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Decision

Matter of: Southeastern Paper Group -- Costs

File: B-412475.3

Date: May 25, 2016

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DIGEST

Request for a GAO recommendation that the agency reimburse the protester for the costs of filing and pursuing its protest is denied where the record does not show that the initial protest was clearly meritorious, and the agency took prompt corrective action in response to the supplemental protest.

DECISION

Southeastern Paper Group (SEPG), of Spartanburg, South Carolina, requests that we recommend that it be reimbursed the reasonable costs of filing and pursuing its protest of the award of a contract to Bunzl of California, under request for proposals (RFP) No. HDEC05-15-R-0003, issued by the Defense Commissary Agency (DeCA) for miscellaneous operating supplies.

We deny the request.

BACKGROUND

DeCA issued the RFP for miscellaneous operating supplies and paper bags for Continental United States (CONUS), Puerto Rico, Alaska, Hawaii, and Pacific Theater commissary stores on June 25, 2015. The RFP contemplated the award of a requirements contract for each of nine geographical “clusters” of store locations for a base year and four option years, with fixed unit prices and fixed unit prices with economic price adjustment. RFP at 101-102; Contracting Officer’s Statement (COS) at 2. Proposals could be submitted for an individual contract line item number (CLIN)/cluster, a combination of CLINs/clusters, or all nine CLINs/clusters.

Id. at 2. Award was to be made on a lowest-priced technically acceptable basis, considering price, technical acceptability, and past performance. Id.; RFP at 82. The date for submission of initial proposals was August 7, 2015. Agency Report (AR) Tab 29, Source Selection Decision Document (SSDD), at 003558. After two rounds of discussions, final proposals were due on September 8, 2015. AR at 1-3; see RFP Amend. No. 4.

The RFP incorporated by reference Defense Federal Acquisition Regulation Supplement (DFARS) clause 252.225-7021, “Trade Agreements,” RFP at 123, which implements provisions of the Trade Agreements Act (TAA), 19 U.S.C. § 2501 et seq.¹ Further, in RFP Amendment No. 1, in response to a question inquiring whether product components must also meet the “country of origin” standard, the agency advised:

In requesting “Country of Origin” on the Solicitation Pricing Guide, it is DeCA’s intention to determine whether or not supplies purchased under any ensuing contract will comply with DFARS 252.225-7021, “Trade Agreements—Basic.” The awardee has the obligation to comply with all terms and conditions of the contract, including DFARS 252.225-7021, which provides the answer to this question based on the source country.

RFP Amend. No. 1, at 000360.

DeCA received proposals from Bunzl, SEPG, and a third offeror. AR at 2. Following the initial evaluations, the Contracting Officer (CO) conducted discussions. Id. After the receipt of revised proposals, a second round of discussions was held and final proposals requested. Id. Based on SEPG’s concerns that other offerors’ prices were lower due to items being sourced from non-compliant countries, the CO published RFP Amendment No. 6 on August 27, 2015, to incorporate a new pricing sheet, and to incorporate a statement that offerors were required to acknowledge concerning the TAA.² Id. at 3; COS at 7-9; RFP Amend. No. 6.

¹ The TAA clause requires offerors to provide only “U.S.-made, qualifying country, or designated country end products,” absent circumstances not relevant here. DFARS clause 252.225-7021(c); see generally Master Lock Co., LLC, B-309982.2, June 24, 2008, 2009 CPD ¶ 2 at 2.

² Offerors were required to acknowledge receipt of the following statement:

NOTE: Competing companies, whistleblowers and Government personnel monitor compliance with the Trade Agreements Act (TAA). Known violators of the TAA will be referred to the Department of

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Following receipt of the final proposals, the agency determined that all three proposals clearly met the minimum requirements of the solicitation and that the offerors' past performance was relevant and that each performed satisfactorily on past contracts. AR at 3; COS at 8-9.

Prompted by emails from SEPG, DeCA contacted various commissaries at which Bunzl was providing supplies under its existing contract to have them check packaging of six items to ensure that the items were from TAA compliant countries. AR at 3; COS at 8-9. Several commissaries notified the CO that Bunzl was supplying some noncompliant products. Id. The CO required Bunzl to provide information on the items identified, to provide the agency with a proposed remedy in any case of noncompliance, and to provide written assurance that it would have adequate procedures in place to be TAA compliant on the new contract. AR at 3; COS at 7-8; AR, Tab 26, Bunzl Correspondence, at 003243.

In its response letter, Bunzl stated that it had "considerable resources" to identify potential sources and that "hopefully within a week" it would inform DeCA when each item would be corrected. Id. at 4. Bunzl further advised that it believed that SEPG "likely had the same issue" with noncompliant goods. COS at 4; Bunzl Correspondence at 003239. DeCA investigated the claim and found that SEPG also had noncompliant items under its existing contract and required SEPG to provide a proposed remedy and written assurances that its firm would have adequate procedures in place to comply with the requirements of the contract. COS at 8; see AR, Tab 27, SEPG Correspondence, at 003535.

After the CO received assurances from Bunzl and SEPG, she found both companies responsible. AR at 4; COS at 9. In reaching her conclusion, the CO relied on the assurances from each company, the agency's previous dealings with each company, and her personal experience with each company. Id.³

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Justice for a determination as to whether the United States will prosecute and/or fine for non-compliance with the TAA.

RFP Amend. No. 6, Attach. B.

³ The CO advised:

Bunzl and SEPG both communicated to DeCA through email correspondence that they had a plan to correct issues with the current contracts and would comply with TAA requirements in any new awards. I was comfortable with the response from both companies because, through my previous course of dealings, they had both been very good contractors and had corrected any previous issues with no problems. Bunzl has been doing business with DeCA for 20 years

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Proposals were evaluated for technical acceptability and lowest-price. AR, Tab 29, Source Selection Decision Document (SSDD) at 003555. Bunzl received an acceptable technical rating and had the lowest total price. Id. Thereafter, as a result, the CO awarded contract HDEC05-16-D-0001 to Bunzl on November 9, 2015. COS at 9.

Following a requested debrief, SEPG filed a protest with this Office on November 19, 2015. The protester alleged that the agency failed to “ensure ‘country of origin’ compliance beyond offerors filling in country of origin status on pricing sheets;” that Bunzl did not comply with DFARS clause 252.225-7021, as required by the RFP; and that the agency had failed to “verify and validate product sourcing.” Protest at 1, 2.

On December 21, the agency filed its report on the protest. The agency argued, citing our decision in YKK (U.S.A.), Inc., B-280447, Aug. 28, 1998, 98-2 CPD ¶ 68, that whether an offeror can or will supply compliant products in accordance with the terms of a solicitation concerns a matter of responsibility that GAO generally will not review, and that allegations that a contractor is not meeting its obligations is a contract administration matter not for resolution under the our protest function. The agency recognized, however, that our Office would review such matters where the CO should have been aware that an offeror might not furnish compliant products. Id.

On December 31, the protester filed a supplemental protest, asserting that Bunzl had indicated that it could not supply TAA-compliant sources for several items; the agency unreasonably eliminated certain items from the award to Bunzl rather than find Bunzl technically unacceptable; and the agency engaged in unequal discussions.

On January 7, 2016, prior to the due date for submission of an agency report on the supplemental protest issues (January 13, 2016), the agency took corrective action, including reopening discussions, modifying certain requirements, reviewing new pricing offers, and requesting letters of supply for all goods to be provided. Agency

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with acceptable performance, and SEPG has been doing business with DeCA for over 4 years with acceptable performance. Based upon this I evaluated the final proposals submitted by Bunzl and SEPG in response to HDEC05-15-R-0003 and believed they demonstrated that each would be compliant with the requirements outlined in the TAA

COS at 9.

email, Jan. 7, 2016. GAO found that this action rendered the protest academic and dismissed it on that basis. Southeastern Paper Group, B-412475, B-412475.2, Jan. 12, 2016 (unpublished decision).

DISCUSSION

SEPG now requests that we recommend that the agency reimburse it for the costs of filing and pursuing its protest.

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, not only must the protest have been meritorious, but it also 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, with regard to each protest ground raised by SEPG, we find that a recommendation of reimbursement of costs is not appropriate.

Original Protest Grounds

In its original protest, SEPG asserted that the agency failed to “verify and validate product sourcing for HDEC05-15-R-0003” and that Bunzl failed to comply with DFARS clause 252.225-7021 and “sourced” items from “non-compliant TAA countries.” Protest at 1.

These protest grounds are not “clearly meritorious,” since, as pointed out above, whether an offeror can or will supply compliant products in accordance with the terms of a solicitation is a matter of responsibility that we generally will not review, see YKK (U.S.A.), Inc., supra, and, even to the extent the CO's determination of TAA-compliance is subject to our review, the record here shows that it was based on a reasonable CO investigation.

When an offeror represents that it will furnish end products of designated or qualifying countries (including domestic end products) in accordance with the TAA,

it is obligated under the contract to comply with that representation. Wyse Tech., Inc., B-297454, Jan. 24, 2006, 2006 CPD ¶ 23 at 6. If prior to award, however, an agency has reason to believe that a firm will not provide compliant products, the agency should go beyond the firm's representation of compliance with the Act. Leisure-Lift, Inc., B-291878.3, B-292448.2, Sept. 25, 2003, 2003 CPD ¶ 189 at 8. Where an agency is required to investigate further, we will review the evaluation and resulting determination regarding compliance with the requirements of the Act to ensure that they were reasonable. Pacific Lock Co., B-309982, Oct. 25, 2007, 2007 CPD ¶ 191 at 4.

Here, the record shows that the CO conducted a thorough investigation into Bunzl's capability and intention to supply compliant products. See AR at 5-6; COS at 7-9; SSDD at 003562, 003568-69. Her review included a check of commissaries being supplied by the awardee, the issuance of a notice to offerors that compliance with the TAA was required, and repeated contact with the awardee, including discussions, in which the CO was given assurances that compliant goods would be supplied. AR at 6. In these circumstances, we cannot conclude that the agency had "no defensible legal position" with regard to the protester's initial allegations.

Supplemental Protest Grounds and Corrective Action

In its supplemental protest dated December 31, 2015, SEPG further asserted that the agency unreasonably eliminated certain items from the award rather than finding Bunzl unacceptable, and that the agency conducted unequal discussions. Comments and Supp. Protest at 3-10. Prior to the date set for submission of the supplemental report, the agency took corrective action, including reopening discussions; modifying the requirements pertaining to certain items, including the items that had been eliminated from the original award to Bunzl; and affording offerors an opportunity to revise their pricing.⁴ Notice of Corrective Action, Jan. 7, 2016.

As a general rule, provided an agency takes corrective action by the due date of the agency's report on a protest, we regard the action as prompt, and will not consider a request to recommend reimbursement of protest costs. CDIC, Inc.--Entitlement to Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52. Accordingly, since DeCA here took corrective action in response to the protester's supplemental grounds of protest

⁴ The agency also indicated that it would require all offerors to provide Letters of Supply for all items on the Miscellaneous Operating Supply pricing spreadsheet, identifying the country of origin; require a re-certification from each offeror that it will comply with the TAA and DFARS clause 252.225-7021; and require an affirmative statement from offerors that items provided will be in compliance with the TAA, that the offeror is capable, and that the offeror will perform in compliance with the contract within 30 days of award. Id.

prior to the due date for the supplemental agency report, the corrective action was not unduly delayed. As a result we will not recommend the reimbursement of the protest costs pertaining to these issues.

The request for a recommendation of reimbursement of protest costs is denied.

Susan A. Poling
General Counsel