



Decision

Matter of: Kuponon Government Services, LLC; Akima Systems Engineering, LLC

File: B-421392.9; B-421392.10; B-421392.11; B-421392.12

Date: June 5, 2023

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DIGEST

Protests challenging the scope of an agency's proposed corrective action in response to several earlier protests are sustained where the agency has not explained or described the concerns that gave rise to the agency's decision to take corrective action and, consequently, our Office cannot determine whether the proposed corrective action is appropriate to remedy the agency's concerns.

DECISION

Kuponon Government Services, LLC, of Orlando, Florida, and Akima Systems Engineering, LLC, of Herndon, Virginia, protest the scope of corrective action proposed in connection with a number of protests that challenged the award of a contract to Eagle Harbor, LLC, of Anchorage, Alaska, under request for proposals (RFP) No. 89303020REA000003. The Department of Energy (DOE) issued the RFP for management and operation of the agency's national training center. Both protesters argue that the agency unreasonably has limited the scope of its proposed corrective action.

We sustain the protests.

BACKGROUND

On December 21, 2022, the agency awarded a contract for the solicited requirement to Eagle Harbor.¹ In the wake of that selection decision, three firms, Kupono, Akima and Chenega Reliable Services, LLC, filed protests with our Office challenging the propriety of the agency's actions. Those protests raised a variety of challenges to the agency's evaluation of cost and non-cost proposals; the adequacy of discussions; and the reasonableness of the agency source selection decision.

In response to those protests, the agency advised our Office that it intended to take corrective action. Specifically, the agency advised that it intended to solicit, obtain, and evaluate revised cost proposals; review other areas of its evaluation and address issues as appropriate; and make a new source selection decision. Kupono objected to dismissal of its protest, maintaining that the scope of the agency's proposed corrective action was too narrow, and arguing that the agency also should solicit and evaluate revised technical proposals. We stated that the agency's proposed corrective action included a representation that it would review the other areas of its evaluation and address issues as appropriate, and concluded that this ultimately could lead the agency to solicit and evaluate revised technical proposals. We also specifically noted that any challenge to the agency's proposed corrective action would amount to a new basis for protest. Therefore, based on the proposed corrective action, we dismissed the three protests as academic. *Kupono Government Services, LLC*, B-421392, B-421392.6, Feb. 23, 2023 (unpublished decision); *Chenega Reliable Services, LLC*, B-421392.2, B-421392.7, Feb. 23, 2023 (unpublished decision); *Akima Systems Engineering, LLC*, B-421392.3, B-421392.4, B-421392.5, Feb. 23, 2023 (unpublished decision).

On February 27, shortly after we dismissed the three prior protests, Kupono filed its current protest based on the contents of the agency's dismissal request. Thereafter, on March 10, the agency issued letters to the offerors that more specifically outlined its intended corrective action, and established a deadline for submission of revised cost proposals by March 29. Akima filed its protest challenging the propriety of the agency's proposed corrective action on March 29, shortly before the deadline for submitting revised cost proposals. Kupono also supplemented its initial protest after the agency issued its March 10 corrective action letter.

¹ The solicitation contemplates the award of an indefinite-delivery, indefinite-quantity hybrid type contract that includes cost-plus-award-fee, labor-hours and fixed-price contract line items. RFP at 87.

DISCUSSION

Both protesters argue that the agency's corrective action is improperly limited to the submission of revised cost proposals. Both protesters argue that their respective cost and technical proposals are inextricably intertwined, and that they should be permitted to revise both portions of their proposals. We sustain the protests.

Agencies have broad discretion to take corrective action where the agency determines that such action is necessary to ensure a fair and impartial competition. *CSRA, LLC*, B-418903.9, Feb. 3, 2022, 2022 CPD ¶ 54 at 4. The details of implementing corrective action largely are within the discretion of the contracting agency, and we generally will not object to any particular corrective action, provided it is appropriate to remedy the concern that prompted the agency to take corrective action. *Id.* The question is whether the agency's corrective action is reasonable in relation to the flaw that the agency believes exists in its procurement process. *Id.*

In this regard, an agency's discretion when taking corrective action extends to a decision on the scope of proposal revisions, and there are circumstances where an agency may reasonably decide to limit the revisions offerors may make to their proposals. See, e.g., *Honeywell Tech. Solutions, Inc.*, B-400771.6, Nov. 23, 2009, 2009 CPD ¶ 240 at 4. However, the agency may not prohibit offerors from revising related areas of their proposals that are materially impacted by the agency's corrective action. See *Deloitte Consulting, LLP*, B-412125.6, Nov. 28, 2016, 2016 CPD ¶ 355 at 6 (sustaining protest where, in response to prior protest, agency imposed unreasonably restrictive limitations on scope of proposal revisions, which prohibited revision of proposal information materially impacted by corrective action).

Here, the agency has failed to articulate what--precisely--it believes are the flaws that exist in its procurement process. In this connection, the agency reports include a declaration from the contracting officer that purports to state the underlying reasons for the agency's corrective action. However, there are no substantive details or explanations in the declaration that detail what the flaws are in the procurement process. For example, in describing the errors found in the agency's evaluation of cost proposals, the contracting officer states only as follows:

After reviewing the specific protest allegations and the Agency's evaluation of offers, I concluded that corrective action was appropriate to address errors in the cost evaluation. These errors included both mathematical errors and errors in certain assumptions that had been used in the evaluation of cost realism. These errors affected both the evaluation of Final Proposal Revisions (FPRs) and DOE's evaluation of the initial cost proposals, and therefore impacted the cost aspect of the discussions that were held in March 2022.

Kupono AR, Exh. C.5, Contracting Officer's Declaration, at 1; Akima AR, Exh. D, Contracting Officer's Declaration, at 1.

Beyond generic references to “mathematical errors” and “errors in certain assumptions,” however, the declaration offers no insight into, or information about, the nature of the errors that the agency has identified in its cost evaluation and how those errors impacted its evaluation of initial and final cost proposals. In addition, it is not clear, nor is there an explanation of why, the agency’s proposed corrective action--soliciting only revised cost proposals, and instructing offerors to “ignore” the agency’s earlier cost-related discussion questions--is appropriate to remedy the errors identified by the agency.

The declaration is similarly vague with respect to the agency’s evaluation of technical proposals. The contracting officer states only as follows:

After a thorough review of the evaluations of technical proposals, DOE identified some areas where the evaluations did not follow the applicable provisions of the Solicitation and regulations as fully as they could have. In the course of performing the corrective action, DOE will revise those areas of the evaluations. However, DOE did not identify any areas of the evaluation of technical proposals where any errors caused inaccurate information to be communicated to Offerors during discussions, or where correcting the evaluations would otherwise require new or revised information from the Offerors.

Kupono AR, Exh. C.5, Contracting Officer’s Declaration, at 1; Akima AR, Exh. D, Contracting Officer’s Declaration, at 1.

As with the statements relating to the agency’s cost evaluation, the contracting officer’s generic representation that there were “some areas where the evaluations did not follow the applicable provisions of the solicitation and regulations as fully as they could have” provides no insight into, or information about, the nature of the errors identified; nor how the identified errors impacted the agency’s evaluation of proposals. Neither does the agency explain how its proposed corrective action will remedy the errors identified. In fact, the contracting officer’s declaration also does not suggest that the agency will perform a meaningful reevaluation of technical proposals, and promises only that the agency will “revise” those areas of the evaluation where it believes it has identified problems.

Beyond the vague, non-specific descriptions of the errors identified by the agency in the contracting officer’s declaration, the record is devoid of any other information concerning the nature of the errors identified by the agency in its procurement. In this connection, Akima filed a supplemental protest after receiving the agency report that specifically challenged the adequacy of the record in terms of agency’s explanation of its corrective action, and specifically requested all documents relating to the agency’s decision to limit its corrective action. Akima Comments and Supplemental Protest, at 29-30.

In response to that request, the agency, among other things, asserted an unidentified privilege in connection with its decision to withhold the requested documents. Agency

Response to Supplemental Document Request, at 3. Based on the agency's position, our Office requested that the agency produce a privilege log detailing the documents being withheld, and the privilege or privileges being asserted. In response to that request the agency stated as follows:

DOE has reviewed its files to attempt to identify any documents relevant to the above document request that it is withholding based on an assertion of privilege. However, as you can see from the attached log, DOE has not been able to identify any such documents. The primary reasons for this are that, as explained in the attached CO's [contracting officer's] Supplemental Declaration: 1) much of the subject "thorough review" was conducted by the evaluation team at the request of the attorneys assigned to this matter, as part of the attorneys efforts to develop a litigation strategy for the bid protests; and 2) the decisions a) to take corrective action; and b) the scope that such corrective action should encompass, were discussed and decided upon in virtual meetings, not in an exchange of documents, and the decision was not memorialized by a memorandum to the file or similar document.

Agency Response to GAO Request for a Privilege Log.

Again, the record is devoid of any documentation beyond the contracting officer's declaration detailing the agency's review of its acquisition to determine what errors were made, or otherwise detailing the agency's decision to limit its corrective action.² As discussed above, the contracting officer's does not provide any meaningful explanation for the agency's actions.

As noted, while our Office generally will not object to any particular corrective action, the corrective action must be appropriate to remedy the concern that prompted the agency to take the corrective action proposed. *CSRA, LLC, supra*. Here, as discussed, we cannot tell from the record what concern or concerns prompted the agency to take corrective action. It necessarily follows that, if we cannot tell what the concerns were that gave rise to the agency's decision to take corrective action, we also cannot tell whether the proposed corrective action is appropriate to remedy the unidentified concerns.

The protesters, for their part, have shown that, because the agency is soliciting for a cost-reimbursement type contract, their respective cost and technical proposals are inextricably intertwined. First and foremost, the protesters direct our attention to the RFP's cost evaluation factor which provides:

² Given its ultimate admission that there are no documents memorializing its decision to limit its corrective action, it is not apparent why the agency initially asserted some sort of privilege in connection with its initial response to Akima's supplemental document request.

The evaluation of cost realism is the process of evaluating specific elements of the offeror's proposed cost estimate to determine whether the cost elements – (i) are realistic for the work to be performed; (ii) reflect a clear understanding of the requirements; and (iii) *are consistent with the unique methods of performance and materials described in the offeror's technical and management proposal.*

RFP at 110 (emphasis supplied).

Both protesters argue--persuasively--that changes to their respective cost proposals will necessarily impact their respective technical approaches. For example, Kuponon points out that, under the solicitation's staffing plan proposal instructions, offerors were instructed to detail their ability to recruit, obtain, and retain personnel to ensure stable operations, to address their plans for the use and retention of incumbent staff, and to address risks inherent in their proposed staffing approaches. RFP at 95-96. Kuponon argues that any changes to its cost proposal will necessarily impact its proposed approach to recruiting, obtaining and retaining personnel.

As a second example, Akima points out that its technical proposal included details relating to the health insurance benefits provided to its employees. Akima AR, Exh. C, Akima Technical Proposal, at 107-108. Akima notes that any changes to its cost proposal will impact its approach to providing these benefits to its employees, and thus, its technical approach as well.

In addition to these examples, a review of the agency's earlier discussions with both offerors reveals that the agency implicitly understands the intertwined nature of the firms' cost and technical proposals. Both firms were asked cost-related questions based entirely on their proposed technical approaches to staffing the contract. See Kuponon AR, Exh. B.1, Competitive Range Notice, at 29; Akima AR, Exh. G.1, Competitive Range Notice, at 40. In other words, the agency specifically asked them to reexamine the interrelationship between their proposed technical approaches and their proposed cost.³

³ As a final matter, Akima also notes that, during discussions on the subject of past performance, the agency did not raise a concern relating to a safety incident that occurred with one of its subcontractors. The agency responds that this incident had not occurred at the time it conducted its discussions with Akima, and it was only during its evaluation of final proposals and source selection that the incident occurred and came to the agency's attention.

The agency appears to be taking the position that, because the incident had not occurred at the time when it engaged in discussions, it was under no obligation to discuss the matter with Akima. While agencies are not required to reopen discussions to allow an offeror to respond to negative past performance information that comes to the agency's attention after discussions are concluded, *see, Snodgrass, JV*, B-420376.2, Jan. 20, 2023, 2023 CPD ¶ 34 at 7-9, the agency has not explained its

For its part, the agency essentially has offered no explanation for why permitting offerors to revise their technical proposals would be inappropriate or otherwise adversely affect the competition. As discussed at length above, the underlying reasons for the agency decision to take corrective action are not explained in the record and, consequently, we have no basis to determine whether its proposed corrective action is appropriate to remedy the defects identified by the agency in its acquisition. We therefore sustain the protests.

RECOMMENDATION

In light of the foregoing discussion, we conclude that the agency has erred in limiting its corrective action to permitting offerors to revise their cost proposals only. We recommend the agency permit offerors the opportunity to revise any aspect of their proposals. In the alternative, if the agency chooses to limit offerors' revisions to their costs proposals, the agency should permit offerors the opportunity to revise any aspect of their proposals impacted by changes to their costs proposals. We also recommend under either alternative, that the agency solicit, obtain, and evaluate revised proposals, and make a new source selection decision based on those activities. Finally, we recommend that the protesters be reimbursed the costs associated with filing and pursuing their respective protests, including reasonable attorneys' fees. The protesters should submit their certified claims for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protests are sustained.

Edda Emmanuelli Perez
General Counsel

current decision not to permit Akima an opportunity to respond to the incident at this juncture, given that the agency intends to reopen discussions.