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Decision

Matter of: Draken International, Inc.

File: B-421097.5

Date: April 6, 2023

John E. McCarthy Jr., Esq., and Issac D. Schabes, Esq., Crowell & Moring LLP, for the protester.

Erika Whelan Retta, Esq., Aaron J. Weaver, Esq., and Christian H. Robertson II, Esq., Department of the Air Force, for the agency.

Mary G. Curcio, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation that protester be reimbursed the costs of filing and pursuing its protest is granted where protest was clearly meritorious and the agency delayed taking corrective action until after record was fully developed.

DECISION

Draken International, LLC, of Fort Worth, Texas, requests that our Office recommend it be reimbursed the costs of filing and pursuing its protest challenging the issuance of a task order to Top Aces Corporation, of Reno, Nevada, under solicitation No.CAF-CAS-14, issued by the Department of the Air Force for adversary air training services. The protester challenged the agency's evaluation of proposals and best-value tradeoff decision.

We grant the request.

BACKGROUND

On September 26, 2022, Draken filed its protest against the Air Force's issuance of a task order to Top Aces Corporation. As relevant to this request, the protester argued in part that the Air Force unreasonably evaluated proposals under the technical experience subfactor and conducted a flawed best-value tradeoff.

After development of the protest record, the cognizant GAO attorney conducted an "outcome prediction" alternative dispute resolution (ADR) conference. During that ADR,

the GAO attorney advised the parties that GAO would likely sustain Draken's challenges to the agency's evaluation of proposals under the technical experience subfactor and the best-value tradeoff decision.¹

In response to the ADR, the Air Force informed GAO that it intended to take corrective action consisting of re-evaluating the offerors' technical experience and conducting a new best-value tradeoff. Based on the agency's proposed corrective action, GAO dismissed Draken's protest as academic. *Draken International, LLC*, B-421097, Dec. 6, 2022 (unpublished decision). Following the dismissal of the protest, Draken filed this request that GAO recommend that Draken be reimbursed for the costs of filing and pursuing its protest that the agency unreasonably evaluated proposals under the technical experience subfactor and conducted a flawed best-value tradeoff.²

DISCUSSION

Draken requests our Office recommend that the Air Force reimburse Draken for the costs associated with its challenges to the agency's evaluation of the technical experience subfactor and the best-value tradeoff decision. The agency asserts that we should deny Draken's request because the agency had a defensible legal position. Specifically, the agency argues the protester did not demonstrate that it was competitively prejudiced by the improper evaluation, and the protest was therefore not clearly meritorious.³

When a procuring agency takes corrective action in response to a protest, our Office may recommend under 4 C.F.R. § 21.8(e) that the agency reimburse the protester its reasonable protest costs where, 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, thereby causing the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. *Pemco Aeroplex, Inc.--Recon. & Costs*, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 5. A protest is clearly meritorious when a reasonable agency inquiry into

¹ The attorney further advised the parties that GAO would likely deny all other issues that were raised.

² While Draken raised a number of other protest grounds, it seeks reimbursement of its costs related only to its challenge to the evaluation of proposals under the technical experience subfactor and the resulting best-value tradeoff decision. Request at 4-5.

³ Generally, where an agency takes corrective action by the due date for its report, we regard the action as prompt, and will not consider a request to recommend reimbursement of protest costs. *A-Ability Med. Equip., Inc.--Costs*, B-403256.3, Apr. 4, 2011, 2011 CPD ¶ 81 at 2. Here, the agency took corrective action after its report was filed and does not dispute that it did not take timely corrective action. Accordingly, we consider the corrective action unduly delayed.

the protest allegations would show facts disclosing the absence of a defensible legal position. *The Real Estate Ctr.--Costs*, B-274081.7, Mar. 30, 1998, 98-1 CPD ¶ 105 at 3. As a general matter, a GAO attorney will inform the parties through outcome prediction ADR that a protest is likely to be sustained when he or she has a high degree of confidence regarding the outcome; therefore, the willingness to do so is generally an indication that the protest is viewed as “clearly meritorious.” *National Opinion Research Center--Costs*, B-289044.3, Mar. 6, 2002, 2002 CPD ¶ 55 at 3; *Inter-Con Sec. Sys., Inc.; CASS, a Joint Venture--Costs*, B-284534.7, B-284534.8, Mar. 14, 2001, 2001 CPD ¶ 54 at 3.

Here, during the ADR conference the GAO attorney noted that under the technical experience subfactor the solicitation instructed offerors to “provide an approach that demonstrates the Technical Experience of the company specifically regarding the ability to generate contract adversary air” with a special emphasis placed on eleven specific areas. See Agency Report (AR), Tab 7, Fair Opportunity Request for Proposals at 6-7. The attorney explained that GAO would likely sustain the protest because Top Aces’s proposal did not demonstrate relevant experience in many of the areas as evidenced by the agency’s rating sheet. See AR, Tab 11, Experience Evaluation. In this regard, the rating sheet for Top Aces’s proposal showed that many of the eleven areas were blank or specifically indicated that there was no performance data. *Id.* Despite this evident lack of information in the contemporaneous evaluation record, during the protest the agency did not provide any explanation of how it concluded that Top Aces demonstrated relevant experience and should be rated acceptable for technical experience. The attorney further notified the parties that GAO would also sustain Draken’s challenge to the best-value tradeoff decision because the decision was based on a faulty technical evaluation.

Also during the ADR conference, agency counsel asserted that the protester was not competitively prejudiced as a result of the improper evaluation of technical experience. In response, the GAO attorney informed the parties that since the protester’s proposal was significantly lower in price than the awardee’s--more than \$30 million dollars--GAO could not conclude that the protester was not prejudiced by the improper evaluation. That is, GAO could not state that even if technical experience had been properly evaluated the protester would not have received the award.

The Air Force does not dispute that the evaluation of experience was flawed. The agency asserts, however, that we should not recommend that Draken be reimbursed its protest costs because the issue of whether Draken was competitively prejudiced by the improper evaluation was not clearly meritorious since even if there were errors in the evaluation, technical experience was the least important technical factor.

Even where a protester successfully challenges an agency action, such as an evaluation, we will sustain a protest only where the protester demonstrates a reasonable possibility that it was competitively prejudiced by the agency's improper actions, that is, but for the agency's actions, the protester would have had a substantial chance of receiving the award. See *McDonald-Bradley*, B-270126, Feb. 8, 1996, 96-1

CPD ¶ 54 at 3. We resolve any doubts regarding prejudice in favor of the protester since a reasonable possibility of prejudice is a sufficient basis for sustaining a protest. See *Kellogg, Brown & Root Services, Inc.-Recon.*, B-309752.8, Dec. 20, 2007, 2008 CPD ¶ 84 at 5.

Here, the solicitation provided that the task order would be issued on a best-value tradeoff basis considering the following factors: technical with the following three subfactors, aircraft capability, aircraft availability, and technical experience; technical risk; and price. The agency rated both the Draken and Top Aces proposals as acceptable for the aircraft capability, aircraft availability, and technical experience subfactors. The agency also rated the Top Aces proposal as low for technical risk, and the Draken proposal as high risk.⁴ Draken's proposed price was more than \$30 million dollars lower than Top Aces's proposed price. The solicitation stated that the "greater the equality of proposals for the technical factor and technical risk factor; the more important price becomes in selecting the best value." If technical experience had been properly evaluated--and Top Aces's proposal received a lower rating for this subfactor--a tradeoff decision based on that evaluation could have resulted in an award to Draken.⁵ Accordingly, we conclude that the record does not disclose the presence of a defensible legal position. In addition, this conclusion was readily apparent from a reasonable examination of the contemporaneous record. As such, since the protest record does not disclose the presence of a defensible legal position, the argument that Draken was competitively prejudiced was clearly meritorious.

RECOMMENDATION

As stated, the agency does not dispute that it unduly delayed taking corrective action. Accordingly, since we also conclude that Draken's allegations were clearly meritorious, we recommend the agency reimburse the protester the reasonable costs of filing and pursuing its protest, including attorneys' fees, challenging the agency's evaluation of proposals received under the technical experience subfactor and resulting best-value

⁴ The solicitation stated that each technical subfactor would be assigned one of the following adjectival ratings: good, acceptable, or marginal. The technical risk factor would be assigned one of the following risk ratings: low, moderate, high, or unacceptable. The solicitation further explained that when combined, the three technical subfactors were "approximately equal" to the technical risk factor. RFP at 11-12.

⁵ We also note that the requester has argued that Top Aces's lack of technical experience may have resulted in it being rated as "[u]nacceptable" under this subfactor, which would render it ineligible for award. Comments at 4.

tradeoff decision. The protester must file its claim for costs, detailing and certifying the time expended and costs incurred, with the Air Force, within 60 calendar days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The request is granted.

Edda Emmanuelli Perez
General Counsel