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Comptroller General
of the United States

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Decision

Matter of: Systems Research and Applications Corporation--Costs

File: B-406775.3

Date: April 10, 2013

Scott E. Pickens, Esq., Barnes & Thornburg LLP, for the protester.
Kimberly Foxx, Esq., Department of the Navy, Military Sealift Command, for the agency.
Matthew T. Crosby, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester not entitled to costs of filing and pursuing protest, where protest was not clearly meritorious even though agency took corrective action.

DECISION

Systems Research and Applications Corporation (SRA) requests that our Office recommend that the Department of the Navy, Military Sealift Command, reimburse attorneys' fees and costs that SRA incurred in filing and pursuing a protest of a task order that the agency awarded to Science Applications International Corporation (SAIC) under task order request for proposals (TORFP) No. N00024-11-R-3368/N00033-11-R-6501 for information technology services.

We deny the request.

BACKGROUND

On May 26, 2011, the agency issued the TORFP to firms holding indefinite-delivery/indefinite-quantity contracts under the agency's SeaPort-e multiple award contract program. See Contracting Officer's Statement ¶¶ 11, 14. The solicitation sought information technology support services and contemplated the award of a single, one-year, cost-plus-fixed-fee task order with two one-year options. TORFP at 1-2, 10, 35. The solicitation stated that award would be made to the offeror whose proposal represented the best value to the government, considering the

following evaluation factors listed in descending order of importance: technical; past performance; socioeconomic considerations; and probable cost.¹ TORFP at 51-53. The solicitation stated that the non-cost factors, when combined, were significantly more important than probable cost. Id. at 53.

The solicitation incorporated numerous Federal Acquisition Regulation (FAR) clauses, including the clause at FAR § 52.222-46. Id. at 49. This clause is titled Evaluation of Compensation for Professional Employees and provides that the procuring agency will evaluate an offeror's professional employee compensation plan (salaries and fringe benefits) to assess the offeror's ability to provide uninterrupted, high-quality work and the effect of the proposed compensation on the offeror's ability to recruit and retain qualified personnel. FAR § 52.222-46(a). This clause further provides that "proposals envisioning compensation levels lower than those of predecessor contracts for the same work will be evaluated on the basis of maintaining program continuity, uninterrupted high-quality work, and availability of required competent professional service employees." Id. § 52.222-46(b).

SRA is the incumbent contractor for the solicited requirement. Contracting Officer's Statement ¶ 42.b. SRA and SAIC both submitted proposals in response to the TORFP. Following an evaluation, SRA's and SAIC's proposals received identical ratings for each of the non-cost factors and subfactors. Agency Report (AR), Tab 14, Source Selection Decision Document (SSDD), at 6. SAIC's final evaluated probable cost was the lowest of all the offerors and was [DELETED] percent below the independent government estimate (IGE). Id. at 12. SRA's final evaluated probable cost was 0.4 percent below the IGE. Id.

After reviewing the evaluation results, the source selection authority (SSA) conducted a best value tradeoff analysis wherein he first considered whether any proposals were rated technically superior to SAIC's lowest-probable-cost proposal. Id. at 13. He found that no proposals were rated technically superior to SAIC's proposal, but that SRA's proposal had received identical ratings under the technical factors and subfactors. Id. He then comparatively analyzed SAIC's and SRA's proposals and determined that SRA's proposal was "slightly better" or "moderately better" than SAIC's in several areas. Id. at 14-17. He concluded, however, that the "small difference in strengths related to the non-cost factors in no way justifies the . . . difference in the evaluated probable cost advantage SAIC has over SRA." Id. at 17.

With respect to SAIC's comparatively lower evaluated probable cost, the SSA documented the following findings:

¹ The technical factor included two equally-important subfactors: technical capability and management. TORFP at 53-54.

There remains a risk that SAIC's proposed costs are too low to attract qualified employees; however, a very thorough cost analysis found no specific cost realism issues. I am confident that SAIC has the current staff onboard, who meet the minimum qualifications for the positions SRA proposed to staff non-key personnel positions with employees that exceed the minimum qualifications of the positions While this may explain SRA's higher hourly rates, that strategy does not add technical value to its proposal. The contract awardee will only be required to meet the minimum qualifications for the non-key personnel when executing the contract. SRA's approach to use more experienced employees at higher rates for non-key personnel does not add any tangible value to its proposal to overcome the cost differential.

AR, Tab 14, SSDD, at 17.² Based on these findings and his tradeoff analysis, the SSA determined that SAIC's proposal represented the best value to the government. Id. at 18.

On May 8, the agency awarded the task order to SAIC. AR, Tab 16, Award Notification. On May 21, following a debriefing, SRA filed a protest with our Office. In its protest, SRA asserted that the agency: improperly converted the basis of award from best value where non-cost factors were significantly more important than probable cost to lowest cost, technically acceptable; unreasonably evaluated SAIC's proposal by failing to evaluate the realism of SAIC's proposed costs and failing to evaluate SAIC's proposal in accordance with the clause at FAR § 52.222-46; made an unreasonable best value determination; and unreasonably failed to investigate whether SAIC may have had an unfair competitive advantage based on a former agency official's alleged participation in SAIC's proposal effort. Protest at 8-14.

On June 20, the agency filed a report with our Office responding to each of SRA's claims. On July 2, SRA filed a supplemental protest asserting that the agency unreasonably evaluated SAIC's technical proposal. On July 5, SRA filed comments on the agency's report. On July 10, SRA withdrew its claim regarding SAIC's alleged unfair competitive advantage. On July 13, the agency filed a supplemental report responding to SRA's supplemental protest claim.

² Consistent with the SSA's remarks regarding the qualifications of SRA's proposed staff, the agency's business clearance memorandum stated that "the IGE used high labor rates based on the current contract which has more experienced, higher paid staff than the Performance Work Statement requires." AR, Tab 9, Business Clearance Memorandum, at 10.

On July 18, the GAO attorney assigned to the protest notified the agency via e-mail that based on GAO's review of the existing record, the agency's actions with regard to the evaluation contemplated in the clause at FAR § 52.222-46 were unclear. The e-mail requested that the agency provide any previously undisclosed documentation regarding this aspect of the evaluation.

On July 20, the agency notified our Office that it intended to take corrective action consisting of reevaluating the proposals in accordance with the solicitation and applicable regulations (including the clause at FAR § 52.222-46), and, if necessary, re-opening discussions with the competitive range offerors.³ On July 25, our Office dismissed SRA's protest, finding that the agency's proposed corrective action rendered it academic. Systems Research and Applications Corp., B-406775, B-406775.2, July 25, 2012. On August 9, SRA filed a request asking our Office to recommend that the agency reimburse SRA's costs of filing and pursuing its protests.

DISCUSSION

SRA asserts that reimbursement of its costs is appropriate because, in SRA's view, its protests were clearly meritorious and the agency unduly delayed taking corrective action. SRA Request for Costs at 1. With respect to its claim regarding the clause at FAR § 52.222-46, SRA asserts that our Office's request that the agency provide any additional documentation shows that "the issue was clearly not defensible." Id. at 2. SRA does not advance specific arguments regarding why it believes that its other claims were clearly meritorious.

Where a procuring agency takes corrective action in response to a protest, we 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. 4 C.F.R. § 21.8(e) (2012); Information Ventures, Inc.--Costs, B-294580.2 et al., Dec. 6, 2004, 2004 CPD ¶ 244 at 2-3; Georgia Power Co.; Savannah Elec. and Power Co.--Costs, B-289211.5, B-289211.6, May 2, 2002, 2002 CPD ¶ 81 at 5. Thus, as a prerequisite to our recommending that costs be reimbursed where a protest has been settled by corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious. Apptis Inc.--Costs, B-402146.3, Mar. 31, 2010, 2010 CPD ¶ 123 at 4; Triple Canopy, Inc.--Costs, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 3. We consider a protest to be clearly meritorious where a reasonable agency inquiry into the protester's allegations would reveal facts showing the absence of a defensible legal position; i.e., where the protest does not

³ Also on July 20, SRA filed comments on the supplemental agency report.

involve a close question. Triple Canopy, Inc.--Costs, supra; Georgia Power Co.; Savannah Elec. and Power Co.--Costs, supra.

Here, based on the record presented, we cannot conclude that SRA's claim regarding the clause at FAR § 52.222-46 was clearly meritorious. As discussed above, the record reflects that the SSA made findings regarding SAIC's comparatively low proposed costs and SRA's higher hourly rates. This suggests that the agency may have engaged in some analysis of the firms' proposed compensation. Whether such an analysis actually occurred and, if it did, whether the analysis was consistent with the requirements of the clause at FAR § 52.222-46 required further development, which was why our Office requested that the agency provide any additional documentation.⁴ Because the ultimate resolution of this claim required further development, this protest claim, in our view, presented a close question, and therefore was not clearly meritorious. See ARINC Eng'g Servs., LLC, B-405731.3, Mar. 28, 2012, 2012 CPD ¶ 126 at 3; Alaska Structures, Inc.--Costs, B-298575.4, Jan. 22, 2007, 2007 CPD ¶ 15 at 6, 8. Accordingly, we decline to recommend reimbursement of SRA's costs related to this claim. We similarly conclude that SRA's remaining claims--i.e., those that were not withdrawn or abandoned--were not clearly meritorious.

The request is denied.

Susan A. Poling
General Counsel

⁴ Absent the submission of additional documentation from the agency, our Office may have convened a hearing to further develop the issue. See 4 C.F.R. § 21.7(a).