



441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

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Decision

Matter of: CSM Solutions, Inc.--Costs

File: B-420936.3

Date: January 4, 2023

Gunjan R. Talati, Esq., and Jennifer L. Andrews, Esq., Kilpatrick Townsend & Stockton LLP, for the requester.

Major Chris Walton, and Michael McDermott, Esq., Department of the Army, 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 protest is denied where the protester failed to show that grounds of its initial protest were clearly meritorious when the agency announced corrective action, and where the corrective action was prompt in relation to issues raised in the supplemental protest.

DECISION

CSM Solutions, Inc., of Leesburg, Virginia, a small business, requests a recommendation that the Department of the Army, Regional Contracting Office Bavaria, reimburse the firm's costs of filing and pursuing a protest challenging the award of a requirements contract to Poland-U.S. Operations Sp. z o.o., of Gdynia, Poland, under request for quotations (RFQ) No. W912PB22Q3012, issued by the Department of the Army for battlefield staff ride services at European battlefield sites. CSM argues the Army unduly delayed taking corrective action in response to clearly meritorious grounds of protest.

We deny the request.

BACKGROUND

The RFQ required vendors to provide battlefield staff ride services, the main elements of which were to be leadership workshops, en-route instruction, terrain walks and historical analysis, bus transportation, hotel accommodations, and meals for

participants. Agency Report (AR), Tab 9, Consolidated RFQ at 4. Award was made to Poland-U.S. on July 25, 2022.

On August 4, CSM filed its protest with our Office challenging the contract award, which argued that the awardee's quotation was unacceptable under the lowest-priced technically acceptable award criteria in the RFQ. CSM contended that the RFQ required, and the awardee lacked, experience in providing battlefield staff ride services or any comparable services. Consequently, the protester maintained that the awardee's quotation should have been evaluated as unacceptable under the RFQ's experience subfactor, which was one of two technical subfactors.

The pertinent requirement under the experience subfactor was to provide

[s]upporting documentation demonstrating that the offeror has a minimum of one (1) year in performing services of same/similar scope to this solicitation within the last ten (10) years, in the amount of no less than a total amount of one (1) [m]illion [d]ollars per year.

RFQ at 11.

The second subfactor, subcontracting, required the vendor to show either that the firm would perform the contract itself, or submit a list of all subcontractors and provide contact information, explain each subcontractor's role, and include a letter of commitment on the subcontractor's official letterhead. *Id.*

The protester asserted that the awardee's quotation should have been rejected as unacceptable under the experience subfactor. CSM argued the awardee's website indicated that its experience was in defense and logistics management, and further stated that the firm had only begun to offer battlefield ride services in 2022. Protest at 4.

The Army submitted its agency report to our Office, which argued that the awardee was reasonably evaluated as acceptable, and in particular, the awardee "and their subcontractors" had collectively demonstrated that they met the minimum experience requirement of providing similar battlefield ride services for a period of at least one year in an amount over \$1 million per year. AR, Tab 2, Contracting Officer's Statement (COS) at 4 (quoting AR, Tab 14, Technical Evaluation Form for Awardee at 1). The agency argued that consideration of the awardee's subcontractors' experience in the evaluation was consistent with the RFQ's instructions. In this regard, the agency contended that the meaning of the term offeror was clarified by a statement that "certificates, documents, and/or references confirming the qualification of the offeror, to include sub-contractors, shall be submitted to the Contracting Officer along with the submission of the offer." COS at 6 (quoting RFQ at 52).

In its comments on the agency report, CSM disputed the agency's interpretation of the RFQ, and contended that the Army departed from the experience criteria in the RFQ that required experience be shown by "the offeror" to an expanded interpretation that

included experience possessed by the awardee's subcontractors. Comments & Supp. Protest at 8. Additionally, CSM supplemented its protest to contend that even if the RFQ permitted the Army to consider the experience of the subcontractors, the record showed that none of the awardee's subcontractors had experience that satisfied the RFQ criteria. CSM argues that the awardee had not identified any contracts performed by its subcontractors, and the Army instead accepted statements about the subcontractors' "annual turnover" value, rather than requiring evidence that showed qualifying contracts valued over \$1 million. *Id.* at 15.

Seven days after CSM filed its supplemental protest grounds, the Army filed a request for dismissal, arguing that the protest had become academic because the agency was taking corrective action. Request for Dismissal, Aug. 15, 2022, at 1. In support of the request, the contracting officer informed our Office that the decision was based on a review of the allegations in the protest, and the supplemental protest grounds in particular (along with the record, the agency's acquisition approach, and consultation with legal counsel and procurement officials). Electronic Protest Docketing System No. 26, Memorandum Notice of Corrective Action at 1. The contracting officer stated that the agency would revise the RFQ, request and evaluate revised quotations, and make a new source selection decision. *Id.*

Our Office then dismissed CSM's protest as academic, and the firm filed a timely request that we recommend that the Army reimburse the costs of filing and pursuing the protest, as provided in our Bid Protest Regulations, 4 C.F.R. § 21.8(e).

DISCUSSION

CSM argues that the Army unduly delayed taking corrective action in response to a clearly meritorious protest. Specifically, the firm argues that a reasonable inquiry into the protester's allegations would have revealed to the agency that the awardee lacked the required experience, and the experience of its subcontractors failed to meet the RFQ's criteria. Request for Costs at 1. In fact, the firm contends that the contracting officer conceded that the corrective action was taken in response to the protest and was directly aimed at the evaluation challenge raised in the protest.

The Army argues that the protester is not entitled to reimbursement of its costs because the agency's decision to revise the solicitation was independent of, and unrelated to, the protest issues. Specifically, the agency states that the contracting officer determined that proceeding with a requirements contract was inconsistent with the agency's intent to have military personnel lead some battlefield staff rides, rather than a contractor. Opposition to Costs at 2; exh. 1, Contracting Officer's Memorandum for Record at 3. The agency states that only an indefinite-delivery, indefinite-quantity (IDIQ) contract would allow the agency to provide military-led battlefield staff rides; whereas the agency would be subject to a claim for breach of contract for using military personnel to provide battlefield staff rides under the terms of the requirements contract that the RFQ specified. Opposition to Costs at 2, 4-5. The Army states that the agency's decision to revise the solicitation was thus motivated by the agency's need to revise the solicitation

to avoid breaching the requirements contract, and instead specify an IDIQ contract. *Id.* at 3, 5.

The agency also argues that the protest was not clearly meritorious because the agency presented a meritorious defense that the RFQ provided for the evaluation of experience to include subcontractors. *Id.* at 6-7. The agency denies that the contracting officer's justification for taking corrective action conceded that the protest had merit; instead the agency argues that the contracting officer simply acknowledged that amending the RFQ to eliminate an arguably unclear standard would be appropriate. *Id.* at 3. Finally, the agency argues that its corrective action was not unduly delayed because, at best, it addressed an issue first raised as a supplemental ground of protest as part of the protester's comments on the agency report. *Id.* at 11. Taken together, the agency argues that the protester's request should be denied because the issue raised in the initial protest was not clearly meritorious and, even if the supplemental protest could be considered clearly meritorious, the corrective action was prompt because it was announced before the supplemental agency report was due. *Id.* at 2.

Our Bid Protest Regulations, 4 C.F.R. § 21.8(e), provide that this Office may recommend that an agency pay protest costs where the agency decides to take corrective action in response to a protest. In general, however, we will make such a recommendation only where the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. *CSL Birmingham Assocs.; IRS Partners-Birmingham--Costs*, B-251931.4, B-251931.5, Aug. 29, 1994, 94-2 CPD ¶ 82 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. *Iron Mountain Info. Mgmt., LLC--Costs*, B-418797.4, June 23, 2021, 2021 CPD ¶ 235 at 4. This principle is intended to prevent inordinate delay in investigating the merits of a protest and taking corrective action once an error is evident, so that a protester will not incur unnecessary effort and expense in pursuing its remedies before our Office. *Debcon, Inc.--Costs*, B-412298.3, Apr. 26, 2016, 2016 CPD ¶ 122 at 2.

As an initial matter, we do not agree with the Army that it has shown a valid basis to take corrective action for reasons unrelated to the protest. As noted above, the Army contends that it needed to amend the solicitation because the solicitation was inconsistent with the agency's needs. According to the Army, the award of a requirements contract as contemplated by the solicitation, was inconsistent with the agency's intention to provide some battlefield ride services using military personnel, rather than its contractor. We do not see any inconsistency or incompatibility between the agency's award of a requirements contract for battlefield ride services and its continued use of military personnel to provide some of these same services. Indeed, the clause setting forth the effect of a requirements contract, provides first that the government will order all quantities "that are required to be purchased" by the activity. Additionally, the clause allows the agency to provide expressly (by using alternate I) that the agency's requirements are those quantities that exceed "the quantities that the activity may itself furnish within its own capabilities." Federal Acquisition Regulation clause 52.216-21(c) (Alternate I). Accordingly, based on the reasons advanced by the

Army, we cannot conclude that the Army in fact needed to change the type of contract contemplated by the solicitation from a requirements contract to an IDIQ contract because only an IDIQ contract could accurately meet the Army's needs.

Nevertheless, considering the circumstances of the procurement at the time when the Army announced corrective action, we conclude that CSM has not shown that its initial protest was clearly meritorious. In this connection, CSM has not shown that the record demonstrated that the consideration of subcontractor experience in assessing the awardee's quotation was precluded by the RFQ or was otherwise improper. Rather, we accept the Army's position that it had at least a defensible legal position. As noted above, the Army argued that its assessment of the qualifications of the contractor could include consideration of its subcontractors because the RFQ described the evaluation of experience as including consideration of documentation that "confirm[ed] the qualification of the offeror, to include sub-contractors." RFQ at 52. In our view, the Army had at least a defensible legal position that the experience factor expressly identified consideration of subcontractors in assessing whether a vendor's quotation demonstrated at least minimally acceptable experience. *E.g.*, *Sterling Med. Assocs., Inc.*, B-419910.3, Jan. 10, 2022, 2022 CPD ¶ 28 at 8-9 (denying costs where agency had presented a defensible legal position). Consequently, CSM's initial protest was not clearly meritorious.

With respect to the supplemental protest, the corrective action was prompt, and not unduly delayed, because the agency announced its corrective action before the due date for a supplemental agency report responding to CSM's additional challenges. Again, as a general rule, so long as an agency takes corrective action by the due date of its protest report, we regard the action as prompt, and will not consider a request to recommend reimbursement of protest costs. *CDIC, Inc.--Entitlement to Costs*, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52.

The request is denied.

Edda Emmanuelli Perez
General Counsel