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Decision

Matter of: VSE Corporation; The University of Hawaii--Costs

File: B-407164.11; B-407164.12

Date: June 23, 2014

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Christopher S. Cole, Esq., Department of the Air Force, for the agency.
Nora K. Adkins, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

GAO recommends reimbursement of protest costs to two protesters where, after submission of the agency's report on the protests and submission of the protesters' comments, the agency took corrective action in response to a clearly meritorious protest argument raised by each protester; reimbursement is not recommended with regard to other protest grounds, because those grounds are severable from the clearly meritorious protest ground.

DECISION

VSE Corporation of Alexandria, Virginia, and The University of Hawaii (UH), of Honolulu, Hawaii, request that our Office recommend that they be reimbursed the reasonable costs of filing and pursuing their protests of the award of a contract to Science Applications International Corporation (SAIC), of McLean, Virginia, under request for proposals (RFP) No. FA9451-10-R-0007, issued by the Department of the Air Force, for support of the Air Force Research Laboratory, Maui High Performance Computing Center (MHPCC), Defense Supercomputing Resource Center (DSRC), in Maui, Hawaii.

We grant the protesters' requests in part and deny them in part.

BACKGROUND

As set forth in greater detail below, these requests for a recommendation that protesters be reimbursed their protest costs ultimately involve only the agency's second decision to take corrective action, which occurred in late October 2013. For the sake of completeness, we outline below the events in this procurement beginning with the issuance of the RFP, two years earlier.

The RFP, which was issued on June 6, 2011, provided for the award of a cost-plus fixed-fee, indefinite-quantity contract, for a base period of 4 years with three 2-year options. RFP at 13, 19. The agency received proposals from four offerors by the solicitation's closing date of July 21, 2011. Contracting Officer's Statement (Sept. 4, 2013) at 6. The agency evaluated final revised proposals received by the due date of June 25, 2012, and found that SAIC's proposal represented the best value to the government. *Id.* at 8-9. The Air Force awarded a contract to SAIC on August 1. *Id.* at 9. After requesting and receiving debriefings, VSE and UH filed protests with our Office contending that the agency failed to conduct meaningful discussions, and that the agency's evaluation of proposals, and selection of SAIC's proposal for award, were unreasonable and inconsistent with the terms of the solicitation.

As a result of the protests, the GAO attorney assigned to the protests held an outcome prediction alternative dispute resolution (ADR) conference on November 8, 2012.¹ During the ADR, the GAO attorney informed the parties that, in his view, the protests would likely be sustained because he believed that the Air Force should have considered the past performance issues raised by two of SAIC's prior contracts--which were the subject of litigation, and were considered in the agency's responsibility determination--in the evaluation of SAIC's past performance evaluation. On November 9, 2012 the Air Force issued a corrective action notice stating as follows:

[T]he Air Force will take corrective action by reconvening the Source Selection Evaluation Team, reevaluating SAIC's past performance including consideration, to the extent appropriate, of contract efforts related to any cases disclosed by SAIC pursuant to FAR 52.209-5, including the CityTime contract and the NAVO MSRC [Naval Oceanographic Office Major Shared Resource Center] contracts,²

¹ Pursuant to GAO's Bid Protest Regulations and our established practice, the GAO attorney handling a protest may conduct "outcome prediction" ADR by advising the parties of the attorney's views as to the likely outcome of the protest. See Pond Sec. Grp. Italia JV--Costs, B-400149.2, Mar. 19, 2009, 2009 CPD ¶ 61 at 3 n.1.

² Under the CityTime contract, SAIC was retained by the City of New York to develop and implement an automated time-and-attendance management system. AR, Tab 143a, SAIC Responsibility Disclosures, at 3. Under the NAVO MSRC

(continued...)

then if necessary, make a new source selection decision. The Air Force also intends to take any additional corrective action that may be necessary to ensure the integrity of the procurement.

AR, Tab 120, Notice of Corrective Action (Nov. 9, 2012), at 1. Our Office dismissed the protests of VSE and UH on November 14, 2012, as academic. The Univ. of Hawaii; VSE Corp., B-407164 et al., (Nov. 14, 2012).

As part of the Air Force's corrective action, the agency's source selection evaluation team reconvened and collected information relating to SAIC's CityTime and NAVO MSRC contracts for use in its re-evaluation of SAIC's past performance. The agency also sent SAIC an evaluation notice. This evaluation notice advised that the agency's re-evaluation of SAIC's past performance resulted in the agency considering "adverse past performance information," and provided SAIC with "the opportunity to respond to this information." AR, Tab 132, SAIC Evaluation Notice, at 1. The notice further stated that "[t]he Government will not accept proposal revisions based on this clarification evaluation notice." Id.

In response to the evaluation notice, SAIC submitted an 89-page document, explaining its view of the history of these two contracts. Of relevance here, this document identifies the reasons for the cost increase and scope changes in SAIC's earlier "CityTime contract," as well as providing argument as to why it would be "entirely unreasonable for the Air Force to lower its degree of confidence in SAIC's ability to successfully perform the MHPCC effort based on events under the CityTime contract." AR, Tab 133, Integrated Evaluation/SAIC Evaluation Notice Response, at 2.

The Air Force considered SAIC's response as part of its corrective action re-evaluation, and concluded that SAIC's "response gives much more detail and some new information regarding the City[T]ime contract and subsequent issues with fraud. This information will be incorporated as part of the overall past performance evaluations." Id. at 20. Following the re-evaluation, the agency again assigned SAIC a substantial confidence past performance rating. AR, Tab 134, Source Selection Decision, at 12-13.

The agency issued a new source selection decision on July 24, 2013, which concluded that SAIC was the best-value offeror. Id. at 21. In this regard, the agency's award decision stated that SAIC had adequately addressed concerns regarding the CityTime contract, as follows:

(...continued)

contract, SAIC was retained by the General Services Administration to perform support services for the National Center for Critical Information Processing and Storage. Id. at 2.

[T]he manner in which SAIC has addressed the misconduct of their managers, the processes SAIC has put in place to avoid any future problems of a similar nature and the limited relevance of those contracts to the MHPCC effort when combined with the exceptional and very good ratings on more relevant contracts support SAIC's past performance confidence assessment rating as SUBSTANTIAL CONFIDENCE.

Id. at 12-13.

VSE and UH filed protests with our Office on August 5 and August 12, respectively, challenging the agency's re-evaluation and new source selection decision. Both protesters also filed supplemental protests. The protesters generally argued that the agency's evaluation and selection of SAIC's proposal for award were unreasonable and inconsistent with the terms of the solicitation, and that the agency failed to conduct equal discussions. As a result of the protests, the GAO attorney assigned to the protests provided outcome prediction ADR on October 24.³

During the ADR conference, the GAO attorney advised that, in her view, the protests would likely be sustained on the basis that the agency held unequal discussions since the agency advised SAIC of adverse past performance, and relied upon SAIC's evaluation notice response in its re-evaluation of SAIC's past performance, without providing VSE and UH with a similar opportunity. The GAO attorney advised that this was the only protest ground that would likely be sustained. The attorney explained that if GAO issued a decision, she believed it would likely recommend that the agency re-open discussions with all offerors whose proposals were within the competitive range, obtain revised proposals, evaluate the revised proposals, and make a new source selection decision.

On October 29, the agency informed our Office and the parties that it would take corrective action by reconvening the source selection evaluation team, re-opening discussions with the offerors remaining in the competitive range, and then, if necessary, making a new source selection decision. Air Force Notice of Corrective Action (Oct 29, 2013), at 1. Our Office subsequently dismissed VSE's and UH's protests as academic based on the corrective action. VSE Corp.; The Univ. of Hawaii, B-407164.8 et al., (Oct. 30, 2013).

On October 31, VSE requested that our Office recommend that the Air Force reimburse the protester its reasonable costs of filing and pursuing its protests. UH filed its request for reimbursement on November 7.

³ The GAO attorney assigned to these protests was different from the attorney assigned to the initial protests.

DISCUSSION

VSE and UH contend that they should be reimbursed the costs of pursuing their protests because the Air Force failed to take prompt corrective action in response to their clearly meritorious arguments. In this regard VSE states that while all of its protest grounds were meritorious, the following two grounds were clearly meritorious: (1) VSE's allegation in its protest of August 5, 2013, that the agency improperly ignored the effect of SAIC's split into two companies, and (2) VSE's allegation in its supplemental protest of September 16, 2013, that the agency improperly engaged in discussions with SAIC without offering all offerors an opportunity to submit final proposal revisions. VSE Request for Entitlement, at 1-2. UH argues that "at least four of UH's protest and supplemental protest grounds were clearly meritorious" including the following: (1) the Air Force treated offerors unequally, including conducting improper and unequal discussions; (2) the Air Force unreasonably re-evaluated SAIC's past performance during corrective action; (3) the award to SAIC was based on inaccurate and outdated information, due to SAIC's corporate reorganization; and (4) the Air Force failed to amend the solicitation, despite the agency's changed needs. UH Request for Entitlement at 2. As explained below, we recommend reimbursement of the protesters' requests for the unequal discussions claim, and deny all of the others.

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) (2014); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. 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, *i.e.*, not a close question. J.F. Taylor, Inc.--Costs, B-266039.3, July 5, 1996, 96-2 CPD ¶ 5 at 3; Baxter Healthcare Corp.--Costs, B-259811.3, Oct. 16, 1995, 95-2 CPD ¶ 174 at 5. 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. First Fed. Corp.--Costs, B-293373.2, Apr. 21, 2004, 2004 CPD ¶ 94 at 2.

Here, VSE and UH request that we recommend that they be reimbursed the reasonable costs of filing and pursuing their protests, including attorneys' fees. The protesters assert that all of their allegations were clearly meritorious, and the Air Force's corrective action was unduly delayed because it was taken after submission of the agency report. The Air Force states that it does not object to reimbursing the protesters the reasonable costs of filing and pursuing their protest grounds related to the unequal discussions claim. Agency Response to VSE's Request for Costs,

at 1; Agency Response to UH's Request for Costs, at 1. In accordance with the agency's concession, we recommend reimbursement of the protest costs associated with this issue. The agency, however, opposes VSE's and UH's reimbursement with respect to the remaining protest grounds.

Based upon our review of the record, we agree with the Air Force that the remaining issues raised by VSE and UH with respect to the agency's evaluation of SAIC's planned restructuring (VSE claim 1; UH claim 3), the evaluation of SAIC's past performance with regard to the consideration of SAIC's past litigation (UH claim 4), and the agency's failure to amend the solicitation (UH claim 2) do not meet the standard for our Office to recommend reimbursement of protest costs. For illustrative purposes, we discuss the first of these allegations below.

VSE and UH both protested the agency's failure to consider SAIC's planned corporate restructuring in evaluating SAIC's technical and past performance. The protesters' based their contentions upon a press release issued by SAIC on August 20, 2012. The agency's response to VSE's and UH's allegations argued that it properly considered SAIC's proposal and was not required to consider SAIC's plans to restructure because the restructuring would not occur, if it occurred at all, until after award of the contract. AR, Tab 155, Air Force Memorandum of Law, at 40-41. Moreover, the agency asserted that the protesters' arguments regarding the effect of any possible restructuring on the availability of SAIC personnel or other technical and past performance matters are no more than speculation. Id. The Air Force also argued that any changes related to the restructuring of the corporation would be matters of contract administration not properly before the GAO because the potential restructuring would not occur until after the initial award date of August 1, 2012. AR at 6.

As relevant here the press release, which was issued by SAIC on August 20, 2012, stated the following:

[SAIC] today announced that its Board of Directors, . . . , has authorized management to pursue a plan to separate into two independent, publicly traded companies.

* * * * *

Management is continuing to develop detailed plans on capital structure, management, governance and other significant matters. In addition, the completion of any separation transaction will be subject to certain customary conditions, including implementation of intercompany agreements, filing of required documents with the Securities and Exchange Commission, receipt of an opinion from tax counsel and a ruling from the Internal Revenue Service Although SAIC expects that the separation of its businesses, if

consummated, would be completed in the second half of fiscal year 2014, there can be no assurance that a separation will ultimately occur.

SAIC Comments (Sept. 16, 2013), Attachment A, Public Release (Aug. 20, 2012), at 1-2.

Based upon our review of the record, including SAIC's press release upon which the protesters' base their allegations, we do not consider clearly meritorious VSE's and UH's allegations that the agency was required to consider SAIC's corporate reorganization during its evaluation of SAIC's technical and past performance. In this regard, the release was nothing more than an announcement of SAIC's board of directors stating its intentions to plan to examine the possibility of future action by SAIC, which did not trigger any obligation by SAIC to report or the agency to consider in the conduct of the procurement at issue. See generally Metro Mach. Corp., B-402567, B-402567.2, June 3, 2010, 2010 CPD ¶ 132 at 9 (no duty to report arose given that the impact of the change was not known until after award was made).

We note that a decision by our Office concerning a different procurement found that an agency had an obligation to consider the implications of SAIC's announcement of an intention to split into different business entities where that plan was specifically identified in SAIC's proposal, and where SAIC advised the agency that, if awarded the contract, SAIC intended to novate the contract to a business entity that had not yet been created. See Wyle Labs., Inc., B-408112.2, Dec. 27, 2013, 2014 CPD ¶ 16 at 8-11. Here, in contrast, the protesters do not contend that SAIC's proposal specified how the company would be split or which company would ultimately perform the contract. In addition, unlike the situation here, in Wyle, SAIC expressly advised the agency during discussions of the pending split and identified which entities would be performing the contract. Further, SAIC offered to cap rates that might be affected by the approaching split and the agency declined their offer. On this record, where there was no discussion of the pending split, we see no basis to conclude that the agency was required to evaluate SAIC's past performance in the manner argued by the protesters.

Additionally, to the extent that VSE contends that statements made by the GAO attorney during the second outcome prediction ADR demonstrate that its allegations with regard to the agency failing to consider SAIC's corporate restructuring are clearly meritorious, we disagree. The GAO attorney assigned to the second protests (B-407164.8; B-407164.9; B-407164.10) advised during the second outcome prediction ADR that she did not agree with the agency that it could rely upon an August 1, 2012, award date for the proposition that any events occurring after that date--such as exchanges with SAIC--are matters of contract administration. This statement, however did not concern whether the basis of VSE's allegations were meritorious. Rather, in light of the GAO attorney's view that

our Office would likely recommend that the Air Force reopen discussions, this information was provided to prospectively advise the agency that it may want to consider the effect of SAIC's continuing reorganization in its re-evaluation.⁴ Thus, we find that the protesters' claims with regard to SAIC's corporate restructuring were not clearly meritorious.⁵

Finally, we conclude that VSE's and UH's claims with regard to the agency's evaluation of SAIC's planned restructuring (VSE claim 1; UH claim 3), the evaluation of SAIC's past performance with regard to the consideration of SAIC's past litigation (UH claim 4), and the agency's failure to amend the solicitation (UH claim 2) are properly severable from the protesters' meritorious objection regarding unequal discussions.

As a general rule, we may recommend that a successful protester be reimbursed its incurred costs with respect to all issues pursued and not merely those upon which it prevails, AAR Aircraft Servs.--Costs, supra, at 9, 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 as to essentially constitute a separate protest. BAE Tech. Servs., Inc.--Costs, B-296699.3, Aug. 11, 2006, 2006 CPD ¶ 122 at 3. 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., the extent to which successful and unsuccessful arguments share a common core set of facts, are based on related legal theories, or are otherwise not readily severable. See Sodexho Mgmt., Inc.--Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 29.

VSE's and UH's protests against the evaluation and solicitation were not clearly intertwined with the protesters' allegations that the Air Force conducted unequal discussions. Specifically, whether the agency's evaluation of SAIC's proposal was reasonable and whether the agency was required to amend the solicitation due to changed needs concern legal theories and underlying facts that are distinct and severable from those relevant to the issue of unequal discussions with SAIC during the re-evaluation of the awardee's past performance. See Focused Mgmt., Inc.--

⁴ In this regard, SAIC publically announced that its "Board of Directors has approved the separation of its technical, engineering and enterprise information technology services business . . . , effective after market close on Friday, September 27, 2013." SAIC Comments (Sept. 16, 2013), Attach. B, SAIC Press Release (Sept. 27, 2013), at 1-2.

⁵ We have also fully considered UH's remaining claims with regard to the agency's re-evaluation of SAIC's past performance and failure to amend the solicitation and find them to be not clearly meritorious.

Costs, B-404029.6, Oct. 3, 2011, 2011 CPD ¶ 204 at 4-5. Under these circumstances, we agree with the agency that the protesters' reimbursement of protest costs should be limited to those costs incurred in connection with their unequal discussions basis of protest.

VSE's and UH's requests for reimbursement of protest costs for issues other than unequal discussions are denied.

RECOMMENDATION

We recommend that Air Force reimburse VSE and UH the costs for filing and pursuing their protests challenging the agency's unequal discussions, including reasonable attorneys' fees. VSE and UH should submit their certified claims, 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 in part and denied in part.

Susan A. Poling
General Counsel