



Decision

Matter of: Nationwide IT Services, Inc. - Costs

File: B-404160.2

Date: August 8, 2011

Jim Lay, Esq., and Julie Parks, Esq., Phalanx PLLC, for the protester.
John E. Cornell, Esq., General Services Administration, for the agency.
Frank Maguire, Esq., Scott H. Riback, Esq., and David A. Ashen, Esq., Office of the
General Counsel, GAO, participated in the preparation of the decision.

DIGEST

GAO recommends reimbursement of protest costs where procuring agency took corrective action after parties were informed through alternative dispute resolution procedures that protest would be sustained on single ground, since that ground is considered to be clearly meritorious; reimbursement is not recommended with regard to other protest grounds, since those grounds are severable from the successful protest ground.

DECISION

Nationwide IT Services, Inc., of Alexandria, Virginia, requests that we recommend that it be reimbursed the costs of filing and pursuing its protest against the General Services Administration's (GSA) award of a contract to Binary Group, under request for quotations (RFQ) No. GSC-QFOB-10-32326, for enterprise architecture support services. The protester filed a combined request that GAO recommend the reimbursement of protest costs, 4 C.F.R. § 21.8(e) (2011), and determine the amount of those costs. 4 C.F.R. § 21.8 (f)(2).

As set forth below, we grant the request that GAO recommend the reimbursement of Nationwide's costs, but dismiss as premature the request for a recommendation regarding the amount of those costs.

BACKGROUND

The RFQ was issued on August 23, 2010 to obtain contractor support to document the systems, operations, technical and standards architecture viewpoints needed to support the Army's Chief Information Officer (CIO/G6) for Defense Chemical,

Biological, Radiological, Nuclear and High Yield Explosive (CBRNE) response forces. Contracting Officer's (CO) Statement at 1; RFQ at 2-1, 2-2. Award was to be made on a best value basis, with technical factors deemed significantly more important than price. RFQ at 12-1. Six quotations, including Nationwide's, were received in response to the RFQ. CO Statement at 1.

On October 5, 2010, Nationwide received a letter from GSA advising that its quotation was not selected for award because, although the quotation was rated "Good" overall, it contained weaknesses, risks and deficiencies. AR, exh. 10. GSA also advised that Nationwide "does not currently hold a secret facility clearance," and that its quotation "was not the best value to the government." Id.

In its original protest, Nationwide asserted that: (1) its debriefing did not meet Federal Acquisition Regulation (FAR) requirements; (2) its quotation was improperly downgraded because it did not hold a secret facility clearance, which was not required by the RFQ prior to award; (3) the agency did not consider Nationwide's significantly lower price; and (4) the acquisition improperly was "pre-marketed" by the awardee.

During a telephone conference on October 18, 2010, the cognizant GAO attorney advised that Nationwide's first protest ground, regarding its debriefing, would be dismissed. See Healthcare Tech. Solutions Int'l, B-299781, July 19, 2007, 2007 CPD ¶ 132 at 5 (GAO will not consider assertions regarding the adequacy and conduct of a debriefing, since that is a procedural matter that does not involve the validity of an award). He also indicated that Nationwide's third and fourth protest grounds, regarding its lower-quoted price and the asserted "premarketing" of the acquisition, failed to state a valid basis of protest. See 4 C.F.R. §§ 21.1(c)(4), 21.1(f), 21.5(f); View One, Inc., B-400346, July 30, 2008, 2008 CPD ¶ 142 at 2-3. Accordingly, the agency was asked to address only Nationwide's second protest ground relating to its lack of a facility clearance.

The agency filed its report on October 28. In the protester's comments on the report, Nationwide addressed the agency's arguments regarding its remaining protest ground, and also raised a supplemental protest ground regarding the agency's alleged failure to consider subcontractor capabilities in the technical evaluation. Comments at 8.

On December 8, 2010, the cognizant GAO attorney held an alternative dispute resolution (ADR) conference, in which he engaged in outcome prediction. 4 C.F.R. § 21.10(e). He advised the parties that the protest likely would be sustained on the second protest ground--the agency's improper downgrading of Nationwide's quotation based on its alleged lack of a secret facility clearance--because that had not been an evaluation factor under the terms of the RFQ. In this connection, the record showed that this was a significant consideration in the agency's evaluation of the protester's quotation. AR, exh. 7, at 3.

In view of our conclusion relating to this aspect of the protest, the GAO attorney advised the parties that Nationwide's supplemental protest basis--the agency's asserted failure to reasonably consider subcontractor capabilities in the technical evaluation--was academic because the agency would be reevaluating Nationwide's proposal. Nonetheless, for the guidance of the parties, he noted that GAO likely would have denied Nationwide's supplemental protest ground, since the record did not support the protester's contention that the agency disregarded the experience of Nationwide's subcontractor in its evaluation.

On December 29, 2010, the agency advised GAO that, consistent with the ADR, GSA would reevaluate the quotations. GSA E-mail, Dec. 29, 2010. Based on that advice, we dismissed the protest as academic. B-404160, Jan. 3, 2011. The protester then filed a timely request, pursuant to 4 C.F.R. § 21.8(e), that we recommend that it be reimbursed the costs of filing and pursuing its protest. The protester also requested a GAO recommendation regarding the amount of those costs pursuant to 4 C.F.R. § 21.8(f)(2).

DISCUSSION

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs if, 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. 4 C.F.R. § 21.8(e); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. 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. Core Tech Int'l Corp.--Costs, B-400047.2, Mar. 11, 2009, 2009 CPD ¶ 59 at 6. Additionally, while we consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest, we generally do not consider it to be prompt if it is taken after that date. CDIC, Inc.--Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 2.

Here, GSA did not take corrective action until after the filing of its agency report on October 28 and after the subsequent December 8 ADR conference. Further, our advising the parties through outcome prediction ADR that the protest was likely to be sustained on the identified ground was an indication that we viewed that ground as clearly meritorious. National Opinion Research Ctr.--Costs, B-289044.3, Mar. 6, 2002, 2002 CPD ¶ 55 at 3. Accordingly, we do not consider its corrective action prompt.

Although we therefore recommend that Nationwide be reimbursed its costs, we do so only with regard to the issue identified as meritorious during the ADR conference. In this connection, when appropriate, we will limit our recommendation for reimbursement of protest costs where we determine that the successful and unsuccessful protest grounds clearly are severable. See, e.g., BAE Tech. Servs., Inc.--Costs, B-296699.3, Aug. 11, 2006, 2006 CPD ¶ 122 at 3. In making this determination,

we consider, among other things, the extent to which the protest issues are interrelated or intertwined, e.g., whether the successful and unsuccessful issues share a common core set of facts, are based on related legal theories, or are otherwise not readily severable. See Sodexo Mgmt., Inc.--Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 29.

We conclude that none of the other protest grounds raised in Nationwide's original and supplemental protests was related to the successful protest ground and, accordingly, those grounds are clearly severable. We viewed the successful protest ground--improper downgrading of the protester's proposal for lack of a facility security clearance--as meritorious because the agency's evaluation was based on a factor not set forth in the solicitation.

In contrast, the other protest grounds were based on different core sets of facts and were not based on interrelated legal theories. The first and fourth grounds for protest (inadequate debriefing and the alleged "pre-marketing" by the awardee) were not further developed as they failed to state a basis for protest. The protester's third original protest ground (failure to consider its lower priced offer) and supplemental protest ground (failure to evaluate its subcontractor) were evaluation challenges, but challenged the reasonableness of the agency's evaluation, not the application of an unstated evaluation factor. Additionally, as noted, we advised the parties during the ADR procedure that the supplemental protest ground appeared meritless, inasmuch as it was not supported by the record. Accordingly, we find Nationwide's other protest bases severable from its successful argument, and therefore limit our recommendation that Nationwide be reimbursed its protest costs to its single successful issue.

Finally, in addition to its request for a GAO recommendation of entitlement to costs, 4 C.F.R. § 21.8(e), Nationwide requests that we recommend the amount of costs the agency should pay. 4 C.F.R. § 21.8(f)(2). Our Bid Protest Regulations contemplate that, after a GAO recommends the reimbursement of protest costs, the parties "shall attempt to reach agreement on the amount of costs," 4 C.F.R. § 21.8(f)(1), and that the agency "shall issue a decision on the claim for costs as soon as practicable," 4 C.F.R. § 21.8(f)(2). Since the protester's request that GAO determine the amount of its costs precedes both GAO's recommendation regarding reimbursement and the parties' attempt to reach agreement on the amount of the protester's costs, it is premature and will not be considered.

The request that GAO recommend reimbursement of protest costs is granted; the request for a recommendation on the amount of protest costs is dismissed.

Lynn H. Gibson
General Counsel