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Decision

Matter of: OnPoint Consulting, Inc.--Costs

File: B-417397.4

Date: October 16, 2019

Kevin J. Maynard, Esq., Cara L. Lasley, Esq., and Riley J. MacGraw, Esq., Wiley Rein LLP, for the requester.

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DIGEST

Request that GAO recommend reimbursement of the protester's costs of filing and pursuing its initial protest, which resulted in corrective action, and its second protest, which also resulted in corrective action, is denied where the agency did not unduly delay in taking corrective action in response to the protests and where the protests were not clearly meritorious.

DECISION

OnPoint Consulting, Inc., of Arlington, Virginia, requests that our Office recommend that it be reimbursed the costs associated with filing and pursuing its first protest (B-417397) and second protest (B-417397.2), which challenged the issuance of a task order to Data Systems Analyst, Inc. (DSA), of Trevose, Pennsylvania, by the Department of Defense, Defense Information Systems Agency, under request for proposals (RFP) No. 831710869, for information and knowledge management solutions and services. The requester argues that the agency's corrective action in both instances failed to address what it describes as meritorious protests, which required it to file a third protest--that our Office ultimately denied. OnPoint Consulting, Inc., B-417397.3 et al., Oct. 3, 2019, 2019 CPD ¶ ____.

We deny the request.

BACKGROUND

The agency issued the RFP on July 23, 2018, under the National Institutes of Health information technology acquisition and assessment center Chief Information Officer-Solutions and Partners 3 governmentwide multiple-award indefinite-delivery, indefinite-quantity contract. Agency Report (AR), Tab 1, RFP at 1.¹ The RFP sought services to support the Product Lead Military Technical (MilTech) Solutions with expertise in developing, acquiring, fielding, sustaining, and enhancing MilTech's suite of applications and systems. AR, Tab 1A, Performance Work Statement, at 3. This includes support such as systems engineering, project management, systems administration, and technical support to provide a variety of services for the MilTech's technology portfolio. Id.

The RFP contemplated the issuance of a cost-plus-fixed-fee/fixed-price task order with a 1-year base period and four 1-year option periods. RFP at 1. The solicitation provided for a best-value tradeoff based on a technical/management approach factor and a cost/price factor. Id. at 3-4. The technical/management approach factor was more important than the cost/price factor, and was evaluated using six subfactors, which were all of equal importance. Id.

The agency received proposals from three offerors, including OnPoint and DSA. Following discussions, the technical evaluation team (TET) evaluated the proposals and assigned a technical/risk rating for each subfactor. See AR, Tab 7, Selection Recommendation Document. The source selection official reviewed the TET's evaluation; conducted an independent assessment; considered the technical superiority of DSA's proposal compared to OnPoint's proposal and the lower price of OnPoint's proposal compared to DSA's proposal; and decided that "award to DSA is in the best interest of the [g]overnment." AR, Tab 8, Price Negotiation Memorandum (PNM), at 10.

On March 15, 2019, OnPoint filed its first protest (B-417397) challenging the agency's evaluation of proposals and best-value tradeoff determination. On April 1, prior to the due date for the agency report, the agency advised our Office that it intended to take corrective action by reevaluating proposals and making a new award decision. Based on the agency's proposed corrective action, we dismissed the protest. OnPoint Consulting, Inc., B-417397, Apr. 8, 2019, at 1-2 (unpublished decision).

After the agency reevaluated the proposals and reaffirmed its award to DSA, OnPoint filed a second protest with our Office (B-417397.2), again challenging the agency's evaluation of proposals and best-value tradeoff determination.² On June 14, prior to the

¹ Citations to the RFP and the AR are to the record provided by the agency in response to OnPoint's third protest (B-417397.3) and associated supplemental protests (B-417397.5, B-417397.6).

² OnPoint's second protest was nearly identical to its first protest, with one exception: In its initial protest, OnPoint alleged, among other things, that the agency's evaluation of
(continued...)

due date for the agency report, the agency advised our Office that it intended to take corrective action by reevaluating proposals and making a new award decision. OnPoint stated that it did not object to the scope of the agency's proposed corrective action. Based on the agency's proposed corrective action, we dismissed the protest. OnPoint Consulting, Inc., B-417397.2, June 18, 2019, at 1-2 (unpublished decision).

After the agency "reviewed its evaluation" and reaffirmed its award to DSA, the agency notified OnPoint of its decision on June 21. Agency Response to GAO Request to Explain Its Second Corrective Action, Aug. 2, 2019, at 2;³ TET Declaration, Aug. 2, 2019, at 1. In addition to filing a third protest again challenging the evaluation of proposals and best-value tradeoff determination (B-417397.3), OnPoint filed this request.

DISCUSSION

OnPoint requests that our Office recommend that the agency reimburse its costs of filing and pursuing its first (B-417397) and second (B-417397.2) protests. OnPoint does not dispute that the agency took corrective action prior to the time for filing the agency reports in response to the first and second protests. Instead, the requester argues that the agency twice failed to implement the promised corrective action, constituting "undue delay" and requiring OnPoint to file a third protest raising the same "meritorious protest issues." Req. for Costs at 3-4.

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its proposal under the fourth technical/management approach subfactor was unreasonable because it should have received two strengths, instead of one strength. During the first corrective action, the agency assessed an additional strength to OnPoint's proposal under this subfactor. In its second protest, OnPoint alleged that the agency's evaluation under this subfactor was unreasonable because it contended that it should have received a higher rating for having two strengths.

³ During the development of OnPoint's third protest, GAO held a conference call with the parties, during which GAO asked the agency to explain an apparent discrepancy in the record--specifically, the agency had provided an evaluation report that was dated from the first round of corrective action and did not appear to reflect the second round of corrective action. During the conference call, agency counsel stated that the agency did not reevaluate proposals during its second corrective action. Following the conference call, the agency provided a letter, in which agency counsel sought to clarify its prior "erroneous state[ment]." In this regard, the agency provided a declaration from the TET lead asserting that the TET had contemporaneously "reviewed its evaluation" and "concluded that there were no changes that would be necessary to the [evaluation report]." The declaration further explained that, "[a]s a result, the TET did not re-sign the [evaluation report]." Agency Response to GAO Request to Explain Its Second Corrective Action, Aug. 2, 2019, at 2; TET Declaration, Aug. 2, 2019, at 1.

Specifically, OnPoint contends that the agency failed to implement the promised corrective action in response to its first protest because, although the agency reevaluated proposals and assessed an additional strength to OnPoint's proposal, OnPoint complains that the "remainder of the evaluation results, overall ratings[,] and ultimate award decision remained the same." Req. for Costs at 3. OnPoint then contends that the agency failed to implement the promised corrective action in response to its second protest, based on: (1) the debriefing provided to OnPoint that was "identical to the previous debriefing--with the same ratings, same narrative, and same ultimate award decision[.]" and (2) the short amount of time--that is, five business days--between when the agency advised that it would again take corrective action and when the agency issued its third award notification. Id. at 4.

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 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.

On this record, we find no merit to OnPoint's request. As noted above, OnPoint does not dispute that the agency took prompt corrective action. Yet, OnPoint contends, essentially, that the agency's corrective action twice failed to undertake a good faith effort to address its "meritorious" protests. Req. for Costs at 3; compare Louisiana Clearwater, Inc.--Recon. & Costs, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209 at 6 (explaining that "[w]hen an agency proposes corrective action, we consider it implicit that it will undertake a good faith effort to address all issues raised by the protester that are meritorious") with Xcellent Tech. Sols., LLC--Costs, B-412591.3, Nov. 14, 2016, 2016 CPD ¶ 332 at 4-7 (explaining that the principles set forth in Louisiana Clearwater address a narrow range of circumstances, namely, those where an agency fails to implement corrective action in good faith in response to a clearly meritorious protest).

Here, the record shows that, during the agency's corrective action in response to OnPoint's first protest, the agency reevaluated proposals--which included assessing an additional strength to OnPoint's proposal--and reaffirmed the task order award to DSA. The record also shows that, during the agency's corrective action in response to OnPoint's second protest, the agency "reviewed its evaluation" and again reaffirmed the

task order award to DSA. Agency Response to GAO Request to Explain Its Second Corrective Action, Aug. 2, 2019, at 2; TET Declaration, Aug. 2, 2019, at 1; see also PNM at 10. While OnPoint complains about the apparent speed with which the agency completed the second corrective action (i.e., five business days), we cannot conclude based on this record that the agency failed to act in good faith to implement its proposed corrective action in either round.

Moreover, the fact that OnPoint disagreed with the results, and filed protests based on the same arguments, does not demonstrate that the agency failed to act in good faith to implement both rounds of corrective action. See Taylor Consultants, Inc.--Costs, B-400324.3, Feb. 2, 2009, 2009 CPD ¶ 37 at 3 (finding that the protester's disagreement with the agency's conclusions did not demonstrate that the agency failed to implement its promised corrective action). Our decisions do not require the agency to make a new decision that favors the protester, nor do they state that a protester is entitled to a recommendation for reimbursement merely because it files the same protest arguments. See Xcellent Tech. Sols., LLC--Costs, supra, at 7.

Finally, we reject OnPoint's assertion that its first and second protests raised "meritorious protest issues." Req. for Costs at 3. As a preliminary matter, we note that OnPoint's request does not characterize any of the issues raised in its protests as clearly meritorious. See id. We also note that OnPoint only later specifies--for the first time--in its reply to the agency's response that its protests raised a "clearly meritorious" challenge to the agency's best-value tradeoff determination. Protester's Comments, July 22, 2019, at 3. Clearly, at the time OnPoint filed its request, OnPoint knew what it had argued in its first and second protests, but OnPoint failed to raise this argument in its request; we therefore will not consider it further. See 4 C.F.R. § 21.8(e).

In any event, as the agency points out, "none of the protest grounds presented in either of [OnPoint's] protests [were] determined by GAO to be clearly meritorious." Agency Response, July 12, 2019, at 2. We conclude that there was not an adequate record for our Office to find that any of the issues raised in OnPoint's first and second protests were clearly meritorious, and that further record development was required to decide OnPoint's protest--which, as noted above, our Office ultimately denied. OnPoint Consulting, Inc., B-417397.3 et al., supra; see also A1C Partners, LLC--Costs, B-409189.3, Sept. 30, 2014, 2014 CPD ¶ 295 at 3-4 (finding that a protest issue was not clearly meritorious where additional analysis of the record and briefing by the parties would have been required to address the issue).

The request is denied.

Thomas H. Armstrong
General Counsel