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Decision

Matter of: Colorado Professional Resources, LLC

File: B-404725.3

Date: November 16, 2012

Anne B. Perry, Esq., Sheppard Mullin Richter & Hampton LLP, for the protester. Sharon A. Jenks, Esq., and Col. Mark S. Teskey, Department of the Air Force, for the agency.

Christina Sklarew, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reimbursement of protest costs is denied where record fails to establish that the agency unduly delayed taking corrective action in the face of clearly meritorious protest.

DECISION

Colorado Professional Resources, LLC (CPR) asks our Office to recommend that the Department of the Air Force reimburse its costs of filing and pursuing its protest of the Air Force's award of a contract to Infinity Systems Engineering, LLC under request for proposals (RFP) No. FA2550-08-R-8002, for support and engineering services for extremely high frequency satellite communications. CPR contends that the Air Force unduly delayed taking corrective action in the face of a clearly meritorious protest.

We deny the request.

BACKGROUND

The RFP provided for award of a cost-plus-fixed-fee contract. Following the award of the contract to Infinity and a debriefing, CPR protested to our Office, arguing, among other things, that the agency failed to analyze Infinity's proposal for cost realism, that Infinity had underpriced and understaffed the work required under the solicitation; that the agency had failed to amend the solicitation to reflect a reduction in the work that was actually required; and that the Air Force failed to meaningfully consider potential organizational conflict of interest (OCI) issues involving Infinity.

Following receipt of the agency's report on its initial protest, CPR filed a supplemental protest, in which it argued that the agency had failed to evaluate Infinity's proposal of a staffing level that was only [deleted] percent of the independent government estimate (IGE).

Prior to the date for filing its supplemental agency report, the Air Force stated that it would take corrective action by, among other things, re-evaluating both Infinity's and CPR's proposals. Notice of Corrective Action, at 1. We dismissed CPR's protest as academic based upon this corrective action.

DISCUSSION

CPR asks that we recommend that the Air Force reimburse the firm its protest costs, because the Air Force unduly delayed taking corrective action in response to CPR's clearly meritorious protest. The Air Force opposes the request, arguing that the corrective action taken was not in response to the initial protest, but was based on CPR's supplemental protest, to which its corrective action was a prompt response. The Air Force also contends that CPR's protest was not clearly meritorious.

Where a procuring agency takes corrective action in response to a protest, our Office may recommend that the agency reimburse the protester its 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 a protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3554(c)(1)(A) (2006); Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2012); Pemco Aeroplex, Inc.--Recon. and 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 the protest allegations would show facts disclosing the absence of a defensible legal position. AVIATE L.L.C., B-275058.6, B-275058.7, Apr. 14, 1997, 97-1 CPD ¶ 162 at 16. For a protest to be clearly meritorious, the issue involved must not be a close question. J.F. Taylor, Inc.- Entitlement to Costs, B-266039.3, July 5, 1996, 96-2 CPD ¶ 5 at 3. Rather, the record must establish that the agency prejudicially violated a procurement statute or regulation. Tri-Ark Indus., Inc.--Declaration of Entitlement, B-274450.2, Oct. 14, 1997, 97-2 CPD ¶ 101 at 3.

Here, the record does not establish that CPR's protest was clearly meritorious. CPR's protest is hinged upon its argument that the agency failed to conduct an adequate cost realism analysis of Infinity's proposal, thereby allowing Infinity to "under-staff and under-bid" the work required. The record documents that the agency did perform a cost realism analysis of Infinity's proposal, analyzing whether the firm's offer was consistent with the offeror's technical proposal. See Agency Report (AR), Tab 14, Proposal Analysis Report, at 10. The Air Force noted that

Infinity introduced a unique [deleted to perform technical requirements; that [deleted] was intended to improve productivity and reduce idle time of critical personnel resources; and that [deleted] techniques included the use of [deleted]. Id. at 13. The agency also noted that, although Infinity initially did not adequately explain how the [deleted] approach would meet certain contract requirements, Infinity provided additional rationale for its approach and increased its FTEs (albeit minimally) during discussions, which the agency found was sufficient. Id. at 23. The agency recognized that Infinity's price was \$12.3 million lower than the IGE, and that the difference in price was "due largely to [Infinity's] [deleted] proposed staffing that includes [Infinity's] [deleted] approach." Id. at 30. The agency concluded that Infinity's proposed staffing approach was acceptable, notwithstanding its lower overall staffing. Id.

Although CPR vigorously challenged the agency's cost realism evaluation, we are unable to say from our review of the record that the agency's judgment regarding the realism of Infinity's proposed costs and staffing was clearly erroneous. Stated another way, CPR's protest presented close questions as to the merits of the agency's cost and technical evaluation.¹

The request that we recommend reimbursement of CPR's protest costs is denied.

Lynn H. Gibson
General Counsel

¹ We also do not find that CPR's contention that Infinity had an OCI was clearly meritorious.