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Decision

Matter of: Hughes Coleman JV--Costs

File: B-417787.4

Date: April 15, 2020

Kenneth A. Martin, Esq., Martin Law Firm, PLLC, for the protester.
Captain Jeremy D. Burkhart, Department of Army, for the agency.
Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's request that GAO recommend reimbursement of protest costs is denied where the protester's initial arguments were not clearly meritorious, and where the agency took prompt corrective action in response to supplemental protest arguments.

DECISION

Hughes Coleman JV (HCJV), a service-disabled veteran-owned small business (SDVOSB), of Tacoma, Washington, requests that our Office recommend that it be reimbursed the reasonable costs of filing and pursuing its protests (B-417787.2, B-417787.3) challenging the award of a contract to Pegasus Support Services, LLC (PSS), of Woodstock, Georgia, also an SDVOSB, by the Department of the Army, under request for proposals (RFP) No. W9124M-19-R-0017, for base operations and maintenance support services. HCJV argues that it is entitled to reimbursement of its protest costs because the agency unduly delayed taking corrective action in response to its protest.

We deny the request.

BACKGROUND

The Army issued the RFP on June 14, 2019, seeking proposals to provide base operations and maintenance support services at Fort Stewart and Hunter Army Airfield, Georgia. Agency Report (AR), Tab 6, Conformed RFP, at 1, 3.¹ The solicitation was

¹ All citations to the solicitation are to the confirmed version of the RFP.

set aside for SDVOSB firms. RFP at 74. The RFP advised offerors that proposals would be evaluated based on the following three factors: (1) mission capability, which was to be evaluated on an acceptable/unacceptable basis, (2) past performance, and (3) price. RFP at 108. As relevant to the issues raised in HCJV’s protest, the agency was to assign a past performance confidence rating based on an assessment of “an Offeror’s recent and relevant Past Performance, focusing on and targeting performance which is relevant to the effort as it directly relates to the work being procured under this solicitation. . . .” *Id.* at 109. The RFP stated that past performance information was required for “all subcontractors, teaming partners, and/or joint venture partners proposed to perform 10% or greater of the proposed effort based on the total proposed price.” *Id.* at 104. The RFP also stated that the agency would evaluate the relevance of an offeror’s past performance as follows:

A relevancy determination of the Offeror’s (including joint venture partner(s) and major and critical subcontractor(s)) past performance will be made. In determining relevancy for individual contracts, consideration will be given to the effort, or portion of the effort, being proposed by the Offeror, teaming partner or subcontractor whose contract is being reviewed and evaluated.

Id. at 109-110. For purposes of award, past performance was “approximately equal” to price. *Id.* at 107.

The Army received proposals from three offerors, including PSS and HCJV, by the closing date of July 29. Contracting Officer’s Statement (COS) (B-417787.2) at 1; AR, Tab 13, Source Selection Decision Document (SSDD), at 2. The agency evaluated the protester’s and awardee’s proposals as follows:²

	HCJV	PSS
Mission Capability	Acceptable	Acceptable
Past Performance Relevancy	Relevant	Very Relevant
Past Performance Confidence	Satisfactory Confidence	Substantial Confidence
Evaluated Price	\$174,348,384	\$195,511,382

AR, Tab 14, HCJV Debriefing, at 1-2.

² For past performance relevancy, the agency assigned one of the following ratings: very relevant, relevant, somewhat relevant, or not relevant. RFP at 110. For past performance confidence, the agency assigned one of the following ratings: substantial confidence, satisfactory confidence, neutral confidence, limited confidence, or no confidence. *Id.* at 110-11.

The Army selected PSS's proposal for award on November 22, and notified HCJV of the decision the same day. AR, Tab 13, SSDD, at 1, 20; Tab 14, HCJV Debriefing, at 1. HCJV filed a protest with our Office on December 10 challenging the award to PSS. The protester raised the following four primary arguments: (1) the agency failed to evaluate all of HCJV's past performance references; (2) the agency evaluated past performance unequally; (3) the agency unreasonably evaluated PSS's past performance, based on what the protester contends was the awardee's reported revenues on USAspending.gov³, and therefore the agency's evaluation placed improper emphasis on the performance record of the awardee's proposed principal subcontractor; and (4) the unreasonable past performance evaluations rendered the award decision improper. Protest at 8-14.

On December 23, the Army requested that our Office dismiss the protest, arguing that HCJV failed to state valid bases of protest, and that certain arguments were untimely. Agency Request for Dismissal, Dec. 23, 2019, at 6-24. The protester withdrew its arguments that the agency failed to evaluate all of its past performance references and that the agency treated offerors unequally. Protester's Response to Request for Dismissal, Dec. 31, 2019, at 1. The protester maintained, however, that its other arguments concerning the evaluation of PSS's past performance, and its effect on the award decision, were valid bases of protest. *Id.* at 2-9.

On January 2, 2020, our Office advised the parties that we granted in part and denied in part the request for dismissal. Electronic Protest Docketing System (Dkt.) No. 19, GAO Notice, Jan. 2, 2020, at 1. We agreed with the agency that the protester's challenge to the evaluation of the past performance of an offeror's proposed subcontractor was an untimely challenge to the terms of the solicitation, as the RFP did not prohibit such consideration. *Id.* at 1 (citing Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1)). We also concluded, however, that HCJV's challenge to the evaluation of PSS's past performance, based on what the protester contends was the awardee's limited performance record disclosed in USAspending.gov, set forth a valid basis of protest. *Id.* at 1-2 (citing 4 C.F.R. §§ 21.3(c), (f); 21.5(f)).

The Army filed its report on the protest on January 13, and the protester and intervenor filed comments on January 23. The protester also filed a supplemental protest, arguing that the awardee's proposal failed to state that it would comply with the limitations on subcontracting required by Federal Acquisition Regulations (FAR) clause 52.219-14, and that the agency unreasonably and unequally evaluated the relevance of the awardee's proposed subcontractors' past performance. Supp. Protest, Jan. 23, 2020, at 5-19. Specifically, the protester argued that the agency credited PSS with the full contract values of its subcontractors' past performance and extended the subcontractors' "very relevant" past performance ratings to PSS even though PSS's proposal failed to explain what, if any, portion of the past performance the subcontractor

³ USAspending.gov is the "official source for spending data for the U.S. Government," and as relevant here, provides information about the award of contracts over \$25,000. USAspending website, www.usaspending.gov/#/about (last visited Apr. 13, 2020).

actually performed. *Id.* at 8. Our Office requested that the agency file a supplemental report addressing the new arguments by February 10. Dkt. No. 30, GAO Notice, Jan. 24, 2020, at 1.

On February 3, prior to filing its report responding to the supplemental protest, the Army advised our Office that it would take corrective action to resolve the protest, as follows:

The Army intends to: (1) re-evaluate the proposals of the offerors within the competitive range under Factor 2, Past Performance; (2) issue clarifications and/or conduct discussions, if appropriate; (3) make a new Source Selection Decision; and (4) if the awardee is other than the current awardee, terminate the existing contract and make a new contract award.

Notice of Corrective Action, Feb. 3, 2020, at 1.

We found that the agency's proposed corrective action of reevaluating proposals and making a new award decision rendered the protest academic, and therefore dismissed the protest. *Hughes Coleman JV*, B-417787.2, B-417787.3, Feb. 5, 2020, at 1-2 (unpublished decision). This request for a recommendation that the agency reimburse HCJV's costs of filing and pursuing its protest followed.

DISCUSSION

HCJV contends that it should be reimbursed the costs of filing and pursuing its protest (B-417787.2, B-417787.3) because the Army failed to take prompt corrective action in response to its clearly meritorious arguments. The agency responds that the protester's initial arguments concerning the past performance evaluation were not clearly meritorious, and that the agency took timely corrective action in response to the supplemental protest arguments. For the reasons discussed below, we find no basis to recommend that the protester be reimbursed for any of its costs.

When an 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 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. A protest is clearly meritorious where it is not a "close question," e.g., where a reasonable inquiry by the agency into the protester's allegations would have revealed facts showing the absence of a defensible legal position. *InfraMap Corp.--Costs*, B-405167.3, Mar. 26, 2012, 2012 CPD ¶ 123 at 3; *First Fed. Corp.--Costs*, B-293373.2, Apr. 21, 2004, 2004 CPD ¶ 94 at 2.

Here, we find no basis to recommend reimbursement of HCJV's costs of pursuing its initial or supplemental protests. With regard to the initial protest, all of the initial protest grounds were either withdrawn or dismissed, with the exception of three arguments. Protester's Response to Request for Dismissal, Dec. 31, 2019, at 1. First, the protester argued that the Army unreasonably evaluated PSS's past performance because the awardee's total reported contract awards on USAspending.gov were less than the anticipated value of the contract awarded here. Protest at 10-11; Protester's Comments, Jan. 23, 2020, at 10-13. Second, the protester contended that the agency's evaluation gave unreasonable weight to the past performance of the awardee's proposed subcontractors, and that the awardee's performance record as a prime contractor precluded the assignment of a substantial confidence rating. *Id.* Finally, the protester argued that the first two protest grounds showed that the award decision was unreasonable.

The record here shows that the Army evaluated eight past performance references for the awardee and its proposed subcontractors, including three performed by the awardee as a prime contractor that were found to be recent and rated "somewhat relevant." AR, Tab 13, SSDD, at 12. The record further shows that the agency based its evaluation of the awardee's past performance on the record of PSS as well as its subcontractors, and that this evaluation was permitted by the terms of the solicitation. See *id.* at 11-14; RFP at 103-04, 109-10.

We conclude that the protester's disagreement with the agency's judgment (in essence, the weight of past performance assigned to the awardee) does not establish that its initial arguments were clearly meritorious, *i.e.*, that the agency lacked a legally defensible position. In this regard, the evaluation of the relative merit or relevance of an offeror's past performance is a matter within the agency's discretion, and a protester's disagreement with the agency's judgment, without more, does not establish that an evaluation was improper. *L-3 Nat'l Sec. Sols., Inc.*, B-411045, B-411045.2, Apr. 30, 2015, 2016 CPD ¶ 233 at 12. On this record, we find no basis to recommend reimbursement of the protester's costs associated with this issue. As we find no basis to conclude that the protester's challenge to the evaluation of PSS's past performance was clearly meritorious, we in turn find no basis to conclude that the challenge to the award decision based on alleged flaws in the past performance evaluation was clearly meritorious.

Next, HCJV raised two supplemental protest arguments: (1) PSS's proposal took exception to the limitations on subcontracting at FAR clause 52.219-14, because the awardee did not expressly state it would comply with the clause, and (2) the agency's evaluation of the awardee's past performance improperly assigned a very relevant rating to a reference for one of the awardee's proposed subcontractors because the subcontractor was not the same firm that performed the work identified in the reference. Supp. Protest at 5-19.

With regard to the first issue concerning the limitations on subcontracting clause, the agency took prompt corrective action prior to filing its report in response to the

supplemental protest.⁴ See *Alsalam Aircraft Co.--Costs*. We therefore find no basis to recommend reimbursement of costs. See *id.*

The second issue, concerning the evaluation of the awardee's past performance, was cited as part of the agency's primary reason for taking corrective action to resolve this protest. See Notice of Corrective Action, Feb. 3, 2020, at 1. In response to HCJV's current request, the Army explains that it took corrective action in response to the supplemental protest because "it does not appear that the Army properly evaluated the relevancy of certain past performance efforts submitted by Protester and Awardee." Memorandum of Law (B-417787.4) at 1 (quoting Notice of Corrective Action, Feb. 3, 2020, at 1). Specifically, the Army's notice of corrective action stated that the agency assigned a "highly relevant" rating to one of PSS's past performance references, despite the fact that "there was no indication in PSS' proposal that [the firm] would be involved in the instant requirement," and was an affiliate of the awardee's proposed subcontractor. Notice of Corrective Action, Feb. 3, 2020, at 1-2. Similarly, the agency found that three of HCJV's past performance references were "performed by entities that also have no apparent connection to the instant requirement," and were instead affiliates of the protester's proposed subcontractor. *Id.* The agency additionally identified concerns regarding the attribution of past performance to certain joint ventures in the evaluation of both offerors' proposals. *Id.*

As discussed above, we will recommend reimbursement of costs where an agency unduly delays taking corrective action in response to a clearly meritorious protest. *AAR Aircraft Servs.--Costs, supra*. We will also recommend costs where a protester raises a clearly meritorious supplemental protest ground that could have been identified by an agency's reasonable inquiry into the merits of a related initial protest ground--even where the agency takes corrective action prior to filing a report on the supplemental arguments. See *Vane Line Bunkering, Inc.--Costs*, B-416033.2, July 5, 2018, 2018 CPD ¶ 299 at 6-7. We must therefore address whether the supplemental protest challenging the evaluation of the awardee's proposed subcontractor's past performance was so closely related to the protester's initial challenge to the evaluation of its awardee's past performance as a prime contractor that the agency should have identified the supplemental issue during its preparation of the agency report. See *id.*

We conclude that the initial protest issue concerning the awardee's alleged lack of relevant past performance as a prime was distinct from the supplemental protest issue concerning the past performance reference for PSS's subcontractor. We also find that the agency did not unreasonably fail to inquire into the latter issue. In other words, we do not think that the nature of the protester's initial argument--that PSS lacked past performance and the agency therefore gave unreasonable weight to the past performance of PSS's proposed subcontractors--put the agency on notice that it should have reviewed the relevance of the subcontractors' work as part of its preparation of the agency report. See *Procinctu Grp., Inc.--Recon.*, B-416247.5, Mar. 15, 2019, 2019 CPD ¶ 299 at 6-7.

⁴ The Army's notice did not state that the agency was taking corrective action in response to this issue. See Notice of Corrective Action, Feb. 3, 2020, at 1.

CPD ¶ 109 (finding no basis to conclude that a reasonable inquiry by the agency into the protester's initial arguments should have led the agency to identify the basis for the supplemental protest that prompted the agency to take corrective action); *JRS Staffing Servs.--Costs*, B-410098.6 *et al.*, Aug. 21, 2015, 2015 CPD ¶ 262 at 5 (concluding that initial and supplemental protest grounds concerning worker's compensation relied on different legal theories and were unrelated). We therefore find no basis to recommend that the agency reimburse the protester's costs.

The request is denied.

Thomas H. Armstrong
General Counsel