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Decision

Matter of: Friendship Dental Laboratories, Inc.

File: B-404741.4

Date: August 24, 2011

Joseph Katz, Esq., Huddles Jones Sorteberg & Dachille, PC, for the protester.
Tracy J. Downing, Esq., Department of Veterans Affairs, for the agency.
Nora K. Adkins, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request that GAO recommend reimbursement of costs for filing and pursuing a protest against the agency's evaluation of offerors is granted where the protester raised a clearly meritorious protest ground and the agency did not take prompt corrective action.

DECISION

Friendship Dental Laboratories, Inc., of Rosedale, Maryland, requests that our Office recommend the reimbursement of Friendship's costs of filing and pursuing its protest challenging the award of a contract by the Department of Veterans Affairs to Green Dental Laboratories, Inc., of Heber Springs, Arkansas, under request for proposals (RFP) No. VA-256-10-RP-0164, for the fabrication and repair of fixed and removable dental prosthesis. Friendship also requests that we recommend the reimbursement of its costs associated with its subsequent protest challenging the award of a sole-source purchase order No. VA598-C-15277 to Green for similar services.

We grant the protester's request regarding the cost of filing and pursuing its protest challenging the award of the contract under the RFP, but deny the protester's request for costs regarding its protest against the award of the sole-source purchase order.

The VA issued the RFP on August 25, 2010, seeking proposals to provide for the fabrication and repair of dental fixed and removable prosthesis for the Central Arkansas Veterans Healthcare System Dental Service. The RFP contemplated an

award of a fixed-price, indefinite-quantity contract for a base period with four 1-year options. Award was to be made to the best-value offeror based upon the evaluation of past performance, management approach, and price.¹ Past performance was to be assessed based upon an offeror’s demonstrated successful, recent, and relevant past performance; performance response time, quality, responsiveness, and professionalism; and past performance history in identifying and correcting problems without having to be prompted. Management approach was to be assessed based upon optimal service effectiveness and delivery of dental services; organizational communication; and a quality assurance plan.

Seven offers were received by the agency in response to the RFP. Friendship and Green’s offers were evaluated as follows²:

	Friendship	Green
Past Performance	[REDACTED]	[REDACTED]
Management Approach	[REDACTED]	[REDACTED]
Price	\$954,725.45	\$1,001,644.40

Agency Report (AR), Feb. 16, 2011, Tab H, Source Selection Decision, at 2.

The source selection official accepted the evaluations and ratings of the technical evaluators, and based upon these results, determined that Green offered the best overall value to the government. The source selection official determined that Green had a “[REDACTED],” and that while Friendship had the lowest-priced offer it had [REDACTED]. *Id.* at 4. Thus, the VA awarded Green the contract on December 30. After a debriefing, this protest followed.

Friendship filed its initial protest with our Office on January 21. In its protest, Friendship challenged the agency’s evaluation of its proposal asserting that agency failed to evaluate the proposals of Friendship and Green in accordance with the stated evaluation criteria of the solicitation or in a consistent and unbiased manner. On February 17, the agency filed a report responding to the protest allegations defending its evaluation of Friendship and Green. On February 28, Friendship filed a supplemental protest in which it enhanced its initial arguments based upon its

¹ The RFP informed offerors that past performance was significantly more important than management approach, and all non-price factors, when combined, were approximately equal to price.

² For the record—and unlike many other evaluation records we have reviewed—a green rating here was higher than a blue rating. Evaluators assigned ratings of green (best rating), blue (second best rating), yellow or unacceptable to assess the past performance and management approach criteria.

review of the evaluation documentation. Additionally, on March 1, the protester filed its comments responding to the agency's report and reiterating, almost verbatim, the arguments found in its supplemental protest. On March 2, our Office requested a supplemental report from the agency.

On March 7, Friendship's third and final protest was filed with our Office in response to the agency's posting of a justification for other than full and open competition on the government's FedBizOpps.gov website on February 28.³ The agency's justification provided for the issuance of a sole-source purchase order No. VA598-C-15277 to Green Dental Laboratories, Inc. on an urgent and compelling basis for the fabrication and repair of fixed and removable dental prosthesis until Friendship's previously filed protests were resolved by our Office.

On March 10, prior to the agency's submission of its supplemental report on the prior protests, the agency notified our Office of its intent to take corrective action regarding all of Friendship's protests. The agency stated that in lieu of responding to the allegations contained in the protester's supplemental protests, the agency would undertake corrective action by "reviewing its requirement, amending the solicitation as necessary, determining a competitive range, conducting discussions, and requesting final proposal revisions from the vendors remaining in the competition." Agency Corrective Action Notice, Mar. 10, 2011, at 2. The agency also stated that it intended to cancel the sole-source purchase order issued to Green. *Id.* As a result of the agency's intended corrective action, our Office dismissed Friendship's protests as academic on March 14. Friendship then filed this request for reimbursement of its protest costs on March 25.

Where, as here, an agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs, including reasonable attorneys' fees, if, 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, thereby causing the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2011); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 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. Yardney Tech. Prods., Inc., B-297648.3, Mar. 28, 2006, 2006 CPD ¶ 65 at 4. Additionally, 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. Basic Commerce and Indus., Inc.--Costs, B-401702.3, Feb. 22, 2010, 2010 CPD ¶ 258 at 4; AGFA HealthCare Corp.--Costs, B-400733.6, Apr. 22, 2009, 2009 CPD ¶ 90 at 3-4.

³ The purchase order to Green was signed on January 25 and issued January 27.

Friendship asserts that reimbursement of its protest costs is warranted here because, in its view, its initial protest raised issues that were clearly meritorious as to the agency's failure to evaluate Friendship's proposal in accordance with the stated evaluation criteria and the agency's failure to evaluate the proposals in a consistent and unbiased manner. However, the agency failed to take corrective action until after the protester had responded to the agency report.

The agency denies that it unduly delayed taking corrective action in the face of a clearly meritorious protest because, according to the agency, it determined to take corrective action based not upon Friendship's initial protest, but rather its supplemental protest. Thus, the agency contends that because its notice of corrective action was provided prior to its supplemental agency report there is no basis for recommending reimbursement of protest costs.

We agree with the protester that the agency failed to take prompt corrective action in the face of a clearly meritorious protest. After the agency's investigation into the protester's initial protest grounds, the agency determined that its evaluators had evaluated the proposals based upon an undisclosed on-site dentist requirement. AR, Feb. 16, 2011, at 6. After this discovery, instead of taking corrective action, the agency filed a report attempting to defend its actions. In its report, the agency asserted that Friendship was not prejudiced by the agency's evaluation since the on-site dentist requirement was considered under the past performance factor under which the proposals were equally rated. However, when the agency provided the technical evaluators' individual rating sheets, it became clear that the undisclosed requirement was assessed under the management approach factor, not the past performance factor. AR, Feb. 16, 2011, Tab 15-F, Individual Evaluator Sheets. Accordingly, the agency's prejudice defense was shown to be inaccurate and unavailing as the offerors were not equally rated under the management approach factor. In fact, under the management approach factor, our review of the evaluation shows that Friendship's proposal received a [REDACTED] for the lack of an on-site dentist, while Green received a [REDACTED] for having two on-site dentists. Indeed, the source selection official relied upon the management approach factor as the discriminator in reaching her best value decision finding that Green had a "[REDACTED]." AR, Feb. 16, 2011, Tab 15H, Source Selection Decision, at 4.

We conclude that the agency's application of an undisclosed on-site dentist requirement was a clearly meritorious basis of protest that the agency discovered prior to the issuance of its initial agency report and that there was a reasonable possibility that Friendship was prejudiced.⁴ See The Salvation Army Community Corrections Program--Costs, B-298866.3, Aug. 29, 2007, 2007 CPD ¶ 165.

⁴ Agencies are required to evaluate proposals based solely on the factors identified in the solicitation, and must adequately document the bases for their evaluation conclusions. Intercon Assocs., Inc., B-298282, B-298282.2, Aug. 10, 2006, 2006 CPD ¶ 121 at 5. While agencies properly may apply evaluation considerations that are not

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We therefore recommend that Friendship be reimbursed the costs of pursuing its protest with regard to the clearly meritorious issue of the agency's evaluation. Friendship should submit its certified claim, detailing the time spent and costs incurred, directly to the agency within 60 days of its receipt of this decision. 4 C.F.R. § 21.8(f)(1).

In contrast, we deny Friendship's request for reimbursement of its costs of protesting the agency's sole-source purchase order, given that the agency took corrective action on this matter almost immediately after the protest was filed.

The request that we recommend reimbursement of protest costs is granted in part and denied in part.

Lynn H. Gibson
General Counsel

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expressly outlined in the RFP where those considerations are reasonably and logically encompassed within the stated evaluation criteria, there must be a clear nexus between the stated criteria and the unstated consideration. Global Analytic Info. Tech. Servs., Inc., B-298840.2, Feb. 6, 2007, 2007 CPD ¶ 57 at 4.