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Decision

Matter of: Blackstone Consulting, Inc.

File: B-405909.2

Date: January 31, 2012

David S. Black, Esq., and Oliya S. Zamaray, Esq., Holland & Knight LLP, for the protester.

Christopher S. Cole, Esq., Department of the Air Force, for the agency.

Tania Calhoun, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

GAO recommends reimbursement of the costs of filing and pursuing protest challenging agency's failure to evaluate firm's past performance questionnaires as part of the past performance evaluation where the issue was clearly meritorious but the agency unduly delayed taking corrective action; protest costs need not be allocated between clearly meritorious protest issue and other protest issues where all issues were intertwined parts of protester's basic objection that the agency's past performance evaluation was improper.

DECISION

Blackstone Consulting, Inc., of Los Angeles, California, requests that our Office recommend that the Department of the Air Force reimburse its costs of filing and pursuing its protest challenging the award of a contract to Food Services, Inc. of Gainesville (FSIG), of Gainesville, Florida, under request for proposals (RFP) No. FA7037-11-R-0006, for the provision of full food services at the Five Hats dining facility located at Fort Meade, Maryland.

We grant the request.

The solicitation provided for a best value source selection where offerors' past performance history would be evaluated on a basis significantly more important than cost or price considerations. RFP § M.A. Past performance information would consist of offeror-provided self-assessment surveys of their performance under up to five contracts, as well as past performance questionnaires from up to five references. The questionnaires were to be emailed directly from the reference to

the agency by a specified date. Offerors' self-assessment surveys would be matched to the corresponding questionnaires. The Air Force planned to use the performance surveys, past performance questionnaires, and other sources to assess performance. The questionnaires would be an "integral" consideration in proposal evaluations. Id. at § L.C.2.(a)-(c).

In this regard, using the self-assessment surveys and past performance questionnaires, the contracting officer would consider relevant performance information on the five offerors whose proposals were evaluated as the lowest priced to assess their ability to perform the effort. The assessment would result in an overall performance confidence assessment of substantial confidence, satisfactory confidence, limited confidence, and so on. Id. at § M.B. The solicitation advised that if the lowest evaluated priced offer had a substantial confidence performance assessment, that offer would represent the best value, and award would be made to that offeror. Id. at § M.D.

Ten firms, including Blackstone and FSIG, submitted proposals. Blackstone's proposal offered the lowest evaluated price and was assessed a satisfactory confidence past performance rating. FSIG's higher-priced proposal was assessed a substantial confidence past performance rating. In describing Blackstone's past performance, the source selection decision document stated that no past performance questionnaires were submitted on its behalf even though the firm's proposal stated that it sent questionnaires to five references. The source selection authority found that, although FSIG's proposed total price was higher than Blackstone's, the tradeoff of the higher price for a higher confidence rating represented the best value. Agency Report (AR), Tab 9, Source Selection Decision Document at 2-3, 6. Award was made to FSIG and Blackstone's protest followed.

Blackstone's protest challenged the reasonableness of the past performance evaluation. The firm alleged that the agency failed to evaluate the past performance questionnaires submitted by its references or to make reasonable efforts to contact those references regarding the questionnaires, and failed to consider its past performance information in the Contractor Performance Assessment Reporting System. Blackstone argued that if its past performance had been properly assessed a substantial confidence rating, under the solicitation's terms, as the lowest-priced offeror, it would have represented the best value and been selected for award. The protester said it had confirmed that two references timely emailed questionnaires to the agency, and provided supporting evidence from those references.

Blackstone received its copy of the agency report on November 8, 2011. In response to Blackstone's document request, the agency report included an exhibit of e-mails the contracting officer had received concerning the past performance questionnaires; the emails Blackstone claimed the agency must have received were not included. After reviewing the agency report, Blackstone cited the evidence it

had provided to support its claim that two references emailed their questionnaires to the agency, and asked the agency to conduct an additional search of its email files. The Air Force agreed and searched again.

On November 15, the Air Force advised Blackstone that it had located the two questionnaires in its email system. The next day, the Air Force advised our Office that it decided to take corrective action by reconvening the source selection committee, reevaluating Blackstone's past performance including this new information, re-ranking the proposals, and terminating for convenience FSIG's contract and reawarding if necessary. We dismissed the protest as academic.

On December 1, Blackstone timely requested that we recommend, pursuant to section 21.8(e) of our Bid Protest Regulations, that it be reimbursed its costs of filing and pursuing its protest. 4 C.F.R. § 21.8(e) (2011). The Air Force advised that it had no objection to reimbursing Blackstone for reasonable costs incurred in the filing and pursuit of the protest ground that ultimately resulted in the corrective action--that the Air Force failed to evaluate the past performance questionnaires submitted by its references. The Air Force maintained its position that the protester's other allegations were meritless or did not prejudice the firm.

In response to our request for clarification, the Air Force confirmed that it objected to reimbursing Blackstone for its costs associated with the other protest grounds. The Air Force stated that the only basis for the corrective action concerned the agency's inability to locate the two submissions provided by the two references, but that this ground was clearly severable from its other protest grounds as based on entirely distinct core sets of facts and legal theories. Blackstone countered that its protest grounds were all based on the related legal theory that the agency miscalculated its proposal under the past performance factor, and the issues it raised regarding the past performance evaluation shared a common set of facts--whether the agency's assessment of a satisfactory confidence rating for its proposal was based on consideration of all relevant information.

Where, as here, a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs, including reasonable attorneys' fees, if, based on the circumstances of the case, we determine 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. 31 U.S.C. § 3554(c)(1)(A); 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 protester's allegations would reveal facts showing the absence of a defensible legal position. Yardney Tech. Prods., Inc.--Costs, B-297648.3, Mar. 28, 2006, 2006 CPD ¶ 65 at 4. 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 where it is

taken after that date. AGFA HealthCare Corp.--Costs, B-400733.6, Apr. 22, 2009, 2009 CPD ¶ 90 at 3-4.

The Air Force does not dispute that Blackstone's argument that it failed to evaluate its past performance questionnaires was clearly meritorious. There is also no dispute that the protest as initially filed advised the agency that these questionnaires had been submitted by email and provided evidence from the firm's references. The agency did not take prompt corrective action in response to this protest. As a result, we conclude that had the agency conducted an adequate search of its email system prior to filing its report it would have ascertained that it had, in fact, timely received two past performance questionnaires for Blackstone as argued by the protester.

As a general rule, we recommend that a successful protester be reimbursed protest costs with respect to all issues pursued, not merely those upon which it prevails. AAR Aircraft Servs.--Costs, *supra* at 9. Nevertheless, in appropriate cases, we have limited our recommendation for the award of protest costs where a part of those costs is allocable to an unsuccessful protest issue that is so clearly severable from the successful issues that it essentially constitutes a separate protest. In determining whether protest issues are so clearly severable as to essentially constitute separate protests, we consider, among other things, the extent to which the issues are interrelated or intertwined--i.e., whether the successful and unsuccessful arguments share a common set of facts, are based on related legal theories, or are otherwise not readily severable. Basic Commerce and Indus., Inc.--Costs, B-401702.3, Feb. 22, 2010, 2010 CPD ¶ 258 at 4.

Here, we do not find that Blackstone's other arguments were clearly severable from its argument that the agency failed to evaluate its past performance questionnaires. All of the arguments concerned the reasonableness of the agency's evaluation of its proposal under the past performance factor, such that the arguments were interconnected and based on common factual underpinnings. We agree with Blackstone that its protest issues were intertwined parts of its basic objection that the Air Force miscalculated its proposal under the past performance factor. I Square Logistics Servs. Corp., Inc.--Costs, B-297790.6, June 7, 2007, 2007 CPD ¶ 108 at 9; *see also* BAE Tech. Servs., Inc.--Costs, B-296699.3, Aug. 11, 2006, 2006 CPD ¶ 122 at 2. Under the circumstances, we find that all of Blackstone's costs incurred in filing and pursuing its protest are reimbursable.

We therefore recommend that Blackstone be reimbursed its costs of pursuing its protest. Blackstone should submit its certified claim, detailing the time spent and costs incurred, directly to the agency within 60 days of its receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The request is granted.

Lynn H. Gibson
General Counsel