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Decision

Matter of: CAE Healthcare, Inc.

File: B-407328.3

Date: February 1, 2013

Joseph P. Hornyak, Esq., Alexander B. Ginsberg, Esq., and Timothy J. Taylor, Esq., Holland & Knight LLP, for the protester.

Debra J. Talley, Esq., Department of the Army, for the agency.

Tania Calhoun, Esq., and Edward Goldstein, 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 where agency did not unduly delay taking corrective action in the face of a clearly meritorious protest.

DECISION

CAE Healthcare, Inc., of Sarasota, Florida, requests that we recommend that it be reimbursed the costs of filing and pursuing its protest challenging the Department of the Army's award of a contract to Laerdal Medical Corporation, of Wappinger Falls, New York, under request for proposals (RFP) No. W900KK-12-R-0013, issued to procure High Fidelity Tetherless Mannequins for training at the Army's Medical Simulation Training Centers.

We deny the request.

The RFP, issued on April 23, 2012, as a commercial items acquisition under Federal Acquisition Regulation (FAR) Part 12, provided for the award of a fixed-price contract for Virtual Patient Systems High Fidelity Tetherless Mannequins (HFTM). Contractors were to deliver systems that met the specific requirements defined in the statement of work (SOW), including those in an appendix.

Award was to be made on a best value basis, considering technical capability, past performance, and price evaluation factors. The non-price factors, when combined, were significantly more important than price. RFP Proposal Submission Instructions at 12. Under the technical capability factor, the Army was to evaluate both written

proposals and the results of a system capability demonstration to determine the extent to which the proposed system met or exceeded the government's minimum requirements. During the capability demonstration, offerors were to show the Army the extent to which the proposed product met or exceeded seven "critical" requirements culled from the SOW appendix. After the offeror made its presentation, the Army was to perform procedures on each system in order to assess the product. Id. at 14. Proposals had to be rated at least acceptable under the technical capability factor in order to be considered for award. Id. at 12.

The Army received proposals from four firms. CAE's proposal was rated marginal under the technical capability factor, and received a substantial confidence past performance rating. Laerdal's higher-priced proposal was rated acceptable under the technical capability factor, and also received a substantial confidence past performance rating. Agency Report (AR), Exh. 10, Source Selection Decision Document at 5. The source selection authority noted that three of the four offerors, including CAE, were ineligible for award because their proposals received less than acceptable ratings under the technical capability factor. He found that Laerdal's proposal, the only one eligible for award, offered the best value to the government. Id. at 9.

On September 14, CAE filed its initial protest challenging the Army's evaluation of both proposals.¹ CAE argued that the agency did not adhere to the solicitation's technical capability evaluation criteria, and that the ratings for both proposals were unreasonable and inconsistent with the solicitation's terms. CAE's arguments concerned specific requirements listed in the SOW and/or its appendix. Its allegations with respect to Laerdal's proposal relied largely on a publicly available product manual for a certain model of Laerdal mannequin.

In its agency report in response to the protest, the Army defended its evaluation by providing a detailed rebuttal to each of CAE's allegations. With respect to Laerdal's proposal, the Army argued that it properly evaluated the proposal based on the contents of the proposal and the system capability demonstration, not the product manual cited by CAE.² The agency report was accompanied by supporting documents, including notes of the capability demonstration.

¹ CAE challenged the evaluation of Laerdal's proposal under the technical capability and past performance factors. The firm's entitlement request only discusses the allegations concerning the technical capability factor.

² CAE's argument that the Army should have used this product manual in evaluating Laerdal's proposal is misplaced. Although the "contractor" is required to provide manuals for the offered HFTM system during contract performance, see RFP SOW ¶ 3.3, the solicitation did not require offerors to provide manuals for the Army to use in evaluating proposals, and did not contemplate consideration of such manuals in the evaluation process. In any event, CAE's supplemental protest argued that

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On October 22, CAE filed a supplemental protest based on information provided in the agency report, particularly the notes of the capability demonstration and Laerdal's proposal. CAE argued that the Army's testing of Laerdal's product during the demonstration showed that the product did not meet certain requirements in addition to those that were the subject of the initial protest. CAE also argued that the product offered by Laerdal--a model other than the one upon which CAE based its initial protest--was not a commercial-off-the-shelf product. On October 25, CAE filed comments on the agency report reiterating its initial grounds of protest.

After reviewing the supplemental protest, our Office asked the Army to submit a supplemental agency report on November 2. The Army advised our Office of its intent to file a request for summary dismissal based on its discovery that CAE's proposal did not conform to the solicitation's requirements. In light of this development, the Army was granted until November 6 to file either a supplemental agency report or a notice of corrective action. On October 31, the Army filed a request for summary dismissal; we concluded that the protest was not appropriate for dismissal without requiring a response from CAE. On November 7, the Army filed a notice of corrective action dated November 5.³ In its notice, the Army stated that it had reviewed the requirement and the manner of testing the mannequins in response to CAE's supplemental protest, and determined to reevaluate both firms' proposals, as well as the capability of the mannequins. On November 8, our Office dismissed the protest as academic.

CAE requests that we recommend that it be reimbursed the reasonable costs of filing and pursuing its initial protest, including attorneys' fees. CAE asserts that its supplemental protest was clearly meritorious, and the Army's corrective action was unduly delayed because it was filed after the due date for the supplemental report. CAE also asserts that its initial protest was clearly meritorious and not severable from its supplemental protest, and that the corrective action was unduly delayed because it came after the initial agency report, and after CAE's comments were filed.

When 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

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Laerdal proposed a "heretofore unknown product," CAE Supplemental Protest at 2, putting into doubt the value of this manual for any purpose in this procurement.

³ In transmitting the notice of corrective action, agency counsel stated that she had prepared the notice on November 5 and hit the "send" button, but that it apparently never went through.

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) (2012); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. Thus, as a prerequisite to our recommending that costs be reimbursed where a protest has been settled 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. J.F. Taylor, Inc.--Entitlement to Costs, B-266039.3, July 5, 1996, 96-2 CPD ¶ 5 at 3; Baxter Healthcare Corp.--Entitlement to Costs, B-259811.3, Oct. 16, 1995, 95-2 CPD ¶ 174 at 5. 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. We find that reimbursement is not appropriate in this case.

With regard to CAE's supplemental protest, the agency took corrective action promptly because it was taken in response to supplemental protest arguments prior to providing the agency's response to those newly-raised arguments. KNAPP Logistics Automation, Inc.--Protest and Costs, B-404887.2, B-404887.3, July 27, 2011, 2011 CPD ¶ 141 at 5. Here, the Army filed a notice of corrective action instead of a supplemental agency report and, even though it exceeded the due date by one day, CAE was not required to expend additional time or resources preparing report comments. Thus, the purpose of section 21.8(e) of our Regulations has been served. See The Sandi-Sterling Consortium--Costs, B-296246.2, Sept. 20, 2005, 2005 CPD ¶ 173 at 3. Under these circumstances, we consider the corrective action to be prompt; it follows that there is no basis for recommending reimbursement of CAE's protest costs for the supplemental protest. Id.

We also find that the initial protest was not clearly meritorious. First, CAE's allegations with respect to the evaluation of Laerdal's proposal relied largely on its erroneous assumption that the Army should have relied on a Laerdal product manual in conducting its evaluation. The Army was not required to do so and, as CAE elsewhere argues, Laerdal actually offered a "heretofore unknown" product. CAE Supplemental Protest at 2. Second, we do not agree with CAE that the allegations raised in the supplemental protest were related to the initial protest such that the agency's investigation of the initial protest should have revealed the asserted evaluation flaws. Indeed, our Office required a separate report in response to the supplemental protest in recognition of the different nature of the supplemental protest allegations. Thus, CAE has not met the standard for

demonstrating entitlement to protest costs as a result of its initial protest.
Metalcraft, Inc.-- Costs, B-402181.3, May 17, 2010, 2010 CPD ¶ 116 at 3.

The request is denied.

Susan A. Poling
General Counsel