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Decision

Matter of: Protection Strategies, Inc.

File: B-414573.3

Date: November 9, 2017

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DIGEST

GAO recommends reimbursement of protest costs where the agency unduly delayed taking corrective action in response to a clearly meritorious protest that objected to the agency's source selection determination as failing to adequately document consideration of the underlying merits of offerors' proposals; reimbursement is not recommended with regard to other protest grounds where those grounds are severable from the successful protest ground.

DECISION

Protection Strategies, Inc. (PSI), of Oak Ridge, Tennessee, requests that our Office recommend that the United States Securities and Exchange Commission (SEC) reimburse its costs of filing and pursuing its protest of the establishment of a blanket purchase agreement (BPA) with PAE Professional Services, Inc., of Arlington, Virginia, under request for quotations (RFQ) No. SECHQ1-16-Q-0109, for background investigative and adjudication services.

We grant the request in part and deny it in part.

BACKGROUND

The RFQ provided for the establishment of a BPA against the successful vendor's Federal Supply Schedule (FSS) contract in accordance with Federal Acquisition Regulation (FAR) § 8.405-2. Agency Report (AR), Tab 4, RFQ amend. 1, at 1. The purpose of the BPA was to provide services and deliverables to the SEC's Office of

Security Services in the administration, operations, control, processing, and adjudication of background investigations. Id. The RFQ contemplated a period of performance comprised of a base year and four option years. Id.

The RFQ stated that the BPA would be established with the vendor offering the best value to the government, considering price and three non-price factors (in descending order of importance): technical approach and understanding, management approach and capabilities, and past performance. Id. at 2, 13. The non-price factors, when combined, were to be considered significantly more important than price. Id. at 13.

With respect to past performance, the RFQ stated that, “[t]he Quoter shall identify three (3) current/previous contracts/task orders with the Federal Government that demonstrate recent and relevant past performance. . . . Relevant is defined as work similar in complexity and magnitude to the work identified in the SOW [statement of work].” Id. at 3. The RFQ also stated that the government would consider information obtained from references provided by the vendor, as well as other recent, relevant past performance and/or information obtained from other sources known to the government, such as the Past Performance Information Retrieval System. Id. at 4.

With respect to price, the RFQ required vendors to complete two tables. In Table 1 vendors were required to map five labor categories to the labor categories listed in their FSS contracts and list the FSS labor rates and any discounts. Id., Table 1, Labor Categories and Rate Table. Table 2 listed the labor categories and the number of personnel and estimated hours required for each labor category (estimated level of effort).¹ Id., Table 2, Total Price. For each labor category, total onsite pricing was to be calculated. Id. The RFQ stated that the vendor’s pricing would be evaluated against the government’s estimated level of effort and advised vendors that unrealistically low prices may be rejected. RFQ amend. 1, at 14.

The SEC received six quotations, including those of PSI and PAE. AR, Tab 16, Best-Value Award Memorandum, at 3. After evaluating quotations and engaging in

¹ Table 2 identified three personnel security assistants, two personnel security specialist I positions, one personnel security specialist II position, one investigative analyst I position, and one program manager. RFQ amend. 1, Table 2, Total Price.

discussions, the technical evaluation team assigned the following adjectival ratings to the two vendors:²

	PSI	PAE
Technical Approach and Understanding	Acceptable	Outstanding
Management Approach and Capabilities	Acceptable	Outstanding
Past Performance	Neutral	Outstanding
Overall Rating	Acceptable	Outstanding
Price	\$3,647,663	\$3,944,505

Id. at 5, 6.

PSI's quotation was assigned five strengths and no weaknesses under the technical approach and understanding factor and three strengths, one significant strength, and no weaknesses under the management approach and capabilities factor. AR, Tab 13, Final Technical Evaluation Report, at 7. The technical evaluation team assigned PSI a neutral rating under the past performance factor because only one of the three past performance contracts it submitted appeared to involve similar services to those required under the RFQ's statement of work. Id. PAE's quotation was assigned four significant strengths under the technical approach and understanding factor and two strengths and five significant strengths under the management approach and capabilities factor. Id. at 5-6. The technical evaluation team assigned PAE an outstanding rating under the past performance factor because all three of its past performance submissions involved similar services to those required under the RFQ. Id. at 6.

In making the award decision, the contracting officer, who was also the selection official, recognized that PSI's price was \$297,000 less than PAE's, but concluded that PAE offered the best value because PAE's technical quotation far surpassed PSI's. AR, Tab 16, Best-Value Award Memorandum, at 8. The award memorandum included a detailed discussion of the many outstanding features of PAE's quotation. Id. With respect to the merits of PSI's quotation, the award memorandum stated only that PSI's technical rating was two categories below PAE's. Id. On this basis, the contracting officer selected PAE for establishment of the BPA. Id. at 10.

Upon receiving notice of the agency's decision, PSI protested to our Office. In its initial protest, PSI argued that its quotation should have received an outstanding rating under the technical approach and understanding factor and that the agency's tradeoff decision was flawed because it failed to justify paying a price premium. Protest at 6, 7. After receiving the agency report, PSI filed a supplemental protest with its comments, in

² The RFQ did not define the adjectival ratings.

which it argued that the best-value determination unreasonably focused on differences in adjectival ratings. Protester's Comments & Supp. Protest at 16. In addition, PSI challenged the assignment of a neutral rating for its past performance and the evaluation of PAE's and its quotations under the management approach and capabilities factor. Id. at 6-7, 10-16. PSI also challenged the SEC's price evaluation, arguing that the agency failed to conduct and document a price realism analysis and that the agency failed to evaluate PAE's proposed pricing against the agency's estimated level of effort, as required by the RFQ. Id. at 3-5. In this regard, PSI argued that PAE proposed fewer personnel and level of effort than required under the solicitation. Id. at 4.

After the SEC filed its supplemental report and PSI filed its supplemental comments, the GAO attorney assigned to the protest convened a conference call with the parties. During the conference call, the GAO attorney asked the SEC to provide additional information concerning the adjectival ratings assigned to the vendors' quotations and to explain how the language in the solicitation permitted vendors to change the level of effort in the pricing table. The GAO attorney also provided her view of the litigation risk of each party.³ Subsequent to the conference call, the SEC advised our Office that it was terminating PAE's BPA and canceling the RFQ. SEC Letter, July 7, 2017. As a result, we dismissed PSI's protest as academic. Protection Strategies, Inc., B-414573, B-414573.2, July 11, 2017 (unpublished decision).

DISCUSSION

PSI requests that we recommend that the SEC reimburse it for the costs of filing and pursuing its protest, arguing that the agency unduly delayed taking corrective action in response to PSI's clearly meritorious protest. The agency asserts that it did not unduly delay taking corrective action and that none of the protest grounds were clearly meritorious.

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

³ Litigation risk alternative dispute resolution may be appropriate in situations where the record has been sufficiently developed to allow the GAO attorney to assess the validity of each side's arguments and provide feedback. See Bid Protest Regulations, 4 C.F.R. § 21.10(e). While an assessment of litigation risk does not involve a prediction of the overall outcome, the GAO attorney will discuss the likely analysis of the case and will provide his or her assessment of the strengths and weaknesses of each side's position. With a better understanding of the GAO attorney's views of each side's arguments, the parties may be in a better position to reach a negotiated settlement, or to take other action (withdrawal of the protest or corrective action) that will resolve the protest without continuing to a final decision.

unnecessary time and resources to make further use of the protest process in order to obtain relief. Bid Protest Regulations, 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 resolved 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. Overlook Sys. Techs., Inc.--Costs, B-298099.3, Oct. 5, 2006, 2006 CPD ¶ 184 at 6. 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. Office Depot, Inc.--Costs, B-408850.2, Feb. 25, 2014, 2014 CPD ¶ 85 at 5.

Here, we conclude, based on the record before us, that one protest ground was clearly meritorious, and grant PSI’s request for reimbursement for the costs of filing and pursuing the one protest ground. For the reasons that follow, we recommend that the agency reimburse PSI its reasonable costs for filing and pursuing its allegation that the SEC’s selection decision failed to consider the underlying technical differences between offerors. However, we do not recommend the reimbursement of PSI’s costs for filing and pursuing the other allegations.

Clearly Meritorious Protest Ground

PSI contends that its challenge to the SEC’s tradeoff decision was clearly meritorious. Request for Reimbursement at 8-9. In its supplemental protest, PSI argued that the SEC’s selection decision improperly focused on the offerors’ adjectival ratings rather than on the advantages and disadvantages of the offerors’ competing quotations. Protester’s Comments & Supp. Protest at 16. The SEC states that PSI’s challenge to the award decision was not clearly meritorious because the selection official concurred with the technical evaluation report, which provided detailed comments regarding the quality of the quotations. SEC Objections to Reimbursement at 11.

Where, as here, a procurement conducted pursuant to FAR subpart 8.4 provides for award on a “best-value” tradeoff basis, it is the function of the source selection official to perform a price/technical tradeoff, that is, to determine whether one quotation’s technical superiority is worth its higher price. NikSoft Sys. Corp., B-406179, Feb. 29, 2012, 2012 CPD ¶ 104 at 7; InnovaTech, Inc., B-402415, Apr. 8, 2010, 2010 CPD ¶ 94 at 6. Moreover, under the minimum documentation requirements of FAR subpart 8.4, documentation of the source selection rationale may be limited, but it must be sufficient to show a reasonable basis for any tradeoffs. FAR § 8.405-3(a)(7)(viii); SRA Int’l, Inc.; NTT DATA Servs. Fed. Gov’t, Inc., B-413220.4 *et al.*, May 19, 2017, 2017 CPD ¶ 173 at 13.

Here, the record shows that although the best-value award memorandum discusses some of the more outstanding features in PAE’s quotation, *see, e.g.*, AR, Tab 16, Best-Value Award Memorandum, at 8-9, the award memorandum is devoid of any consideration of the strengths and significant strengths in PSI’s quotation, as would be appropriate given PSI’s lower price. With respect to PSI’s quotation, the award

memorandum simply states, "Protection Strategies' quote provided lower pricing and received an overall rating of 'Acceptable'. However, Protection Strategies' technical rating was two categories below PAE Professional Services' rating (Outstanding)." Id. at 8. Agencies are required to look behind the adjectival ratings to consider a qualitative assessment of the underlying technical differences among competing offers. In this regard, evaluation ratings, whether numerical, color, or adjectival, are merely guides for intelligent decision making, and an agency's source selection decision must rest upon a qualitative assessment of the underlying technical differences among competing offers. Tiber Creek Consulting, Inc., B-411550.4, B-411550.5, Jan. 6, 2016, 2016 CPD ¶ 15 at 6. The best-value memorandum does not demonstrate that the source selection official performed a price/technical tradeoff and looked behind the adjectival ratings to assess the underlying technical differences of PAE's and PSI's quotations.

The SEC argues that PSI's protest was not clearly meritorious because the selection official relied on the technical evaluation report, which provided sufficient documentation of a tradeoff. SEC Objections to Reimbursement at 11. Although a comparative assessment might be made in the underlying documents upon which the selection decision relies, or in the selection decision itself, it must be documented and reviewable. M7 Aerospace LLC, B-411986, B-411986.2, Dec. 1, 2015, 2016 CPD ¶ 100 at 5. Here, the final technical evaluation report contained a listing of strengths and significant strengths in the offerors' quotations, but did not contain a comparative assessment upon which the selection official could rely. The record contains no evidence of a comparative assessment. Accordingly, we conclude that this protest ground was clearly meritorious.

Other Protest Grounds

PSI also asserts that its remaining protest grounds--challenges to the adjectival ratings assigned to PSI's proposal under the technical and management approach factors, the SEC's price realism analysis with respect to PAE's proposal, and the evaluation of PSI's past performance--also were clearly meritorious. Request for Reimbursement at 3-4. Based on the record before us, we conclude that these protest allegations were not clearly meritorious. To illustrate, we discuss only a few of PSI's allegations.

In its supplemental protest, PSI argued that the SEC improperly assigned it a neutral past performance rating because the SEC found only one of its past performance references to be relevant. Protester's Comments & Supp. Protest at 12-13. In this regard, PSI asserted that the SEC's action violated FAR § 15.305, which provides that a neutral past performance rating should be assigned only in the case of an offeror without a record of relevant past performance or for whom information on past performance is not available. Id. at 13.

In reviewing a protester's challenge to an agency's evaluation of vendors' past performance, our Office does not independently evaluate quotations; rather, we review the agency's evaluation to ensure that it is reasonable and consistent with the terms of

the solicitation and applicable statutes and regulations. CSR, Inc., B-413973, B-413973.2, Jan. 13, 2017, 2017 CPD ¶ 64 at 5.

Here, the solicitation stated that, “[t]he Quoter shall identify three (3) current/previous contracts/task orders with the Federal Government that demonstrate recent and relevant past performance. . . .” but also stated that the government would consider other recent, relevant past performance and/or information obtained from other sources. RFQ amend. 1, at 3, 4 (emphasis added). Although PSI submitted three contracts to demonstrate past performance, the SEC found only one to be relevant. We have concluded in other decisions that where the solicitation requires offerors to submit a specific number of relevant past performance references and an offeror fails to do so, the agency may reasonably assign a neutral/unknown confidence rating. See, e.g., HydroGeoLogic, Inc., B-406635 et al., July 25, 2012, 2012 CPD ¶ 224 at 5; Thomas Brand Siding Co., Inc., B-286914.3, Mar. 12, 2001, 2001 CPD ¶ 53 at 4. In light of these decisions and the solicitation language, we cannot conclude that PSI’s protest was clearly meritorious.

With respect to PSI’s challenge to the evaluation of its proposal under the technical approach and understanding and management approach and capabilities factors, as well as PSI’s allegation that the SEC failed to conduct a price realism analysis of PAE’s proposal, we conclude that these protest grounds also are not clearly meritorious. As discussed above, in the conference call with the parties, the GAO attorney requested additional information from the SEC in order to further develop the record with respect to these issues. In our view, because the agency took corrective action before providing this information, the record is not complete, and provides no basis to find that these protest arguments are clearly meritorious. See Apptis Inc.--Costs, B-402146.3, Mar. 31, 2010, 2010 CPD ¶ 123 at 6; Alaska Structures, Inc.--Costs, B-298575.4, Jan. 22, 2007, 2007 CPD ¶ 15 at 6.

Undue Delay

As set forth above, our Office may recommend reimbursement of protest costs if we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. This principle is intended to prevent inordinate delay in investigating the merits of a protest and taking corrective action once an error is evident, so that a protester will not incur unnecessary effort and expense in pursuing its remedies before our Office. East Coast Nuclear Pharmacy--Costs, B-412053.5, Aug. 31, 2016, 2016 CPD ¶ 249 at 5. We generally consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest but not prompt where it is taken after that date. Alsalam Aircraft Co.--Costs, B-401298.3, Nov. 5, 2009, 2009 CPD ¶ 208 at 3.

With regard to PSI’s clearly meritorious protest ground, we find that the agency unduly delayed taking corrective action in response to this allegation. PSI first raised this allegation in its protest. The SEC elected to take corrective action in response to the GAO attorney’s conference call requesting additional information and advising the

parties of their litigation risk, which occurred after the agency submitted its reports in response to the protest and supplemental protest and after the protester submitted its comments and supplemental comments. As a result, we find that the agency's corrective action was unduly delayed. See The Jones/Hill JV--Costs, B-286194.3, Mar. 27, 2001, 2001 CPD ¶ 62 at 13 (undue delay found where agency took corrective action after litigation risk alternative dispute resolution).

Severance of Costs

A protester generally should be reimbursed its costs with respect to all issues pursued and not merely those on which it prevails. See East Coast Nuclear Pharmacy--Costs, *supra*, at 6; Focused Mgmt., Inc.--Costs, B-404029.6, Oct. 3, 2011, 2011 CPD ¶ 204 at 4. In appropriate cases, however, we have limited our recommendation for the award of costs where a part of those costs is allocable to an unsuccessful protest issue that is so clearly severable from the successful issues as to essentially constitute a separate protest. See Focused Mgmt., Inc.--Costs, *supra*. In determining whether protest issues are so clearly severable as to essentially constitute separate protests, we consider, among other things, the extent to which the issues are interrelated or intertwined--*i.e.*, the extent to which successful and unsuccessful arguments share a common core set of facts, are based on related legal theories, or are otherwise not readily severable. See Loyal Source Gov't Servs., LLC--Costs, B-407791.4, Feb. 14, 2014, 2014 CPD ¶ 139 at 3-4.

Here, the sole clearly meritorious protest ground is severable from the remaining protest grounds. The adequacy of the SEC's selection decision is distinct from PSI's other, not clearly meritorious protest grounds challenging the adjectival ratings assigned to PSI's proposal under the technical and management approach factors, the price realism analysis, and the evaluation of PSI's past performance. Resolution of these protest grounds would not involve a common set of facts or related legal theory such that they would be considered interrelated or intertwined with the protest ground that was clearly meritorious. See Loyal Source Gov't Servs., LLC--Costs, *supra*.

RECOMMENDATION

We recommend that PSI be reimbursed the costs associated with filing and pursuing its protest, including reasonable attorneys' fees, to the extent that those costs were incurred in connection with its challenge to the adequacy of the source selection decision. PSI should submit its claim for costs, detailing and certifying the time expended and costs incurred, directly to the SEC within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The request is granted in part and denied in part.

Susan A. Poling
General Counsel