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Decision

Matter of: DCR Services & Construction, Inc.--Costs

File: B-420485.3

Date: September 27, 2023

Bret S. Wacker, Esq., Clark Hill PLC, for the protester.
Javier E. Gonzalez, Esq., Department of the Navy, for the agency.
Charmaine A. Stevenson, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation that agency reimburse the protester's costs associated with filing and pursuing its bid protest is denied where, although the agency delayed taking prompt corrective action, the protest allegations were not clearly meritorious.

DECISION

DCR Services & Construction, Inc., a small business of Detroit, Michigan, requests that we recommend that it be reimbursed the costs associated with filing and pursuing its bid protest. In its protest, DCR challenged the agency's failure to award it a contract under solicitation No. N69450-20-R-0012, issued by the Department of the Navy, Naval Facilities Engineering Systems Command, for design-build and design-bid-build construction for naval operations in the Jacksonville, Mayport, and Orlando areas. DCR argues that its protest was clearly meritorious, and the agency unduly delayed taking corrective action.

We deny the request.

BACKGROUND

The solicitation, issued on May 7, 2020, established that the procurement was set aside for competition among historically underutilized business zone small businesses in accordance with Federal Acquisition Regulation (FAR) section 6.205, and would be conducted using the negotiated contract procedures of FAR part 15. Agency Report

(AR)¹, Tab 5a, Solicitation at 1, 19. The solicitation sought proposals for the award of “approximately five” fixed-price, indefinite-delivery, indefinite-quantity contracts, as well as proposals for the first project for which a task order would be issued under the awarded contracts. *Id.* at 8-9. The solicitation stated that each contract would be for a period of five years or an aggregate maximum value of \$99 million, whichever occurred first. *Id.* at 9.

The procurement was divided into two phases, and only offerors invited to participate in phase two were permitted to submit a phase two proposal. *Id.* at 6. The solicitation stated that the agency would evaluate price and the following non-price factors: technical approach, experience, safety, past performance, technical solution, and energy and sustainable design. *Id.* at 10. The solicitation stated that all non-price factors, excluding past performance, were of equal importance; when combined, these non-price factors were equally important to past performance; and the non-price factors and past performance combined were equally important to price. *Id.*

Regarding the evaluation of price, the solicitation stated as follows:

The Government will evaluate price based on the total price. Total price consists of the basic requirements and any option items. Analysis will be performed by one or more of the following techniques to ensure a fair and reasonable price:

- (i) Comparison of proposed prices received in response to the RFP.
- (ii) Comparison of proposed prices with the [independent government estimate (IGE)].
- (iii) Comparison of proposed prices with available historical information.
- (iv) Comparison of market survey results.

Id. at 17. The solicitation did not provide for a price realism evaluation.

The agency received 34 proposals, included 15 offerors in phase two of the procurement, conducted two rounds of discussions, and received final proposal revisions. Contracting Officer’s Statement (COS) at 2-3; see AR, Tab 4h, Business Clearance Memorandum. Based on the final evaluation results, 10 of the 15 proposals received an overall non-price evaluation rating of acceptable with a past performance rating of satisfactory confidence, including DCR.² *Id.* at 12. The evaluators concluded that “the best value is represented by the five (5) lowest price offerors that received an

¹ All AR citations are to the record from B-420485.2.

² The following adjectival ratings were used to rate proposals under the non-price factors: outstanding, good, acceptable, marginal, and unacceptable. AR, Tab 4a, Source Selection Plan Addendum 0003 at 23. In addition, the following adjectival ratings were used to assess past performance: satisfactory confidence; neutral confidence; limited confidence; or no confidence. *Id.* at 26; Solicitation at 8.

overall non-cost/price rating of Acceptable with Satisfactory Confidence.” *Id.* The evaluators further determined that DCR’s proposal, with a final proposed price of \$2,437,381 that was the highest of all 15 offerors, represented the eighth best value to the government. *Id.* at 14.

Ultimately, five awards were made to offerors at the following price positions and prices:³

Offeror	Price Position	Price
Wright Bros., LLC	4	\$1,269,000
CORE Engineering Construction, Inc.	6	\$1,296,882
Howard W. Pence, Inc.	8	\$1,398,355
Sergent Construction, LLC	10	\$1,446,867
Healtheon, Inc.	11	\$1,495,000

AR, Tab 4k, Phase Two Source Selection Decision at 20. In addition, Wright Bros., LLC was selected for award of the task order for the first project. *Id.* at 19.

On February 20, 2023, DCR filed a protest with our Office challenging the agency’s decision not to select DCR for award. Specifically, the protester argued that the agency improperly performed a price realism evaluation that led it to conduct misleading discussions with DCR. Based on the date the protest was filed, the deadline for the agency report was March 22, but the agency initially filed its report on March 9, and then refiled the report on March 17.⁴ The protester filed its comments on the agency report on March 21.

³ On October 20, 2022, offerors were notified of the apparent successful offerors, and as a result, protests were filed at the Small Business Administration. AR, Tab 4h, Business Clearance Memorandum at 10. Subsequently, the agency concluded that two of the apparent successful offerors initially identified were ineligible for award, and revised the selection decision. *Id.*

⁴ Although the protest included requests for specific documents, the agency failed to file a five-day letter, as required by our regulations. See 4 C.F.R. § 21.3(c). Instead, the agency filed its report on March 9, and provided record documents in three PKWARE, Inc. zip files, but the record did not include a document index or identify all of the documents by assigning identifying tab numbers or letters to all corresponding files. On March 14, our Office advised the parties that the record was inadequate for review and instructed the agency to refile the record “with the documents organized in a logical manner, and include an index that assigns a letter, number, or combination of both (as applicable), to corresponding document files,” and to “revise the contracting officer’s statement and legal memorandum to include citations to the re-filed record, as appropriate.” Electronic Protest Docketing System (Dkt.) No. 13, Notice of Requirement to Refile the Record. The due date for the protester to file its comments was also extended to March 22. *Id.*

On March 22, the agency advised that it would take corrective action, to consist of reevaluating the protester's price proposal and the price discussions held by the agency, and as a result would "either amend the solicitation, reopen discussions, or issue a new or revised source selection decision." *DCR Servs. & Construction, Inc.*, B-420485.2, Mar. 31, 2023 (unpublished decision). Accordingly, our Office dismissed the protest as academic. *Id.* This request followed.

DISCUSSION

DCR requests that our Office recommend that it be reimbursed the reasonable costs of filing and pursuing its protest because the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Req. for Reimbursement at 4-12. Based on the circumstances of this case, although we conclude that the agency delayed taking prompt corrective action, we deny the request because the protest was not clearly meritorious.

When a procuring agency takes corrective action in response to a protest, our Office may recommend under 4 C.F.R. § 21.8(e) that the agency reimburse the protester its reasonable 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. *CloudFirstJV, LLC--Costs*, B-416872.4, May 10, 2019, 2019 CPD ¶ 177 at 3. Therefore, as an initial matter, with respect to the promptness of the agency's corrective action, 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. 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.

The agency argues that it took prompt corrective action because its request for dismissal based on corrective action was filed on the original agency report due date, *i.e.*, 30 days after the protest was filed. Resp. to Req. for Reimbursement at 5-6. Here, as noted, the protest was filed on February 20, 2023; as a result, the agency report due date was March 22. See Dkt. No. 4, B-420485.2 Acknowledgement Package with Protective Order at 1. The agency, however, initially filed its report on March 9, and refiled the report on March 17. See Dkt. Nos. 7-10, 12, 16-19. The protester then filed comments on March 21, and the agency advised that it would take corrective action on March 22. Although the agency took corrective action by the original agency report due date, the agency chose to file its report prior to that deadline, and as a result the protester was required to expend time and resources preparing and filing comments. It was not until after the protester filed its comments on the agency report that the agency notified our office of its proposed corrective action. Accordingly, on this record, we conclude that the agency delayed taking prompt corrective action.

The agency also argues, however, that the request should be denied because the protest was not clearly meritorious. Resp. to Req. for Reimbursement at 6. As noted above, the solicitation did not provide for a price realism evaluation and in its protest, DCR argued that the agency nonetheless improperly conducted a price realism evaluation which led to misleading discussions with DCR. The agency argues that the record clearly shows that it did not perform a price realism evaluation, the discussions with DCR were not misleading, and that DCR exercised its independent business judgment when it increased its proposed price by 97 percent in response to the discussions. *Id.* at 7-9.

When awarding a fixed-price contract, agencies are required to determine that the price offered is fair and reasonable. FAR 15.402(a). A price reasonableness analysis focuses primarily on whether the proposed prices are too high. *Lily Timber Servs.*, B-411435.2, Aug. 5, 2015, 2015 CPD ¶ 246 at 3. Although it is not required, an agency also may provide for a price realism analysis in a solicitation for award of a fixed-price contract to assess whether an offeror's low price reflects a lack of understanding of the contract requirements, or risk inherent in an offeror's proposed approach. See *Milani Constr., LLC*, B-401942, Dec. 22, 2009, 2010 CPD ¶ 87 at 4-5. In other words, a price realism evaluation assesses whether an offeror is likely to be able to execute its proposed technical approach in the manner described at its proposed price. See *Octo Consulting Grp., Inc.*, B-416097.3, B-416097.4, Sept. 24, 2018, 2018 CPD ¶ 339 at 8.

In order to conduct a price realism evaluation in a fixed-price environment, an agency must provide for such an analysis in the solicitation. *Ball Aerospace & Techs. Corp.*, B-402148, Jan. 25, 2010, 2010 CPD ¶ 37 at 8. Where, as in this case, the solicitation does not provide for a price realism evaluation, an agency is neither required nor permitted to perform one. See *Crown Point Sys.*, B-413940, B-413940.2, Jan. 11, 2017, 2017 CPD ¶ 19 at 5.

Regarding the conduct of the price evaluation, the contracting officer stated as follows:

For the initial price proposal evaluation during Phase Two, the Contracting Officer utilized comparison of proposed pricing to the IGE. During FPR [final proposal revision] price evaluation, the Contracting Officer utilized comparison of proposed pricing to the IGE and comparison of proposed prices received in response to the RFP.

COS at 9. When compared to the IGE of \$1,621,261, all offerors' initially proposed prices were lower by 0.5 to 111 percent. *Id.* at 8. The contracting officer considered eight offerors' prices to be "low" because they were lower than the IGE by 22 percent or more; another four offerors' prices were considered to be "significantly low" because they were lower than the IGE by 64 percent or more. *Id.*; see AR, Tab 4i, Price Evaluation Report at 9. DCR's initial proposed price was \$1,236,185. AR, Tab 2b, DCR Initial Price Proposal at 2.

The agency engaged in discussions with offerors during its evaluation of phase two proposals. COS at 3. In the discussion letters sent to all offerors, the agency provided offerors with the weaknesses, significant weaknesses, and deficiencies identified in the evaluation of their non-price proposals, and advised as follows:

Weaknesses and Significant Weaknesses do not have to be corrected for an offeror to be eligible for award. However, if they are not corrected, the proposal may not represent the best value to the Government. Proposals found to have a deficiency in meeting the stated solicitation requirements or performance objectives will be considered ineligible for award, unless the deficiency is corrected through discussions. Offerors are reminded that this is a competitive procurement, therefore; ensure your proposal revision is reflective of your most favorable price and technical terms.

AR, Tab 4f, Phase Two Offeror Discussion Letters, June 23, 2022, at 1.

In its discussion letter to DCR, the agency identified 18 weaknesses and a deficiency in DCR's non-price proposal. AR, Tab 4f, DCR Phase Two Discussion Letter, June 23, 2022, at 2-3. In addition, regarding price, the agency stated as follows:

The price submitted by the offeror is considered low. Offeror should revise their price to ensure that there is not a mistake in their offer, that they understand the full scope of requirements at the project location, and that they are not taking unnecessary financial risks. Offerors invited to discussions may submit revised pricing.

Id. at 2. The agency included identical language in 11 other discussions letters sent to offerors in phase two; in fact, four of these offerors were advised that their price was considered to be "significantly low." See AR, Tab 4f, Phase Two Offeror Discussion Letters, June 23, 2022. The record showed that, following discussions, 14 of the 15 offerors--including DCR--proposed prices that to varying degrees were higher than their initially proposed prices, and one offeror left its price unchanged. AR, Tab 4i, Price Evaluation Report at 9.

In response to the protest, the agency argued that it did not perform a price realism analysis, rather it compared only the total proposed prices to the IGE, consistent with the solicitation. Memorandum of Law at 5. The agency provided computations to demonstrate that after discussions while all other offerors proposed price increases that represented up to a 47 percent increase from their initially proposed prices, or an average price increase of 17 percent, only DCR significantly increased its price by proposing a price that represented a 97 percent increase to its initially proposed price.

Id. at 8-9. The agency argued that discussions with DCR were not misleading, all offerors similarly situated to DCR received the same price evaluation information as DCR in their discussion letters, and DCR's decision to almost double its price was an exercise of its independent business judgment. *Id.* at 5-9.

As a prerequisite to our recommending the reimbursement of costs where a protest has been resolved 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. *Valkyrie Enters., LLC--Costs*, B-415633.2, Oct. 29, 2018, 2019 CPD ¶ 41 at 3. A protest is clearly meritorious where a reasonable agency inquiry into the protest allegations would show facts disclosing the absence of a defensible legal position. *CloudFirstJV, LLC--Costs, supra* at 3; *Deque Sys., Inc.--Costs*, B-415965.5, Aug. 23, 2018, 2018 CPD ¶ 304 at 4. The mere fact that an agency decides to take corrective action does not establish that a statute or regulation clearly has been violated. *Distributed Sols., Inc.--Costs*, B-403566.2, Feb. 14, 2011, 2011 CPD ¶ 41 at 3.

On this record, we conclude the protester's allegation was not clearly meritorious. Here, the record showed that consistent with the solicitation, the contracting officer used one of the four price analysis techniques listed in the solicitation to determine whether total proposed prices were fair and reasonable, and compared prices to the IGE. See Solicitation at 17. When it was determined that all offerors' initially proposed prices were below the IGE, the agency engaged in virtually identical price discussions with 12 of the 15 offerors and advised that their proposed prices were considered "low" or "significantly low." AR, Tab 4f, Phase Two Offeror Discussion Letters, June 23, 2022. As noted, the letters stated that offerors "should revise their price to ensure that there is not a mistake in their offer, that they understand the full scope of requirements at the project location, and that they are not taking unnecessary financial risks." *Id.* at 2.

To the extent that the letters advised some offerors that they should revise their low price to ensure the offeror's "understanding of the full scope of requirements," we recognize that such a concern implicates a recognized hallmark of a price realism analysis. See *Shearwater Mission Support, LLC*, B-416717, Nov. 20, 2018, 2018 CPD ¶ 402 at 6-7.⁵ However, the question of whether the agency's conclusion that an

⁵ The protester cited our decision in *Shearwater* to support its argument that the agency had performed an improper price realism evaluation and engaged in misleading discussions. See Comments at 6, 9. However, we find the facts of that case to be distinguishable from the facts here in ways that could have been dispositive of the outcome. In *Shearwater*, the RFP included price evaluation language almost identical to the RFP language here, and did not include a price realism analysis. See *Shearwater Mission Support, LLC, supra* at 2-3. Nonetheless, the agency compared offerors' line item pricing information for 19 technical annexes, each of which represented a discrete service or area of work to be provided by the contractor, to the IGE and advised the protester in discussions that its proposed prices for certain annexes were either "unreasonably low" or "unreasonably high." *Id.* at 6. The record also showed that the agency's evaluation identified pricing for some offerors as "unrealistically high/low" and stated that a "price that is found to be unreasonably high or unrealistically low in relation to the proposed work may be indicative of an inherent lack of understanding of the RFP requirements and may result in the overall proposal not being considered for award." *Id.* In contrast, here, the contracting officer considered

(continued...)

offeror's price was considered "low" or "significantly low" constituted a price realism evaluation, when read in the context of the record as a whole, is a close one. Specifically, our Office has not previously considered whether an agency's discussion letter request for an offeror to ensure that its low price does not reflect a mistake in its offer constitutes a price realism assessment. Further, nothing in the record establishes that the agency evaluated proposals to determine if the protester's price was unrealistic or otherwise evaluated proposals to determine if the protester's technical approach was inconsistent with its proposed price. Reviewing the question of whether these various aspects of the agency's evaluation and conduct of discussions constituted a price realism analysis would have required our Office to further deliberate and resolve the agency's legal position. In other words, the legal arguments raised presented a defensible legal position for the agency and close question for our Office.

As discussed, the discussion letters provided the offerors with the weaknesses, significant weaknesses, and deficiencies identified in the evaluation of their proposals, but clearly stated that an offeror would be ineligible for award only if it failed to correct a deficiency, if any. AR, Tab 4f, Phase Two Offeror Discussion Letters, June 23, 2022, at 1. The letters also reminded offerors to ensure their proposal revisions reflected their most favorable price and technical terms in this competitive procurement. *Id.* While the letter informed DCR that it "should revise" its price, it also stated that offerors invited to discussions "may submit revised pricing." Of all the offerors whose discussion letters included nearly identical price evaluation language, only DCR significantly increased its price by almost doubling it.

Thus, when considering the record as a whole as of the time the agency submitted its notice of corrective action, the agency presented a defensible legal position to argue that its price evaluation did not constitute a price realism analysis that resulted in misleading discussions. *See General Dynamics Info. Tech., Inc.*, B-420589, B-420589.2, June 15, 2022, 2022 CPD ¶ 149 at 21-24. Accordingly, because we find

only the offerors' total proposed prices, and there is nothing in the record to support a conclusion that any offeror was not considered for award on the basis that its price was either unrealistically low or unreasonably high. As noted, the agency's evaluation concluded that DCR's proposal represented the eighth best value to the Government. AR, Tab 4h, Business Clearance Memorandum at 14.

that the agency had a defensible legal position, we conclude that the protest allegations were not clearly meritorious.

The request is denied.

Edda Emmanuelli Perez
General Counsel