



Decision

Matter of: Talladega Machinery & Supply Company, Inc.--Costs

File: B-401049.3

Date: July 6, 2009

Robert J. Symon, Esq., and Jeremy Becker-Welts, Esq., Bradley Arant Boult Cummings LLP, for the protester.

Major Walter R. Dukes, Department of the Army, U.S. Army Materiel Command, for the agency.

Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation that protest costs be reimbursed is denied where the record establishes neither that agency action rendering the protest academic was taken in response to the protest nor that the protest was clearly meritorious.

DECISION

Talladega Machinery & Supply Company, Inc. of Talladega, Alabama, requests that we recommend that it be reimbursed the costs of filing and pursuing its protest of the award of a contract to Valley Machine Company (VMC) under request for proposals (RFP) No. W911KF-08-R-0010, issued by the Department of the Army for the abrasive cleaning, light oiling, and painting of combat vehicle parts; the RFP was issued to augment the agency's in-house performance of such services at the Anniston Army Depot (ANAD). We dismissed the protest after the agency notified us that it was terminating the awardee's contract because of changed requirements; specifically, the agency reported that, due to workload reductions, it no longer had a need for the solicited services. The protester, alleging that its protest was clearly meritorious and the agency unreasonably delayed taking corrective action in response to the protest, contends that it should recover its protest costs.

We deny the request.

The RFP called for the award of a contract to the offeror whose proposal was found to offer the best value to the government, considering (in descending order of importance) technical factors, price, and past performance. In its protest, Talladega

challenged the agency's evaluation of its proposal and the agency's determination that VMC's lower-risk proposal warranted the associated price premium. Talladega also argued that the agency failed to properly evaluate the offerors' proposed prices. In this regard, the RFP called for unit prices for an extensive list of parts to be serviced, for a base and 4 option years. For each year, the RFP specified both a guaranteed quantity and a "surge" quantity of parts, representing additional work that could be ordered under the contract. For the surge quantities, the RFP listed, by year, both a minimum quantity of zero for all years, and a maximum quantity which varied by the part and year. The record showed that the agency evaluated the offerors' surge quantity prices using 2 percent of the maximum quantities specified in the RFP. Talladega argued that the agency instead should have evaluated prices using the maximum quantities specified for the surge work; this approach would have substantially increased the price premium associated with award to VMC.

In its report responding to Talladega's protest, the agency asserted that the firm's proposal's lower technical rating reasonably reflected its lack of relevant experience with performing a substantial portion of the work, as well as its lack of an existing facility in which to perform that work. The agency also argued that the source selection authority reasonably concluded that the lower performance risk of the VMC proposal was worth the price premium associated with it. With respect to Talladega's challenge to the evaluation of surge quantity prices, the agency asserted that, contrary to the protester's suggestion, the RFP did not require evaluation of price proposals based on the maximum estimated quantities of surge work.¹ The agency explained that its price evaluation was based on 2 percent of the stated estimated maximum quantities because that amount reflected the likely quantity of surge work that would be required, based on historical and projected needs.

Talladega filed comments in response to the agency's report and included supplemental protest contentions which principally added specificity to its previous challenges. Shortly thereafter, the agency advised our Office that it no longer needed the solicited services and thus was terminating the awardee's contract, rendering the protest of the award academic. The agency explained that it had become apparent during the pendency of the protest that it could handle all the work in-house and thus that the contractor-provided services called for under the RFP were not required.

Our Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2009), provide we may recommend that an agency pay protest costs where the agency decides to take corrective action in response to the protest. This does not mean, however, that we will recommend that costs be reimbursed in every case in which an agency takes action that renders a

¹ With regard to the evaluation of prices, the RFP stated that the agency would use the "price per part and yearly quantities stated in the RFP for evaluation purposes." RFP at 69.

protest academic; rather, we will recommend that a protester be reimbursed its costs only where the record establishes that (1) the agency action that rendered the protest academic was taken in response to the protest, see Takota Corp.–Costs, B-299600.2, Sept. 18, 2007, 2007 CPD ¶ 171 at 3, and (2) the agency unduly delayed taking the action in the face of a clearly meritorious protest. Baine Clark–Costs, B-290675.3, Sept. 23, 2002, 2002 CPD ¶ 166 at 2. We consider a protest to be clearly meritorious when a reasonable agency inquiry into the protester’s allegations would show that the agency lacked a defensible legal position. SDA Inc.–Costs, B-298216.2, Sept. 11, 2006, 2006 CPD ¶ 133 at 2.

Talladega argues that the agency’s decision to terminate the award due to the reduced workload should be viewed by our Office as having been made in response to its protest, arguing in essence that by challenging the agency’s decision to evaluate surge prices based on only 2 percent of the estimated maximum quantities, Talladega called into question the agency’s estimates, which led to (or should have led to) the decision to terminate. We disagree. As noted above, the RFP was issued on the assumption that the required workload would exceed the in-house capacity; the actual circumstances as they unfolded during the protest revealed that the in-house capacity in fact was sufficient to meet the agency’s needs and thus that the additional contractor support was not required. While Talladega challenged the evaluation of prices based on only 2 percent of the estimated maximum surge quantities, we simply fail to see the required nexus between that contention and the decision to terminate. At best, we understand Talladega to be arguing that its protest forced the agency to reconsider its requirements, which should have revealed that the requirement for contractor support no longer existed, since the agency apparently had been experiencing some reduction in workload during the procurement; however, it was in fact the actual events as they developed during the pendency of the protest that led to the termination decision, once it became apparent that the services under the RFP were not required to meet the agency’s actual needs.

Talladega also questions the motivation for the agency’s action, arguing that, faced with a meritorious protest, the agency decided to terminate the contract to avoid payment of Talladega’s protest costs. There is no support in the record for Talladega’s contention. First, there clearly is no evidence in the record of any impropriety on the agency’s part; rather, the record shows that the termination decision stemmed from a change in the anticipated need for contractor support to augment the agency’s in-house capacity, which the protester does not dispute. Second, we are not persuaded that Talladega’s protest was clearly meritorious. The agency’s report included legally defensible bases in response to each of the protester’s allegations, *i.e.*, that the firm’s proposal’s lower technical rating reasonably reflected both its lack of experience with performing a substantial portion of the work and its lack of an existing facility in which to perform that work, that the RFP did not include a requirement to evaluate surge prices at maximum estimated quantities, and that the source selection authority reasonably determined

that the higher performance risk associated with the protester's proposal outweighed its slightly lower price.

Given that the record fails to show either that the action rendering the protest academic--termination of VMC's contract--was taken in response to the protest or that the protest was clearly meritorious, the request for reimbursement of protest costs is denied.

Daniel I. Gordon
Acting General Counsel