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Decision

Matter of: Columbia Ancillary Services, Inc.

File: B-416800.4

Date: January 21, 2020

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DIGEST

Request for recommendation that agency reimburse costs of two sequential protests because agency failed to address issues alleged in first protest is denied because the agency promptly proposed corrective action in response to the second protest on the basis of new information not available to it during the pendency of the first protest.

DECISION

Columbia Ancillary Services, Inc., a small business of Houtzdale, Pennsylvania, requests that our Office recommend that it be reimbursed the costs of filing and pursuing two protests of the decision to set aside a procurement for service-disabled veteran-owned small businesses (SDVOSBs) by the Department of Veterans Affairs (VA) to acquire durable medical equipment (DME) and related services. The protester alleges that the agency unduly delayed taking corrective action in response to a clearly meritorious protest because the agency's corrective action taken in response to Columbia's first protest did not effectively resolve its protest issues, forcing it to protest the procurement a second time on the same grounds.

We deny the request.

BACKGROUND

On August 20, 2018, the agency issued the request for proposals (RFP) as an SDVOSB set-aside. Agency Response at 1. The solicitation contemplated the award of nine fixed-price indefinite-delivery, indefinite-quantity contracts for each of nine major sites in

veterans integrated service network (VISN) 4.¹ Id. at 1-2. Prior to issuing the RFP, the agency conducted market research and received expressions of interest from two SDVOSBs: one SDVOSB that was currently providing DME services in VISN 4, and another SDVOSB that expressed interest in providing DME to all nine sites in VISN 4. Id. at 2.

On September 11, Columbia filed a protest of the set-aside decision with our Office, alleging that there were not two SDVOSBs capable of successfully performing the requirements, and the VA had failed to assess whether there was a reasonable expectation that it would receive fair and reasonable prices. Protest (B-416800.1) at 12-15. On September 19, the agency notified GAO that it would take corrective action by re-examining its market research and set-aside decision, and then re-soliciting if necessary. Agency Request for Dismissal (B-416800.1). On September 25, our Office dismissed the protest as academic. Columbia Ancillary Servs., Inc., B-416800.1, Sept. 25, 2018 (unpublished decision).

As part of the corrective action, the agency conducted additional market research, and received two additional expressions of interest from SDVOSBs. Agency Response at 3-4. The agency then distributed a sources sought notice, and received four responses. Id. The contracting officer reviewed the capabilities and experience of the four respondents to the sources sought notice and concluded that the agency could expect to receive proposals from multiple SDVOSBs at fair and reasonable prices. Id. The agency notified the protester, on June 6, 2019, that the procurement would remain a SDVOSB set-aside, and amended the solicitation to establish a July 8 due date for proposals. Id.

On July 3, the protester filed a new protest of the set-aside decision on substantially the same grounds as its original protest. See Protest (B-416800.2). Notwithstanding the ongoing protest, on July 7 and 8, the agency received two proposals in response to the solicitation. Agency Response at 5. On July 9, the agency filed a request for dismissal of the protest alleging that the protest was untimely because it was filed more than ten days after the agency notified the protester of its set-aside decision. Id. at 4-5. We denied the request for dismissal because a protest of the terms of a solicitation is timely when filed prior to the date for receipt of proposals. 4 C.F.R. § 21.2(a)(1).

On July 23, the agency performed a preliminary review of the two proposals received and concluded that neither proposal was likely to be awardable. Agency Response at 5-6. Specifically, neither offeror proposed services at all nine major sites and both proposed unreasonably high prices. Id. Additionally, one of the proposals--from an offeror not previously identified as a capable offeror by the market research--failed to conform to the solicitation's requirements. Id. On July 24, prior to the August 2 due date for the agency report, the agency notified our Office that it intended again to take

¹ VISN 4 covers a region that includes Pennsylvania, New Jersey, New York, Ohio, West Virginia, and portions of Delaware.

corrective action by performing additional market research and reconsidering the set-aside decision. Id.

The protester objected on the basis that the agency proposed to take substantially identical corrective action as it took in response to Columbia's first protest. See Protester's Objection to Agency Corrective Action Notice (B-416800.2). The agency responded that, because it had received proposals, it was taking corrective action based on new information that was not previously available. See Agency Clarification Regarding Scope of Corrective Action (B-416800.2). Our Office dismissed the protest as academic over the protester's objection on August 1.² Columbia Ancillary Servs., Inc., B-416800.2, Aug. 1, 2019 (unpublished decision)

DISCUSSION

The protester argues that the agency unduly delayed taking corrective action in response to its clearly meritorious protests because the agency's initial corrective action did not adequately address Columbia's original protest grounds, and thus forced Columbia to file effectively the same protest a second time. Protester's Comments at 2-6. Specifically, the protester contends that the agency's initial market research was unreasonable because it focused only on the number of SDVOSB firms that could have been able to submit proposals, but failed to meaningfully consider whether those firms could propose fair and reasonable prices. Id. As a result, Columbia argues the VA could not have reasonably expected proposals from at least two SDVOSBs at fair and reasonable prices.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs if based on the circumstances of the case we conclude that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. 4 C.F.R. § 21.8(e); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 5. With respect to the promptness of the agency's corrective action, we review the record to determine whether the agency took appropriate and timely steps to investigate and resolve the impropriety. Chant Eng'g Co., Inc.--Request for Costs, B-274871.2, Aug. 25, 1997, 97-2 CPD ¶ 58 at 4. We generally consider corrective action to be prompt if taken before the due date for the agency report responding to the protest. CDIC, Inc.--Entitlement to Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 2. However, we have concluded that where an

² On August 9, the protester filed an additional protest alleging that the agency's proposed corrective action was unreasonable because the agency could potentially make award to one of the proposals it already received. See generally Protest (B-416800.3). On August 16, the agency filed a request for dismissal arguing the protest was premature. Agency Request to Dismiss (B-416800.3). On August 22, the protester agreed that its protest was premature, Protester's Response to Agency Request for Dismissal, (B-416800.3) at 1, and our Office subsequently dismissed the protest. The protester does not request costs for its third protest.

agency fails to implement a promised corrective action, or implements a corrective action that fails to address a clearly meritorious issue raised in an initial protest, such that a protester is put to the expense of subsequently protesting the very same procurement deficiency, the agency's action has precluded the timely and economical resolution of the protest, and can constitute undue delay. Louisiana Clearwater, Inc.-- Recon. and Costs, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209.

Reimbursement is not appropriate in this case because the agency did not unduly delay taking corrective action.³ Here, corrective action was taken in both protests before the agency reports were due. Additionally, the two rounds of corrective action were based on different factual circumstances. The first round of corrective action was taken in response to Columbia's initial protest and the agency's subsequent determination that additional market research was needed. The second corrective action was prompted by new information, specifically the fact that, notwithstanding additional expressions of interest from SDVOSBs received during the second round of market research, the agency subsequently received proposals from only two SDVOSBs, neither of which were awardable.

In response, the protester contends that both its protests noted that there were not two SDVOSBs which would be able to respond to the requirement at reasonable prices, so the agency was on notice before it received proposals, and the proposals only confirm what the protester previously argued. Protester's Comments at 4-6. Further, the protester argues that the agency's corrective action market research failed to consider whether the SDVOSBs it identified would be able to offer reasonable prices, and so unduly delayed taking corrective action with respect to that element of the original protest.⁴ Id.

³ Because we conclude that the agency did not unduly delay corrective action, we do not address the question of whether the protest grounds were clearly meritorious.

⁴ Collaterally, the protester also argues that the agency unduly delayed taking corrective action with respect to its second protest because the agency filed a request to dismiss the protest after the agency had received the offers that formed the basis of the agency's later corrective action. Protester's Comments at 6-7. Specifically, the protester notes that the agency received the two proposals on July 7 and 8, but filed a request to dismiss on July 9. Id. Further, the agency concedes it did not review the offers until July 23, more than two weeks after the agency received them. Agency Response at 5. The protester therefore contends that the agency's decision to file the request to dismiss put it to the unnecessary expense of responding to that request. Protester's Comments at 6-7. In this case, the agency filed a good faith request to dismiss that was ultimately unsuccessful, and then took corrective action more than a week prior to the due date for the agency report. Agency Response at 4-5. As noted above, we generally consider corrective action to be prompt if taken before the due date for the agency report. CDIC, Inc.--Entitlement to Costs, supra. We see no basis to conclude that VA's filing of a dismissal request provides a basis to depart from that general rule.

Under the Veterans Benefits, Health Care, and Information Technology Act of 2006, VA acquisitions are required to be set aside for either SDVOSBs or veteran-owned small businesses where there is “a reasonable expectation that two or more small business concerns owned and controlled by veterans or small business concerns owned and controlled by veterans with service-connected disabilities will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.” 38 U.S.C. § 8127(d). While the requirements of 38 U.S.C. § 8127(d) do not dictate the use of any particular methodology in assessing the availability of potential SDVOSB firms, our Office has explained that the assessment must be based on sufficient evidence to establish its reasonableness. Kevcon, Inc., B-406101 et al., Feb. 6, 2012, 2012 CPD ¶ 95 at 3.

While Columbia’s predictions concerning the propriety of the set-aside ultimately proved correct, that is not an appropriate measure of the reasonableness of the agency’s market research. The agency here had reason to believe that at least four SDVOSBs could respond to the requirement, including from firms that were already performing similar services for the agency. Agency Response at 3-4. The fact that only two SDVOSBs responded, and that the proposals were ultimately unawardable, does not retrospectively render the contracting officer’s judgment unreasonable. Further, the agency believed that it would receive adequate price competition. Agency Response at 3-4. Adequate competition can be a valid basis for concluding that an agency may expect to receive reasonable pricing when considering an SDVOSB set-aside.⁵ Veterans Shredding, LLC, supra at 4 n.6.

On this record, we see no basis to conclude that the agency unduly delayed taking corrective action in response to these protests. Therefore, reimbursement is not appropriate in this case.

⁵ Columbia argues that we rejected this position in Veterans Shredding, LLC, B-417399, June 4, 2019, 2019 CPD ¶ 210. Protester’s Comments at 5. However, Columbia’s reliance on that decision is misplaced. In Veterans Shredding, our Office denied a protester’s challenge of an agency’s decision to convert a SDVOSB set-aside to a small business set-aside after the agency received five unreasonably high quotations from SDVOSBs. Veterans Shredding, LLC, supra at 4. The issues in that case turned on the agency’s consideration of prices it actually received in response to the SDVOSB set-aside. Id. Here, the protester challenged the agency’s prediction that it would likely receive reasonable pricing from SDVOSBs in the response to the solicitation. Moreover, Veterans Shredding specifically concluded that an agency may rely on the methods for establishing price reasonableness in Federal Acquisition Regulation § 15.404--such as adequate price competition--when considering whether it is likely to receive reasonable prices in response to a potential set-aside. Veterans Shredding, LLC, supra at 4 n.6.

The request for costs is denied

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General Counsel