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Decision

Matter of: Spry Methods, Inc.--Costs

File: B-417800.3

Date: February 14, 2020

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DIGEST

Request for recommendation of reimbursement of costs of filing and pursuing a protest challenging the agency's technical evaluation is granted where the agency unduly delayed taking corrective action in the face of a clearly meritorious protest.

DECISION

Spry Methods, Inc., of McLean, Virginia, requests that we recommend that it be reimbursed the costs of filing and pursuing its protest challenging the issuance of a task order to Customer Value Partners, Inc. (CVP), of Fairfax, Virginia, under request for quotations (RFQ) No. 140D0419Q0011, issued by the Department of the Interior (DOI) for information management and assurance program support services. We dismissed the protest after the agency advised our Office that it would take corrective action by reevaluating vendors' quotations and making a new award decision. Spry argues that its protest was clearly meritorious and the agency's corrective action unduly delayed.

We grant the request.

BACKGROUND

The RFQ was first issued on October 15, 2018, to holders of General Services Administration 8(a) Streamlined Technology Acquisition Resources for Services (STARS) II contracts, which are multiple-award, indefinite-delivery, indefinite-quantity (IDIQ) contracts for various information technology services and service-based solutions, pursuant to the procedures of Federal Acquisition Regulation (FAR)

subpart 16.5.¹ Agency Report (AR), Tab 5b, RFQ amend. 2, Standard Form 1449 at 1; Memorandum of Law (MOL) (B-417800) at 1. The RFQ contemplated the award of a time-and-materials task order for a base year with four 1-year options. RFQ at 15; MOL (B-417800) at 1. In general terms, the contractor was to provide qualified personnel, in specified labor categories, to successfully perform the stated performance work statement (PWS) requirements in three task areas: risk management and information security continuous monitoring; information system security officers and system security; and privacy. AR, Tab 5b, RFQ amend. 2, attach. 2, PWS at 1; COS (B-417800) at 2.

The RFQ established that task order award would be made on a best-value tradeoff basis, based on two evaluation factors of equal importance: technical approach and price. RFQ at 19-20. The technical approach factor consisted of four subfactors: (1) understanding of PWS requirements; (2) quality control plan; (3) staffing plan; and (4) key personnel. Id. at 19; MOL (B-417800) at 3.

Twenty vendors, including Spry and CVP, submitted quotations by the December 28 closing date. COS (B-417800) at 2. An agency technical evaluation committee (TEC) evaluated vendors' technical quotations, assigning adjectival ratings (e.g., strong, good) to the technical subfactors, as well as making findings regarding whether the quotations adequately addressed PWS requirements in 90 different areas. COS (B-417800) at 3. After completing its initial evaluation, the TEC found that 15 vendors had failed to adequately address the technical approach factor and, on April 10, 2019, these vendors were notified of their elimination from the competition. AR, Tab 12, Source Selection Decision Document (SSDD) at 5.

On April 18, the contracting officer sent CVP an email communicating the following:

The Government has completed the evaluation of your company's technical . . . quote and noted the following:

1. Technical Quote: Vendor depends on [DELETED] . . . and other to[o]ls to implement automation; however, there is no clear indication whether [DELETED] will be able to integrate with [assessment and authorization] functions in order to achieve automation.
2. Technical Quote: Vendor depends on implementing tools in the DOI environment (pg. 17 [DELETED]) that may not integrate with DOI architecture or be approved by government boards.

¹ The agency utilized a multi-phase approach to its procurement. In the first phase, a preliminary RFQ was issued to STARS II contract holders, and an amended solicitation was then issued on November 15 to the 35 vendors that opted-in to the second phase. Contracting Officer's Statement (COS) (B-417800) at 2. Unless stated otherwise, all citations are to the final amended version of the solicitation.

3. Technical Quote: Vendor did not describe Task Area 2 function of serving as the key advisor to risk and mitigation of vulnerabilities, as required in the PWS page 10.

* * * * *

Please provide a revised technical quote identifying any changes made to address the technical findings listed above while staying within the maximum of 25 pages for the technical quote stated in the RFP . . . no later than 10:00 a.m. ET on Wednesday, April 24, 2019.

AR, Tab 17, Contracting Officer Email to CVP, Apr. 18, 2019.

CVP thereafter submitted a revised technical quotation in which it addressed the technical approach issues identified by the contracting officer. AR, Tab 7c, CVP Revised Quotation, Vol. 1, Revised Technical Quotation. For example, with regard to the third technical finding, CVP revised its quotation to state, “Team CVP will [DELETED].”² Id. at 17.

The agency does not dispute that no similar exchanges occurred with any other vendor, nor that any vendor other than CVP was allowed to submit a revised quotation. See MOL (B-417800.3) at 1-5.

The agency states it completed its evaluation of vendors’ quotations on May 15, with the final evaluation ratings and prices of the Spry and CVP quotations as follows:

	Spry	CVP
Technical Approach		
Understanding of PWS	74 of 90 met	86 of 90 met
Quality Control Plan	Good	Strong
Staffing Plan	Good	Strong
Key Personnel Resumes	Good	Good
Price	\$[DELETED]	\$65,349,169

COS (B-417800) at 2; MOL (B-417800) at 2; AR, Tab 12, SSDD at 3-4, 29.

The agency states that on July 15, the contracting officer, as source selection authority, conducted a comparative assessment of the five vendors--including Spry and CVP--that were found to have adequately addressed the technical approach factor. AR, Tab 12,

² Similarly, with regard to the second technical finding, CVP revised its quotation to state that “[DELETED].” Id. at 18.

SSDD, at 29-33. The contracting officer thereafter concluded that CVP's technical advantages outweighed Spry's price advantage, and that CVP represented the overall best value to the government.³ Id. at 33-35.

Spry, after receiving notice of task order award to CVP and a debriefing, filed its protest with our Office on July 29, raising the following arguments: (1) the agency unreasonably evaluated Spry's technical approach; (2) the agency unreasonably and unequally evaluated CVP's technical approach, including holding unequal discussions; (3) the evaluation of CVP's key personnel and staffing plan were unreasonable; and (4) the agency's resulting best-value determination was unreasonable.⁴ Protest (B-417800) at 10-38.

On August 29, DOI filed its agency report and argued that the evaluation of vendors' quotations and resulting award decision was reasonable and consistent with the stated evaluation criteria. MOL (B-417800) at 2-9. With regard to the protest ground concerning disparate treatment and unequal discussions, the agency stated that the same standards had been applied to both vendors' quotations (e.g., the same 25-page limit for technical submissions had been enforced) and that no discussions had occurred. Id. at 7-8.

On September 9, Spry filed its comments on the agency report. While continuing to protest that DOI's evaluation was unreasonable in several regards, the gravamen of Spry's comments was that the agency had conducted unequal discussions with CVP as evidenced by the contracting officer's April 18 email to CVP.⁵ Comments (B-417800) at 3-9.

On October 9, DOI submitted a letter to our Office, notifying our Office of the following:

After reviewing the procurement record, [the agency] has concluded that to ensure fairness to all [vendors], corrective action is warranted. In particular[,] the agency is unable to support [the] rationale in the award

³ The agency's April 18 exchange with CVP also instructed the vendor to revise its price: "[r]eview pricing and provide additional discounts in a revised price quote." AR, Tab 17, Contracting Officer Email to CVP, Apr. 18, 2019. However, the record reflects that the contracting officer's best-value tradeoff determination was based on CVP's initial, and not revised, price amount. AR, Tab 12, SSDD, at 3, 28, 34.

⁴ As the value of the awarded task order was greater than \$10 million, the procurement here was within our jurisdiction to hear protests related to the issuance of task orders under IDIQ contracts awarded by civilian agencies. 41 U.S.C. § 4106(f); Analytic Strategies LLC; Gemini Indus., Inc., B-413758.2, B-413758.3, Nov. 28, 2016, 2016 CPD ¶ 340 at 4-5.

⁵ Spry also withdrew its protest ground concerning the agency's evaluation of CVP's key personnel. Comments (B-417800) at 14 n.12.

summary where only one [vendor] was given the opportunity to engage in discussions/negotiations with the Government.

Agency Notice of Corrective Action, Oct. 9, 2019, at 1 (EPDS Dkt. No. 32).

The agency also clarified that its intended corrective action would involve reevaluating all quotations received in response to this phase of the procurement, potentially conducting discussions with those vendors determined to have a reasonable chance for award, and making a new award decision. Agency Revised Notice of Corrective Action, Oct. 10, 2019, at 2. Our Office thereafter dismissed Spry's protest as academic based on the announced corrective action. Spry Methods, Inc., B-417800, Oct. 16, 2019 (unpublished decision).

DISCUSSION

Spry requests that our Office recommend that the agency reimburse the protester's costs of filing and pursuing its underlying protest. Spry argues that the agency unduly delayed taking corrective action--as evidenced by its failure to do so until after filing of the agency report and submission of comments by the protester--and that its protest of the agency's disparate treatment/unequal discussions was clearly meritorious. Protest (B-417800.3) at 5-8. The agency argues that Spry's protest with regard to unequal discussions was not clearly meritorious, and therefore is not entitled to reimbursement of protest costs. MOL (B-417800.3) at 3-5.

When a contracting agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs, including reasonable attorneys' fees, 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 (i.e., not a close call), thereby causing the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Competition in Contracting Act of 1984, 31 U.S.C. § 3554(c)(1)(A); Bid Protest Regulations, 4 C.F.R. § 21.8(e); Synchron, LLC--Costs, B-412622.4, Aug. 31, 2016, 2016 CPD ¶ 250 at 4-5; Wisconsin Physicians Serv. Ins. Corp.--Costs, B-401068.12, Mar. 22, 2013, 2013 CPD ¶ 81 at 4. A protest is considered clearly meritorious where a reasonable agency inquiry into the protester's allegations would reveal facts showing the absence of a defensible legal position. Synchron, LLC--Costs, supra, at 5; Genesis Bus. Sys.--Costs, B-411264.11, Dec. 10, 2015, 2015 CPD ¶ 389 at 2.

As a general rule, so long as an agency takes corrective action in response to a protest by the due date of its protest report, we regard such action as prompt and decline to consider favorably a request to recommend reimbursement of protest costs. Alsalam Aircraft Co.--Costs, B-401298.3, Nov. 5, 2009, 2009 CPD ¶ 208 at 3. Here, the agency does not dispute that its corrective action occurred after the filing of the agency report and the protester's comments. Rather, the agency argues that "[i]f the protest is not clearly meritorious[,] it is irrelevant whether the agency 'unduly delayed' taking corrective action." MOL (B-417800.3) at 5.

Because there is no issue that the agency submitted its notice of intent to take corrective action after the submission of the agency report and the protester's comments, we turn now to the agency's argument that the protest was not clearly meritorious. For the reasons below, we find that Spry's protest that DOI conducted unequal discussions with CVP was clearly meritorious. In fact, a reasonable agency inquiry into Spry's protest allegations would have plainly demonstrated facts disclosing the absence of any defensible legal position. CSRA LLC--Costs, B-415171.3, Aug. 27, 2018, 2018 CPD ¶ 307 at 4; First Fed. Corp.--Costs, B-293373.2, Apr. 21, 2004, 2004 CPD ¶ 94 at 2.

As a preliminary matter, the agency does not dispute that it conducted exchanges only with CVP. MOL (B-417800.3) at 3 (“[t]he [d]ecision to [c]onduct [e]xchanges with CVP and [n]ot Spry [w]as [r]easonable”). Instead, DOI now contends the exchanges with CVP did not amount to discussions, or even if they were discussions, that the agency's actions were “fair and equitable,” and without prejudice to Spry. Id. at 3-4. We find the agency to be mistaken in all regards, and that its present assertions are, in fact, contradicted by its prior representations to our Office.

First, the record demonstrates that the agency's exchange with CVP amounted to discussions. We have consistently stated that discussions occur when an agency communicates with a vendor for the purpose of obtaining information essential to determine the acceptability of a quotation, or provides the vendor with an opportunity to revise or modify its quotation in some material respect. See, e.g., Alliant Enter. JV, LLC, B-410352.4, Feb. 25, 2015, 2015 CPD ¶ 82 at 5; Highmark Medicare Servs., Inc. et al., B-401062.5 et al., Oct. 29, 2010, 2010 CPD ¶ 285 at 11; see FAR § 15.306(d).⁶ In situations where there is a dispute regarding whether an exchange between an agency and a vendor constituted discussions, the acid test is whether a vendor has been afforded an opportunity to revise or modify its quotation. Alliant Enter. JV, LLC, supra.

⁶ Although the regulations concerning discussions in procurements conducted pursuant to FAR part 15 do not, as a general rule, govern task order competitions conducted pursuant to FAR subpart 16.5, when an agency engages in exchanges with vendors in task order competitions, such exchanges must be fair. Tetra Tech, Inc., B-416861.2, B-416861.3, May 22, 2019, 2019 CPD ¶ 196 at 8; AT&T Corp., B-414886 et al., Oct. 5, 2017, 2017 CPD ¶ 330 at 4. Moreover, in a procurement conducted pursuant to FAR subpart 16.5, such as this one, when an agency elects to conduct discussions--or exchanges that would otherwise amount to discussions under FAR part 15--with one vendor, it must conduct discussions with all vendors included in the competitive range and may not engage in conduct that favors one vendor over another. See Tetra Tech, Inc., supra, at 8-9; AT&T Corp., supra; see also Kathryn Huddleston and Assocs., Ltd., B-289453, Mar. 11, 2002, 2002 CPD ¶ 57 at 6 (finding that when an agency establishes a competitive range or conducts discussions under simplified acquisition procedures, it must do so fairly and reasonably).

Here, it is clear that the contracting officer, in the April 18th email, informed CVP of various weaknesses in its technical quotation and afforded CVP an opportunity to address these weaknesses by submitting a revised quotation. AR, Tab 17, Contracting Officer Email to CVP, Apr. 18, 2019 (“Please provide a revised technical quote identifying any changes made to address the technical findings listed above . . .”). The record also reflects that none of the technical issues identified in the contracting officer’s email to CVP were found to be weakness in the TEC’s subsequent evaluation report of CVP’s revised quotation.⁷ See AR, Tab 9, CVP Technical Evaluation Report at 1-24.

Second, insofar as DOI did not conduct discussions or exchanges with any other vendor, including Spry, its actions were unequal and favored one vendor over another. Quite simply, only CVP was told of weaknesses in its technical approach and provided an opportunity to submit a revised quotation which addressed the agency’s concerns. We find no logic in the agency’s assertion that its conduct was “fair and equitable” when the contracting officer clearly favored one vendor over all others in the evaluation process.⁸ See SRA Int’l, Inc., B-410973, B-410973.2, Apr. 8, 2015, 2016 CPD ¶ 32 at 5 (finding discussions to be unequal where the agency engaged in discussions with only the awardee and allowed only the awardee to submit a revised proposal); SeaSpace, B-241564, Feb. 15, 1991, 91-1 CPD ¶ 179 at 5-6.

Moreover, DOI has previously admitted that it conducted discussions with CVP and that such discussions were unequal. As set forth above, as part of its notice of corrective action to our Office, DOI stated “the agency is unable to support [the] rationale in the award summary where only one [vendor] was given the opportunity to engage in discussions/negotiations with the Government.” Agency Notice of Corrective Action,

⁷ For example, while the contracting officer informed CVP that its initial quotation failed to describe the function of serving as the key advisor to risk and mitigation of vulnerabilities as required by the PWS, the TEC subsequently found that CVP’s revised quotation adequately addressed how the vendor would accomplish this task. AR, Tab 9, CVP Technical Evaluation Report at 15.

⁸ The agency now contends that because Spry’s quotation had adequately addressed the technical factor, and its price was reasonable, DOI “had no reason” to conduct discussions with Spry. MOL (B-417800.3) at 4. This argument reflects a fundamental misunderstanding of the discussions process. As a preliminary matter, we note that CVP was also found to have adequately addressed the technical factor but nonetheless was extended discussions by the agency with an opportunity to submit a revised quotation. Moreover, when an agency elects, as it did here, to conduct discussions with vendors in a task order competition, such discussions must be fair, and an agency may not engage in conduct that favors one vendor over another. Booz Allen Hamilton, Inc., B-417418 et al., July 3, 2019, 2019 CPD ¶ 246 at 15; see YWCA of Greater Los Angeles, B-414596 et al., July 24, 2017, 2017 CPD ¶ 245 at 5 (finding the agency held unequal discussions where the record showed the agency engaged in a second round of discussions with only the awardee and allowed only the awardee to submit a final proposal modification).

Oct. 9, 2019, at 1. The integrity of the protest process does not permit a party to espouse different positions at different times to our Office. See Quotient, Inc., B-416473.6, B-416473.7, July 30, 2019, 2019 CPD ¶ 281 at 7; WingGate Travel, Inc., B-412921, July 1, 2016, 2016 CPD ¶ 179 at 8. Given DOI's prior admission to our Office that it conducted unequal discussions, we find that Spry's protest here was clearly meritorious. See Browning-Ferris Indus. of Hawaii, Inc.--Costs, B-278051.2, Apr. 27, 1998, 98-1 CPD ¶ 122 at 5 (finding protest to be clearly meritorious in light of agency's admission that it lacked any documentation to support its solicitation estimates).

The agency also argues in the alternative that, even if the agency had engaged in unequal discussions, Spry was not prejudiced by the unequal discussions. In support thereof, the agency states "the record shows that both proposals were considered acceptable, and that the [award] decision, while close, came down to the better written proposal." MOL (B-417800.3) at 4. We disagree.

Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest. SRA Int'l, Inc., *supra*, at 7; see Statistica, Inc. v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996). In the case of unequal discussions, the focus of our inquiry is on whether the protester, had it been afforded meaningful discussions, could have revised its quotation in a manner that would result in a substantial chance of the protester receiving the award. See Piquette & Howard Electric Serv., Inc., B-408435.3, Dec. 16, 2013, 2014 CPD ¶ 8 at 10 (protester established that it was prejudiced by unequal discussions by demonstrating that, if afforded meaningful discussions, it would have lowered its price).

Here, Spry contends that had the agency discussed its concerns regarding Spry's technical quotation, the firm would have revised its submission and thereby eliminated the 16 instances where the vendor's quotation was found not to adequately address the PWS requirements (while remaining substantially lower-priced than CVP). Comments (B-417800) at 17; Protest (B-417800.3) at 9. Additionally, we resolve any doubts regarding competitive prejudice in favor of the protester where, as here, the protester has shown a reasonable possibility that it was prejudiced by the agency's action. Information Int'l Assocs., Inc., B-416826.2 *et al.*, May 28, 2019, 2019 CPD ¶ 200 at 9; SRA Int'l, Inc., *supra*, at 8. Since the agency failed to engage in discussions with all of the vendors fairly, we find there is a reasonable possibility that Spry was prejudiced by this failure.

Lastly, in the latest of conflicting representations to our Office, DOI now asserts that the contracting officer's April 18 email exchange with CVP occurred after, and not before, the agency had selected CVP for award. Specifically, the agency contends that "[h]ere, following the Phase 2 best value proposal evaluation, the Contracting Officer requested additional price discounts [and technical approach revisions] from CVP after

determining that it should be awarded [the task order]”).⁹ MOL (B-417800.3) at 4 n.3. Because CVP was already selected for award, DOI argues, there was no requirement that Spry also be extended discussions.¹⁰ Id. Such an assertion, however, would call into question the veracity of DOI’s prior representations to our Office. See COS (B-417800) at 2; MOL (B-417800) at 2; see also AR, Tab 12, SSDD at 1, 3, 36.

As set forth above, the agency previously represented to our Office that--in contrast to the April 18 exchange with CVP--the agency completed its evaluation of vendors’ quotations on May 15 and made its award determination on July 15. COS (B-417800) at 2; MOL (B-417800) at 2 (“On May 15, 2019, evaluations were completed. . . . On July 15, 2019 the [contracting officer], as the Source Selection Authority (SSA), made an award determination to Customer Value Partners, Inc. (‘CVP’) for award, representing the best value to the Government.”); see also AR, Tab 12, SSDD at 3, 36 (stating the evaluation was completed on May 15, 2019, and that the date of the award decision was July 15, 2019). If, as the agency now asserts, the contracting officer had selected CVP for award before the April 18 exchange, then the prior statements of the contracting officer and agency counsel to our Office, as well as the SSDD submitted to our Office, appear to misrepresent the sequence of events that occurred. Again, the integrity of the protest process does not permit a party, including the contracting agency, to espouse different representations to our Office at different times as here. See University Research Co., LLC, B-294358 et al., Oct. 28, 2004, 2004 CPD ¶ 217 at 9-10 (finding a contracting officer’s misstatements in agency filings to our Office affected the integrity of the bid protest process and rendered our review less efficient); Beneco Enters., Inc., B-283512.3, July 10, 2000, 2000 CPD ¶ 176 at 9-10 (finding an agency’s misstatements and inconsistent arguments in defending the protest cast a shadow over the integrity of the procurement process). Moreover, it was DOI’s initial representations (or misrepresentations) that resulted in Spry’s continued pursuit of its protest that the agency had conducted unequal discussions with CVP prior to task order award. As the contemporaneous record does not support DOI’s newly-revised version of events, we find Spry’s protest of unequal discussions to be a clearly meritorious one.

Lastly, Spry contends that its clearly meritorious challenge to the unequal discussions with CVP is subsumed within the larger issue of an unreasonable evaluation of vendors’ technical quotations generally. Protest (B-417800.3) at 9. As these issues are not severable, Spry argues, it is entitled to reasonable costs for each protest ground raised.

⁹ As set forth above, the requested price discount and the identified technical findings were in the same email provided to CVP on April 18.

¹⁰ The record, however, includes no contemporaneous documentation of any source selection decision prior to the commencement of discussions with CVP in April 2019: there is but one SSDD in the record and it is dated July 15, 2019, after discussions had been held with CVP. Moreover, the contracting officer’s purported selection of CVP in April would necessarily have occurred before the TEC had completed its evaluation of vendors’ quotations on May 15, according to the contemporaneous documentation and other DOI representations to our Office.

Id. The DOI does not dispute Spry's assertion that the unequal discussions challenge was part of the larger issue of the agency's unreasonable technical evaluation generally or challenge the non-severability of these issues. See MOL (B-417800.3) at 1-5. We therefore find that Spry's clearly meritorious challenge to the unequal discussions is subsumed within the larger issue of an unreasonable evaluation of vendors' technical quotations generally, such that Spry is entitled to the reimbursement of its protest costs for each ground raised (apart from the protest ground withdrawn).

RECOMMENDATION

We recommend that Spry be reimbursed the reasonable costs of filing and pursuing its protest (apart from the withdrawn protest ground), including attorneys' fees, including those incurred here for requesting a recommendation for costs. Spry should submit its claim for costs, detailing and certifying the time expended and costs incurred, directly to DOI within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The request that we recommend reimbursement of costs is granted.

Thomas H. Armstrong
General Counsel