfraMap Corp.--Costs, B-405167.3, Mar. 26, 2012, 2012 CPD ¶ 123 at 3; Apptis Inc.--Costs, B-402146.3, Mar. 31, 2010, 2010 CPD ¶ 123 at 4; Triple Canopy, Inc.--Costs, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 3. A protest is clearly meritorious where a reasonable agency inquiry into the protest allegations would have shown facts disclosing the absence of a defensible legal position. Procinctu Grp., Inc.--Costs, B-416247.4, Sept. 21, 2018, 2019 CPD ¶ 36 at 3; First Fed. Corp.--Costs,

¹¹ The agency corrected errors in the TEP pricing spreadsheets during the pendency of the protests by amending the solicitations. To the extent that those errors addressed by amendments are part of the protester's request for recommendation of reimbursement, the protester did not address them in the Combined Reply to Opp'n to Requests for Partial Reimbursement of Costs. Accordingly, we consider the request as it relates to these protest grounds to be abandoned. Odle Mgmt. Grp. LLC--Costs, B-404855.2, Mar. 26, 2012, 2012 CPD ¶ 122 at 1 n.1. To the extent that the request for recommendation of reimbursement of protest costs is related to the protest grounds related to Grainger, we consider it to be addressed by our analysis here.

B-293373.2, Apr. 21, 2004, 2004 CPD ¶ 94 at 2. The existence of any defensible legal position or close question is sufficient to show that a protest allegation was not clearly meritorious so as to warrant reimbursement of protest costs. Procinctu Grp., Inc.--Costs, supra, at 3.

We conclude that it is not appropriate to recommend that Noble recover its protest costs because these protest grounds were not clearly meritorious as initially filed.¹² The record reflects that while Noble's protest challenged the structure of the procurement with regard to the selection of Dayton-brand items, Noble's protest ground regarding the Grainger-approved items required further record development.¹³

In its protest, Noble argued that reference retailers should not be permitted to submit quotations because they "could underbid competitors and simply raise prices after award, thereby winning award while avoiding the consequences of a 'low ball' bid (and also depriving the Air Force of the benefit of such low bid prices)." B-417472, Protest at 11. Noble also contended that Grainger's position as both a reference retailer and a likely vendor improperly "afford[ed] Grainger unique and unfair insight into and control over product costs." Id. at 12. In its comments on the agency report, Noble further developed these arguments, asserting that the solicitation improperly required vendors to obtain the Grainger-approved items from a single retailer--Grainger--at whatever price Grainger set, even if the vendor could have procured the same item on its own from another seller at a lower price. B-417472, Comments at 14. The protester also asserted that the potential vendors were in unequal positions because Grainger, alone among the vendors, had the liberty to make like-item substitutions for the Grainger-approved items without prior approval, because Grainger controls the sourcing of this product. Id. at 14-15.

After reviewing Noble's comments, the GAO attorney assigned to the protest held two conference calls with the parties in the F.E. Warren protest to discuss the protest grounds as framed in the protester's comments. In the first conference call on July 8, the GAO attorney asked the parties for clarification regarding their interpretation of the solicitation structure. B-417472.2, Req. for Partial Reimbursement of Protest Costs at 3. During the second call on July 12, the GAO attorney asked the parties about the arguments raised by the protester in its comments, as they related to the Grainger-

¹² To the extent that the protester raises collateral arguments regarding its request for recommendation of reimbursement of protest costs, we have considered those and conclude that they also were not clearly meritorious. Therefore, any related request for recommendation of reimbursement of costs is denied. Procinctu Grp., Inc.--Costs, supra, at 3.

¹³ In addition, Noble again argued that there was an unmitigated organizational conflict of interest with regard to Grainger and that the agency lacked a necessary justification and approval for the brand-name items. B-417472, Comments at 2-4. The protester also insisted that the solicitation improperly omitted a FAR-mandated economic price adjustment clause. Id. at 4-11.

approved items. See Opp'n to Req. for Recommendation for Reimbursement of Protest Costs at 3.

The record reflects that Noble's protest required considerable development through its comments, as well as further development of the record at the request of the GAO attorney. Accordingly, Noble has not shown that its initial protest on this ground was clearly meritorious, i.e., not a close question. Intercontinental Constr. Contracting, Inc.--Costs, B-400729.3, Mar. 4, 2009, 2009 CPD ¶ 44 at 3; see also Career Quest, a Div. of Syllan Careers, Inc.--Costs, B-293435.5, Apr. 13, 2005, 2005 CPD ¶ 79 at 3.

Noble contends that its protests were clearly meritorious on the basis that it "raised 'the Grainger-approved issue' at least four times in the [initial] protest." Reply to Agency's Consolidated Opp'n to Req. for Recommendation for Payment of Protest Costs at 3. However, the record does not support this claim. Noble also asserts that the grounds raised in its initial protest were merely "expanded in its comments." B-417472.2, Req. for Recommendation of Reimbursement of Costs at 15. However, the record again shows that the particular arguments about the Grainger-approved items, which were reasonably related to several of the protest grounds, required further clarification from the parties in the form of two conference calls. Because Noble's initial protest did not present what could reasonably be described as clearly meritorious issues, it follows that there is no basis for recommending reimbursement of Noble's protest costs. Intercontinental Constr. Contracting, Inc.--Costs, supra, at 4.

The request is denied.

Thomas H. Armstrong
General Counsel