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Decision

Matter of: Harley Marine Services, Inc.--Costs

File: B-416033.4

Date: March 15, 2019

Brooke Shapiro, Esq., and Bryant E. Gardner, Esq., Winston & Strawn LLP, for the protester.
Colonel C. Taylor Smith and Captain Jacquelyn Fiorello, 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 allegation that was not clearly meritorious and not intertwined with clearly meritorious protest ground.

DECISION

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

We grant the request in part and deny it 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 3, 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. Id. at 104-107.

The PWS further specified barrel capacity requirements for each type of vessel. Id. For the five tank barges, three were required to have a capacity between 20,000 and 30,000 barrels, one was required to have a capacity between 10,000 and 20,000 barrels, and one was required to have a capacity of 50,000 to 60,000 barrels. Id. at 104. The PWS also provided that the “[c]ontractor is required to comply with the maximum safe navigable draft¹ and length overall for all loading and discharge locations.” Id. Additionally, in response to two separate questions received from offerors regarding these size limitations, the agency stated that “[t]he contractor is responsible for ensuring all barges” meet “the restrictions at all loading and discharging ports listed in the PWS.” AR, Tab 5, Responses to Questions and Answers 2-16, at No.5 and No.6.

The RFP provided a non-exhaustive list of loading and discharging ports between which offerors would deliver fuel. RFP at 98. Relevant here, the solicitation delineated specifically which ports would be served by the different sized barges. Id. at PWS, App. E, Barge Utilization Sites/Regions.

The agency initially made award to Harley on January 31, 2018. AR, Tab 32, Source Selection Decision Document (SSDD), at 3. Vane [deleted] protested, prompting the agency to take corrective action which consisted of reevaluating proposals under the technical subfactors. Id. Our Office dismissed Vane’s protest as academic.

The agency entered into discussions, solicited, obtained, and evaluated revised proposals as follows:

¹ The agency explained that “draft” measures the vertical distance between the waterline and the bottom of the vessel’s hull. Memorandum of Law (MOL) at 8.

		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		\$109,183,002	\$95,805,199

AR, Tab 31, Source Selection Evaluation Board Report, at 16.

On September 12, the agency made award to Vane. AR, Tab 32, SSDD, at 5. Harley protested the award, arguing that the agency unreasonably found Vane’s proposal technically acceptable. In particular, Harley argued that Vane’s proposed barges did not meet the solicitation’s technical requirements regarding maximum safe navigable length, breadth, or draft. Protest at 10. Harley also alleged that the agency unreasonably found Vane’s past performance acceptable.

In its report responding to the protest, the agency contested the protester’s allegations and submitted a contemporaneous record that detailed its evaluation and award determination. The agency maintained that it reasonably evaluated Vane’s proposal under both the technical and past performance factors. MOL at 6-24.

In responding to Harley’s argument that Vane’s barges failed to meet the solicitation’s technical requirements regarding, length, breadth, or draft, the agency asserted that the solicitation only required that offerors provide five barges at the specified sizes. Id. at 10. The agency further argued that Harley unreasonably construed the solicitation as imposing additional technical requirements and that “[n]ot every barge is expected to transit every restricted port.” Id. at 9. According to the agency, as long as the offeror proposed at least one barge that could meet the restrictions of each port, the offeror satisfied the requirement to “comply with the maximum safe navigable draft and length overall for all loading and discharge location.” Id.

On October 26, Harley submitted its comments on the agency report and raised an additional protest ground, contesting the agency’s interpretation of the solicitation’s requirements and maintaining that the agency unreasonably found Vane’s barges acceptable. The agency filed a notice of corrective action on November 2, stating that it would cancel the award, revise its requirements, and issue a new solicitation. Notice of Corrective Action at 1. As a result, our Office dismissed the protest as academic.

DISCUSSION

Harley requests that our Office recommend that it be reimbursed the costs associated with filing and pursuing its protest. Harley 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, requiring Harley to file comments on the agency report. Request for Recommendation of Reimbursement of Protest Costs at 3-4.

In response to Harley's request for reimbursement of costs, the agency only "partially oppos[es] Harley's request." Agency Response to Protester's Request for Recommendation of Reimbursement of Costs, at 1. The agency argues that Harley's "past performance argument falls short of GAO's clearly meritorious standard, which consequently should reduce the amount Harley is entitled to receive." Id. at 2.

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. 4 C.F.R. § 21.8(e); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 5. Thus, as a prerequisite to 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. 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. Triple Canopy, Inc.--Costs, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 3.

Harley alleged in its initial protest that Vane's proposal should not have been found technically acceptable because several of its barges did not meet the solicitation's requirements regarding maximum safe navigable length, breadth, and draft. Protest at 10-11. In particular, Harley noted that Vane's proposed primary barges were either too long, too wide, or too deep to comply with these size restrictions for ports required to be serviced by these vessels. Id.

As noted above, the RFP provided that the "[c]ontractor is required to comply with the maximum safe navigable draft and length overall for all loading and discharge locations." RFP at 104. Additionally, the solicitation delineated specifically which ports would be served by the different sized barges, including the 20,000-30,000 barrel barges. Id. at PWS, App. E, Barge Utilization Sites/Regions. The agency also explained that "the contractor is responsible for ensuring all barges" meet "the restrictions at all loading and discharging ports listed in the PWS." AR, Tab 5, Responses to Questions and Answers 2-16, at No. 5 and No.6.

Vane proposed three barges at the 20,000-30,000 barrel capacity. AR, Tab 25, Vane Response to Evaluation Notice, at 4-5. The record shows that these vessels are either too long, too wide, or too deep to comply with the RFP's delineated size restrictions for ports required to be serviced by these barges.² For example, one is [deleted] feet long,

² The agency also argued that Harley could not demonstrate competitive prejudice because Harley's barges similarly do not strictly comply with the aforementioned size restrictions. Where the underlying record does not demonstrate competitive prejudice, we have concluded that an agency had a defensible legal position and, thus, for

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[deleted] feet wide, and has a loaded draft of [deleted] feet, making it too long and wide for the DFSP North Landing port, too wide for Langley Air Force Base port, and too deep for North Landing, Langley, and Port Mahon.³ Notwithstanding this facial noncompliance with the solicitation's requirements, the agency's evaluation concluded that Vane "comple[d] with maximum safe navigable draft, width and length overall for all loading and discharge locations . . ." AR, Tab 37, Vane Consolidated Technical Evaluation, at 2.

The record therefore shows that a reasonable inquiry into the merits of Harley's protest prior to the submission of the agency report would have revealed that Vane's barges did not comply with the size restrictions for barges delineated in the solicitation, which should have rendered Vane's proposal technically unacceptable. Accordingly, we find that these allegations were clearly meritorious.⁴

We also find that in light of this conclusion, the agency unduly delayed taking corrective action in response to the protest, waiting instead to take its corrective action until after the protester submitted its comments on the agency report. See Alsalam Aircraft Co.--Costs, B-401298.3, Nov. 5, 2009, 2009 CPD ¶ 208 at 3 (corrective action generally not considered prompt where it is taken after the due date for submission of the agency report). We therefore recommend that Harley be reimbursed the 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 Harley's initial protest.

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purposes of determining whether to recommend costs, that the protest was not clearly meritorious. See LENS, JV--Costs, B-295952.4, Dec. 12, 2005, 2006 CPD ¶ 9 at 5. Here, however, if Harley's protest were sustained, Vane [deleted] would also be ineligible for award, and the agency would be faced with resoliciting the requirement. Under such circumstances, we find that Harley demonstrated competitive prejudice. See CGI Fed., Inc., B-410714, Jan. 28, 2015, 2015 CPD ¶ 67 at 5 n.2.

³ The RFP listed the following size restrictions for these ports: North Landing had a maximum barge length of 270 feet, a maximum width 40 feet, and a maximum draft 9 feet; Langley Air Force Base had a maximum length of 300 feet and a maximum width 40 feet, and Port Mahon had a maximum draft 7 feet, 6 inches.

⁴ As part of Harley's challenge to the technical evaluation, it also asserted that the agency failed to find that Vane's vessel's did not comply with the RFP's maximum age criterion, did not have adequate stripping systems, failed to meet a "tank material" requirement, and that Vane lacked sufficient barges of required size and age to meet "On-Call Tow" requirements. Protest at 11-12. The agency responded to each of these allegations in its report, and Harley did not provide a substantive response to the agency's position. It follows that we have no basis to conclude that these aspects of Harley's initial technical challenge were clearly meritorious.

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 separate protest. See, e.g., BAE Tech. Servs., Inc.--Costs, B-296699.3, Aug. 11, 2006, 2006 CPD ¶ 122 at 3. Relevant here, in applying these principles, we have severed costs arising from allegations of misevaluation under separate evaluation factors on the basis that they are not clearly intertwined. For example, we have found that challenges to a past performance evaluation were not clearly intertwined with clearly meritorious challenges to the technical factor evaluation and the resulting tradeoff. See, e.g., Genesis Bus. Sys.--Costs, B-411264.11, Dec. 10, 2015, 2015 CPD ¶ 389 at 4.

Specifically, we deny the request for reimbursement of costs as it relates to Harley's protest allegations that the agency unreasonably evaluated Vane's past performance. Harley asserted that since Vane allegedly lacks proper equipment to satisfy the requirements under the current solicitation, it necessarily must have failed to perform adequately on the predecessor contract. Protest at 13.

Under the past performance factor, the agency was to evaluate the recency and relevancy of the past performance rating provided. RFP at 87. The agency provided a detailed response as to why it reasonably found Vane's past performance acceptable. In its submissions, Harley did not actually challenge the agency's assessment of the recency or relevancy of Vane's past performance, nor did it even engage with the substance of the agency's evaluation under this factor. As such, we find that this protest ground was not clearly meritorious. Moreover, given that past performance was independently evaluated under a separate factor from the technical subfactors, and contemplated a distinct analysis from that described above, it follows that this ground is not intertwined with the clearly meritorious protest ground. Accordingly, we limit our recommendation for award of protest costs.

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 technical proposals. We do not recommend reimbursement for the protester's allegations that the agency unreasonably evaluated the awardee's past performance. Harley 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