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Decision

Matter of: Hewlett Packard Enterprise Company--Costs

File: B-413444.3

Date: March 3, 2017

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Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's request for reimbursement of protest costs is granted where the agency unduly delayed taking corrective action in response to a clearly meritorious challenge regarding the evaluation of the realism of offerors' prices.
 2. Reimbursement of costs is not recommended for protest arguments that are not clearly meritorious and relied upon distinct and unrelated factual and legal bases.
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DECISION

Hewlett Packard Enterprise Company (HPEC), of Herndon, Virginia, requests that our Office recommend that it be reimbursed the reasonable costs of filing and pursuing its protests (B-413444, B-413444.2) challenging the award of a contract to IronBrick Associates, of Vienna, Virginia, under request for proposals (RFP) No. W91RUS-16-R-0002, which was issued by the Department of the Army, Army Materiel Command, for information technology support services. HPEC argues that it is entitled to reimbursement of its protest costs because the agency unduly delayed taking corrective action in response to its clearly meritorious protests.

We grant in part and deny in part the request.

BACKGROUND

The RFP was issued on December 21, 2015, and sought proposals for support of the Global Enterprise Fabric, which is a cloud enterprise environment that will

provide the Army a complete suite of computing enterprise services under three broad areas: infrastructure as a service, network services, and computer network defense. RFP at 3. The solicitation anticipated the award of a fixed-price contract for the delivery of required products and associated monthly services. Award was to be made to the offeror that submitted the lowest-priced, technically acceptable proposal. Id. at 40. The RFP stated that prices would be evaluated as follows: “[The agency] shall evaluate the offeror’s understanding of the [statement of objectives] technical requirements and the risk associated with the offeror’s technical [proposal]. Offeror[s] may be required to provide documentation supporting the realism of costs proposed.” Id. at 41.

The Army received proposals from 13 offerors by the closing date of May 27, 2016. The agency concluded that three of the offerors, including HPEC and IronBrick, submitted acceptable proposals. Agency Report (AR), Tab 14, Source Selection Decision Document (SSDD), at 2.¹ The agency found that IronBrick offered the lowest price, and HPEC offered the second-lowest price. Id. The Army therefore selected IronBrick’s proposal for award. Id. at 3.

HPEC received a post-award debriefing and filed a protest with our Office (B-413444) on July 25 challenging the award to IronBrick. The protester argued that the awardee’s proposal took exception to a material solicitation requirement, which rendered its proposal technically unacceptable, and that the agency failed to reasonably evaluate the realism of the awardee’s proposed price. Protest (B-413444) at 10-16.

Prior to the time for filing the agency report, the Army requested that we dismiss the price realism argument because, in the agency’s view, the RFP did not require such an evaluation. See Agency Request for Dismissal (Aug. 12, 2016) at 4. We declined to dismiss the argument, concluding that the issue of whether the solicitation required the agency to evaluate the realism of proposed prices was a matter to be decided on the merits, and was therefore not appropriate for dismissal. GAO Email (Aug. 18, 2016). The Army also requested that we dismiss HPEC’s challenge to the acceptability of the awardee’s proposal. Our Office dismissed this

¹ References to the agency report are to the documents provided by the agency in response to the initial protests (B-413444, B-413444.2), this request for a recommendation for reimbursement of its protest costs in connection with the first two protests (B-413444.3), and the protester’s challenge to the agency’s corrective action (B-413444.4, B-413444.5), which was addressed by our Office in Hewlett Packard Enterprise Co., B-413444.4, B-413444.5, Jan. 18, 2017, 2017 CPD ¶ 29.

argument on August 18, concluding that it failed to state a valid basis of protest.² Id. (citing Bid Protest Regulations, 4 C.F.R. §§ 21.1(c)(4), 21.1(f), 21.5(f)).

The Army filed its report on the protest on August 24, and HPEC filed its comments on the agency report on September 6. The protester's comments included a supplemental protest (B-413444.2) challenging the awardee's compliance with the RFP's technical proposal page limit. Protester's Comments & Supp. Protest (Sept. 6, 2016) at 18-23.

On September 15, the Army filed a supplemental report which responded to the supplemental protest and also provided additional arguments concerning the protester's challenge to the evaluation of price. On September 20, our Office conducted a conference call to address the protester's request for additional documents regarding the agency's evaluation of price. We requested that the agency either provide additional documents substantiating its price evaluation, or acknowledge that such documents did not exist. We also established a due date of September 23 for the protester's and intervenor's comments on the supplemental agency report.

On September 22, the Army advised our Office that it would take corrective action in response to the protest. The agency stated that it would "conduct discussions with the technically-acceptable offerors, request revised price proposals compliant with the terms of the solicitation from those offerors, re-evaluate and issue an award decision." Notice of Corrective Action (Sept. 22, 2016) at 1. Based on the agency's notice, we dismissed the protest as academic on September 23.

On October 5, the Army advised IronBrick and HPEC that their proposals "did not provide the required Labor spreadsheet as required in Section L, Paragraph 5" of the RFP, and requested that the offerors submit the spreadsheets. AR, Tab 24a, Letter to HPEC (Oct. 5, 2016), at 1; Tab 24b, Letter to IronBrick (Oct. 5, 2016), at 1. Offerors were not permitted to revise their proposed prices.

On October 11, HPEC filed this request (B-413444.3) seeking a recommendation from our Office that the Army reimburse the protester's costs of filing and pursuing its protest concerning the award to IronBrick. On October 12, HPEC filed a protest (B-413444.4) with our Office challenging the terms of the corrective action, arguing that the agency's request for revisions to the price proposals was inadequate to

² HPEC argued that IronBrick's proposal took exception to the RFP's requirement to provide certain software licenses. Protest (B-413444) at 10-14. The record provided by the parties in connection with the request for dismissal showed that the awardee's proposal did not take exception to this requirement. GAO Email (Aug. 18, 2016); see Intervenor's Request for Dismissal (Aug. 15, 2016), at 3-4.

address the issues raised in the initial protest, and therefore did not constitute adequate corrective action. On October 27, the Army filed its response to the request for a recommendation of reimbursement. On November 7, HPEC filed a supplemental protest (B-413444.5) challenging the corrective action, arguing that the agency's October 27 response demonstrated that the agency failed to evaluate the realism of the proposed prices in connection with the initial award, which in turn shows that the agency will not properly evaluate prices during the corrective action.

On January 18, 2017, we dismissed in part and denied in part the challenge to the corrective action. Hewlett Packard Enter. Co., B-413444.4; B-413444.5, supra. Specifically, we dismissed as premature the protester's argument that the agency might not conduct a reasonable price realism analysis during its corrective action, and denied the protester's argument that the agency unreasonably concluded that the offerors' price proposals were unacceptable and required revision through discussions. Id. at 4-7.

DISCUSSION

HPEC contends that it should be reimbursed the costs of pursuing its protests (B-413444, B-413444.2) challenging the evaluation of IronBrick's proposed price because the Army failed to take prompt corrective action in response to its clearly meritorious arguments. The protester also argues that it should be reimbursed the costs associated with its other protest arguments concerning the acceptability of the awardee's technical proposal and the awardee's adherence to the RFP's proposal page limit. The agency responds that the protester's arguments concerning the price evaluation were not clearly meritorious. The agency also argues that the other protest grounds are not clearly meritorious and are also severable from the price evaluation arguments. For the reasons discussed below, we agree that the protester should be reimbursed its protest costs with regard to the agency's price evaluation; we find no basis to recommend that the protester be reimbursed for any other costs.

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. 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. Alsalam Aircraft Co.--Costs, B-401298.3, Nov. 5, 2009, 2009 CPD ¶ 208 at 3. We will also recommend reimbursement only where the underlying protest is 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.

Price Realism Evaluation

When awarding a fixed-price contract, an agency is generally only required to determine whether the offered prices are fair and reasonable. Federal Acquisition Regulation § 15.402(a). An agency may, however, conduct a price realism analysis in awarding a fixed-price contract for the limited purposes of assessing whether an offeror's low price reflects a lack of technical understanding or performance risk. Id. § 15.404-1(d)(3); Emergint Techs., Inc., B-407006, Oct. 18, 2012, 2012 CPD ¶ 295 at 5-6. Even where a solicitation does not expressly require a price realism evaluation, we will conclude that such an evaluation is required where the RFP states that the agency will review prices to determine whether they are so low that they reflect a lack of technical understanding, and advises offerors that the agency could reject proposals or assign technical risk based on this evaluation. DynCorp Int'l, LLC, B-407762.3, June 7, 2013, 2013 CPD ¶ 160 at 9; GlobalOpal, LLC, B-408414.7, B-408414.8, Mar. 19, 2014, 2014 CPD ¶ 140 at 4.

HPEC argues that the RFP provided for a price realism evaluation. We agree. As discussed above, the RFP stated that the Army would evaluate offerors' prices as follows: "[The agency] shall evaluate the offeror's understanding of the [statement of objectives] technical requirements and the risk associated with the offeror's technical [proposal]. Offeror[s] may be required to provide documentation supporting the realism of costs proposed." RFP at 41. The RFP also provided the following ratings to be assigned to offerors' proposals for the price evaluation factor:

Rating	Description
Acceptable	Price of the offeror's technical proposal demonstrates an understanding of the technical requirements, and the Government has a reasonable expectation the offeror will successfully perform the required effort, submitted proposal costs is not a false economy.
Unacceptable	Price of the offeror's technical proposal does not demonstrate [an] understanding of the technical requirements, and the Government has no reasonable expectation the offeror will successfully perform the required effort, submitted proposal prices are a false economy.

Id. at 41-42.

Here, the RFP clearly stated that the price evaluation would evaluate the offeror's understanding of the technical requirements and the risk associated with the offeror's technical proposal. RFP at 41. The RFP further provided that the assessment of whether the price reflects an understanding of the technical requirements would determine whether the price was acceptable or unacceptable. We therefore conclude that the solicitation language obligated the agency to evaluate the realism of offerors' proposed prices. DynCorp Int'l, LLC, supra; GlobalOpal, LLC, supra.

The Army argues that, even if the RFP required a price realism analysis, its evaluation of offerors' proposed prices satisfied such a requirement. HPEC argued, and we agree, that the record does not support the agency's argument.

Three documents in the record provided by the agency address the evaluation of price: (1) a price evaluation memorandum, AR, Tab 13a; (2) a fair and reasonable price determination memorandum, id., Tab 13b; and (3) the SSDD, id., Tab 14. The price evaluation memorandum recited the evaluation standard set forth in the solicitation, and concluded that HPEC's and IronBrick's proposed prices were "acceptable." AR, Tab 13a, Price Evaluation Memorandum, at 2-4. This memorandum, however, did not specifically address the realism of the offerors' prices, or otherwise explain why the agency concluded that the prices were acceptable. See id. at 3-4. Instead, for each offeror, there was simply a notation that its proposed price was acceptable, not evaluated, or not the lowest price. Id. at 3-5. The fair and reasonable price determination memorandum stated that HPEC's and IronBrick's proposed prices were fair and reasonable and also stated that the awardee's price was higher than the independent government cost estimate (IGCE) due to technical advances and upgrades in the current market, but did not address the realism of the prices. AR, Tab 13b, Fair and Reasonable Price Determination Memorandum, at 2. The SSDD stated that HPEC's and IronBrick's proposals were acceptable under the price factor, but did not provide any details beyond the rating. AR, Tab 14, SSDD, at 2.

The Army's response to the protest also included a statement by a contract specialist, who stated that the agency evaluated the realism of offerors' prices as follows: "[the evaluators] cross-walked the price proposal and technical proposal of the lowest priced of the technically acceptable offerors (IronBrick) to determine if the price of the LPTA offeror's technical proposal demonstrated an understanding of the technical requirements of the solicitation." AR, Tab 16, Decl. of Contract Specialist (Aug. 23, 2016) at 2. The contract specialist stated that he relied on available "market research information available . . . to determine that [IronBrick's] price was consistent with their technical solution." Id. The contract specialist also stated that he "determined that IronBrick's proposed prices/costs were not a 'false economy' based on [his] comparison of IronBrick's proposal to information obtained from market research, the Independent Government Cost Estimate (IGCE) and

utilizing the technical expertise from the Technical Experts within the Requiring Activity.” Id.

Aside from the general statements that the agency conducted a cross-walk analysis and considered market research and the IGCE, the declaration did not provide any details regarding the analysis described in the declaration.³ For example, the declaration did not explain what aspects of the awardee’s proposal were considered, or describe the technical expertise upon which the contract specialist states he relied. As discussed above, our Office requested that the Army provide documentation supporting its price evaluation, such as the cross-walk analysis and the market research supporting the IGCE. The Army did not provide the requested information, and instead advised our Office that it would take corrective action in response to the protest.

Based on the record here, we conclude that neither the contemporaneous record nor the agency’s response to the protest provides a basis to find that the agency reasonably evaluated the realism of the offerors’ prices. In the absence of such a record, we conclude that the protester’s argument was clearly meritorious. See Solers Inc., B-409079, B-409079.2, Jan. 27, 2014, 2014 CPD ¶ 74 at 9-10 (protest sustained where the “inadequacies of the contemporaneous record” preclude finding that the agency’s price evaluation was reasonable); Eagle Home Med. Corp.--Costs, B-299821.3, Feb. 4, 2008, 2008 CPD ¶ 41 at 4-5 (reimbursement of costs recommended where the lack of an adequate record demonstrates that the protest was clearly meritorious).

³ In reviewing an agency’s evaluation, we do not limit our consideration to contemporaneously-documented evidence, but instead consider all the information provided, including the parties’ arguments, explanations, and any hearing testimony. Remington Arms Co., Inc., B-297374, B 297374.2, Jan. 12, 2006, 2006 CPD ¶ 32 at 10. While we accord greater weight to contemporaneous source selection materials as opposed to judgments made in response to protest contentions, post-protest explanations that provide a detailed rationale for contemporaneous conclusions, and simply fill in previously unrecorded details, will generally be considered in our review of the rationality of selection decisions--so long as those explanations are credible and consistent with the contemporaneous record. NWT, Inc.; PharmChem Labs., Inc., B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158 at 16 (citing Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15). Here, we find that the post-protest statement filed by the Army did not provide any meaningful detail regarding the evaluation of the offerors’ prices, and the agency did not provide a record which supported the post-protest statements.

The Army additionally argues that, even if HPEC's protest concerning the evaluation of price was clearly meritorious, reimbursement of the protester's costs is not warranted because the agency took corrective action for a different reason. Specifically, the agency states that it took corrective action to address the failure by the protester and the intervenor to address its concern that "none of the technically acceptable offerors had submitted a price proposal which complied with the requirements of Section L, Paragraph 5 of the solicitation." Memorandum of Law (B-413444.3) at 3.⁴

In our decision addressing HPEC's challenge to the agency's corrective action, we agreed with the Army that its basis for taking corrective action was reasonable. Hewlett Packard Enter. Co., B-413444.4; B-413444.5, supra at 5-6. However, even if the agency had a valid independent basis for taking corrective action, the record still shows that the protester's arguments concerning price realism were clearly meritorious. The Army's conclusion that the offerors who submitted otherwise technically acceptable proposals did not submit acceptable price proposals meant, at best, that the agency was required to grant the relief sought by the protester, i.e., an opportunity for offerors to submit proposal revisions and the agency's commitment to conduct a new evaluation and make a new award decision. Therefore, the agency's additional basis for taking corrective action does not affect our conclusion that the agency failed to take timely corrective action in response to the protester's clearly meritorious arguments concerning the evaluation of price.

Other Protest Arguments

Next, HPEC argues that it should be reimbursed the costs of all of its protest arguments, including those that we find are not clearly meritorious, because the allegations are not severable. The protester argued that IronBrick's technical proposal took exception to a material solicitation requirement and that the agency failed to recognize that the awardee's proposal exceeded the RFP's proposal page limit. For the reasons discussed below, we do not recommend reimbursement of the costs of pursuing these arguments.

As a general rule, a successful protester should be reimbursed the costs incurred with respect to all the issues pursued, not merely those upon which it has prevailed. The Salvation Army Cmty. Corr. Program--Costs, B-298866.3, Aug. 29, 2007, 2007 CPD ¶ 165 at 7. In appropriate cases, however, 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

⁴ The RFP required offerors' price proposals to "include a spreadsheet in the contractor's own format that details the labor calculation of its proposed monthly fixed prices for services." RFP at 40.

successful issues as to essentially constitute a separate protest. Burns & Roe Servs. Corp.--Costs, B-310828.2, Apr. 28, 2008, 2008 CPD ¶ 81 at 3.

As discussed above, we dismissed the protester's challenge to the evaluation of the awardee's technical proposal because it failed to state a valid basis. GAO Email (Aug. 18, 2016). With regard to the proposal page limit argument, HPEC argued that IronBrick's proposal included a website reference which allowed the awardee to present information in excess of the RFP's limit of 10 pages for technical proposals. RFP at 36; Protester's Comments & Supp. Protest (Sept. 6, 2016) at 18-23 (citing AR, Tab 10, IronBrick Technical Proposal, at 4). The Army's supplemental report in response to this argument included a statement from an information technology (IT) specialist supervisor who explained that the evaluators were provided hard copies of the proposals, did not have access to the internet during the evaluation of technical proposals, and that the evaluators were instructed not to conduct independent research regarding the offerors' proposals. AR, Tab 19, Decl. of IT Specialist Supervisor (Sept. 15, 2016), at 1-2. Because the agency took corrective action prior to the time for the protester to file its comments on the supplemental report, the protester did not have an opportunity to address the agency's defense to the argument. Based on the available record, however, we find no basis to conclude that this argument was clearly meritorious, *i.e.*, lacked a defensible legal position. See First Fed. Corp.--Costs, B-293373.2, Apr. 21, 2004, 2004 CPD ¶ 94 at 2.

We conclude that both of these additional arguments are severable from the price realism argument. In this regard, the facts and legal theories associated with the material exception and proposal page limitation arguments are so distinct from the price realism argument as to constitute separate and unrelated protests. See Lockheed Martin Corp.; Northrop Grumman Sys. Corp.--Costs, B-410719.8, B-410719.9, Dec. 12, 2016, 2017 CPD ¶ 8 at 9-10. For this reason, we do not recommend that the Army reimburse HPEC's costs of pursuing these two arguments.

CONCLUSION AND RECOMMENDATION

We recommend that the Army reimburse HPEC's costs for filing and pursuing its protest challenging the agency's evaluation of the realism of offerors' proposed prices in connection with its protests (B-413444, B-413444.2). HPEC should submit its certified claim, detailing the time spent and costs incurred, directly to the agency within 60 days of its receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The request is granted in part and denied in part.

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General Counsel