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Decision

Matter of: S2 Analytical Solutions, LLC--Costs

File: B-415613.6

Date: August 28, 2018

Nicole Hardin Brakstad, Esq., and Thomas A. Coulter, Esq., O'Hagan Meyer, PLLC, for the protester.

Mason Alinger, Esq., National Geospatial-Intelligence Agency, for the agency.

Peter D. Verchinski, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's request that our Office recommend it be reimbursed the costs of filing and pursuing its protest is denied where the protest grounds were not clearly meritorious.

DECISION

S2 Analytical Solutions, LLC, of Herndon, Virginia, requests that we recommend the firm be reimbursed the costs of filing and pursuing its protest with respect to the issuance of a task order to New River Systems Corporation, of Ashburn, Virginia, under task order request for proposals (TORFP) No. 31, issued to small business contract holders under the National Geospatial-Intelligence Agency's (NGA) Emerald Program for support services for the NGA's Open Information Technology (IT) Solutions Office.

We deny the request.

BACKGROUND

On September 23, 2016, NGA awarded six indefinite-delivery, indefinite-quantity (IDIQ) small business set-aside contracts to provide total life cycle acquisition management, strategic financial management, and strategic business management support services in support of the agency's Emerald program. Combined Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 1. The TORFP here, initially issued on May 9, 2017, and then revised on May 31, 2017, provided for the award of a fixed-price, level-of-effort task order with a 1-year base period and four 1-year options. TORFP, amend. 3, at 1. The task order required offerors to furnish skilled labor to fill 64 government-defined IT service positions (plus 6 "optional" positions). TORFP, Statement of Work

(SOW), at 15-16. The 64 positions were identified by labor category and skill level. Id. The TORFP provided that the task order would be issued to the offeror whose proposal offered the best value to the government, considering price and four technical evaluation factors: resumes and skill level (government defined positions); optional positions; position ID matrix; and organizational conflict of interest (OCI) strategy. TORFP, amend. 3, at 1-4.

With regard to the resumes and skill level factor, offerors were to provide 20 resumes for certain “critical positions.” Id. at 1-2; SOW, at 15-16. The solicitation stated that, if a candidate was proposed for one of the critical positions and that candidate was a contingent hire, the offeror was required to provide a letter of intent with its proposal. TORFP, amend. 3, at 6.

With regard to price, the RFP provided:

The Government, in its sole discretion, reserves the right to conduct a price realism analysis of any offer using the techniques described in [Federal Acquisition Regulation] 15.404-1(d) to ensure that the offered prices are realistic. The results of the price realism analysis can be used in performance risk assessments and responsibility determinations. Offered prices shall not be adjusted as a result of a price realism analysis. The Government is not required to conduct a price realism analysis on any or all proposals, but may do so if it determines in its sole discretion to conduct such an analysis.

TORFP, amend. 3, at 4.

On June 16, 2017, the agency received timely proposals from 5 of the 6 Emerald contract holders. COS/MOL at 2. The agency conducted discussions and received revised proposals. The protester’s and awardee’s final proposals were evaluated as follows:

	New River	S2
Resumes and Skill Level	Good	Outstanding
Optional Positions	Pass	Pass
Position ID Matrix	Pass	Pass
OCI Strategy	Pass	Pass
Overall Technical Rating	Good	Outstanding
Price	\$59,909,570	\$82,112,084

COS/MOL at 8. The agency determined that New River’s proposal offered the best value to the government, and the agency made award to New River on September 29. Following a written debriefing, S2 protested the award to this Office on October 24, 2017.¹ Protest at 5, 8.

In its protest, S2 alleged that: (1) the agency failed to perform a proper price realism analysis of New River’s proposal; (2) the agency improperly evaluated one of S2’s resumes for a critical position; (3) the agency improperly made award on a lowest-priced, technically-acceptable basis; (4) the agency’s improper technical evaluation resulted in a flawed best-value award decision; and (5) the agency used an improper adjectival evaluation scheme to rate the offerors’ proposals.

On November 21, 2017, the agency filed its agency report in response to S2’s protest. In its report, the agency argued that each of the protest grounds was without merit. COS/MOL at 1-19. The protester timely filed its comments on the agency’s report on December 1. Protester’s Comments, at 1-18. The protester continued to allege that each of its protest grounds was meritorious. Protester’s Comments at 1-17.

On December 5, 2017, the agency requested the opportunity to respond to the protester’s comments. Specifically, the agency requested the opportunity to respond to what was, in its view, “additional allegations regarding the reasonableness of the agency’s consideration of [New River’s] price proposal.” Agency Email to GAO, Dec. 5, 2017 (10:21 a.m.). Thus, on December 6, 2017, the agency provided its response to

¹ On the same date, a second disappointed offeror, WiSC Enterprises, LLC, filed a protest with our Office (B-415613, B-415613.4). Furthermore, the task order at issue was valued in excess of \$25 million; therefore, our Office had jurisdiction to hear the protests. 10 U.S.C. § 2304c(e)(1)(b).

the protester's comments. Two days later, the protester provided its comments on the agency's December 6 submission. Protester's Supp. Comments, at 1-6

By letter dated December 11, the agency notified our Office of its intent to take corrective action, stating that the agency had learned of "new information" providing "reason to question the representations made in the awardee's final proposal revision regarding the candidates the Offeror proposed for performance on Emerald Task Order #31."² Agency Corrective Action Letter, Dec. 11, 2017, at 1. The agency further stated that "[s]eparately, post-award business practices have called into question the integrity of the procurement process." Id. The agency explained that it would terminate the award of the task order to New River, and, as appropriate, revise the requirement, request updated proposals, conduct a new evaluation, and make a new source selection decision. Id.

Based on the agency's corrective action, our Office dismissed S2's protest as academic on December 15, 2017. S2 then timely submitted this request for a recommendation that it be reimbursed its protest costs.

DISCUSSION

S2 requests that we recommend that the agency reimburse S2's costs of filing and pursuing its protest as the agency unduly delayed taking corrective action in the face of its clearly meritorious protest. NGA responds that it did not take corrective action based on any allegation raised in S2's protest, and further alleges that S2's allegations contain no merit.

Our Bid Protest Regulations provide that where an agency takes corrective action in response to a protest, our Office may recommend that the agency pay the protester its reasonable costs of filing and pursuing the protest. 4 C.F.R. § 21.8(e). However, our Regulations do not contemplate a recommendation for the reimbursement of protest costs in every case where an agency takes corrective action, but rather only where an agency unduly delays taking corrective action in the face of a clearly meritorious protest. Information Ventures, Inc.--Costs, B-294580.2 et al., Dec. 6, 2004, 2004 CPD ¶ 244 at 2. 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. Id. The fact that an agency decides to take corrective action does not necessarily establish

² As stated above, a second disappointed offeror, WiSC Enterprises, LLC, protested the award in this procurement. Rather than file a supplemental agency report responding to the allegations raised by WiSC in its comments, the agency announced its intention to take corrective action in this procurement.

that the protest was clearly meritorious, let alone that a statute or regulation has clearly been violated. Yardney Technical Prods., Inc.--Costs, B-297648.3, Mar. 28, 2006, 2006 CPD ¶ 65 at 4.

Based on our review of the record, we find that none of S2's protest allegations was clearly meritorious. Although we discuss only a representative example of the allegations, we have reviewed each of the arguments, and find no basis to grant the request.

Price Realism

S2 alleged that the agency failed to perform a proper price realism analysis. While the protester acknowledges that the terms of the solicitation did not require the agency to perform such an analysis, it did allow for one. S2 maintains that, in accordance with prior GAO decisions, if an agency chooses to perform a price realism analysis--even when it is not required, but is instead optional--the agency must perform a proper analysis.³ The protester argues that, here, the record shows the agency engaged in a price realism analysis when it considered whether the awardee's prices were too low. Specifically, the agency conducted an analysis when it raised the issue of New River's discounted pricing during discussions, considered New River's response, and compared offerors' prices to each other and to the independent government estimate during its price evaluation. Protest at 11-12. The protester argues that this analysis constituted a price realism analysis and that this analysis was improper because the agency accepted New River's explanation for its low price "at face value without any independent analysis." Protester's Comments at 6.

The agency argued in response that, under the terms of the solicitation, it was not required to perform a price realism analysis, and, in fact, did not perform such an analysis. COS/MOL at 10. Rather, the agency explains that it informed New River during discussions that New River's price included discounts and asked New River to "confirm" that the firm "can provide the proposed candidates at the required skill levels at the proposed discounted rates for this task order." Id. (quoting Agency Report (AR), Tab 4a, New River Discussions Letter, Aug. 15, 2017, at 2). The agency further explains that it considered New River's response, which provided the firm's explanation for its discounted prices, and found the response to be reasonable. COS/MOL at 11. Given this explanation for New River's pricing, the agency determined that a "price realism analysis of proposals was not warranted."⁴ Id.

³ The protester points to decisions such as Next Tier Concepts, Inc.; Maximus Fed. Servs. Inc., B-414337, B-414337.2, May 15, 2017, 2017 CPD ¶ 161.

⁴ The agency also argues in the alternative that, if "the agency was found to have opened the door to a price realism analysis," then the agency's conduct was proper. COS/MOL at 11 n.2.

On this record, S2's claim that NGA failed to perform a proper price realism analysis is not clearly meritorious. Even if we agreed with the protester that the agency's actions constituted a price realism evaluation, these same actions demonstrate that the agency's analysis was sufficient. See Flight Safety Servs. Corp., B-403831, B-403831.2, Dec. 9, 2010, 2010 CPD ¶ 294 (finding that where agency recognized that awardee's price was low compared to other offerors, raised this issue with the awardee in discussions, considered the awardee's response, found the response to be reasonable and declined to reject the awardee's proposal, was sufficient to satisfy the RFP's requirement to provide a price realism analysis); see generally Arch Sys.; KEN Consulting, Inc., B-415262, B-415262.2, Dec. 12, 2017, 2017 CPD ¶ 379 at 7-9 (finding that agency's price realism analysis, as defined by the Federal Acquisition Regulation, was sufficient). While S2 asserts that a proper price realism analysis requires a more in-depth examination of New River's pricing, for example, by determining whether the awardee's individual rates were "realistic and in line with the market rates," nothing in the RFP required such a probing inquiry here. Protester's Comments at 8; see id. (providing that the depth of an agency's price realism evaluation is matter within the agency's discretion).

In determining whether to recommend the reimbursement of costs, we need not definitively resolve whether the protest grounds were meritorious; rather, we must determine whether they were clearly meritorious--that is, that they did not present close questions for which there was no defensible legal position. Triple-Canopy, Inc.--Costs, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 4. The allegations raised by S2 in its protest do not meet the high bar set by the clearly meritorious standard. Since none of S2's allegations were clearly meritorious, and despite the fact that the agency decided to take corrective action after filing its agency report, we do not recommend that the agency reimburse S2 the cost of filing and pursuing its protest.⁵

The request for reimbursement of costs is denied.

Thomas H. Armstrong
General Counsel

⁵ As another example, the protester maintained that the agency improperly awarded the task order on a lowest-priced, technically-acceptable basis. However, the record demonstrated that the agency conducted a detailed assessment of the relative merits of each proposal, including the respective prices of the offerors, and specifically evaluated the merits of New River's proposal compared to S2's. AR, Tab 9a, Source Selection Decision Document, at 1-21. Based on the record, we reject S2's contention that this protest ground was clearly meritorious.