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Decision

Matter of: WiSC Enterprises, LLC--Costs

File: B-415613.5

Date: August 28, 2018

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

WiSC Enterprises, LLC, of Chantilly, Virginia, requests that we recommend that it 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 vendors 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 vendor that submitted 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.¹ TORFP amend. 3, at 1-4.

With regard to the resumes and skill level (government defined positions) factor, offerors were to provide 20 resumes for certain “critical positions.”² 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, then the vendor was required to provide a letter of intent with its proposal. TORFP amend. 3, at 6.

On June 16, 2017, the agency received timely proposals from five 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	WiSC
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	\$74,408,023

Agency Report (AR), Tab 3b, Post-Award Debriefing, at 7. The agency determined that New River’s proposal offered the best value to the government, and made award to

¹ The TORFP provided that the resumes and skill level evaluation factor would be evaluated on an adjectival basis, while the other technical evaluation factors would be rated on a pass/fail basis. TORFP amend. 3, at 4.

² The agency explains that the positions identified as critical were not more important to performance than positions not marked as critical. COS/MOL at 2-3.

New River on September 29. On October 19, WiSC received a written debriefing, and timely filed a protest with our Office on October 24.³ Protest at 5, 8.

In its protest, WiSC alleged that the agency's determination not to conduct a price realism analysis was arbitrary and capricious. Protest at 10-13. The protester also asserted that the awardee's proposal contained a material misrepresentation, as the awardee's proposal stated that the firm had contingent agreements with certain critical employees, and yet New River was now seeking to renegotiate these contingent contracts at reduced salaries. Protest at 13.

On November 1, the agency requested dismissal of the protest. The agency asserted that the solicitation did not require the agency to conduct a price realism analysis, and thus there was no requirement that the agency conduct such an analysis. With regard to the allegation that the awardee was seeking to renegotiate agreed-upon contingent contracts for certain employees, the agency argued that the protester provided nothing more than its own speculation in support of this allegation. Agency Request for Dismissal, Nov. 1, 2018.

The protester filed its response to the request for dismissal on November 7. The protester argued that its price realism allegation challenged the reasonableness of the agency's discretionary decision not to conduct such an analysis. The protester argued that the agency failed to provide a reasonable basis for exercising its discretion, and that our Office will review such a determination. Protester's Response to the Request for Dismissal, Nov. 7, 2017, at 5-9. With regard to the second allegation, the protester stated that the awardee's proposal misrepresented that New River had entered into binding contracts with certain employees that it needed to perform the task order. Id. at 10-13. WiSC supported this allegation with two declarations from two different individuals. Each declaration stated that the individual had spoken with someone who had been proposed by New River for a critical position. The declarations further stated that the declarants had been told that New River had entered into a contingent contract with the proposed critical employee, only to be approached by New River after it had been awarded the task order to renegotiate the contracts at lower salary and benefits. Id. at 11; Declaration of R at 1-2; Declaration of M at 2.

On November 13, the agency filed a second request for dismissal in response to the protester's second allegation. The agency stated that the protester's November 7 submission, which included the subsequent declarations, constituted an untimely, "piecemeal" development of WiSC's protest allegation. The agency argued that the declarations contained information that was either known or should have been known to the protester when it first filed its protest, and thus the introduction of the declarations two weeks later was an improper piecemeal presentation. In its request for dismissal,

³ The value of the task order was greater than \$25 million. Accordingly, the procurement was within our jurisdiction to hear protests related to the issuance of task orders under IDIQ contracts. 10 U.S.C. § 2304c(e)(1)(B).

the agency asserted that the new information was “filed . . . seven days after WiSC’s post-award debriefing closed” (that is, October 31). Agency Second Request for Dismissal, Nov. 13, 2017, at 2.

WiSC responded to the agency’s second dismissal request on November 15. The protester argued that the declarations were not part of an improper piecemeal presentation of its protest ground, and that, in any case, the agency had conceded that the contracting officer held WiSC’s debriefing open until October 31. Thus, its declarations independently satisfied GAO’s timeliness rules because the declarations were filed within 10 days of WiSC’s requested and required debriefing.

On November 16, GAO dismissed the protester’s challenge to the agency’s price realism analysis. GAO Email to the Parties, Nov. 16, 2017. GAO declined to dismiss the protester’s allegations that the awardee had made material misrepresentations in its proposal. Id. The agency filed its report on November 24.

In its agency report, NGA explained that it had, in response to the protester’s allegations, requested that New River “attest to the validity of the . . . remaining contingent hire letters of commitment included in its FPR [Final Proposal Revision].” COS/MOL at 8. Specifically, the agency

requested [that New River] attest to whether the letters of intent signed by the . . . remaining contingent hires, which were signed between June 1, 2017 and June 15, 2017 and stated in all cases that “details on a financial compensation package and benefits has been reached,” were still valid letters of commitment between [New River] and its contingent hires when [New River] submitted its reduced priced FPR on September 8, 2017.

Id. In response to the agency’s request, New River’s president and chief operating officer submitted a declaration providing specific information regarding the status of each of New River’s contingent hires for the critical positions. AR, Tab 4b, Declaration of Mr. E. This individual explained that, of the eight contingent hires it had proposed, only two were unavailable to perform work on the task order. Id. These two individuals were unavailable for reasons unrelated to New River’s wage and benefits. Id. at 3.

The declaration also stated that New River’s president and chief operating officer had sought to “re-negotiate wages and benefits with some of the critical position hires” after award was made, but that “[a]t no point did I intend to remove a critical position contingent hire from task order performance merely because he or she refused to accept lower wages or benefits...” Id. at 4-5. The agency concluded that the awardee “[would] still be delivering six of the eight contingent hires”; the fact that two candidates were “no longer available to perform on the task order is not an unusual occurrence in Emerald task order environment”; and that the agency had no reason to question the basis for the candidates unavailability or the truthfulness of New River’s explanations for their unavailability. COS/MOL at 9, 10. The agency argued that WiSC had failed to provide “any actual, concrete or reliable evidence” in support of its allegation, and that the agency’s investigation—including the information provided in New River’s sworn

statement--was sufficient to establish that the source selection decision should not be overturned. Id. at 10.

The protester submitted its comments on December 4. The protester continued to argue that the awardee's proposal contained a material misrepresentation. The protester also raised (in its view) four supplemental protest grounds, which alleged that the agency's evaluation of the awardee's position ID matrix was unreasonable; certain post-award correspondence, pertaining to the availability of the awardee's proposed critical employees, demonstrated that the agency's evaluation of the awardee's critical employees was unreasonable; the agency should have rated the awardee's proposal as "fail" under the position ID matrix evaluation factor; and the agency failed to undertake a reasonable or meaningful investigation into the awardee's material misrepresentation. Protester's Comments at 17-37. With regard to the agency's failure to investigate the material misrepresentation, the protester essentially asserted that the agency should have contacted the awardee's proposed contingent hires to inquire about what actions the awardee took with regard to their contingent employment. Id. at 28-37.

As part of its comments, the protester also provided a new declaration from one of New River's contingent hires. The declaration stated that New River informed him, following the award of the task order, that New River could not hire him at the agreed upon salary; thus, New River had offered him a lower salary. Protester's Comments, attach. 1., Declaration of L., at 3. He stated that he would not have agreed to New River's use of his resume in New River's proposal if New River had initially offered him the lower salary. Id. at 4.

Our Office established Monday, December 11, as the due date for the agency's supplemental report responding to the protester's supplemental protest grounds. Rather than provide a report, on December 11, the agency provided notice that it was taking corrective action. The agency explained that

[b]ased on new information, the agency has 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. Separately, post-award business practices have called into question the integrity of procurement process.

Agency Letter to GAO, Dec. 11, 2017. The agency asserted that it would terminate the task order issued to New River and revisit the requirement. Id. The agency further stated that it would, as appropriate, revise the requirement, request updated proposals, conduct a new evaluation, and make a new award decision. Id. Our Office dismissed WiSC's protest as academic on December 15.

DISCUSSION

WiSC requests that our Office recommend it be reimbursed the costs associated with filing and pursuing its protest, including reasonable attorney's fees, for its allegation that New River's proposal contained a material misrepresentation. Protester's Request at 1. The protester asserts that the agency unreasonably delayed its response to the protester's clearly meritorious protest ground, and contends that reimbursement for costs associated with its initial protest, its responses to the agency's requests for dismissal, its response to the agency's report, and its request for costs, as they pertain to the material misrepresentation allegation, are appropriate.

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 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 mere fact that an agency decides to take corrective action does not necessarily establish the absence of a defensible legal position, nor 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.

We decline to recommend reimbursement of costs associated with WiSC's protest of the awardee's alleged material misrepresentation. We have reviewed WiSC's protest allegation, as well as the underlying record, and conclude that this issue, as presented in WiSC's original protest, was not sufficiently persuasive to support a view that the agency lacked a legally justifiable explanation to defend against the allegation. As noted above, WiSC's initial protest alleged that the awardee engaged in a material misrepresentation in its proposal when it provided letters of intent for its contingent employees. However, WiSC's initial protest provided nothing in support of these allegations. Rather, it was only in response to the agency's request for dismissal that WiSC provided declarations from two individuals who were told, by others who were allegedly proposed as New River's critical employees, that New River had allegedly engaged in improper activities following contract award. Moreover, in response to the protest and subsequent declarations, the agency specifically requested information from the awardee regarding this issue and provided in its report a declaration from the awardee supporting the agency's position that there was no evidence of misrepresentation. It was only when the protester provided, in its comments on the agency's report, a declaration from one of New River's proposed critical employees that

the agency was presented with an allegation from an individual directly involved in the matter.

On this record, where the protester's initial protest provided only a general allegation; the protester then subsequently provided declarations from individuals with second-hand knowledge of allegedly improper awardee actions in response to an agency's request for dismissal; and the protester finally provided a declaration from a critical employee with its comments on the agency's report, we conclude that the protester's initial protest allegation was not clearly meritorious.

Additionally, to the extent that WiSC argues that a reasonable inquiry following the filing of its protest should have led the agency to conclude that it did not have a defensible legal position with regard to the material misrepresentation allegation, we disagree. In this regard, the protester asserts that the agency's inquiry should have included interviews with the various employees that were identified in the awardee's proposal as contingent. The protester maintains that the agency could have investigated as to whether these individuals' accounts agreed with the account of events as provided by the awardee. However, as explained above, the agency conducted an inquiry into the protester's allegations by asking the awardee to re-certify that the representations it made in its proposal were accurate. We do not think that, under the circumstances here, the agency was required to conduct interviews with the awardee's potential contingent hires in order to investigate the protester's allegations. As the record above demonstrates, we find the agency conducted an inquiry, reasonably concluded that it had a defensible legal position, and promptly took corrective action when presented with the additional information WiSC provided in its comments. We therefore find no undue delay on the part of the agency in taking corrective action once it had been provided specific information regarding the protest allegations as part of the protester's comments.

The request is denied.

Thomas H. Armstrong
General Counsel