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Decision

Matter of: Imagine One Technology & Management, Ltd.--Costs

File: B-412860.3

Date: December 9, 2016

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Caroline H. Cobb, Esq., Department of the Navy, for the agency.
Charmaine A. Stevenson, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reimbursement of protest costs is denied where the agency did not unduly delay taking corrective action in response to supplemental protest grounds and where the remaining protest grounds were not clearly meritorious.

DECISION

Imagine One Technology & Management Ltd., of Colonial Beach, Virginia, a woman-owned small business, requests that our Office recommend it be reimbursed the reasonable costs of filing and pursuing a protest of the award of a contract to Precise Systems, Inc., of Lexington Park, Maryland, under request for proposals (RFP) No. N00024-15-R-3217, issued by the Department of the Navy, Naval Air Systems Command, for project management support services. We dismissed the protest as academic based on the agency's corrective action. Imagine One argues that the Navy failed to take prompt corrective action in response to a clearly meritorious protest.

We deny the request.

BACKGROUND

The Navy issued the RFP on July 7, 2015, to holders of the Navy's SeaPort-e multiple award contract, Zone 2, as a small business set-aside. Agency Report (AR) at 1; RFP at 2. The RFP contemplated a best-value award of a task order

based on the following three evaluation factors: (1) technical, (2) past performance, and (3) cost/price. RFP at 105.¹ The technical factor included two subfactors, in descending order of importance: understanding and approach; and staffing and personnel. Id. at 105-106. The RFP stated that the technical factor is more important than past performance, and when combined, technical and past performance are significantly more important than cost/price. Id. at 105.

The Navy received three proposals in response to the requirement, and announced the award of the contract to Precise on February 23, 2016. AR at 7-8. Imagine One was provided a written debriefing on March 10. AR, Tab 17, Debriefing. On March 15, Imagine One filed its initial protest.

Imagine One's initial protest argued that the Navy misevaluated Imagine One's proposal under each of the technical subfactors, misevaluated the awardee's proposal under the technical and past performance factors, performed an irrational cost realism analysis, and as a result, performed a flawed best-value tradeoff analysis. Protest at 9-16. In its agency report, the Navy argued that the evaluation and source selection decision were reasonable. AR at 9-35.

In its comments on the agency report, Imagine One continued to challenge the reasonableness of the evaluation and selection decision. In addition, the comments contained supplemental protest grounds that raised new challenges to the evaluation of Precise's key personnel. Specifically, Imagine One argued that the agency failed to assign weaknesses where it alleged certain of Precise's key personnel failed to demonstrate that they satisfied the minimum experience requirements set forth in the RFP, and applied an unstated evaluation criterion when giving Precise undue credit for having so many personnel with top secret clearances when the RFP required only a secret clearance. Comments at 13-16. In addition, Imagine One alleged that Precise's proposal on its face demonstrated an over-reliance on Precise's subcontractor such that it is not small under the ostensible subcontractor rule, and requested that our Office recommend that the agency refer the matter to the Small Business Administration for a size determination. Id. at 10-13.

Prior to filing a supplemental agency report, the Navy notified our Office that it intended to re-evaluate the key personnel sections of the initial proposals, and would also review other allegations raised, as necessary. Notice of Corrective Action at 1. Our Office dismissed the protest as academic on May 4. Imagine One Tech. and Mgmt. Ltd., B-412860; B-412860.2, May 4, 2016 (unpublished decision). Thereafter, Imagine One filed its request for protest costs.

¹ Our references are to the conformed version of the solicitation provided by the agency in its report.

DISCUSSION

Imagine One requests that we recommend that it be reimbursed the reasonable costs of filing and pursuing its initial and supplemental protests. Imagine One argues that its supplemental protest grounds were based on information revealed in the documents produced with the Navy's agency report, and establish that its protest was clearly meritorious. Request for Costs at 1, 4-6. Imagine One further argues that there is a clear nexus between the initial and supplemental protest grounds, the report produced by the agency supported its allegations, and therefore, the corrective action taken by the agency was not timely because it was not taken until after the agency report was produced. Id. at 7-8.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs where, based on the record, 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 recommending that costs be reimbursed 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. J.F. Taylor, Inc.--Entitlement to Costs, B-266039.3, July 5, 1996, 96-2 CPD ¶ 5 at 3. 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. Triple Canopy, Inc.--Costs, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 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. See Chant Eng'g Co., Inc.--Request for Costs, B-274871.2, Aug. 25, 1997, 97-2 CPD ¶ 58 at 4. While we usually consider corrective action to be prompt if 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. See CDIC, Inc.--Entitlement to Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 2. The 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 a competitive procurement. See Takota Corp.--Costs, B-299600.2, Sept. 18, 2007, 2007 CPD ¶ 171 at 3. Here, we find that reimbursement is not appropriate.

Clearly Meritorious

With regard to Imagine One's initial protest grounds, we find that none were clearly meritorious. For example, Imagine One challenged its evaluation under the understanding and approach subfactor, and argued that it should have been rated outstanding rather than good based on the seven strengths and only one weakness (regarding production line impacts) identified by the evaluators, and further argued that the weakness assigned was unreasonable. Protest at 9-11. In its report, the agency justified its identification of the weakness, arguing that Imagine One's proposal lacked adequate detail regarding production line impacts, and stood by its rating of good because it concluded that the strengths in Imagine One's proposal did not "far outweigh" the weakness such that a rating of outstanding was warranted. AR at 10-13. Imagine One's comments on the agency's report generally reiterate the same arguments made in its initial protest that it should have been rated outstanding. Comments at 23-25.

With respect to the agency's evaluation of Imagine One's proposal under the staffing and personnel subfactor, the protester also argued that the agency should have assigned its proposal a rating higher than acceptable because it had received one strength and no weaknesses. Protest at 11-12. Regarding the agency's evaluation of Precise under this subfactor, Imagine One argued that it was unreasonable for the Navy to assign Precise a rating of good because Precise lacks the personnel and capacity to perform the contract. Id. at 12-13. Imagine One further argued that to the extent Precise proposed to provide incumbent employees, the Navy failed to evaluate the risk associated with this approach, and that if any incumbent employees had been proposed as key personnel, Precise could not have provided signed letters of intent as required by the RFP.² Id. at 13.

In response, the agency argued that it reasonably evaluated Imagine One's proposal under the staffing and personnel subfactor, and assigned a rating of acceptable despite not having found any weaknesses under the subfactor because the agency determined that the one strength assigned would have little or no impact on the overall performance. AR at 12-16. The agency also argued that it reasonably assigned a rating of good based on aspects of Precise's proposal not

² The RFP defined a "contingent hire" as "an individual who has committed, under a signed letter of intent, to being employed by the offeror if the offeror is awarded the task order." RFP at 93. The RFP stated: "The offeror is forewarned that it may receive a weakness if it proposes the predominance of a labor category or Statement of Work (SOW) section tasking using prospective or contingent hire employees and the evaluation team deems this a risk to successful performance." Id. Offerors were required to provide a letter of intent for any proposed key employee that was a contingent hire or employed by a subcontractor or team member. Id.

specifically related to the experience of its personnel, and that Precise and its teammates proposed all current employees, and only one contingent hire key employee for whom a letter of intent was included in Precise's proposal. Id. at 17-19.

It is well-established that adjectival ratings are merely guides to intelligent decision-making in the procurement process. See Epsilon Sys. Solutions, Inc., B-409720, B-409720.2, July 21, 2014, 2014 CPD ¶ 230 at 8. Where the evaluation and source selection decision reasonably consider the underlying basis for the ratings, including the advantages and disadvantages associated with the specific content of competing proposals, in a manner that is fair and equitable, and consistent with the terms of the solicitation, the protester's disagreement over the actual numerical, adjectival, or color ratings is essentially inconsequential in that it does not affect the reasonableness of the judgments made in the source selection decision. General Dynamics, American Overseas Marine, B-401874.14, B-401874.15, Nov. 1, 2011, 2012 CPD ¶ 85 at 10. Given that the protester's allegations focus on the ratings assigned and constitute mere disagreement with agency's ratings, we decline to accept that these protest grounds were clearly meritorious.

Imagine One also challenged the agency's cost realism analysis. Specifically, Imagine One argued that it was irrational for the agency to upwardly adjust some of its proposed labor rates because these rates reflect what it was actually paying to incumbent employees.³ Protest at 14-15. In its report, the agency explained its methodology for performing its cost realism analysis and defended the upward adjustments to Imagine One's proposal. See AR at 26-32. Indeed, the agency cited to our decision resolving a protest against the award of the incumbent contract to Imagine One, noting that we found reasonable the agency's upward adjustment to some of Imagine One's proposed labor rates despite the fact that it provided certified payroll records to demonstrate that the rates proposed were actually being paid to current employees. Id. at 31 citing Wyle Laboratories, Inc., B-407784, Feb. 19, 2013, 2013 CPD ¶ 63 at 7-9. On this record, we do not find the grounds raised in the initial protest were clearly meritorious.

Undue Delay

³ Imagine One also generally argued that the cost realism analysis was unreasonable insofar as the agency determined Precise's lower proposed costs were realistic. Protest at 15. After reviewing the agency report, Imagine One raised additional specific challenges to the agency's cost realism analysis of Precise's proposal. Comments at 16-21. Since the agency took corrective action prior to filing a supplemental agency report, and therefore has not responded to these allegations, we cannot say that these allegations are clearly meritorious. We also note that the agency has since refuted that these allegations have any merit. See Response to Request for Costs at 14-21.

In its supplemental protest, Imagine One raised new challenges to the agency's evaluation of Precise's proposal under the staffing and personnel subfactor. In response to the supplemental protest grounds, the agency notified our Office that it intended to "re-evaluate the Key Personnel sections of the initial proposals... [and] review other allegations raised, as necessary." Notice of Corrective Action at 1. Taking this action, rather than filing a supplemental agency report responding to the new allegations, constitutes the prompt action that our protest procedures contemplate.

Imagine One argues that there is a nexus between its initial and supplemental protest grounds and that the challenges raised in its initial protest to the evaluation of Precise's key personnel "forecasted" each of the supplemental protest grounds raised in its comments on the agency report. Reply to Response to Request for Costs at 3-6. Imagine One therefore argues that the agency's corrective action in response to the supplemental protest was unduly delayed. While we recognize that Imagine One could not have raised with any degree of specificity the supplemental protest grounds set forth in its comments prior to gaining access to the procurement record, the protester has failed to demonstrate that its initial challenges to the agency's evaluation of Precise's proposal provided a clearly meritorious basis to sustain the protest. Accordingly, the agency's corrective action was not unduly delayed here because it was taken in response to new protest grounds first raised in the supplemental protest and prior to the agency filing a supplemental agency report addressing those grounds.

The request for costs is denied.

Susan A. Poling
General Counsel