



Decision

Matter of: Marine Design Dynamics, Inc.--Costs

File: B-407816.2

Date: July 3, 2013

Bradford Johnson, Esq., Johnson Law Group Int'l, PLLC, for the protester.
Sebastian B. Vaneria, Esq., Department of the Navy, 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 reimbursement of protest costs where the procuring agency took corrective action after the submission of the agency's report and the parties were informed through alternative dispute resolution procedures that the protest would likely be sustained on a single ground; reimbursement is not recommended with regard to other protest grounds, because those grounds are severable from the clearly meritorious protest ground.

DECISION

Marine Design Dynamics, Inc., of Washington, D.C., requests that our Office recommend that it be reimbursed the costs of filing and pursuing its protest challenging the terms of request for proposals (RFP) No. N00033-13-R-8009, issued by the Department of the Navy for engineering services supporting the agency's extended life program for the USS Mount Whitney. Marine Design primarily challenged the Navy's decision to issue the RFP on an unrestricted basis.

We grant the request in part and deny it in part.

BACKGROUND

The USS Mount Whitney is a Blue Ridge class amphibious command ship, which has been in service for over 40 years. To extend the vessel's service life through 2039, the Navy placed the USS Mount Whitney in the agency's extended service life program. This program is a multi-year effort under which the vessel will receive significant modifications and repairs at an estimated cost of more than \$100 million. Agency Report (AR) at 2; Tab 1, Acquisition Strategy, at 1. The Navy issued the

RFP on an unrestricted basis, seeking proposals for marine engineering, naval architecture, electrical and electronics engineering, maintenance engineering, shipboard testing, inspections, and failure analysis services to support the USS Mount Whitney's extended service life program. RFP at 7.

Prior to issuing the RFP, the contracting officer considered the extent to which the procurement could be set aside for small businesses. AR at 3. The contracting officer relied upon three procurements that were conducted on an unrestricted basis in 2012 for engineering services for the USS Mount Whitney: a \$44,000 procurement for auxiliary boiler and fuel overflow system design; a \$142,000 procurement for heating, ventilation, and air conditioning equipment and miscellaneous piping; and a \$100,000 procurement for habitability modification design services (the "habitability procurement"). AR at 3-5, 6-7.

For each of these prior procurements, the Navy conducted market research and concluded that they should not be set aside for small businesses. The record showed, however, that, the Navy had received acceptable quotations from a number of small businesses and, in fact, had issued an order to a small business for the habitability procurement.

The Navy's Engineering Directorate reviewed these three prior procurements, and found them directly relevant to the procurement here. Nonetheless, the Engineering Directorate informed the contracting officer that it concluded that there was no reasonable expectation of receiving proposals from two or more responsible small businesses for this procurement.

The contracting officer requested the concurrence of the Small Business Administration (SBA) district office, informing the SBA that the Navy had considered the three prior procurements for the USS Mount Whitney to be similar to the task orders that would be issued under the proposed contract. The contracting officer also informed the SBA's district office that the contract would encompass other tasks, and that the Navy did not believe that the proposed contract should be set aside for small businesses because it involved furnishing services on a recurring and overlapping basis, which would require a higher degree of contractor resources. AR, Tab 7, Initial Small Business Coordination Record for the RFP, Aug. 7, 2012, at 2; Tab 13, Final Small Business Coordination Record, at 5. The SBA district office concurred with the Navy's decision to conduct the procurement on an unrestricted basis.

Following the issuance of the RFP on an unrestricted basis, Marine Design protested to our Office on November 26, 2012. Marine Design argued that the agency's decision to conduct the procurement on an unrestricted basis was unreasonable. Specifically, the protester contended that the Navy violated Federal Acquisition Regulation § 19.502-2(b), which generally requires agencies to set aside for small businesses procurements that exceed \$150,000 if there is a reasonable

expectation of receiving fair market price offers from at least two responsible small business concerns. See Comments at 6; Supp. Comments at 4-5. Marine Design also protested that the RFP's price factor was ambiguous, and that the RFP's past performance factor was unduly restrictive because it provided that more specific experience may be evaluated more favorably.

On December 21, the Navy filed a report in response to the protest that defended the issuance of the RFP on an unrestricted basis. In this regard, the Navy argued that its decision was adequately supported by the contracting officer's review of the three prior procurements and the analysis provided by the agency's Engineering Directorate. See AR at 13-14. The agency also contended that, although the three prior procurements "yielded a total of four proposals from small businesses that were evaluated as technically acceptable," this did not indicate that the agency would receive acceptable proposals from two or more responsible small businesses. Id.

Our Office requested that the SBA submit its views with respect to this dispute. The SBA informed our Office and the parties that the Navy had not performed adequate market research to determine whether or not the RFP should be set aside for small businesses. SBA Report, Feb. 14, 2013, at 6. The SBA also noted that, if the market research done by the Navy was considered to be sufficient, the RFP should have been set aside for small businesses because the research indicated that there were, in fact, two or more small businesses that could likely perform the work. Id. at 7.

On February 15, 2013, the cognizant GAO attorney conducted an alternative dispute resolution (ADR) conference, in which he provided outcome prediction. See 4 C.F.R. § 21.10(e) (2013). He advised the parties that GAO likely would sustain the protest because the record did not establish that the agency had performed adequate market research to determine whether or not there was a reasonable expectation of receiving fair market price offers from at least two responsible small businesses, and that, to the extent that the Navy conducted market research, that research did not support the agency's view that it could not expect reasonable offers from two or more small businesses.

On February 19, the Navy informed our Office and the parties that it intended to take corrective action in response to the protest. Specifically, the Navy stated that it would cancel the solicitation and reassess its acquisition strategy for this requirement. The cancellation of the RFP rendered the protest academic, and we dismissed Marine Design's protest. Marine Design Dynamics, Inc., B-407816, Feb. 20, 2013.

On March 4, pursuant to 4 C.F.R. § 21.8(e), Marine Design requested that our Office recommend that the Navy reimburse the protester its reasonable costs of filing and pursuing the protest.

DISCUSSION

Marine Design contends that it should be reimbursed all its protest costs.¹ The Navy responds that it should not have to reimburse the protester any of its protest costs because, in the Navy's view, the agency did not unduly delay taking corrective action where it stated its intention to take corrective action one business day after receiving outcome prediction from our Office.² Agency Response to Request for Reimbursement at 2. The Navy also argues that to the extent that our Office recommends reimbursement, it should be limited to those costs associated with the protester's challenge to the agency's decision to conduct the procurement on an unrestricted basis. Id.

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. While we consider corrective action to be prompt if it is taken before the due date for the agency report

¹ Marine Design also requests that we recommend reimbursement of its proposal preparation costs. Our Bid Protest Regulations do not provide for a recommendation that an agency reimburse such costs where the agency decides to take corrective action prior to our issuing a decision on the merits. See 4 C.F.R. § 21.8(e); Major Contracting Servs., Inc., B-400737.2, Dec. 17, 2008, 2008 CPD ¶ 230 at 3.

² The Navy does not argue that Marine Design's protest of the issuance of the RFP on an unrestricted basis was not clearly meritorious. Our advising the parties through outcome prediction ADR that the protest was likely to be sustained on the identified ground indicated our view that the ground was clearly meritorious. See Nationwide IT Servs., Inc.--Costs, B-404160.2, Aug. 8, 2011, 2011 CPD ¶ 157 at 3; National Opinion Research Ctr.--Costs, B-289044.3, Mar. 6, 2002, 2002 CPD ¶ 55 at 3.

responding to the protest, we generally do not consider it to be prompt where it is taken after that date. See CDIC, Inc.--Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 2.

Here, the Navy did not take corrective action until after the filing of its report and our subsequent ADR conference. We do not agree with the Navy's apparent belief that the agency could not know that its position, with respect to issuing the RFP on an unrestricted basis, was not legally defensible until it was informed otherwise in our ADR conference. Rather, the record shows that a reasonable agency inquiry into the protester's objection to the issuance of the RFP on an unrestricted basis would have disclosed the absence of a defensible legal position prior to the submission of the agency's report. Accordingly, we do not consider its corrective action prompt.

We agree with the Navy, however, that the Marine Design's challenge to the issuance of the RFP on an unrestricted basis is properly severable from the protester's other objections to the RFP's evaluation provisions. As a general rule, we consider a successful protester entitled to be reimbursed costs incurred with respect to all issues pursued, not merely those upon which it prevails. Burns and Roe Servs. Corp.--Costs, B-310828.2, Apr. 28, 2008, 2008 CPD ¶ 81 at 2-3. 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 as to essentially constitute a separate protest. See, e.g., BAE Tech. Servs., Inc.--Costs, B-296699.3, Aug. 11, 2006, 2006 CPD ¶ 122 at 3; Interface Flooring Sys., Inc.--Claim for Attorneys' Fees, B-225439.5, July 29, 1987, 87-2 CPD ¶ 106 at 2-3.

Here, Marine Design's objections to the RFP's evaluation provisions were not clearly intertwined with the agency's decision to issue the RFP on an unrestricted basis. Whether these provisions were "unduly restrictive" or "ambiguous" concerns legal theories and underlying facts that are distinct and severable from those relevant to Navy's market research to determine whether or not a small business set-aside was required. See Sodexho Mgmt., Inc.--Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 29.

RECOMMENDATION

We recommend that the Navy reimburse Marine Design for the costs of filing and pursuing its protest challenging the issuance of the RFP on an unrestricted basis. Marine Design 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 in part and denied in part.

Susan A. Poling
General Counsel