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Decision

Matter of: Hanford Tank Closure Company, LLC -- Costs

File: B-418778.9

Date: November 16, 2020

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DIGEST

Protest allegations are not clearly meritorious where additional record development would be required to assess the validity of the protester's allegations; accordingly, the protester's request that we recommend reimbursement of protest costs following agency corrective action is denied.

DECISION

Hanford Tank Closure Company, LLC (HTCC), of Richland, Washington, requests our recommendation that the Department of Energy (DOE) reimburse HTCC for the costs HTCC incurred in filing and pursuing protests challenging the agency's award of a contract to Hanford Works Restoration, LLC (HWR) pursuant to request for proposals (RFP) No. 89033319REM000044. The solicitation sought proposals to perform various activities associated with environmental remediation at DOE's Hanford site.¹

¹ The agency explains that "[t]he Hanford Site is located on 580 square miles of desert in southeastern Washington," elaborating that "[f]rom 1943 until the late 1980s, Hanford produced plutonium for nuclear weapons in World War II and the Cold War, generating radioactive and hazardous chemical waste in the process," and adding that "[t]he legacy of this nuclear weapons production created enormous quantities of leftover chemical and radioactive waste." Contracting Officer's Statement of Fact and Memorandum of Law (COS/MOL), July 6, 2020, at 2. The agency further notes that it "has spent nearly \$50 billion in environmental remediation costs at Hanford since clean-up began in 1989." *Id.* at 3. Finally, of relevance to HTCC's protest and reimbursement request, the

We deny the request.

BACKGROUND

The agency began planning for this procurement by conducting site tours and “one-on-one information exchange sessions” with potential offerors in March 2016. COS/MOL, July 6, 2016, at 6. On January 18, 2019, the agency issued a draft RFP seeking industry comments and feedback. *Id.* at 6-7.

The RFP was issued on February 14, 2019, seeking proposals for a single-award indefinite-delivery indefinite-quantity (IDIQ) contract under which subsequent task orders will be issued.² While a primary objective of the procurement is to remediate and close a significant portion of Hanford’s 177 waste storage tanks, the agency describes the overall scope of the IDIQ contract as “extremely broad,” including activities associated with all of the following: contract transition, tank closure mission integration and optimization; tank farms base operations; single-shell tank remediation and closure; waste receiver facilities; supplemental treatment capability; tank waste operations center; low-activity waste pretreatment system; analytical laboratory support; core functions; and usage-based services for other Hanford contractors. *Id.* at 8-9. Following completion of the transition period, the contractor and the agency will negotiate task orders with “discrete end states.”³ *Id.* at 5.

The solicitation provided for award on the basis of a best-value tradeoff and established the following evaluation factors: key personnel, technical/management approach, past performance, and cost/fee. Agency Report (AR) Tab A.1, RFP at 793. For purposes of evaluation, proposals were required to address three task orders regarding: (1) transition; (2) single-shell tank retrieval and closure; and (3) base operations.

agency states that Hanford cleanup operations are managed by two offices--the Office of River Protection (ORP) and the Richland Operations Office (RL). *Id.*

² The procurement is generally referred to as the “tank closure contract” or TCC.

³ In structuring this procurement, the agency made a decision to take a different approach from that taken under the predecessor contract (the prior contract is referred to as the “tank operating contract” or TOC). Specifically, the agency states that the TCC implements an “end state” contracting model “to encourage innovation among contractors and accelerate the completion of a desired end state, namely the closure of tanks.” COS/MOL, July 6, 2020, at 4. The agency further explains that, under this contracting model, most of the task orders will be subject to negotiation “with discrete end states and appropriate pricing”--noting that this differs from “the traditional prime contractor approach in which DOE and the vendor agree to a 10-year pricing agreement in advance.” *Id.* at 5-6.

On or before the March 18, 2019 closing date, proposals were submitted by three offerors, including HTCC and HWR.⁴ Thereafter, the proposals were evaluated; discussions were not conducted. COS/MOL at 13-14. On May 12, the contracting officer, who was also the source selection authority, selected HWR for award.

On May 27, HTCC filed its initial protest, asserting that HWR created the appearance of impropriety and/or obtained an unfair competitive advantage by hiring the former manager of DOE's Richland Office (RL) to assist in preparing HWR's proposal. In this context, HTCC asserts that the former manager began to work on HWR's proposal shortly after retiring from DOE in February 2019. HTCC's initial protest also challenged the agency's evaluation of proposals under the past performance evaluation factor. On June 1, HTCC filed its first supplemental protest, adding challenges to the agency's evaluation of proposals with regard to the technical/management and cost/fee evaluation factors.

On June 15 (prior to the due date for submission of an agency report) DOE produced a substantial portion of the documents requested by the protester.⁵ On June 25, HTCC filed a second supplemental protest based on the agency's early document production. That protest included allegations that: the agency's internal government cost estimate was flawed and/or improperly applied; the agency engaged in unequal treatment in evaluating proposals under the technical/management and past performance evaluation factors; and the agency's determination of responsibility with regard to HWR was flawed.

On July 6, the agency submitted its report responding to each of the allegations in HTCC's initial protest, first supplemental protest, and second supplemental protest.⁶ Specifically, in responding to the allegation that HWR obtained an unfair competitive advantage by hiring the former manager of DOE's Richland Office (RL), the agency maintains that: the DOE's Office of River Protection (ORP) will be responsible for managing the TCC; the two DOE offices (ORP and RL) are separate; and ORP is a "stand-alone office that manages the Hanford Tank Farms." Contracting Officer's Declaration, July 3, 2020 at 1.

⁴ HTCC's team is comprised of Atkins Nuclear Secured, LLC, AECOM Management Services, and Westinghouse Government Services. HWR's team is comprised of BWXT Technical Services Group, Inc., and Fluor Federal Services, Inc. (with INTERA, Inc., and DBD, Inc. as subcontractors). COS/MOL, July 6, 2020, at 13.

⁵ We have noted that early document production facilitates the efficient resolution of protests, since it allows for resolution of issues concerning the scope of the agency's document production and can lead to the identification of supplemental protest issues early in the bid protest process, thereby affording protesters and our Office greater flexibility in resolving protest issues. *Livanta, LLC – Costs*, B-404215.2, Apr. 5, 2011, 2011 CPD ¶ 82 at 3.

⁶ Following submission of the agency's July 6 report, HTCC submitted its third and fourth supplemental protests.

More specifically, the contracting officer states that he “first learned of the allegations regarding [the former manager] when HTCC filed its protest” and that, thereafter, he conducted an investigation into this matter. *Id.* at 1-2. The contracting officer further states that his investigation included discussions with the former manager and various agency personnel, as well as a search of the former manager’s recent emails. Based on that investigation, the contracting officer concluded, among other things, that: (1) the former manager recused himself from participation in the TCC procurement on September 5, 2018 (a little over 5 months before the solicitation was issued); (2) the agency did not decide to use an IDIQ “end state” contracting model until December 12, 2018; (3) the former manager retired on February 18, 2019; (4) prior to retiring, the former manager completed a “retirement worksheet” and indicated that he “did not participate” in the TCC procurement, though acknowledging that he was involved in the “early master acquisition strategy” of several acquisitions; (5) the former manager was advised by DOE’s Office of Chief Counsel that his involvement in contracts at the Hanford site “may disqualify his [subsequent] employer from award” and would be subject to a determination regarding whether his prior activities and access to information “would constitute an unfair advantage”; and (6) after retiring, the former manager assisted in preparing HWR’s proposal. *Id.* at 2-7.

Based on his investigation, the contracting officer concluded that the former manager “did not have access to source selection information after he recused himself on September 5, 2018”; “did not have access to non-public, proprietary information regarding any of the HTCC member companies”; and that “HWR did not gain an unfair competitive advantage [by using the former manager as a consultant].” *Id.* at 7. The agency’s July 6 report also provided specific responses to each of the additional allegations contained in HTCC’s initial protest, its first supplemental protest, and its second supplemental protest.

Following the agency’s July 6 report, this Office conducted various conference calls with the parties. Among other things, the GAO attorney responsible for handling HTCC’s protests expressed concern regarding the scope of the contracting officer’s investigation, and requested that the agency expand the investigation to consider a broader review of agency communications and the former manager’s activities prior to his September 5, 2018 recusal. The GAO attorney further stated that he intended to conduct a hearing in this matter, and identified several individuals from whom testimony would be elicited.

By letter dated July 20, following GAO’s request for additional information, the agency advised this Office and the parties that it was taking corrective action. Specifically, the agency stated:

DOE intends to conduct further investigation into whether retaining [the former manager] as a consultant gave the Awardee an unfair competitive

advantage or created an appearance of impropriety. DOE may also review the evaluation and address any issues as appropriate.

Letter from DOE to GAO, July 20, 2020.

On July 23, we dismissed HTCC's protests on the basis of the agency's pending corrective action. Thereafter, HTCC submitted this request for our recommendation that DOE reimburse HTCC for its protest costs.

DISCUSSION

HTCC asserts that DOE "should reimburse HTCC for the cost of pursuing all of its protest grounds," thereafter repeating its various allegations (MWR obtained an unfair competitive advantage; DOE's cost evaluation was irrational; DOE unreasonably evaluated HTCC's proposed staffing; DOE's evaluation of past performance was irrational; and DOE failed to obtain sufficient information in finding MWR responsible) and asserting that all of its allegations were clearly meritorious. *Req. for Reimbursement*, Aug. 7, 2020, at 2, 10-16.

When a procuring 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. 31 U.S.C. § 3554(c)(1)(A); Bid Protest Regulations, 4 C.F.R. 21.8(e); *AAR Aircraft Servs.--Costs*, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. The fact that an agency decides to take corrective action does not also establish that a statute or regulation clearly has been violated. *Id.* Rather, as a prerequisite to our recommendation for reimbursement of costs following an agency's corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious; that is, not a close question. *PADCO, Inc.--Costs*, B-289096.3, May 3, 2002, 2002 CPD ¶ 135 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. *Yardney Technical Prods., Inc.*, B-297648.3, Mar. 28, 2006, 2006 CPD ¶ 65 at 4. The requirement for further record development regarding the merits of the protest allegations is generally an indication that the allegations are not clearly meritorious. *Id.*; *Spar Applied Sys.—Declaration of Entitlement*, B-276030.2, Sept. 12, 1997, 97-2 CPD ¶ 70 at 5.

Here, based on the record that was presented to GAO and is summarized above, we do not view HTCC's protest allegations as clearly meritorious. Specifically, with regard to HTCC's assertions regarding an unfair competitive advantage, we concluded that additional information in terms of both document production and hearing testimony was necessary in order to address the validity of the agency's conclusion that HWR did not

obtain a competitive advantage.⁷ Although GAO had significant questions and concerns regarding the basis for the agency's determination in this regard, we are unwilling to conclude, without further information, that this allegation was clearly meritorious or that the agency had no defensible position. We have also reviewed HTCC's allegations challenging the other aspects of the agency's evaluation and source selection decision and similarly conclude that, even if GAO might ultimately view HTCC's protest as raising some valid complaints, the record does not demonstrate that those complaints were clearly meritorious.

HTCC's request seeking our recommendation of reimbursement is denied.

Thomas H. Armstrong
General Counsel

⁷ Indeed, following production of the agency report, counsel for HTCC sought expansion of the contracting officer's investigation beyond the expanded scope that GAO ultimately requested from the agency--which could suggest that HTCC was not certain the existing record established the clearly meritorious nature of HTCC's allegations.