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Decision

Matter of: Vane Line Bunkering, Inc.--Costs

File: B-416033.2

Date: July 5, 2018

Jayna Rust, Esq., Scott F. Lane, Esq., and Timothy Sullivan, Esq., Thompson Coburn LLP, for the protester.
Colonel C. Taylor Smith and Lieutenant Colonel Kevin P. Stiens, Department of the Air Force, for the agency.
Joshua R. Gillerman, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

GAO recommends partial reimbursement of protest costs where the record shows that the agency unduly delayed taking corrective action in response to a clearly meritorious protest ground; reimbursement is not recommended with regard to other allegations that were not clearly meritorious and not clearly intertwined with clearly meritorious protest ground.

DECISION

Vane Line Bunkering, Inc., of Baltimore, Maryland, requests that our Office recommend that it be reimbursed the costs of filing and pursuing its protest challenging the award of a contract to Harley Marine Services, Inc., of Seattle, Washington, under request for proposals (RFP) No. HTC711-17-R-W001, issued by the United States Transportation Command for fuel transportation services.

We grant the request in part and deny in part.

BACKGROUND

The RFP, issued on July 24, 2017, contemplated the award of a fixed-price contract to satisfy the Defense Logistics Agency's mission of providing transportation for Department of Defense owned bulk jet, marine diesel, and commercial fuel. Agency Report (AR), Tab 4, RFP, at 1, 89, 100. The requirement entailed delivering fuel between various ports by tug and barge. *Id.* at 98.

Award was to be made to the lowest-priced, technically acceptable offeror, considering four factors: price, technical capability, past performance, and use of United States shipyards. RFP at 89-90. The technical capability factor was divided into two subfactors: equipment and management operations. Id. at 90-91. The agency was to assign an adjectival rating of acceptable or unacceptable for the equipment and management subfactors; the agency would not assign an overall adjectival rating to the technical capability factor. Id. at 90.

To be rated acceptable for the equipment subfactor, offerors were required to propose sufficient equipment to demonstrate compliance with the requirements listed in the performance work statement (PWS). Id. at 91. The PWS required that offerors propose the following vessels: five tank barges, three tows, *i.e.*, tug and barge combinations, and five tugs. AR, Tab 4, RFP, at 104-107, PWS §§ 3.1.1, 3.1.1.1, 3.1.3. The PWS further specified barrel capacity requirements for each type of vessel. Id. Relevant here, the RFP also required that offerors provide documentation to verify ownership or control of the vessels proposed to be utilized during contract performance. Id. at 87. If the offeror did not currently own a particular vessel, the offeror was required to provide supporting documentation demonstrating the ability to obtain it. Id.; PWS § 3.2.

Vane and Harley [deleted] submitted proposals in response to the RFP. AR, Tab 1, Contracting Officer's Statement of Facts (COSF), at 8. The source selection evaluation board (SSEB) performed an initial evaluation of proposals. Id. The SSEB concluded that Harley offered a lower total-evaluated price (TEP) than Vane, but both proposals were technically unacceptable under the equipment and management operations subfactors. AR, Tab 17, Competitive Range Determination, at 3.

The Source Selection Authority (SSA) included both offerors in the competitive range. AR, Tab 1, COSF, at 9. On October 4, the agency entered into discussions with the firms and provided evaluation notices which addressed the deficiencies contained in their respective proposals. Id. at 10. On October 10, the agency held separate teleconferences with both firms to discuss the evaluation notices. Id. The agency informed Harley that the firm that won award would need to be ready to perform within 30 days of winning the award, even though Harley stated a belief that a transition period of only 30 days would serve to benefit the incumbent contractor. AR, Tab 21, Memorandum for Record of Discussions with Harley, at 1.

On October 24, Vane sent the agency a letter via email in which it argued that its competitors did not have access to the equipment necessary to satisfy the solicitation's requirements and that it did not need the 30-day start-up period to commence performance.¹ AR, Tab 23, Pre Award Agency Level Protest, at 2-3. The agency responded on November 8, stating that Vane's assertion regarding its competitor's access to the requisite equipment was speculative, and that the 30-day start-up period

¹ The agency states that it considered this letter to constitute an agency-level protest. AR, Tab 1, COSF at 10.

“provide[d] an acceptable balance between maximizing competition without being overly burdensome” on the agency. AR, Tab 27, Response to Vane’s Pre-Award Protest, at 3.

The agency issued a request for Final Proposal Revisions (FPR) to Harley and Vane on December 19, with FPRs due no later than December 22. AR, Tab 1, COSF at 11. On December 21, Vane indicated that it would not be submitting a FPR, opting instead to make no further changes to an earlier version of its proposal. AR, Tab 38, Vane Final Proposal Revision Response, at 1. The agency represents that Harley, however, made several revisions to its proposal.² AR, Tab 1, COSF at 11. Neither firm revised its pricing. Id. The agency evaluated proposals as follows:

		Harley	Vane
General Compliance		Compliant	Compliant
Technical Capability	Equipment	Acceptable	Acceptable
	Management	Acceptable	Acceptable
Past Performance		Acceptable	Acceptable
U.S. Domestic Shipyard		Acceptable	Acceptable
Total Evaluated Price		\$137,197,230	\$147,142,608

AR, Tab 41, SSEB Report, at 8-9.

On January 31, 2018, the agency made award to Harley. AR, Tab 44, Awarded Contract, at 3. Notice of award was posted on FedBizOpps that same day. AR, Tab 45, FedBizOpps Notice of Award, at 1. On February 2, Vane requested a debriefing, which was provided on February 7. AR, Tab 1, COSF at 13. Vane’s protest followed.

In its protest, Vane alleged that the agency unreasonably determined that Harley’s proposal was technically acceptable. In particular, Vane alleged that Harley did not have the requisite equipment, and documentation of ownership or control of the equipment necessary to meet the solicitation’s requirements. Protest at 17-18. Vane also alleged that the agency conducted misleading and unequal discussions. In this regard, Vane alleged that the agency altered its 30-day startup requirement for Harley, while leading Vane to believe that the requirement remain unchanged. Protest at 15-16. Vane alleged that the agency conveyed to Harley that the awardee would have more than 30 days to commence performance, allowing Harley to submit pricing for a startup period that exceed 30 days, where Vane priced its proposal under the belief that the agency was adhering to the stated 30-day startup period.³ Protest at 17.

² In its agency report, the Air Force completely redacted Harley’s FPR. As a result, our Office cannot confirm the extent of the revisions made by Harley.

³ The agency requested dismissal of the protest in its entirety on February 16, arguing that the protest was legally and factually insufficient. Request for Dismissal at 1. Our
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The Air Force filed its report on March 9,⁴ contesting each of the protester's allegations. AR, Tab 2, Memorandum of Law (MOL), at 7-18. Relevant here, in responding to Vane's allegation that Harley's proposal should have been found technically unacceptable, the agency argued that Harley proposed the required vessels, and included documentation demonstrating ownership or control, or the ability to obtain the vessels. AR, Tab 2, MOL, at 16-17 (citing AR, Tab 10, Harley's Initial Proposal, at 10-259).

On March 12, Vane objected to the scope of the agency's document production. Vane objected to the agency's redaction of the vast majority of the evaluation notices sent to Harley, and the redaction of Harley's FPR in its entirety. Objection to Agency's Document Production at 1-2. Vane also objected to the agency's redactions of Harley's initial proposal, including portions directly relevant to the acceptability of Harley's vessels and supporting documentation of ownership or control. *Id.* at 3-4. Of note here, Vane stated "the currently provided information indicates significant problems regarding the ownership or availability of Harley's proposed equipment." *Id.* at 4. The GAO attorney assigned to the protest requested the agency respond to the protester's objection to the agency's document production. B-416033.1, EPDS, docket entry 37. On March 14, the agency filed a notice of corrective action, stating "[f]ollowing review of the protest and the procurement record, and more specifically after review of protester's comments in its objections to the [a]gency's document production, the [a]gency has decided to take corrective action." Notice of Corrective Action at 1.

We dismissed the protest because the agency's corrective action rendered it academic, and this request followed.

DISCUSSION

Vane requests that our Office recommend that it be reimbursed the costs associated with filing and pursuing its protest. Vane argues that the agency unduly delayed taking corrective action in response to its protest because it waited to do so until after the submission of the agency report. Request for Recommendation of Reimbursement of Protest Costs at 2-3. Vane contends that its objection to the agency's document production raised no new protest allegations but "simply highlighted" the information the

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Office declined to grant the request for dismissal. B-416033.1, Electronic Protest Docketing System (EPDS), docket entry 29.

⁴ Vane had objected to the scope of the agency's proffered document production contained in its 5-day letter. Vane Objection to 5-Day Letter, at 1-4. The GAO attorney assigned declined to require the agency to produce additional documents, but indicated that Vane could renew its objections after receipt of the agency report. B-416033.1, EPDS, docket entry 32.

agency already had in its possession, and a reasonable agency inquiry would have revealed that Vane's allegations were clearly meritorious. Id. at 3.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs where, based on the record, 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. 4 C.F.R. § 21.8(e); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. 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 will recommend reimbursement only where the underlying protest is 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.

Vane alleged in its initial protest that Harley's proposal should not have been found technically acceptable. Specifically, Vane's initial protest stated "Harley's proposal could not meet the [a]gency's strict requirements relating to the length, age, and volume or the on-call equipment and required documentation." Protest at 17-18. Vane additionally stated "Harley could not have submitted a proposal that would satisfy the RFP's requirements relying solely on its own equipment, and assuming Harley intended to use subcontractors for performance, Harley did not have the long-term leases or letters of intent otherwise required by the RFP." Id. at 18.

In response to Vane's request for reimbursement of costs, the agency states as follows:

The [a]gency took corrective action not because any of Harley's proposed equipment could not meet the solicitation requirements, but due to a discrepancy in the bareboat charter that the evaluation team and contracting officer failed to notice at the time. Willamette Champion, LLC is the owner of [deleted]. Harley Franco, [m]anager, is the authorized signatory for Willamette Champion, LLC. Harley Franco is also the [m]anager of Harley Marine Gulf, LLC. As such the evaluation team, understanding the interrelationships of the companies failed to notice this discrepancy between company name and vessel name.

Response to Request for Reimbursement of Costs, at 2.

The agency also notes that it failed to review two pages of Vane's hard copy proposal that were missing from the electronic version of its proposal. Id. The agency concludes that "[t]hese two administrative oversights, not the merits of the protest, are what prompted the [a]gency to take corrective action." Id.

As noted above, the RFP required offerors to provide documentation that verified ownership or control of their proposed vessels, or other supporting documentation demonstrating the ability to obtain the vessels prior to performance, such as a lease agreement. RFP at 83, 107. In its proposal, Harley stated that its inclusion of mortgage documents demonstrated its ownership of the vessels that it proposed for performance. AR, Tab 10, Harley Marine Services Initial Proposal, at 268. The agency agreed, noting that Harley's provision of these mortgages demonstrated the firm's ownership of various vessels, and that Harley provided charter agreements for those remaining vessels that the firm proposed for performance that it did not own. AR, Tab 2, MOL, at 17 (citing AR, Tab 10, 10-259).

The [deleted] was one of the vessels proposed by Harley to satisfy the RFP's requirements for a tug with a 20,000-30,000 barrel capacity. AR, Tab 10, Harley Marine Services Initial Proposal, at 264, 268. However, the mortgage agreement provided by Harley to demonstrate ownership of the [deleted] indicates that the owner of the vessel was a firm named Williamette Champion, LLC.⁵ Id. at 241-259. While Harley Franco, who the agency represents was an authorized signatory for Williamette, signed the mortgage agreement, Harley Marine Services, the awardee, is not a party to the mortgage agreement. Therefore, this documentation, by itself, does not demonstrate that Harley owns the [deleted], nor does it establish that Harley Marine Services could obtain the vessel prior to performance, as was required by the RFP. Accordingly, the "discrepancy" between Harley's proposed utilization of the [deleted] for performance, and the mortgage agreement which indicates that another firm owns this vessel, should have rendered Harley's proposal technically unacceptable under the equipment subfactor.

The record therefore shows that a reasonable inquiry into the merits of Vane's protest prior to the submission of the agency report would have revealed that Harley failed to provide the required documentation demonstrating ownership, or the ability to obtain, the proposed vessel. While the agency attempts to characterize the failure to notice that the documentation proffered did not support Harley's ownership as a mere "administrative oversight," the need to provide this supporting documentation was a material requirement of the RFP. RFP at 83, 107. As a result, the agency's oversight here is a failure to evaluate Harley's proposal in accordance with the stated solicitation criteria.

Further, the agency's assertion that this protest ground was not clearly meritorious is belied by the fact that its explanation for taking corrective action is readily apparent in the page range it cited when responding to Vane's protest allegations. As noted above, the agency report filed in response to the initial allegation stated "Harley provided fleet mortgages showing ownership of the various assets." AR, MOL, at 17 (citing AR,

⁵ While Harley's proposal explains that it is the registered owner of several operating companies, Williamette Champion is not listed as one of Harley's subsidiary companies. AR, Tab 10, Harley Marine Services Initial Proposal, at 10

Tab 10, Harley Initial Proposal at 10-259). This response to the protester's allegations contains the document range which includes the mortgage agreement containing the "discrepancy" which the agency cites as the basis for its corrective action. We therefore find that had the agency conducted a reasonable inquiry into the merits of Vane's protest, it would have discovered that its argument that Harley was technically acceptable was not legally defensible.⁶

The agency also argues that its corrective action was not unduly delayed. The agency asserts that Vane's protest did not identify specific issues with Harley's proposed vessels, and that the agency did not take corrective action in response to Vane's protest allegations, but after further review of Vane and Harley's proposals and after additional objections to the agency report. Response to Request for Costs at 2-3. While Vane's objections to the agency's document production further highlighted potential issues with the Harley's documentation of vessel ownership, we find that the initial protest arguments sufficiently put the agency on notice of the issue, namely that Harley's proposal did not provide the required documentation, and that a reasonable inquiry by the agency should have led it to conclude that it did not have a defensible legal position. See JRS Staffing Services--Costs, B-410098.6, B-410100.6, B-410101.6, Aug. 21, 2015, 2015 CPD ¶262 at 5; Carney Inc.--Costs, B-408176.13, Feb.14, 2014, 2014 CPD ¶ 82 at 4-5. In light of this conclusion, the agency unduly delayed taking corrective action in response to the protest, waiting instead to take its correct action until 5 days after filing its agency report. The agency's actions thus forced Vane to incur protest costs (i.e., analyzing the agency report, preparing and filing an objection to the agency's document production, and beginning to draft comments) that it would not otherwise have incurred had the agency taken prompt corrective action. See Siemens Healthcare Diagnostics, Inc.--Costs, B-413774.3, Apr. 7, 2017, 2017 CPD ¶ at 5.

We recommend that Vane Line be reimbursed its costs incurred in connection with this protest ground. The record demonstrates that the agency unduly delayed corrective action in the face of a clearly meritorious protest ground which was advanced in Vane Line's initial protest.

As a general rule, a successful protester should be reimbursed the costs incurred with respect to all the issues pursued, not merely those upon which it has prevailed. The Salvation Army Cmty. Corr. Program--Costs, B-298866.3, Aug. 29, 2007, 2007 CPD ¶ 165 at 7. 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

⁶ The agency's explanation that it also took corrective action due to its failure to review two pages missing from Vane's electronic proposal that were contained in its hard copy proposal has no impact on our analysis, as the agency has not proffered any explanation as to how this oversight would alter its evaluation of Vane's proposal or the agency's award decision.

separate protest. Burns & Roe Servs. Corp.--Costs, B-310828.2, Apr. 28, 2008, 2008 CPD ¶ 81 at 3.

Vane also contended that the agency conducted misleading and unequal discussions. Specifically, the protester alleged that during discussions the agency informed Harley, but not Vane, of a change in the 30 day start-up requirement. Vane essentially argues that all of its protest grounds merit reimbursement since the agency's evaluation of Harley's proposal was intertwined with the agency's discussions with the two firms. Response to Agency's Response to Request for Reimbursement of Costs, at 2. We disagree. Accordingly, we limit our recommendation for award of protest costs.

Specifically, we deny the request for reimbursement of costs as it relates to Vane's protest allegations that the agency conducted unequal and misleading discussions. These protest grounds are not clearly meritorious given that the record shows that both offerors were informed that the winning contractor would need to be ready to perform within 30 days of contract award.⁷ AR, Tab 21, Memorandum For Record of Discussions with Harley, at 1; AR, Tab 25, Initial Evaluation Notices of Harley, at 61; AR, Tab 26, Initial Evaluation Notices of Vane, at 65. At the very least, Vane would need to have filed comments contradicting the current record, which suggests that the agency's position with regards to these protest grounds is defensible. Accordingly, Vane's protest allegations that the agency conducted misleading and unequal discussions are not clearly meritorious. See Carney, Inc., supra at 5 (protest ground is not clearly meritorious where decision would have required further development of the record).

RECOMMENDATION

We recommend that the protester be reimbursed its costs of filing and pursuing its protest, including reasonable attorneys' fees, but only to the extent those costs were incurred in connection with challenges to the agency's evaluation of proposals. We do not recommend reimbursement for the protester's allegations that the agency conducted unequal and misleading discussions. Vane Line 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.

Thomas H. Armstrong
General Counsel

⁷ The agency also argues that this 30 day start-up period was not an actual requirement of the RFP, but rather reflected the agency's "aspirational intent" to provide this period of time to the awardee to commence performance after award. AR, Tab 2, MOL, at 8.