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Decision

Matter of: Carney, Inc.--Costs

File: B-408176.13

Date: February 14, 2014

Seamus Curley, Esq., and Samuel B. Knowles, Esq., DLA Piper LLP (US), for the protester.

James Muetzel, Esq., Office of Personnel Management, and William J. Grimaldi, Esq., and J. Bryan Warnock, Esq., Department of Justice, for the agency.

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DIGEST

GAO recommends reimbursement of protest costs where the agency took corrective action in response to a clearly meritorious protest argument after the submission of the agency's report and the protester's comments; reimbursement is not recommended with regard to other protest grounds, because those grounds are severable from the clearly meritorious protest ground.

DECISION

Carney, Inc. of Alexandria, Virginia, requests that our Office recommend that it be reimbursed the reasonable costs of filing and pursuing its protest of the elimination of its proposal from further consideration by the Office of Personnel Management (OPM) under request for proposals (RFP) No. OPM19-12-R-0003 for training and management assistance. We dismissed the protest after the agency advised our Office that it would take corrective action by including Carney's proposal in the competitive range. Carney argues that it is entitled to reimbursement of its protest costs because its protest was clearly meritorious and that the agency's corrective action was unduly delayed.

We grant Carney's request in part and deny it in part.

BACKGROUND

The solicitation was issued on June 18, 2012, and contemplated the award of multiple indefinite-delivery/indefinite-quantity (ID/IQ) contracts with a 1-year base

period, and four 1-year options. The solicitation anticipated award of multiple contracts for each of the following two key service areas (KSAs): (1) customized training and learning solutions, and (2) customized human capital solutions. RFP at 4.¹ Offerors could submit a proposal for one or both of these service areas. The solicitation was amended three times.

Under the terms of the solicitation, the contracts were to be awarded to the firms whose proposals represented the best value to the government. RFP at 74. For the purposes of determining best value, the solicitation listed the following evaluation factors in descending order of importance: management approach, small business subcontracting plan, technical capability, past performance, and price. Id. at 76. The solicitation provided that the non-price factors, when combined, were significantly more important than price. Id. at 77.

The solicitation divided the evaluation into two phases. During phase I, OPM was to evaluate an offeror's management approach and subcontracting plan on a pass/fail basis. RFP at 75. OPM was also to evaluate 10 required labor categories in the offerors' price proposals for fairness, reasonableness, and realism. Proposals that were found to have acceptable management approaches and subcontracting plans, as well as fair, reasonable and realistic prices for the labor categories, would then proceed to phase II. In phase II, OPM was to evaluate the remaining offerors' technical capabilities and past performance, and evaluate the proposed labor categories for completeness, reasonableness, realism, and affordability. Id. at 75-76. The solicitation also provided that the contracting officer could limit the competitive range "to the greatest number that [would] permit an efficient competition among the most highly rated proposals." Id. at 78-79.

OPM received proposals from 264 large and small businesses in response to the solicitation. Carney submitted a proposal for the Customized Human Capital Solutions KSA. OPM evaluated Carney's proposal in phase I and found it passed the initial acceptability criteria and merited further consideration in phase II. AR, Tab 32, OPM Phase II Evaluation Report and Competitive Range Determination (Apr. 8, 2013), at 3.

During the phase II evaluation, OPM rated Carney's proposal as "acceptable" for the technical capability factor,² and "exceptional" for past performance. AR,

¹ The agency contemplated awarding approximately thirty to thirty-five contracts, with 40-50 percent of those set-aside for small business contractors. RFP at 79.

² For the technical capability factor the agency used the ratings of outstanding, good, acceptable, marginal and unacceptable; and for past performance the agency used the ratings of exceptional/high confidence, very good/significant confidence, satisfactory/some confidence, neutral/unknown confidence, marginal/little

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Tab 32, Phase II, Evaluation Report and Competitive Range Determination (Apr. 8, 2013), at 12. The agency found that Carney's proposed price was complete and realistic but also was unreasonable and unaffordable. Id. The agency established a competitive range following the Phase II evaluation comprised of the most highly-rated proposals. OPM concluded that Carney's proposal was not among the most highly-rated, and excluded it from further consideration. Id. at 13.

After receiving a debriefing, Carney filed its initial protest in our Office on May 6, 2013, in which it raised the following challenges to the elimination of its proposal from the competitive range: (1) the agency unreasonably found that three of the protester's seven project descriptions were not relevant to the human capital requirements, and were therefore given no weight; and (2) the agency unreasonably concluded that the protester's proposed price was unreasonably high and unaffordable. Protest at 13 and 18.

In its June 5 report responding to the protest, OPM argued that it reasonably eliminated Carney's proposal from the competition. On June 14, Carney filed a supplemental protest in which it raised the following additional protest grounds: (1) the agency disparately evaluated the offerors under the price factor; (2) the agency's "moderate" risk rating for Carney was unreasonable and lacked documentation; and (3) the agency's price evaluation failed to compare the offerors' pricing on a labor category basis. Carney filed its comments on the initial agency report on June 17. On June 26, the agency informed our Office and the protester that it intended to take corrective action by including Carney's proposal in the competitive range. Our Office subsequently dismissed Carney's protest as academic based on the corrective action. Carney Inc., B-408176.3, B-408176.12, July 1, 2013.

On July 9, Carney requested that our Office recommend that OPM reimburse the protester its reasonable costs of filing and pursuing the protest.

DISCUSSION

Carney contends that it should be reimbursed the costs of pursuing its initial protest because OPM failed to take prompt corrective action in response to its clearly meritorious arguments. The agency responds that the protester is not entitled to be reimbursed because the agency decided to take corrective action in response to a single issue in Carney's protest--OPM's refusal to consider three of Carney's projects under the technical capability factor--that was not clearly meritorious at the time it was filed. The agency argues, in the alternative, that to the extent that our

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confidence, and unsatisfactory/no confidence. AR, Tab 2, Source Selection Plan, at 22-23.

Office recommends that Carney be reimbursed for its protest costs, then reimbursement should be limited to the argument concerning the technical evaluation. For the reasons discussed below, we agree that the protester should be reimbursed its protest costs, but also agree with the agency that this reimbursement should be limited.

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 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) (2013); 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 protest allegations would have shown facts disclosing the absence of a defensible legal position. AVIATE L.L.C., B-275058.6, B-275058.7, Apr. 14, 1997, 97-1 CPD ¶ 162 at 16. With respect to the promptness of the agency's corrective action under the circumstances, we review the record to determine whether the agency took appropriate and timely steps to investigate and resolve the impropriety. Chant Eng'g Co., Inc.--Costs, B-274871.2, Aug. 25, 1997, 97-2 CPD ¶ 58 at 4; Carl Zeiss, Inc.--Costs, B-247207.2, Oct. 23, 1992, 92-2 CPD ¶ 274 at 4. 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. CDIC, Inc.--Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 2.

Here, OPM acknowledges that it took corrective action after the agency report, but argues that its corrective action was not in response to a clearly meritorious argument from Carney's initial protest. In this regard, the agency states that it undertook corrective action related to a single issue in Carney's protest--OPM's refusal to consider three of Carney's projects under the technical capability factor. According to the agency, this issue was not "clearly meritorious" until Carney "reformulated" its technical capability factor challenge in its June 17 comments. Agency Response to Request for Costs (July 24, 2013) at 2. The agency contends that recommending reimbursement of protest costs is not appropriate because, once the protester fully articulated its challenge in its comments, the agency promptly took corrective action.

We do not agree with OPM's contention that Carney's argument was not clearly meritorious as raised in the initial protest. Rather, the record shows that a reasonable agency inquiry into the protester's allegation in its protest would have shown that the argument had merit. Specifically, the record shows that while the agency assigned Carney a strength for one project because it was related to human capital requirements, the agency did not reasonably evaluate whether the other six projects were also related to human capital requirements. AR, Tab 28, Carney

Technical Consensus Rating Phase II, at 1. We note that Carney's protest clearly identified the six projects that the agency now concedes were not properly considered.³ See Protest at 13-15. While the protester's comments on the agency report further supported its arguments based on information provided in the report, see Protester's Comments (June 17, 2013), at 25-26, we conclude that the initial protest argument clearly put the agency on notice of the issue, and that a reasonable inquiry by the agency should have led the agency to conclude that it did not have a defensible legal position. See AVIATE L.L.C., supra. On this record, we conclude that this argument was clearly meritorious as raised in Carney's initial protest.

We agree with OPM, however, that Carney's challenge to the agency's evaluation of Carney's technical capability is properly severable from the protester's other objections regarding the evaluation of Carney's price. As a general rule, a successful protester is entitled to be reimbursed costs incurred with respect to all issues pursued, not merely those upon which it prevails. Burns & Roe Servs. Corp.--Costs, B-310828.2, Apr. 28, 2008, 2008 CPD ¶ 81 at 2-3. Nevertheless, in appropriate cases, we have limited our recommendation for the award of protest costs where a part of those costs is allocable to an unsuccessful protest issue that is so clearly severable from the successful issues as to essentially constitute a separate protest. See, e.g., BAE Tech. Servs., Inc.--Costs, B-296699.3, Aug. 11, 2006, 2006 CPD ¶ 122 at 3; Interface Flooring Sys., Inc.--Claim for Attorneys' Fees, B-225439.5, July 29, 1987, 87-2 CPD ¶ 106 at 2-3.

Here, Carney's initial protest argued that the agency's price reasonableness determination was flawed. Protest at 18. In its supplemental protest, however, Carney elaborated on this argument by arguing that the agency unreasonably failed to compare the offerors' individual labor categories and, instead, used an arithmetic mean that was created by adding together each labor category proposed by each offeror. Supp. Protest at 8. According to the protester, this methodology created "an arbitrary benchmark upon which offerors were judged." Id.

We find that the issue of the agency's evaluation of Carney's price was not clearly meritorious because its argument concerning the price reasonableness evaluation would have required further development, in light of its additional protest arguments that were based on documents first provided by the agency in its report responding to the protest. See East Penn Mfg. Co., Inc.--Costs, B-291503.4, Apr. 10, 2003, 2003 CPD ¶ 83 at 2-3 (protest not clearly meritorious where decision would have

³ OPM contends that Carney did not argue that its Transportation Security Administration project fell within the scope of Human Capital Solutions until its comments. Agency Response to Request for Costs (July 24, 2013), at 3. The agency's contention is not supported by the record as this argument was clearly raised in Carney's initial protest filing. See Protest at 15.

required further steps to complete and clarify the record). We further find that Carney's objections to the agency's evaluation of its price were not clearly intertwined with the agency's evaluation of Carney's technical capability, and are thus severable. Marine Design Dynamics, Inc.--Costs, B-407816.2, July 3, 2013, 2013 CPD ¶ 168 at 5.

RECOMMENDATION

We recommend that OPM reimburse Carney for its costs for filing and pursuing its protest challenging the agency's evaluation of the technical capability of its proposal, including reasonable attorneys' fees. Carney 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).

The request is granted in part and denied in part.

Susan A. Poling
General Counsel