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Decision

Matter of: JDD, Inc.--Costs

File: B-417545.5

Date: June 9, 2020

Joel L. Hamner, Esq., Whitcomb Selinsky, PC, for the protester.
Alanna B. Whybrew, Esq., Department of the Navy, for the agency.
April Y. Shields, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation that protest costs be reimbursed is denied on the basis that the protest allegations were not clearly meritorious.

DECISION

JDD, Inc., of Cleveland, Ohio, requests that we recommend reimbursement of the costs it incurred in filing and pursuing its protest challenging the award of a contract to M&M Management Services, Inc., of Augusta, Georgia, under request for proposals (RFP) No. N40085-19-R-9047, issued by the Department of the Navy, Naval Facilities Engineering Command, for custodial services at the Portsmouth Naval Shipyard in Kittery, Maine.

We deny the request.

BACKGROUND

The agency issued the RFP on March 11, 2019, seeking to award a fixed-price, indefinite-delivery, indefinite-quantity contract for custodial services at the Portsmouth Naval Shipyard in Kittery, Maine. Agency Report (AR), Tab 2, RFP.¹ The agency issued several amendments, including one on March 20 to revise the evaluation and award criteria. AR Tab 4, RFP amend. 1, Mar. 20, 2019. The RFP provided for award

¹ Unless otherwise indicated, citations to the protest record are to documents submitted by the protester and agency during the development of JDD's December 26, 2019 protest (B-417545.2).

to “the lowest-price[d,] technically acceptable offer at a reasonable cost to the Government” and provided for the evaluation of price and the following non-price factors: technical approach/management, corporate experience, safety, and past performance. *Id.* at 6.

On or before September 24, the agency received proposals from six offerors. The source selection evaluation board (SSEB) evaluated the proposals and found that only one was technically acceptable. Of note, the agency found that JDD’s proposal was technically unacceptable under the technical approach/management and safety factors and therefore ineligible for award. On December 9, the agency awarded the contract to M&M Management Services. See AR, Tab 5, SSEB Report, Nov. 27, 2019, at 2, 78; AR, Tab 3, Contracting Officer’s Statement at 3, 5.

On December 26, JDD filed a protest primarily challenging the agency’s evaluation of its proposal as technically unacceptable. On January 24, 2020, the agency filed its report responding to JDD’s protest, in which it defended its evaluation and award decision. On February 3, JDD filed comments responding to the agency’s report.

On February 19, the agency advised our Office that it intended to take corrective action. Notice of Corrective Action, Feb. 19, 2020. Specifically, the agency advised that, “[a]lthough the Navy maintains that it addressed all issues raised in JDD[’s] Protest through its Agency Report, the Navy has concluded that corrective action is appropriate, due to a matter solely relating to a separate protest[.]” *Id.* at 1. The agency advised that it planned to reopen the competition, engage in discussions with all offerors, solicit and evaluate revised proposals, and make a new award decision. *Id.* Accordingly, we dismissed the protest as academic. *JDD, Inc.*, B-417545.2, Feb. 25, 2020 (unpublished decision). Thereafter, JDD filed this request for our recommendation that it be reimbursed for its protest costs.

DISCUSSION

JDD contends that reimbursement is warranted because its protest included clearly meritorious protest grounds, and because the agency’s corrective action, taken after the agency filed its report, was unduly delayed.² Request for Costs at 5, 7.

² During the development of the protest record and while pursuing this request for costs, JDD raised various objections to the agency’s document production and complained of unspecified “harm caused by the Navy’s incomplete Agency Report.” Request for Reimbursement of Costs, Mar. 11, 2020, at 2-3 n.1. For example, while JDD requested the agency produce documents from the separate protest that was cited in the agency’s notice of corrective action, JDD concedes that “the Navy’s rationale with respect to this other protest is irrelevant for purposes of determining whether JDD is entitled to reimbursement of its costs.” *Id.* at 8 (emphasis omitted); see *also* Protester’s Objection and Request for Documents, Mar. 30, 2020, at 2. Under our Bid Protest Regulations, agencies are only required to provide documents that are relevant to the issues raised.

Where 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. 4 C.F.R. § 21.8(e); *AAR Aircraft Servs.--Costs*, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 5. That is, as a prerequisite to our recommendation that protest costs be reimbursed, the protest must not only have been meritorious, but it also must have been 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. 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 disagree with JDD's assertion that its protest grounds were clearly meritorious; in this regard, JDD's protest raised no arguments for which the agency lacked a defensible legal position. JDD primarily challenges the agency's evaluation of its proposal as technically unacceptable. As a representative example, JDD argues that the agency unreasonably assessed a deficiency in JDD's proposal under the technical approach/management factor. Protest at 6-7; Protester's Comments at 4-7.

Under this factor, the RFP required offerors to submit an organizational chart that "shall include names of personnel and their position title in this contract" and, "[a]s a minimum, include the [Project Manager], Quality Manager, [Site Safety and Health Officer], and on-site supervisor(s) and who they will report directly to for this contract." RFP at 28; RFP amend. 1 at 10. In its proposal, JDD included an organizational chart that identified a Project Manager and a Site Safety and Health Officer, but not a Quality Manager. AR, Tab 7, JDD Proposal, Sept. 24, 2019, at 12. The agency noted that JDD "neglected to provide for the position of [Quality M]anager . . . as required" in its organizational chart and, accordingly, was assessed a deficiency in JDD's proposal. AR, Tab 5, SSEB Report at 16; Memorandum of Law (MOL) at 6.

A deficiency is a material failure to meet a government requirement or a combination of significant weaknesses that increases the risk of unsuccessful contract performance to an unacceptable level. Federal Acquisition Regulation (FAR) 15.001. Clearly stated RFP requirements are considered material to the needs of the government, and a proposal that fails to conform to material terms is unacceptable and may not form the

See, *e.g.*, 4 C.F.R. §§ 21.3(c), (d). Under these circumstances, we found JDD's objections unpersuasive and did not require further document production. See, *e.g.*, *Mine Safety Appliances Co.*, B-242379 *et al.*, Nov. 27, 1991, 91-2 CPD ¶ 506 at 5 (documents are not relevant when the protester's allegations, even if true, do not establish a valid basis).

basis for award. *National Shower Express, Inc.; Rickaby Fire Support*, B-293970, B-293970.2, July 15, 2004, 2004 CPD ¶ 140 at 4-5. It is a fundamental principle in a negotiated procurement that a proposal that fails to conform to a material solicitation requirement is technically unacceptable and cannot form the basis for award. *The Boeing Co.*, B-311344 *et al.*, June 18, 2008, 2008 CPD ¶ 114 at 54. In reviewing protests challenging the rejection of a proposal based on the agency's evaluation, it is not our role to reevaluate proposals; rather, our Office examines the record to determine whether the agency's judgment was reasonable and in accordance with the solicitation criteria and applicable procurement statutes and regulations. *Wolverine Servs. LLC*, B-409906.3, B-409906.5, Oct. 14, 2014, 2014 CPD ¶ 325 at 3.

Here, the plain language of JDD's proposal shows that it did not identify the required position of Quality Manager in its proposed organizational chart. The record also shows that the agency, consistent with the terms of the solicitation, assessed a deficiency to JDD's proposal. On this record, we find no basis to object to the agency's conclusion that JDD's proposal failed to meet a material requirement of the RFP that resulted in proposal unacceptability.

In its various filings to our Office, JDD concedes that it did not include a Quality Manager in its organization chart. Nonetheless, JDD argues that the agency should have found its proposal technically acceptable because the protester intended for its proposed Site Safety and Health Officer to also serve as the Quality Manager. In this regard, JDD "acknowledges that the organizational chart only refers to [this individual] by his [Site Safety and Health Officer] role," but contends that "the accompanying narrative [in its proposal] sufficiently described JDD's management structure to signal [this individual's] dual role." Protest at 7; see *also* Protester's Response to Agency's Response to Request for Costs, Apr. 6, 2020, at 5 (continuing to claim that "the information was neither missing nor an actual . . . requirement").

We find JDD's argument unpersuasive. An offeror has the responsibility to submit a well-written proposal, with adequately detailed information that clearly demonstrates compliance with the solicitation requirements and allows a meaningful review by the procuring agency. *ProActive, LLC*, B-403545, Nov. 18, 2010, 2011 CPD ¶ 56 at 6. An offeror that does not affirmatively demonstrate the merits of its proposal risks rejection of its proposal or risks that its proposal will be evaluated unfavorably. *Johnson Controls, Inc.*, B-407337, Nov. 20, 2012, 2012 CPD ¶ 323 at 4. We further note that the connection between JDD's organizational chart and the "accompanying narrative [in its proposal]" appears tenuous and does not establish that JDD's proposal met the requirements of the solicitation. In this regard, we find no basis to question the agency's view that these sections of JDD's proposal fail to "provide clarity on the organizational structure[,] make "no connection" between these positions, and "ultimately highlight[] the ambiguity regarding the role that [this individual] is supposed to play." MOL at 6.

In conclusion, we do not find any of JDD's arguments with regard to the assessment of this deficiency to be clearly meritorious. In light of this conclusion, and because the

assessment of this deficiency would have reasonably rendered the protester ineligible for award, we decline to address JDD's other challenges. In any event, we have reviewed all of JDD's allegations and find that they do not meet the clearly meritorious standard for our Office to recommend reimbursement of protest costs.

The request is denied.

Thomas H. Armstrong
General Counsel