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Decision

Matter of: Zodiac-Poettker Joint Venture, LLC--Costs

File: B-412319.6

Date: November 30, 2016

Scott F. Lane, Esq., and Katherine S. Nucci, Esq., Thompson Coburn LLP, for the protester.

Carlton A. Arnold, Esq., Corps of Engineers, for the agency.

Mary G. Curcio, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request that our Office recommend reimbursement of protest costs is denied where the protest grounds were not clearly meritorious or the agency did not unduly delay taking corrective action.

DECISION

Zodiac-Poettker Joint Venture, LLC, of Chesterfield, Missouri, requests a recommendation that it be reimbursed the reasonable costs of filing and pursuing its protest of the award of a contract to Blinderman Construction of Chicago, Illinois, under request for proposals (RFP) No. W912QR-15-R-0037, issued by the Department of the Army, Corps of Engineers, for the design and construction of an Army Reserve Center in Arlington Heights, Illinois.

We deny the request.

BACKGROUND

The RFP, issued on August 10, 2015, contemplated the award of a fixed-price contract to design and construct an Army Reserve Center comprised of three separate buildings. Pursuant to the RFP, proposals were to be evaluated on a best-value basis, considering past performance, technical, and price factors. Id. at 9-10. The technical factor was comprised of management plan and schedule subfactors. Id. The RFP stated that the agency would evaluate offerors under the technical factor using adjectival ratings and on an acceptable/unacceptable basis, and evaluate offers under the past performance factor using relevancy and confidence assessment ratings. Id.

For the schedule subfactor, offerors were to provide a bar chart schedule showing how the work would be performed and completed. With respect to schedule, the solicitation set forth several requirements, including, as relevant here, the following:

1.3.3 Requirements for Completion of Designated Areas Prior to Furniture Installation

. . . The Contractor shall furnish at no additional cost all utilities, including HVAC, lighting and electrical power, during furniture and IT (information technology)/Telecom equipment installation and until the facility is turned over to the Government.

* * * * *

All interior building finishes of areas receiving furniture, including all furniture entries, pathways, staging, and storage areas shall be complete. Completed building finishes shall include. . . HVAC systems and controls. . .

All utilities and systems serving the building shall be fully operational. The HVAC system(s) must be in operation, fully balanced and commissioned. The elevator(s) shall be operable and certified for use by the approving agency prior the delivery of the furniture package and must be made available, at no additional costs, for use by the furniture and IT/Telecom equipment installation contractors.

RFP, Amend. 001, at 3-4.

The agency received proposals from eight offerors, including Zodiac and Blinderman. Agency Report (AR) at 5. The agency concluded that Zodiac's proposal was unacceptable for award due to a deficiency under the schedule subfactor. AR, Tab 7, Source Selection Decision Document (SSDD), at 2, 4. Specifically, the SSDD stated that Zodiac showed that the furniture/IT installation would begin prior to the completion of the HVAC commissioning and elevator certification, which was not in accordance with solicitation. *Id.* at 2. The agency also conducted an independent evaluation of the offerors' schedules and determined that Zodiac's schedule showed the HVAC commissioning would finish 45 days after the furniture, fixtures, and equipment installation. AR, Tab 3, Independent Schedule Evaluation, April 13, 2016. After evaluating proposals, the agency concluded that Blinderman's proposal represented the best value to the government, and awarded the contract to Blinderman on April 19, 2016.¹ AR,

¹ Zodiac's request that we recommend reimbursement of its protest costs concerns protest numbers B-412319.4 and B-412319.5, in which Zodiac protested the award to

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Tab 5, Award Notification.

On May 2, Zodiac filed a protest with our Office (B-412319.4), in which it raised the following allegations: (1) the agency unreasonably evaluated the protester's schedule as deficient for failing to indicate that HVAC commissioning would be completed prior to furniture installation; (2) the agency disparately evaluated proposals because "it is very likely that Blinderman also proposed to only have part of the building commissioning completed prior to furniture installation", and (3) the solicitation was ambiguous to the extent the agency believed that all commissioning was to take place prior to furniture installation because several different tests and systems are covered by building commissioning, some to be commissioned after furniture installation. Protest at 7-11.

On May 27, the Corps filed its agency report recommending dismissal of the protest. The Corps addressed each of the protester's allegations, arguing that the agency's evaluation was reasonable, and submitted a contemporaneous record that detailed its evaluation and award determination.

On June 6, Zodiac filed its comments on the agency report. In those comments, Zodiac addressed the agency's response to the issues raised in Zodiac's protest. Zodiac also raised the following two new issues: (1) Blinderman's proposal should have been rejected as unacceptable because it failed to conform to the RFP schedule requirement that lighting systems be commissioned after furniture installation, and (2) the agency did not reasonably evaluate Blinderman's past performance. Comments at 10-11, 14-15. On June 7, Zodiac filed a separate supplemental protest (B-412319.5) in which it argued that the proposal of a second acceptable offeror should have been evaluated as unacceptable because that offeror did not propose to commission lighting systems after furniture installation. Supplemental Protest at 1. Zodiac further asserted that this also represented disparate treatment.

On June 13, the GAO attorney handling the protest initiated a conference call with the parties to discuss the supplemental protest. During that call, the GAO attorney expressed concern with the evaluation of Blinderman's past performance, and noted that since the agency found that six of the eight proposals submitted were unacceptable under the scheduling factor there may have been a latent ambiguity in the solicitation. Agency Response at 4. Subsequently, on June 22, before submitting a supplemental report, the agency advised our Office that it would conduct discussions with all offerors on their current proposals; issue an amendment clarifying various issues; receive and evaluate revised proposals; and make a new award determination. Agency Notice of Corrective Action, June 22, 2016, at 1. On June 24, we dismissed Zodiac's protest (Zodiac-Poettker Joint Venture LLC, B-412319.4, B-412319.5 (unpublished decision)).

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Blinderman. Three other protests were filed with respect to this procurement (B-412319, B-412319.2, and B-412319.3), which were dismissed following corrective action by the agency.

DISCUSSION

Zodiac requests that we recommend that it be reimbursed the reasonable costs of filing and pursuing its protests, including attorneys' fees. Zodiac contends that its protest grounds were clearly meritorious and revealed facts showing the absence of a defensible legal position. Zodiac further asserts that the Corps' corrective action was unduly delayed because it was filed in response to the protest and after the due date for the initial agency report, and because, in Zodiac's view, a reasonable inquiry into the issues raised in its protest would have uncovered the errors in the evaluation and award decision. The agency argues that the allegations raised in the initial protest were not clearly meritorious. Rather, the agency argues that it took corrective action generally in response to the issue raised in the supplemental protest relating to past performance. Agency Response to Request for Costs at 3-4. For the reasons discussed below, we deny the protester's request for reimbursement of its protest costs with regard to both its initial and supplemental protests.

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. 4 C.F.R. § 21.8(e); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. Thus, as a prerequisite to our recommending the reimbursement of costs where a protest has been settled by corrective action, it must have been clearly meritorious, *i.e.*, not a close question. InfraMap Corp.--Costs, B-405167.3, Mar. 26, 2012, 2012 CPD ¶ 123 at 3. 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. This imposition of costs is not intended as an award to prevailing protesters or as a penalty to the agency, but rather, is designed to encourage agencies to take prompt action to correct apparent defects in competitive procurements. See Takota Corp.--Costs, B-299600.2, Sept. 18, 2007, 2007 CPD ¶ 171 at 3. Here, we find that reimbursement is not appropriate.

Zodiac's initial protest contended that the agency unreasonably evaluated its schedule for failing to show that HVAC commissioning would be completed before furniture installation. Zodiac argued that commissioning is to take place over an extended period of time, and different systems are tested and commissioned at different times. Zodiac asserted that it proposed a total of 56 days for commissioning of the last building with furniture installation four weeks into commissioning, lasting a period of 28 days, followed by an additional two weeks of commissioning. Comments at 6. According to Zodiac, its commissioning schedule was meant to cover total building commissioning, and not just the HVAC commissioning. Id. at 7. Zodiac also asserted that four weeks was a sufficient time to complete HVAC commissioning prior to furniture installation. Protest at 8. Zodiac asserted that in any case, since it provided a schedule for early

completion, there was sufficient time for additional commissioning prior to furniture installation if that became necessary. Comments at 5. According to Zodiac, the agency therefore unreasonably evaluated its proposal.

The agency pointed out, however, that the solicitation required that HVAC commissioning be completed prior to furniture installation. RFP, Amend. 001, at 3-4. The agency reviewed Zodiac's bar chart schedule and determined it showed an HVAC commissioning schedule that extended past the date for furniture installation. AR at 9. Although the protester may have intended something different, and there may have been sufficient time to complete HVAC commissioning prior to furniture installation, the agency's decision to find Zodiac's proposal unacceptable because it did not clearly demonstrate compliance with a solicitation requirement was a legally defensible position. Therefore, this protest issue was not clearly meritorious.

Similarly, Zodiac's initial protest argument that it was evaluated differently from Blinderman is not clearly meritorious. This protest allegation simply speculates that Blinderman, too, may have proposed to have only a part of the building commissioned prior to furniture installation. In its comments on the agency report, Zodiac asserts that the agency engaged in disparate treatment because Blinderman indicated it would perform all mechanical, engineering and plumbing commissioning prior to furniture installation, but did not specifically mention HVAC commissioning. Comments at 9-10. The agency notes, however, that mechanical systems in the construction industry are generally understood to include HVAC systems, which means that Blinderman proposed completion of the HVAC system prior to furniture installation. Agency Response to Request for Costs at 2. Since this is a defensible legal position, this protest allegation is not clearly meritorious.

Finally, Zodiac initially protested that the solicitation was ambiguous to the extent that its proposal was rejected because all commissioning had to be completed prior to furniture installation. This allegation is not clearly meritorious because Zodiac's proposal was not deemed unacceptable for that reason. Rather, Zodiac's proposal was determined to be unacceptable because its proposal schedule did not provide that HVAC commissioning would be completed prior to furniture installation.

With respect to Zodiac's supplemental challenges (those raised for the first time in the comments submitted in response to the agency report, and those raised in its separate supplemental protest), the agency did not unduly delay in taking corrective action because it acted before the deadline for submitting its supplemental report. When an agency takes corrective action before the due date set for receipt of the agency report, our Office views such action as prompt and generally will not recommend the reimbursement of costs. LGS Innovations LLC, B-405932.3, Apr. 26, 2012, 2012 CPD ¶ 147 at 2; The Sandi-Sterling Consortium--Costs, B-296246.2, Sept. 20, 2005, 2005 CPD ¶ 173 at 2-3. Thus, we have no basis to recommend reimbursement of costs associated with Zodiac's supplemental basis of protest.

The request for a recommendation that Zodiac be reimbursed its protest costs is denied.

Susan P. Poling
General Counsel