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Decision

Matter of: Rho Federal Systems Division, Inc.--Costs

File: B-420192.6

Date: July 13, 2022

James Y. Boland, Esq., Michael T. Francel, Esq., and Lindsay M. Reed, Esq., Venable LLP, for the requester.
Anthony E. Marrone, Esq., and Olufemi Adedoyin, Esq., Department of Health and Human Services, for the agency.
Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation that procuring agency reimburse the protester's costs associated with filing and pursuing earlier bid protests is denied where the protester did not demonstrate that any grounds of protest were clearly meritorious when the agency announced corrective action.

DECISION

Rho Federal Systems Division, Inc., of Durham, North Carolina, a small business, requests a recommendation that the Department of Health and Human Services (HHS), National Institutes of Health, reimburse the firm's costs of filing and pursuing a protest challenging the award of a contract to Technical Resources International, Inc., of Bethesda, Maryland, also a small business, under request for proposals (RFP) No. 75N93020R00011. Rho, the incumbent contractor, argues that HHS unduly delayed taking corrective action in response to multiple clearly meritorious grounds of protest.

We deny the request.

BACKGROUND

In June 2020, HHS issued the RFP, seeking proposals from small businesses to provide support services covering a wide range of clinical research data management, safety and pharmacovigilance management for clinical trials and clinical studies of immune-mediated diseases for the National Institute of Allergy and Infectious Diseases.

Following the submission of proposals and an evaluation, HHS announced the award of the contract to Technical.

On September 24, 2021, Rho filed a protest with our Office challenging the award to Technical on the basis of alleged errors in the evaluation of both proposals. In that initial protest (including a supplemental protest filed after HHS provided a debriefing), Rho argued principally that HHS had misevaluated Technical's costs while failing to make a reasonable cost realism analysis of those costs, misevaluated both firms' technical proposals, and made an unreasonable source selection decision. Protest at 1-2; Supp. Protest at 1-2. Rho also contended that HHS had evaluated proposals unequally, particularly regarding staffing and key personnel, and had failed to reasonably consider alleged differences in the past performance records of Rho and Technical. *Id.*

On October 19, prior to filing an agency report in response to the protest, HHS announced that it would take corrective action by reevaluating both firms' proposals and making a new source selection decision. Our Office dismissed the protest as academic on that basis. *Rho Fed. Sys. Div., Inc.*, B-420192, B-420192.2, Oct. 22, 2021 (unpublished decision).

On February 8, 2022, Rho filed a second protest, which it supplemented twice, to challenge HHS's decision to award the contract to Technical again. The second protest argued principally that HHS had again misevaluated both proposals because it allegedly "did not correct the flaws in [the] initial evaluation that Rho identified in its first and supplemental protests." Second Protest at 13. Rho then alleged essentially the same grounds of protest to challenge the evaluation of costs, cost realism, technical, and past performance. Second Protest at 2-3.

In its agency report responding to the protest, HHS maintained that the new evaluation and source selection were reasonable and consistent with the RFP criteria. Shortly after receiving the agency report, Rho filed a supplemental protest, arguing that documents accompanying the report showed that the agency's evaluation of Rho was tainted by an organizational conflict of interest. Specifically, Rho alleged that one member of HHS's evaluation panel was a senior executive at one of Rho's direct competitors, and the same evaluator's interest was also affected by a specific ongoing competition between that firm and Rho in another HHS procurement. First Supp. Protest at 3. Rho also filed another supplemental protest raising challenges to the conduct of discussions and to the technical evaluation. *See generally* Protester's Comments & Second Supp. Protest at 7-47.

On March 21, HHS announced that it would take corrective action by, at a minimum, convening a new evaluation panel, reevaluating Technical's and Rho's proposals, and making a new source selection decision. Our Office dismissed the second protest (and its supplemental protests) as academic based on the proposed corrective action.

Rho then filed this request for costs, arguing that HHS failed to take prompt corrective action in the face of clearly meritorious protests, and asking our Office to recommend that HHS reimburse Rho's reasonable costs of filing and pursuing both its first and second protests. Specifically, Rho seeks a recommendation that HHS reimburse the costs of filing and pursuing the protest grounds raised in its first protest, filed September 24, 2021 (including its supplemental protest dated October 15), and the second protest filed after completion of the initial corrective action, on February 8, 2022. Request at 3.

DISCUSSION

Rho contends that HHS failed to remedy clearly meritorious issues despite taking corrective action in response to the first protest. Rho contends the agency's failure to remedy the issues identified in its first protest compelled the firm to file a second protest and comments on the agency report before HHS announced that it would take an additional round of corrective action.

Where an agency takes corrective action, our Office may recommend reimbursement of the protester's costs if the record shows that the agency unduly delayed taking corrective action and the protest was clearly meritorious. 4 C.F.R. § 21.8(e); *Bay West, LLC--Costs*; *Bhate Zapata LLC--Costs*, B-418960.6, B-418960.7, Mar. 3, 2021, 2021 CPD ¶ 112 at 4. Undue delay is present when an agency takes corrective action after the due date of the agency report; in contrast, where corrective action is taken before that due date, we will generally regard the action as prompt, so a request to recommend reimbursement of costs will not be granted. *Id.* With respect to whether a protest is clearly meritorious, the existence of any defensible legal position or close question is sufficient to show that a protest allegation was not clearly meritorious. *Procinctu Grp., Inc.--Costs*, B-416247.4, Sept. 21, 2018, 2019 CPD ¶ 36 at 4, recon. denied, *Procinctu Grp., Inc.--Recon.*, B-416247.5, Mar. 15, 2019, 2019 CPD ¶ 109.

To provide a basis for reimbursement of its protest costs, Rho has identified multiple grounds of its first protest--which were reasserted in its second protest--that it contends were clearly meritorious when HHS announced the most recent corrective action. Rho contends that HHS lacked a defensible legal basis to defend its evaluation on several points. First, Rho argues that HHS failed to perform a proper cost realism assessment of the labor costs proposed by Technical that were lower than Rho's labor costs on the incumbent contract. Request at 1. Second, the firm contends that HHS made an unreasonable, mechanical assessment of the relative risks of performance by each offeror and thereby failed to recognize a significant advantage from Rho's performance as the longtime successful incumbent contractor. *Id.* Third, the requester argues that when HHS took corrective action in response to the first protest, even though it properly removed a weakness assessed to Rho in the initial evaluation due to the departure of one of the firm's key personnel, the agency continued to improperly benchmark the successor against the qualifications of the departed person, rather than the RFP requirements. *Id.* Rho argues that the record showed that these arguments were clearly meritorious, and that HHS's announcement of corrective action on March 21, 2022 constituted undue delay. We consider each of Rho's arguments in turn

and, as explained below, conclude that none of its protest allegations was clearly meritorious.

With respect to Rho's cost realism arguments, the protester contends that Technical's proposed costs, totaling \$41.2 million, were substantially lower than Rho's proposed costs of \$54.0 million. Request at 7-8. Rho argues that, as the longtime incumbent contractor, its proposed costs were indicative of the realistic costs of performing the contract, so Technical's lower costs "should have compelled the agency to inquire into whether it had performed an adequate cost realism analysis." *Id.* at 8. Additionally, Rho argues that the record showed Technical had proposed compensation [DELETED] percent lower than Rho, and that the agency miscalculated the difference as only 5 percent. *Id.* Additionally, Rho argues that just 2 days after awarding the contract to Technical, HHS exercised options for additional staffing, which Rho argues signified inadequate staffing by Technical, and thus unrealistic costs, which HHS should have recognized before filing its agency report. *Id.*

Based on our review of the record, HHS presented a defensible legal argument in response to these cost realism challenges. In particular, the agency notes that Technical proposed to use its existing staff at their current pay rates to perform the contract, Agency Opposition at 9, and therefore the costs associated with Rho's staffing did not provide a basis for HHS to question the realism of Technical's proposed staffing costs. *Id.* The cost realism analysis identified a primary reason for the total cost difference between Rho and Technical as the requester's substantially higher indirect cost rates, which for Technical were supported by an existing rate agreement that implemented the lower indirect cost rates that it used in its proposal. *Id.*; Agency Report (AR) Tab 8.1, Summary of Cost Analysis & Cost Realism at 2. Although Rho contends that those rates were themselves unrealistic, HHS provided a legally defensible argument that it accepted Technical's indirect rates because they were consistent with the firm's existing rate agreement. Agency Opposition at 9. Although Rho also argued that the exercise of options for additional staffing under Technical's contract undermined the cost realism analysis, we agree with HHS that it had a defensible position to characterize this aspect of Rho's argument as tenuous and speculative, and thus the argument was not clearly meritorious. *Id.*

Next, Rho contends that it raised a second clearly meritorious ground of protest in its challenge to HHS's past performance evaluation. Request at 9-10. Rho argued that despite the RFP providing for the past performance evaluation to consider relative risk, HHS made only a superficial evaluation of risk that failed to differentiate between Rho and Technical. The result was that HHS considered the past performance of both firms to present no risk, and that both were equal with regard to the past performance evaluation. *Id.* at 9; Second Protest at 35-36. Rho contended that the RFP required that the past performance evaluation assess not just the performance risk for each offeror, but also the "relative risks." *Id.* at 35. In assessing that relative risk, Rho contended that a reasonable evaluation would have recognized that Rho had a "singular" performance record of providing clinical support services to the agency over 20 years that made it superior to Technical, in terms of relative risk. *Id.* at 36.

Here again, HHS presented a defensible legal argument in response to Rho's relative risk past performance challenge. HHS did not dispute that the RFP provided for the past performance evaluation to include consideration of relative risk, but argued that it concluded that the performance records justified assessing no risk to awarding the contract to either firm, and that it was thus reasonable to consider the relative risk between them to be zero. Memorandum of Law (MOL) at 42. Rho's argument that the RFP required the agency to make a further analysis--an effort to discern a level of "relative risk" between two firms that the agency reasonably concluded posed no risk--is not one that we can conclude was clearly meritorious. Rather, HHS had a legally defensible argument that it was reasonable to identify no "relative risk" where the agency's evaluation judgment identified no risk in either firm's past performance record. MOL at 42-43.

A third area of its protest that Rho contends was clearly meritorious argued that HHS made at least two errors in the technical evaluation. First, even though HHS removed a weakness that Rho challenged in its first protest, regarding the departure of the firm's **[DELETED]** program lead candidate, HHS still unreasonably evaluated the successor by removing an evaluated strength.¹ Request at 11. Second, Rho contends that it raised a clearly meritorious challenge to the technical evaluation of Technical's proposal in arguing that the agency unreasonably removed a weakness assessed in the initial evaluation regarding the awardee's key personnel even though Technical's revised proposal did not propose additional key personnel.² *Id.* at 12.

¹ Rho also argues that, after assessing weaknesses in the original evaluation regarding the firm's pharmacovigilance plan, the agency held improper discussions that resulted in Rho only partially addressing HHS's concerns, after which the agency failed to increase Rho's technical point score despite the revisions it made in response. Request at 11; Second Protest at 12, 24-25. Contrary to Rho's brief argument on this point, the record does not show that HHS lacked a defensible legal position in arguing that its discussions reasonably informed Rho of the area of concern, and reasonably concluded that notwithstanding the proposal revisions, Rho's revised proposal continued to have a weakness. MOL at 26-27. We therefore conclude that this challenge was also not clearly meritorious.

² Rho also contends that it raised a clearly meritorious challenge to the technical evaluation in arguing that HHS should have recognized that Technical's subcontractor was a large business that would perform the primary and vital elements of the contract, which would render Technical ineligible to compete as a small business under the "ostensible subcontractor" rule. Request at 11-12; Supp. Protest at 15-17. In the second protest, Rho again argued that Technical was ineligible because of the allegedly improper significance of the subcontractor's role. Second Protest at 30-32. On March 7, HHS took corrective action regarding only that issue by referring the matter to the Small Business Administration (SBA) for a ruling on Technical's small business status. Rho maintains that Technical's proposal "on [its] face" showed that Technical was not a small business, and thus our Office had jurisdiction over these arguments, and now argues that corrective action on the issues was unduly delayed. Request at 3.

In response to both technical evaluation challenges, HHS presented defensible legal positions. First, the agency argued that removing a strength from Rho's proposal was reasonable because, even though the departure of Rho's original [DELETED] program lead candidate did not constitute a weakness, the proposed key personnel in the revised proposal, as a whole, no longer justified the strength that had previously been assessed. MOL at 24-25. With respect to the challenge to the evaluation of Technical's key personnel, the agency argues that, even though no additional key personnel had been proposed, it reasonably assessed strengths for specific additional personnel that the firm identified in the revised proposal. MOL at 35-36. The agency provided a defensible basis to argue that the technical evaluations were reasonable and that the protester's challenges constituted no more than disagreement with evaluation judgments.

Altogether, the record does not show that HHS lacked a defensible legal basis when it filed its agency report in response to Rho's second protest, and thus Rho has not shown that either its first or second protest was clearly meritorious.

The request is denied.

Edda Emmanuelli Perez
General Counsel

We disagree. At no point has Rho shown that Technical's proposal, on its face, indicated that the firm was other than small; rather Rho's argument is based on determinations of the significance of the subcontractor's role under the SBA's standards. Our Office thus cannot conclude that we had jurisdiction over these aspects of Rho's protest, and consequently we have no basis to recommend reimbursement of costs regarding the issue. We express no view on the merits of the underlying issues, due to the SBA's exclusive jurisdiction to determine the issues surrounding small business eligibility.