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Decision

Matter of: NavQSys, LLC

File: B-417028.3

Date: March 27, 2019

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William K. Walker, Esq., for the intervenor, Semper Valens Solutions, Inc.
Wade L. Brown, Esq., Department of the Army, for the agency.
Stephanie B. Magnell, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's corrective action, in which the agency advised our Office of its intent to terminate the award to the current protester and award to the former protester, is sustained because the agency failed to adequately document the basis for its decisions and our Office is unable to conclude that the agency had a reasonable basis for its corrective action.

DECISION

NavQSys, LLC,¹ of Aberdeen Proving Ground, Maryland, protests the corrective action taken by the Department of the Army, Army Materiel Command (AMC), in response to an earlier protest by Semper Valens Solutions, Inc. (Semper Valens), of Canyon Lake, Texas, challenging the Army's award of a contract to NavQSys under request for proposals (RFP) No. W56KGY-17-R-0020, issued by the Department of the Army, Army Contracting Command (ACC) - Aberdeen Proving Ground (APG) on behalf of AMC for systems engineering and technical assistance support. In response to Semper Valens' protest, the Army stated its intent to take corrective action by terminating the contract with NavQSys and awarding the contract to Semper Valens; our Office then dismissed the protest. NavQSys challenges the reasonableness of the agency's corrective action.

We sustain the protest.

¹ NavQSys is a joint venture comprised of Navigant Systems, LLC, and QED Systems, LLC, and participates in the Small Business Administration's mentor-protégé program.

BACKGROUND

The RFP was released as a small-business set-aside on July 17, 2017. RFP at 1; Contracting Officer's Statement (COS)/Memorandum of Law (MOL) at 1. The agency intended to award a cost-plus-fixed-fee contract in accordance with Federal Acquisition Regulation part 15 to the offeror whose proposal represented the best value to the agency, considering the factors of technical, past performance, and cost/price. RFP, Amend. 0001, at 21. The technical factor was significantly more important than past performance, and past performance was significantly more important than cost/price. Also, the non-cost factors, when combined, were significantly more important than the cost/price factor. Id. As relevant to this protest, the RFP provided, in part, that in order to respond to the RFP, offerors must have a valid top secret facility clearance. Agency Report (AR), Tab 3, RFP, Attach. 0004 at 3.

On August 11, NavQSys asked the Army for clarity as to whether the facility clearance provision could be satisfied by an "unpopulated" joint venture, if each joint venture member itself held a facility clearance. AR, Tab 8, QED Ltr. to Army at 3. The agency never responded to NavQSys' inquiry. COS/MOL at 8. On August 23, the Army received five proposals, including those of Semper Valens and NavQSys.

On September 29, 2018, the Army selected NavQSys' proposal as offering the best overall value to the agency. AR, Tab 10, Source Selection Decision. The agency advised Semper Valens of the award to NavQSys on October 2. AR, Tab 11, Award Notice. The Army provided Semper Valens with a debriefing, which was completed on October 16. COS/MOL at 9.

On October 18, Semper Valens filed a protest with our Office challenging the Army's award to NavQSys, arguing that the agency should have disqualified NavQSys for failing to hold a top secret facility clearance at the time of proposal submission. AR, Tab 15, Protest B-417028 at 2.

On December 10, the Army advised our Office that it intended to take corrective action by terminating the contract with NavQSys and making award to Semper Valens. AR, Tab 18, Notice of Corrective Action. We dismissed the protest as academic on the basis of this proposed corrective action. Semper Valens Sols., Inc., B-417028, Dec. 11, 2018 (unpublished decision). This protest followed on December 20.

DISCUSSION

NavQSys argues that the agency's intended corrective action is unreasonable and inadequately documented. Based on alleged conversations between NavQSys and the Army after the dismissal of Semper Valens' protest, NavQSys explains that the Army determined that NavQSys was ineligible for award because the joint venture did not

hold its own facility clearance.² Protest at 7-8. The Army does not address these alleged conversations, but broadly claims that NavQSys was ineligible to compete for the solicitation and thus its corrective action was reasonable.³ COS/MOL at 13.

As a general matter, the details of a corrective action are within the sound discretion and judgment of the contracting agency. Jacobs Tech., Inc., B-416314, B-416314.2, July 31, 2018, 2018 CPD ¶ 271 at 4; Rockwell Elec. Commerce Corp., B-286201.6, Aug. 30, 2001, 2001 CPD ¶ 162 at 4. In general, we will not object to the specific corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. Networks Elec. Corp., B-290666.3, Sept. 30, 2002, 2002 CPD ¶ 173 at 3. Where the agency has reasonable concern that there were errors in the procurement, it is within the agency's discretion to take corrective action where the agency made the decision in good faith. Jacobs Tech., supra, at 4.

While we will not substitute our judgment for that of the agency, we will sustain a protest where the agency's conclusions are inconsistent with the solicitation's evaluation criteria, undocumented, or not reasonably based. See Ekagra Software Techs., Ltd., B-415978.3, B-418975.4, Oct. 25, 2018, 2018 CPD ¶ 377 at 5. Where an agency fails to document or retain evaluation materials, it bears the risk that there may not be adequate supporting rationale in the record for us to conclude that the agency had a reasonable basis for its evaluation conclusions. Id.; see also Navistar Def., LLC, BAE Sys., Tactical Vehicle Sys. LP, B-401865 et al., Dec. 14, 2009, 2009 CPD ¶ 258 at 13.

On December 7, during the pendency of Semper Valens' protest, a division chief for ACC APG circulated an internal email containing a status update about the protest, which included the following:

At this point we feel taking corrective action is our only path forward as the facility clearance solicitation requirement was not met by the awardee.
[. . .] We wanted to get your concurrence on our path forward before legal submits the corrective action plan to AMC/GAO which is due by COB [close of business] Monday. Please advise if you have any questions or concerns.

AR, Tab 23, ACC APG Email, Dec. 7, 2018, at 1.

² The parties' arguments and the record are inconsistent as to whether the Army determined that NavQSys was ineligible to compete for the contract or whether its proposal was technically unacceptable. Compare MOL/COS at 9 (NavQSys' proposal did not "conform to a material term or condition of the solicitation") with id. at 13 ("NavQSys was ineligible to bid on this solicitation").

³ The protester raised many other protest grounds. Because we sustain the challenge to the agency's corrective action for lack of adequate documentation, which left our Office with an insufficient record to consider whether the agency had reasonable concerns about the procurement, we do not consider the remaining protest grounds.

On December 10, the agency advised our Office of its intent to take the following corrective action:

(a) terminate for convenience Contract No. W56KGY-18-C-0008 awarded to NavQSys on September 29, 2018; and

(b) award to Semper Valens Solutions, Inc.

AR, Tab 18, B-417028 Notice of Corrective Action at 1.

Because the record provided to our Office contained no further documentation concerning the agency's determination regarding the competitive eligibility of NavQSys, GAO asked the agency to supplement the record with "any other emails, memoranda, or other documents relating to the agency's conclusion that 'the facility clearance solicitation requirement was not met by the awardee.'" GAO Notice to Army, Mar. 13, 2019. The Army "confirm[ed] that the record is complete and that there are no additional documents in response to GAO's attached [GAO] Notice of Request for Documents." Electronic Protest Docket System (EPDS) Docket Entry No. 27.

Here, nothing in the record reflects the agency's apparent determination that award should no longer be made to NavQSys. The agency provided no clear interpretation of the facilities clearance provision nor explained how it applied to NavQSys' proposal. See, e.g., COS/MOL at 8-9 (statement of facts describes no agency determination that NavQSys was ineligible to bid on the solicitation or that its proposal failed to comply with a material solicitation provision). Although the Army claimed that it "will not reevaluate proposals," the agency appears to have reevaluated the facility clearance contained in NavQSys' proposal--without documenting any findings. Id. at 14. While the Army maintains that it "determined that NavQSys was not actually eligible to compete" for this procurement, it produced no document containing such analysis. Id.; EPDS Docket Entry No. 27.

Because the corrective action reflects a reevaluation of NavQSys, which was not documented, we cannot conclude that the agency had a reasonable basis for its corrective action.⁴ Accordingly, we sustain the protest. OGSys., LLC, B-417026 et al., Jan. 22, 2019, 2019 CPD ¶ 66 at 18 (sustaining protest where agency failed to adequately document evaluation); see also IBM Global Bus. Serv.-U.S. Fed., B-409029, B-409029.2, Jan. 27, 2014, 2014 CPD ¶ 43 at 4 (where agency fails to adequately document its evaluation, our Office cannot determine whether agency's evaluation was

⁴ The posture of this protest is not typical due to the nature of the agency's corrective action. In this regard, the corrective action not only addresses Semper Valens' protest, but also reflects a new agency determination about both NavQSys and Semper Valens. As a result, in this protest challenging the agency's corrective action we are asked to consider the reasonableness of both the corrective action and the new agency determination.

reasonable); Navistar Def., *supra*, at 13 (protest sustained where agency could not provide record demonstrating a basis for the evaluation); Solers, Inc., B-404032.3, B-404032.4, Apr. 6, 2011, 2011 CPD 83 at ¶ 14 (protest sustained where the record does not permit a meaningful review of whether the agency's evaluation was reasonable); Rockwell Elec. Commerce Corp., *supra*, at 4 (challenge to corrective action sustained where agency's corrective action was unreasonable).

Prejudice

The limited record here fails to provide a basis for our Office to review whether the agency reasonably determined that there were errors in the procurement. Our Office will not sustain a protest, however, unless the record establishes a reasonable possibility that the protester was prejudiced by the agency's actions; that is, but for the agency's actions, the protester would have had a substantial chance of receiving the award. Ekagra Software Techs., *supra*, at 11. Here, we cannot say with certainty what the agency's conclusion would have been if it had performed and documented the analysis as to the applicability of the facilities clearance provision to NavQSys. In such circumstances, we resolve doubts regarding prejudice in favor of a protester since a reasonable possibility of prejudice is a sufficient basis for sustaining a protest. Id.; AT&T Corp., B-414886 *et al.*, Oct. 5, 2017, 2017 CPD ¶ 330 at 8. Accordingly, we conclude that NavQSys has established the requisite competitive prejudice to prevail in its bid protest.

RECOMMENDATION

We recommend that the Army document the basis for its decision to reject the proposal submitted by NavQSys. We also recommend that NavQSys be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). NavQSys should submit its certified claim, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.⁵

Thomas H. Armstrong
General Counsel

⁵ To the extent that NavQSys challenges the agency's evaluation of its proposal, those protest grounds are dismissed on the basis that NavQSys, which remains the awardee, is not an interested party to challenge the agency's evaluation. Aegis Def. Servs., LLC, B-412755, Mar. 25, 2016, 2016 CPD ¶ 98 at 7.