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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Coulson Aviation (USA) Inc.; 10 Tanker Air Carrier, LLC--Costs

File: B-406920.6; B-406920.7

Date: August 22, 2013

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Elin M. Dugan, Esq., Department of Agriculture, for the agency.
Gary R. Allen, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

GAO recommends that the protesters be reimbursed their costs of filing and pursuing their protests, where the agency unduly delayed taking corrective action in response to clearly meritorious protests by submitting an agency report and defending the protests through the first day of a hearing.

DECISION

Coulson Aviation (USA) Inc., of Port Alberni, British Columbia, Canada, and 10 Tanker Air Carrier, LLC, of Tulsa, Oklahoma, request that our Office recommend that the firms be reimbursed their costs of filing and pursuing protests challenging the award of contracts under request for proposals (RFP) No. AG-024B-S-11-9009, issued by the Department of Agriculture, U.S. Forest Service, as a small business set-aside, for fixed-wing airtanker services.

We grant, in part, Coulson's and 10 Tanker's requests.

BACKGROUND

The RFP provided for the award of multiple fixed-price contracts under seven contract line items (CLINs) for air tanker forest fire fighting services. RFP at 7. Each CLIN identified a different location and start date. Offerors were permitted to submit proposals for award of all or any of the CLINs. The RFP also noted the

awards would be made on a best value basis considering price and the following technical factors, in descending order of importance: structural integrity, maintenance, equipment, past performance, and organizational experience.¹ The technical factors, when combined, were approximately equal to price. RFP at 146.

The Forest Service received a number of proposals in response to the RFP, including 10 Tanker's and Coulson's. 10 Tanker submitted two proposals (a basic and alternate proposal) seeking award under all seven of the CLINs. Agency Report (AR), Tab 16, 10 Tanker Proposal, at 859-67 (basic proposal); 890-99 (alternate proposal). Coulson submitted a single proposal that quoted prices only for CLIN 7.² AR, Tab 15, Coulson Proposal, at 896-902.

The proposals were evaluated by the agency's technical evaluation board (TEB). Following the evaluation of initial proposals, the agency submitted a number of questions to the offerors. Although the agency considered these communications to be clarifications rather than discussions, a number of offerors were questioned about substantive issues, and their responses provided major revisions to their proposals. For example, the Forest Service asked Minden Air Corp., the CLIN 3 awardee, to address how the firm intended to report and handle situations where operational loads exceeded certain amounts--information that was required by the RFP. RFP at 64-71. In response to this communication, the firm provided a multi-paragraph response that provided detailed information that had not been included in that firm's proposal. AR, Tab 21, Awardee Communications, at 11-13. Similarly, the Forest Service asked AeroFlite Inc., the CLIN 7 awardee, to address the status and specifics of its current aircraft maintenance. That firm's detailed response also provided information that had been omitted from the firm's proposal. Id. at 6. In contrast, the Forest Service's communications with Coulson and 10 Tanker concerned minor issues that did not result in revisions to their respective proposals. See, AR, Tab 12, Coulson Communications; Tab 13, 10 Tanker Communications.

After receiving the offerors' responses, the TEB prepared an evaluation report that included the TEB's final consensus evaluation and an analysis of the offerors' evaluated prices. This report included award recommendations that were reviewed and accepted by the source selection authority (SSA). Contracting Officer Statement at 1. Coulson and 10 Tanker were not selected for award under any of the CLINs.

¹ The structural integrity factor had four equally-weighted subfactors: structural integrity program, maintenance, equipment (aircraft), and equipment (tank).

² Coulson claims that its proposal was for all seven CLINs. However, Coulson only priced CLIN 7.

Following debriefings, Coulson and 10 Tanker protested to our Office. In their initial protests, Coulson and 10 Tanker both challenged the agency's price analysis, technical evaluations, and source selection decision.³ Coulson Protest at 16-23; 10 Tanker Protest at 10-28, 30-33. After receipt of the agency's report, Coulson and 10 Tanker filed supplemental protests objecting to the agency's communications with the offerors. Coulson argued that the agency's exchanges with the awardees, including the CLIN 7 awardee, constituted discussions, and that the agency failed to conduct meaningful discussions with Coulson. Coulson 2nd Supp. Protest at 33-38. 10 Tanker did not object to the agency's characterization of the communications as clarifications but complained that the communications were unequal because some offerors, but not 10 Tanker, were provided an opportunity to revise their proposals. 10 Tanker Supp. Protest at 26-27.

The Forest Service filed a supplemental agency report defending its evaluation and conduct of communications. Coulson and 10 Tanker filed supplemental comments. After receiving the protesters' supplemental comments, our Office conducted a hearing to receive testimony concerning the agency's communications with offerors, price analysis, and selection decision.

At the end of the first day of the hearing, the hearing official noted that the testimony thus far appeared to support the protesters' arguments that communications between the agency and certain offerors were discussions rather than clarifications, as described by Federal Acquisition Regulation (FAR) § 15.306. Based upon this information and prior to the second day of the hearing, the agency decided to take corrective action by reopening the competition. We dismissed the protests as academic. Coulson Aviation (USA) Inc.; 10 Tanker Air Carrier, LLC., B-406920 et al., Sept. 7, 2012.

Coulson and 10 Tanker timely requested, pursuant to 4 C.F.R. § 21.8(e), that our Office recommend that the Forest Service reimburse the protesters their reasonable costs of filing and pursuing the protest.

DISCUSSION

Coulson and 10 Tanker contend that they should be reimbursed the costs of pursuing all of their protest grounds.

The Forest Service responds that it should not have to reimburse the protesters for any of their protest costs because none of the protest grounds were clearly

³ 10 Tanker also challenged its, and one of the awardee's, past performance evaluations. 10 Tanker Protest at 28-30. Also, Coulson initially argued that there had been a violation of the Procurement Integrity provisions of the Office of Federal Procurement Act, but it later withdrew this allegation.

meritorious. The agency also argues that to the extent the protest allegations about the agency's communications with offerors are viewed as clearly meritorious, only Coulson (and not 10 Tanker) argued that these communications constituted discussions. The Forest Service also argues that, in any event, it did not unduly delay taking corrective action, where our Office conducted a hearing to further develop the record, and where the agency promptly took corrective action after the first day of the hearing.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of 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 the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Bid Protest Regulations, 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. AVIATE L.L.C., B-275058.6, B-275058.7, Apr. 14, 1997, 97-1 CPD ¶ 162 at 16. With respect to the promptness of the agency's corrective action under the circumstances, we review the record to determine whether the agency took appropriate and timely steps to investigate and resolve the impropriety. See Chant Eng'g Co., Inc.--Costs, B-274871.2, Aug. 25, 1997, 97-2 CPD ¶ 58 at 4; Carl Zeiss, Inc.--Costs, B-247207.2, Oct. 23, 1992, 92-2 CPD ¶ 274 at 4. The mere fact that an agency decides to take corrective action does not necessarily establish that a protest is clearly meritorious. Metalcraft, Inc.--Costs, B-402181.3, May 17, 2010, 2010 CPD ¶ 116 at 3.

We find Coulson's and 10 Tanker's objections to the agency's communications to be clearly meritorious, and we find that the Forest Service's corrective action in response to this ground of protest was unduly delayed.

As explained above, the record (including the hearing testimony) showed that the Forest Service provided a number of offerors, but not Coulson and 10 Tanker, with an opportunity to materially revise their proposals to further address solicitation requirements. The Forest Service's contention that it was not clear whether its communications constituted discussions is not consistent with the guidance set forth in the FAR.

FAR § 15.306 describes a spectrum of exchanges that may take place between a contracting agency and an offeror during negotiated procurements. Clarifications are defined as limited exchanges between the agency and offerors that may occur when contract award without discussions is contemplated. FAR § 15.306(a);

Satellite Servs., Inc., B-295866, B-295866.2, Apr. 20, 2005, 2005 CPD ¶ 84 at 2 n.2. Clarifications, however, cannot be used to provide an offeror with an opportunity to revise or modify its proposal. See Gulf Copper Ship Repair, Inc., B-293706.5, Sept. 10, 2004, 2005 CPD ¶ 108 at 6. In contrast, discussions occur when an agency communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal or provides an offeror with an opportunity to revise or modify its proposal. See FAR § 15.306(d)(3); Gulf Copper Ship Repair, Inc., supra.

Here, because the Forest Service's communications with the offerors allowed some firms to materially revise their proposals, these communications constituted discussions. Where a procuring agency conducts discussions with one offeror, it must conduct discussions with all offerors whose proposals are in the competitive range. See Priority One Servs., Inc., B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 at 5-6. Accordingly, we find Coulson's and 10 Tanker's complaints that the agency conducted discussions with some offerors, but not the protesters, to be clearly meritorious.⁴

We also do not agree with the Forest Service that Coulson and 10 Tanker should be reimbursed only for their protest costs related to the agency's conduct of discussions. For purposes of determining entitlement to protest costs, we generally consider all issues concerning the evaluation of proposals to be intertwined--and thus not severable--and therefore generally will recommend reimbursement of the costs associated with both successful and unsuccessful challenges to an evaluation. See The Salvation Army Community Corrections Program--Costs, B-298866.3, Aug. 29, 2007, 2007 CPD ¶ 165 at 7; Blue Rock Structures, Inc.--Costs, B-293134.2, Oct. 26, 2005, 2005 CPD ¶ 190 at 3. Here, Coulson's and 10 Tanker's protests, which we consolidated, raised issues--the failure to conduct equal and/or meaningful discussions and the misevaluation of proposals--that involve the same set of core facts. We view all of these issues as being intertwined for purposes of reimbursement of protest costs. See Burns & Roe Servs. Corp.--Costs, B-310828.2, April 28, 2008, 2008 CPD ¶ 81 at 3.

We, however, agree with the Forest Service that Coulson is not entitled to reimbursement of its costs with respect to its arguments about CLINS other than CLIN 7 (the only CLIN for which Coulson submitted pricing), and with respect to its Procurement Integrity violation arguments, which Coulson withdrew.

⁴ We recognize that 10 Tanker did not characterize these communications as discussions. 10 Tanker's complaint, however, was grounded upon the agency allowing some offerors (but not 10 Tanker) to materially revise their proposals, which we find implicates the rules of FAR §15.306 governing discussions. See ERIE Strayer Co., B-406131, Feb. 21, 2012, 2012 CPD ¶ 101 at 4-5.

Finally, we do not consider the Forest Service's corrective action after the first day of the hearing to be prompt. Although it is true we conducted the hearing to further develop the record, testimony elicited the first day of the hearing showed that the agency conducted discussions, and not clarifications. The facts surrounding these exchanges could have been determined much earlier if the Forest Service had taken appropriate and timely steps to investigate the allegations raised in Coulson's and 10 Tanker's supplemental protests. See Chant Eng'g Co., Inc.--Costs, supra, at 4. In this regard, we generally do not consider corrective action to be prompt where, as here, it is taken after the due date for the agency report. CDIC, Inc.--Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 2.

RECOMMENDATION

We recommend that Coulson and 10 Tanker be reimbursed their reasonable costs of filing and pursuing their protests. However, because Coulson only competed for award under CLIN 7 and withdrew its allegation of a procurement integrity violation, we do not recommend that Coulson be reimbursed for its costs related to the firm's objections to the evaluation or awards under other CLINs, or for its costs associated with the withdrawn procurement integrity allegation. Coulson and 10 Tanker should file their claims for costs, detailing and certifying the time expended and costs incurred, with the agency within 60 days of receipt of this recommendation. 4 C.F.R. § 21.8(f)(1).

The request for a recommendation for reimbursement of protest costs is granted.

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General Counsel