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Decision

Matter of: RJ's Disposal Service, Inc.--Costs

File: B-410390.2

Date: July 17, 2015

William J. Bainbridge, Esq., Perkins Coie LLP, for the protester.
Jeffrey M. Hysen, Esq., General Services Administration, for the agency.
Peter D. Verchinski, Esq., and Nora K. Adkins, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

GAO recommends reimbursement of protest costs where agency unduly delayed taking corrective action in response to a clearly meritorious protest that challenged the agency's technical and price evaluations, but limits recommendation to costs reasonably related to protester's pursuit of the clearly meritorious issues.

DECISION

RJ's Disposal Service, Inc., of Hyattsville, Maryland, requests that we recommend that the firm be reimbursed the costs of filing and pursuing its protest with respect to the award of a contract to NDB Services, LLC, of Upper Marlboro, Maryland, under request for proposals (RFP) No. GS-11P-14-YE-C-0056, issued by the General Services Administration for waste removal services.

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

BACKGROUND

The RFP, issued on June 4, 2014 as a competitive 8(a) set-aside, provided for the award of an indefinite-delivery, indefinite-quantity fixed-price contract for waste removal services for a base year with four 1-year options. Offerors were informed that award would be made on a lowest-price, technically-acceptable basis, considering price and the following three technical evaluation factors: past experience, past performance, and key personnel. RFP at 104-105. The RFP established that a proposal rated unacceptable under any of the three technical evaluation factors would be ineligible for award. Id. at 104.

With regard to past experience, the RFP required offerors to demonstrate successful experience in performing waste removal services or similar services within the last 3-5 years. Id. at 105. The RFP provided that, in order to demonstrate experience, “the offeror must submit two (2) similar projects [for] which the Offeror was the prime contractor.” Id. With regard to past performance, offerors were to submit three references for each project listed under the past experience evaluation factor. Id. at 104. With regard to key personnel, offerors were to identify their proposed key personnel for the project and provide a narrative demonstrating how those key personnel have relevant qualifications. Id. at 106.

The RFP required offerors to submit pricing information in two parts. In the first part, offerors were to submit unit prices for approximately 45 contract line item numbers (CLIN) covering the different locations where the waste removal services were to be performed during the base year.¹ In the second part, offerors were to submit a “consolidated bid sheet,” consisting of one aggregate price for the base year and four aggregate prices for each option year. Also in the second part, offerors were to fill out pricing sheets (provided in the RFP) with unit prices for various services. Using the unit prices supplied by offerors, and estimates included in the pricing sheets for the amount of services needed each year, offerors were to provide yearly prices for the various services.² The RFP provided that price proposals would be evaluated, and prices that were excessively low could be considered unrealistic and receive no further consideration. Id.

The agency received two proposals in response to the solicitation, RJ’s Disposal’s and NDB’s. The agency’s technical evaluation of the proposals concluded that both RJ’s Disposal and NDB submitted technically acceptable proposals. Agency Report (AR), Tab 27, Source Selection Decision, at 2. The agency found that NDB, which submitted a price significantly below RJ’s Disposal price and the independent government estimate, provided the lowest-priced, technically acceptable proposal, and awarded the contract to NDB. Id. at 10.

On September 15, 2014, RJ’s Disposal protested to our Office, challenging the agency’s evaluation under each of the three technical evaluation factors; the agency’s failure to perform a price realism analysis; and the awardee’s ability to comply with the solicitation’s limitation on subcontracting clause. In response to the protest, the agency filed a request for dismissal, in which the agency responded to the protester’s arguments regarding each of the technical evaluation factors and the awardee’s ability

¹ The RFP also included four additional CLINs, one for each option year, where the offeror was to provide a not-to-exceed price.

² There were five sets of pricing sheets, one for the base year and one for each of the four option years.

to comply with the limitation on subcontracting clause.³ The agency also argued that the solicitation did not require a price realism analysis. On September 30, RJ's Disposal provided both a substantive response to the agency's motion, as well as two supplemental protest grounds challenging the agency's price evaluation.⁴ Our Office declined to dismiss the protest and requested that the agency provide a report that responded both to the five initial protest grounds and the two supplemental protest grounds.⁵

The agency filed its report on October 9, defending its technical evaluation and selection decision. The agency's report acknowledged, however, that the awardee failed to include certain fees required by the solicitation, and conceded that the agency failed to properly evaluate price.⁶ Agency Report (AR), Legal Memorandum, Oct. 9, 2014, at 2. The agency nevertheless maintained that, in light of the protester's allegations, even if the amount of the fees were added to NDB's price, NDB would remain the lowest-priced offeror. Id. The agency argued that RJ's Disposal was not therefore prejudiced by the erroneous price evaluation. Id. at 8.

RJ's Disposal timely filed its comments on the agency's report. In its comments, RJ's Disposal continued to maintain that the agency had failed to properly evaluate the awardee's proposal, including the awardee's price.

After reviewing the record, the cognizant GAO attorney conducted an outcome prediction alternative dispute resolution (ADR) telephone conference.⁷ During the

³ Along with its motion to dismiss, the agency provided several documents, including the awardee's proposal.

⁴ The protester's supplemental protest argued that the agency's evaluation of the offerors' prices was unreasonable and unequal because the awardee's price failed to include certain fees, as required by the solicitation, and the agency accepted the awardee's price without the fees included.

⁵ Prior to receiving the agency's report, RJ's Disposal filed an additional supplemental protest ground. Specifically, RJ's Disposal challenged a past performance reference of the awardee by asserting that it was improper for a proposed subcontractor to submit a past performance reference for the awardee. Our Office requested that the agency address this allegation in its agency report.

⁶ The agency continued to argue that it was not required to conduct a price realism analysis. AR, Legal Memorandum, Oct. 9, 2014, at 7.

⁷ In outcome prediction ADR, the GAO attorney handling a protest convenes the parties, at their request or at GAO's initiative, and explains what she or he has concluded will be the likely outcome, and the reasons for that conclusion. Where the party predicted to lose the protest takes action obviating the need for a written decision (either the agency taking corrective action or the protester withdrawing the protest), our Office closes the case. Although the outcome prediction reflects the view of the GAO attorney handling
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conference, the GAO attorney advised the parties that GAO would likely sustain the protest with regard to the agency's evaluation of the awardee's past experience and price. The GAO attorney explained that the agency's past experience evaluation improperly credited the awardee with experience it gained as a subcontractor, contrary to the terms of the solicitation. The GAO attorney also advised that the agency's price evaluation failed to consider that the awardee did not price certain required fees. Finally, the GAO attorney noted that the agency failed to perform a price realism analysis, which was required by the solicitation. With regard to the agency's contention that the protester did not suffer any prejudice from the agency's improper price evaluation, the GAO attorney concluded that the agency could not predict what the agency would have concluded had it assessed prices for realism, and could not establish what price the awardee intended to propose for the fees.

Following the ADR conference, the agency advised our Office that it intended to take corrective action. Specifically, the agency stated that it would reevaluate the proposals, including a new price analysis, and make a new source selection decision. Agency Notice of Corrective Action at 1. Because the agency's decision to reevaluate the proposals and make a new source selection decision rendered RJ's Disposal's protest academic, we dismissed the protest. RJ's Disposal Service, Inc., B-410390, Dec. 17, 2014. RJ's Disposal then filed a request that our Office recommend that the agency reimburse its costs of pursuing the protest.

DISCUSSION

In its request, RJ's Disposal asks our Office to recommend that the agency reimburse its reasonable costs of preparing and pursuing its protest, including reasonable attorneys' fees. The agency responds that it should not have to reimburse the protester's costs because, in the agency's view, six of the eight protest grounds were not clearly meritorious, since the agency had a "defensible legal position" for those protest grounds. The agency also contends that, for the two protest grounds where it did not have a defensible legal position, it took prompt corrective action. Agency Response to Request for Reimbursement at 2. Alternatively, the agency contends that any recommended reimbursement should be limited to those costs associated with the protester's challenge to the agency's failure to properly evaluate past experience and its failure to perform a price realism analysis. Id.

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 conclude that the agency unduly delayed taking

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the protest, and generally that of a supervisor as well, it is not an opinion of our Office, and it does not bind our Office, should issuance of a written decision remain appropriate. See Sizeway Rentals, LLC--Costs, B-407566.2, July 3, 2013, 2013 CPD ¶ 166 at 3 n.4.

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); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. 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. Triple Canopy, Inc.--Costs, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 3; Georgia Power Co.; Savannah Elec. and Power Co.--Costs, *supra*.

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. As explained below, we recommend reimbursement of costs but limit our recommendation; we deny reimbursement of costs for those protest grounds that are severable from the clearly meritorious issues.

With regard to RJ's Disposal's challenge to the agency's evaluation of the awardee's past experience, we find that the protester's arguments were clearly meritorious, given the record provided to our Office. As explained by the GAO attorney during the ADR conference, the record demonstrates that the agency improperly credited the awardee with experience gained as a subcontractor, in violation of the RFP criteria that required experience as a prime contractor.⁸ We find that, since RJ's Disposal's basis for complaint was stated in its initial protest filing, and since we conclude that its initial protest provided ample information to permit the agency to conclude that it had failed to properly evaluate past experience, the agency unduly delayed taking corrective action in response to this issue. As a result, we recommend that the protester be reimbursed its reasonable costs of pursuing this issue. We also conclude that the protester's challenge to the agency's evaluation of past performance is intertwined with and not readily severable from its challenge to the past experience evaluation since both

⁸ Where a GAO attorney informs the parties through outcome prediction that a protest is likely to be sustained, the willingness to do so is generally an indication that the protest is viewed as clearly meritorious for purposes of recommending reimbursement of protest costs. National Opinion Research Center--Costs, B-289044.3, Mar. 6, 2002, 2002 CPD ¶ 55 at 3; Millar Elevator Serv. Co.--Costs, B-284870.3, Aug. 3, 2000, 2000 CPD ¶ 126 at 3.

evaluations required the agency to consider only projects performed as the prime contractor. Thus, we recommend reimbursement of the costs for this issue as well.

With regard to RJ's Disposal's challenge to the agency's price evaluation, this argument is also clearly meritorious because the record demonstrates that the agency failed to perform the required price realism evaluation. In this regard, the solicitation provided that "prices that are excessively . . . low (without sufficient justification) may be considered unrealistic . . . [and] receive no further consideration." RFP at 106. We have previously held that where a solicitation advises offerors that unrealistically low prices may serve as a basis for rejection of a proposal, it is implicit that the agency will consider whether offerors' prices are in fact unrealistic. Esegur-Empresa de Segurança, SA, B-407947, B-407947.2, Apr. 26, 2013, 2013 CPD ¶ 109 at 4; Logistics 2020, Inc., B-408543, B-408543.3, Nov. 6, 2013, 2013 CPD ¶ 258 at 8. Given the agency's failure to perform such an analysis here, and given that RJ's Disposal's complaint was stated in its initial protest, and in supplemental filings submitted prior to the agency's report, we find that the agency unduly delayed taking corrective action for this clearly meritorious issue. As a result, we recommend that the agency reimburse the protester's reasonable costs of pursuing this issue as well.

Furthermore, in response to GSA's argument that it did not unduly delay taking corrective action because GSA promptly reevaluated price after learning of the protester's supplemental grounds, we disagree that this constitutes prompt corrective action. In the agency report addressing this protest, our Office and the protester learned for the first time that the agency had concluded that RJ's Disposal's challenges to the price evaluation had merit. Specifically, GSA acknowledged that it failed to evaluate properly the awardee's unrealistically low price because the agency did not require the awardee to include certain fees in its price. AR, Legal Memorandum, Oct. 9, 2014, at 2; Contracting Officer's Supp. Statement of Facts, Oct. 7, 2014, at 1. That said, the agency then took the position that RJ's Disposal was not prejudiced by the error. Id. The protester's comments challenged this position as well. Protester's Comments, Oct. 27, 2014 at 1-8.

In our view, RJ's Disposal's challenges to the agency's price reevaluation were simply a continuation of RJ's Disposal's initial protest assertions that GSA's price analysis was flawed. As a result, we conclude that the agency unduly delayed responding to a clearly meritorious protest challenge, even to the point of requiring RJ's Disposal to litigate the question of prejudice. Thus, we see no basis to separate the costs of these efforts--all of these efforts have been related to the price challenge initially raised by RJ's Disposal.

Finally, with regard to RJ's Disposal's assertions that the agency unreasonably evaluated the awardee's key personnel factor, and the awardee's compliance with the solicitation's limitation on subcontracting clause, the protester's challenges did not have merit and are easily severable from the protester's objections to the agency's past experience and price evaluation. Whether these aspects of the agency's evaluation were performed properly concern separate legal theories and underlying facts that are

distinct from those relevant to either the past performance evaluation or price evaluation. Thus, we deny the protester's request that it be reimbursed for these costs.

In sum, we grant the protester's request with regard to the past experience, past performance, and price evaluation challenges. We deny RJ's Disposal's request relating to the agency's key personnel evaluation and the awardee's ability to comply with limitation on subcontracting clause because they are not intertwined with the clearly meritorious issues, and thus, readily severable.

RECOMMENDATION

We recommend that RJ's Disposal be reimbursed the reasonable costs of filing and pursuing its protest as explained above, including those costs incurred here for requesting a recommendation for costs. York Bldg. Servs., Inc.; Olympus Bldg. Servs., Inc.--Costs, B-282887.10, B-282887.11, Aug. 29, 2000, 2000 CPD ¶ 141 at 6. The protester should file its certified claims for costs with the agency within 60 days after 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