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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Glen Mar Construction, Inc.--Costs

File: B-410603.4

Date: April 5, 2016

Andy Brown, for the protester.

David G. Fagan, Esq., Department of Veterans Affairs, for the agency.

Charles W. Morrow, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request that GAO recommend reimbursement of the protester's costs of filing and pursuing a second protest of the award of a contract is denied because, although the agency took corrective action, the issues presented in the second protest were not clearly meritorious based on a lack of prejudice to the protester.

DECISION

Glen Mar Construction, Inc., of Clackamas, Oregon, requests that our Office recommend that it be reimbursed the costs associated with filing and pursuing its second protest (B-410603.3) challenging the award of a contract to Facility Defense Consultants, Inc. d/b/a/ Hanke Construction, of O'Fallon, Missouri, under invitation for bids (IFB) No. VA260-14-B-0412, which was issued by the Department of Veterans Affairs (VA), for construction of a medical center building. The protester argues its protest was clearly meritorious and the agency failed to take timely corrective action.

We deny the request.

BACKGROUND

The IFB was issued on July 21, 2014, as a service-disabled veteran-owned small business set-aside, and contemplated the award of a fixed-priced contract for construction of a primary care building at the VA Medical Center in Vancouver, Washington. See IFB at 1, 7, 30. The IFB incorporated Federal Acquisition Regulation (FAR) clause 52.214-19, Contract Award-Sealed Bidding-Construction, which provided for award to the lowest-priced responsible bidder. Id. at 5.

The IFB's price schedule required bidders to submit unit prices for 10 line items, comprised of a base bid for the construction of the clinic, and 9 additive options that were additional features related to the project that the agency might elect to procure. Id. With respect to the options, the IFB stated "[a]ny one of the . . . option items may be awarded depending on the available funding," and that "[p]ricing shall reflect the full scope of each optional item and shall represent only that line item in the event it is exercised at [the] time of award." Id.

For purposes of evaluation, the IFB incorporated by reference FAR clause 52.217-5, Evaluation of Options, which states as follows:

Except when it is determined in accordance with FAR 17.206(b) not to be in the Government's best interests, the Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. Evaluation of options will not obligate the Government to exercise the option(s).

IFB at 5; FAR clause 52.217-5.

FAR § 17.206(b) states as follows:

(b) The contracting officer need not evaluate offers for any option quantities when it is determined that evaluation would not be in the best interests of the Government and this determination is approved at a level above the contracting officer. An example of a circumstance that may support a determination not to evaluate offers for option quantities is when there is reasonable certainty that funds will be unavailable to permit exercise of the option.

FAR § 17.206(b).

The IFB also included FAR clause 52.217-7, which, as modified in the solicitation, stated as follows:

The Government may require the delivery of the numbered line item, identified in the Schedule as an option item, in the quantity and at the price stated in the Schedule. The Contracting Officer may exercise the option by written notice to the Contractor within 120 calendar days. Delivery of added items shall continue at the same rate that like items are called for under the contract, unless the parties otherwise agree.

IFB at 5, 19.

The VA received timely bids from six firms, including Glen Mar and Hanke, and conducted the bid opening on August 20. The contracting officer determined that the agency only had sufficient funds available to award the base bid requirement, along with additive option 1 (for interior signage). See Agency Report (AR) (B-410603) at 2. For the base bid and all additive options, Hanke submitted the lowest bid of \$9,036,214, and Glen Mar submitted the second-lowest bid of \$9,039,186. Glen Mar's price for the base bid and additive option 1, however, was \$7,962,932, while Hanke's price for the same work was \$8,004,923. Supp. AR (B-410603), attach. A, Bid Abstract, at 1. Although Glen Mar's price for the base bid and additive option 1 was lower than Hanke's price for these items, the agency selected Hanke's bid for award because its price for the base bid and all additive options was lower. Id. The VA awarded the contract to Hanke on October 8 for \$8,004,923. AR (B-410603), exh. A, Award Letter, at 1.

Glen Mar filed a timely protest with our Office, arguing that the award to Hanke was improper because the agency's price evaluation was based on total price for the base and all of the additive options--despite the fact that the agency knew it did not have the funding to exercise all of the options, and did not include those options in the award to Hanke. Glen Mar argued that its bid was lower than Hanke's for the base bid and option included in the award, and that the protester therefore should have received the award.

Our Office sustained the protest on January 14, 2015. We concluded that the award to Hanke was improper because the VA did not have a reasonable basis for identifying the lowest-priced bid by using the price for the base items as well as all of the additive options. Glen Mar Constr., Inc., B-410603, Jan. 14, 2015, 2015 CPD ¶ 40 at 7. In this regard, the record reflected that, at the time of the award, the VA knew with reasonable certainty that it would not have sufficient funds to exercise all, or even most, of the additive options. Id. at 7-8. We explained that where an agency includes FAR clause 52.217-5, which requires the evaluation of all options unless "it is determined in accordance with FAR § 17.206(b) not to be in the Government's best interest," the agency may not base its price evaluation on options that the agency knows with "reasonable certainty" it will not exercise. Id. at 7 (citing Kruger Constr., Inc., B-286960, Mar. 15, 2001, 2001 CPD ¶ 43 at 5; Charles J. Merlo, Inc., B-277384, July 31, 1997, 97-2 CPD ¶ 39 at 3).

Because the record reflected that at the time of award the VA knew that it only had \$8,396,000 available for these construction costs, our Office concluded that the VA did not have a reasonable basis for using the base construction price, and the bid price for all nine additive options to determine that Hanke's bid (\$9,036,214) was lower than Glen Mar's bid (\$9,039,186). Id. at 4, 7. We also found that, to the extent the agency believed that it might be able to spend an additional \$400,000 on the additive options, the VA should have prioritized the remaining options, up to the \$400,000 amount, and included the bidders' prices for those options in its price evaluation. Id. Accordingly, we recommended that the VA conduct a new price

evaluation to determine which bidder submitted the lowest price for the base construction and those additive options the agency reasonably believed it would have the funding to exercise.¹ Id. at 8.

To implement our Office's recommendation, the VA evaluated the additive options listed in the IFB in order of the VA's priority for the work. See AR (B-410603.3) at 4. The VA affirmed the amount of the funding available for the project to be \$8,396,000. Id. Based on this amount, the VA concluded that it could only award a contract for the base bid plus options 1 and 2 (for patient overhead lifts) without exceeding the available funding. Id. The record reflects that for the base bid plus options 1 and 2, Hanke submitted the lowest bid of \$8,103,460 and Glen Mar's bid was next lowest with a price of \$8,123,829. See AR (B-410603) at 4. Because Hanke remained the lowest-priced bidder, the VA lifted the stay of the award to Hanke, which had not been cancelled, and confirmed the award on May 29, 2015. Id.

Glen Mar filed a second protest with our Office (B-410603.3) challenging the VA's decision to again award the contract to Hanke. Specifically, Glen Mar contended that the VA's award to Hanke still was improper because although the VA evaluated prices on the basis of awarding a contract for the base bid plus options 1 and 2, the agency had awarded the contract for only the base bid and option 1. The protester further argued that our decision sustaining the initial protest contemplated that the evaluation would be based upon the work that the VA intended to award.

In response to the second protest, the VA repeated the argument it made in the original protest: that the agency, by virtue of incorporating FAR clause 52.217-7 in the solicitation, reserved the ability to award additional options, such as option 2 or any combination of the other items, within 120 days after the award. See AR (B-410603.3) at 5. The GAO attorney assigned to the protest conducted an outcome prediction alternative dispute resolution (ADR) conference.² As discussed

¹ On January 22, 2015, the VA requested reconsideration (B-410603.2) of our decision sustaining the protest. The VA primarily argued that, although the agency did not have funding to exercise all nine additive optional items, it still was in the agency's best interest to evaluate all nine items because the agency could exercise any combination of the nine optional items within the funding it had available. See Request for Reconsideration at 1-2. On September 21, the VA withdrew its request for reconsideration.

² In an outcome prediction ADR conference, the GAO attorney assigned to the protest will inform the parties as to his or her views regarding whether the protest is likely to be sustained or denied. 4 C.F.R. § 21.10(e); see First Coast Serv. Options, Inc., B-409295.4, B-409295.5, Jan. 8, 2015, 2015 CPD ¶ 33 at 3. The purpose of such outcome prediction conferences is to facilitate the resolution of a protest without a formal decision on the merits by our Office. Id.

in detail below, the GAO attorney advised the parties during the outcome prediction that, based on the protester's and agency's arguments, he viewed it likely that our Office would sustain the protest.

Subsequent to the outcome prediction conference, the VA advised our Office that it would take corrective action in response to Glen Mar's second protest. Specifically, the VA stated as follows:

With reference to the above-mentioned Supplemental Protest filed by Glen/Mar Construction, Inc. ("Glen/Mar") and our ADR call on Tuesday, September 1, 2015, the Department of Veterans Affairs ("VA") has determined that it is the best interest of the government to award the base period along with option one and option two. The VA will make a determination concerning the exercise of option two within the 120 day period allotted for exercising options pursuant to the award. After evaluating the offers from Glen/Mar and Hanke Construction ("Hanke") based on the pricing of the base period and option one and option two, Hanke has been determined to be the lowest bidder. As such, the stay initiated by the above-mentioned protest has been lifted and Hanke has been asked to begin work pursuant to the contract award.

See Agency Notice of Corrective Action (B-410603.3).

Based on the VA's proposed corrective action, our Office dismissed the protest, concluding that the agency had rendered the protest academic by making a new award that included options 1 and 2. Glen Mar Constr., Inc., B-410603.3, Sept. 10, 2015, at 4-5 (unpublished decision). We also advised that, to the extent the protester objected to the corrective action, it could file a separate protest challenging the agency's action. Id. at 5. The protester did not do so. Instead, following the dismissal of its protest, Glen Mar filed this request for reimbursement of its costs of filing and pursuing its second protest.

DISCUSSION

Glen Mar contends that it is entitled to reimbursement because the protest was meritorious, as demonstrated by the GAO attorney's views expressed during the ADR outcome prediction conference. The protester also argues that the VA unduly delayed taking corrective action, forcing it to file another protest before the agency decided to take corrective action based on our outcome prediction ADR. For the reasons discussed below, we deny the protester's request because, although the agency took corrective action in response to the protest, the record shows that the protest was not clearly meritorious because the protester could not have been prejudiced by the agency's actions.

When a procuring agency takes corrective action in response to a protest, our Office may recommend under 4 C.F.R. § 21.8(e) 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 protesters to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Pemco Aeroplex, Inc.--Recon. & Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 5. A protest is clearly meritorious when a reasonable agency inquiry into the protest allegations would show facts disclosing the absence of a defensible legal position. The Real Estate Ctr.--Costs, B-274081.7, Mar. 30, 1998, 98-1 CPD ¶ 105 at 3. 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. Chant Eng'g Co., Inc.--Request for Costs, B-274871.2, Aug. 25, 1997, 97-2 CPD ¶ 58 at 4. While we consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest, we generally do not consider it to be prompt where it is taken after that date. CDIC, Inc.--Entitlement to Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 2.

Glen Mar's second protest of the award to Hanke argued that the VA could not add option 2 to Hanke's contract by deeming that option "exercised" because the option was not included in the initial award. The protester argues that the VA's corrective action was taken in response to its clearly meritorious protest, and that the corrective action was not prompt because it occurred after the submission of the agency report.

The VA argues that Glen Mar's protest was not clearly meritorious because the agency's corrective action in response to our *decision* sustaining Glen Mar's initial decision was appropriate. Agency Response to Request for Costs (Oct. 5, 2015) at 1-2. The agency also argues that, regardless of whether the second award to Hanke was consistent with our decision, the protester was not prejudiced by the agency's actions. *Id.* at 2. We first address the agency's corrective action in response to our sustain, and conclude that the second award to Hanke was flawed. Nonetheless, we also agree with the agency's contention that the second award to Hanke could not have prejudiced the protester.

The VA first argues that its corrective action in response to our decision sustaining Glen Mar's initial protest (B-410603) was appropriate because the agency utilized its authority under FAR clause 52.217-7 to exercise the additive option 2 to Hanke's contract. *Id.* at 1-2. As discussed above, however, our prior decision sustaining Glen Mar's protest explained that agencies must award based on the price for all options--with the exception that agencies should not make award based on options it knows it will not exercise. Glen Mar Constr., Inc., supra, at 6-7. Our decision also explained that FAR clause 52.217-5 does not allow the agency to exercise options that are not included in the contract award. *Id.* Specifically, although the language

in FAR clause 52.217-7 provides the contracting officer with authority to exercise options included in the contract within 120 calendar days of award, the language does authorize the contracting officer to add new options to the contract not included in the initial award. Id. (citing FAR clause 52.217-7).

Turning to Glen Mar's second protest and this cost claim, the VA's corrective action in response to our decision sustaining the original protest was to "exercise" additive option 2 in Hanke's contract. AR (B-410603.3) at 5. The VA argued that because Hanke's bid was lower than Glen Mar's for the base and additive options 1 and 2, the award should remain with Hanke. Id. During the outcome prediction ADR conference, the GAO attorney assigned to the protester advised that, for the same reasons set forth in our decision sustaining the initial protest, he viewed the protester's argument as having merit because the agency could not exercise an option that was not included in the contract. As discussed above, the VA stated that it would take corrective action by amending the contract award, to include option 2 in the contract. Agency Notice of Corrective Action (B-410603.3).

Nonetheless, based on the VA's response to the request for costs, we conclude that the protest issues raised by Glen Mar were not clearly meritorious. See Agency Response to Request for Costs (Oct. 5, 2015) at 2. The VA argues that, regardless of the method by which additive option 2 was added to Hanke's contract (i.e., by exercise of an "option" under FAR clause 52.217-7, or the award of a new contract which included that option), the protester could not have been prejudiced by this error because, in either case, Hanke's bid was lower than Glen Mar's. Id. For these reasons, the protester could not have been prejudiced by the agency's affirmed award to Hanke in response to our decision sustaining Glen Mar's initial protest.³ Id. We agree.

Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found. HP Enter. Servs., LLC, B-411205, B-411205.2, June 16, 2015, 2015 CPD ¶ 202 at 6; Booz Allen Hamilton Eng'g Servs., LLC, B-411065, May 1, 2015, 2015 CPD ¶ 138 at 10 n.16; Colonial Storage Co.--Recon., B-253501.8, May 31, 1994, 94-1 CPD ¶ 335 at 2-3.

The record here shows that Hanke's bid for the base and additive options 1 and 2 was \$8,103,460, and Glen Mar's bid for these items was \$8,123,829. AR (B-410603.3) at 4. On this record, we conclude that, even if Glen Mar was correct

³ We note that Glen Mar did not submit comments on the VA's response to the request for costs. On this record, we conclude that the protester does not dispute the agency's position regarding the issue of prejudice.

that the agency could not add option 2 to Hanke's contract through the exercise of an "option" under FAR clause 52.217-7, the protester could not have been prejudiced by this action because the agency could have made a new award to Hanke that included this option. For this reason, the agency's corrective action of making a new contract award to Hanke that included additive options 1 and 2 showed that Glen Mar's protest was not clearly meritorious.

As our Office has explained, a GAO attorney will conduct an outcome prediction ADR conference only if he or she has a high degree of confidence regarding the outcome; therefore, the willingness to do so is generally an indication that the protest is viewed as clearly meritorious, and satisfies the "clearly meritorious" requirement for purposes of recommending reimbursement of protest costs. National Op. Research Ctr.--Costs, B-289044.3, Mar. 6, 2002, 2002 CPD ¶ 55 at 3. This general rule, however, is not absolute. For example, where, as here, an agency reasonably demonstrates that the underlying protest was not clearly meritorious in its response to the request that we recommend the reimbursement of protest costs, we may conclude that recommendation is not appropriate. See Waterfront Techs., Inc.--Costs, B-401948.8, Sept. 14, 2010, 2010 CPD ¶ 232 at 3 (denying request for costs following agency's corrective action because, although the record did not clearly support the agency's response regarding one of the issues challenged, there was no possibility of prejudice to the protester regarding that issue).

For these reasons, we conclude that although the VA's response to Glen Mar's second protest did not expressly argue that the protester was not prejudiced by the second award to Hanke, we will consider the agency's arguments regarding prejudice in response to Glen Mar's request for costs. For the reasons discussed above, we agree with the VA that Glen Mar's protest was not clearly meritorious, as the agency's actions did not prejudice the protester. Specifically, regardless of the manner in which the agency sought to include additive optional 2 to Hanke's contract, the inclusion of this option meant that Hanke's bid was lower than Glen Mar's.

The request is denied.

Susan A. Poling
General Counsel