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Decision

Matter of: US&S-Pegasus JV, LLC

File: B-421681.7

Date: September 10, 2024

Katelyn Hoelscher, Esq., and John Dulske, Esq., Steptoe & Johnson, PLLC, for the protester.

Erika Whelan Retta, Esq., Geoffrey R. Townsend, Esq., and Aaron J. Weaver, Esq., Department of the Air Force, for the agency.

Christine Milne, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation for reimbursement of the costs of filing and pursuing initial and supplemental protests is denied where the initial and supplemental protests were not clearly meritorious, and the agency did not unduly delay taking corrective action.

DECISION

US&S-Pegasus JV, LLC, of Greenville, South Carolina, requests that our Office recommend that the Department of the Air Force reimburse the attorneys' fees and costs the firm incurred in filing and pursuing initial and supplemental protests challenging the award of a contract to Criterion Corporation, of Marquette, Michigan, under request for proposals (RFP) No. FA670323R0001, issued by the Department of the Air Force for base operations support services at Dobbins Air Reserve Base in Cobb County, Georgia, after the agency took corrective action in response to the protests. US&S, the incumbent contractor, argues that the agency unduly delayed taking corrective action in response to clearly meritorious protests.

We deny the request.

BACKGROUND

The agency issued the RFP on March 30, 2023, pursuant to Federal Acquisition Regulation (FAR) subpart 15.3, for the base operations support services. Agency Report (AR) Tab 5, RFP at 1, 18. The services included materiel management, ground transportation and vehicle management, traffic management, real property

maintenance, and fuel management. *Id.* at 18. The RFP contemplated the award of a hybrid fixed-price, indefinite-delivery, indefinite-quantity contract with award to be made using a best-value tradeoff process considering price and two non-price factors: technical and past performance. AR, Tab 12, RFP amend. 0007 at 27-30.¹ Under the technical factor, offerors were required to provide an approach that met the requirements of the performance work statement (PWS). *Id.* at 30. The PWS included multiple tabs, five of which described a task to be performed. *Id.* at 31-32. Proposals were to be assigned ratings of acceptable or unacceptable under the technical factor. *Id.* at 31.

Under the past performance factor, offerors were required to submit at least two but no more than five past performance references. *Id.* at 18. The references had to be recent, relevant, and demonstrate quality performance. *Id.* at 37. To be recent, references could be active or completed, but at least one year of the contract effort's period of performance had to have been completed within the past seven years from the date the RFP was issued. *Id.* at 19. As to relevance, the RFP provided that the agency would evaluate the extent to which a reference was similar to the current requirement in terms of scope, complexity, and magnitude. *Id.* at 34-35. References would receive a rating of either very relevant, relevant, somewhat relevant, or not relevant. *Id.* at 34. Regarding performance quality, the agency would assess how well the offeror had performed the contract by considering information such as past performance questionnaires. *Id.* at 35-36. Proposals were to be assigned overall ratings of substantial confidence, satisfactory confidence, neutral confidence, or limited confidence under the past performance factor. *Id.* at 36.

Regarding price, the RFP stated that the agency would evaluate price for completeness, fairness and reasonableness, balance, and "realism (if necessary)." *Id.* at 37. As relevant here, the RFP further provided that:

The Government reserves the right to conduct a price realism analysis on the lowest price proposal(s). Proposals are understood to reflect the Offerors' understanding of the technical requirements of the PWS in its entirety. Proposals with an unrealistic price (price too low) may be determined ineligible for award.

AR, Tab 12, RFP, amend. 0007 at 38.

Proposals were first to be evaluated under the technical and price factors. *Id.* at 30. The proposals were then to be sorted by total evaluated price and assigned past performance ratings. *Id.* Once they had been sorted, the source selection authority was to conduct a past performance and price tradeoff analysis. *Id.* Past performance was significantly more important than price. *Id.*

¹ This amendment is the most recent version of the updated evaluation criteria.

The agency received nine proposals in response to the solicitation, eight of which were evaluated for technical acceptability, including those of US&S and Criterion. AR, Tab 24, Source Selection Decision Document at 3. Both proposals were rated technically acceptable. *Id.* The total evaluated prices of both US&S and Criterion, which were [REDACTED], and \$39,208,953, respectively, were found to be fair, reasonable, and balanced, and the agency determined that none of the proposals required a price realism analysis. *Id.* Both US&S and Criterion received overall past performance ratings of satisfactory confidence. *Id.* at 4. The agency determined that Criterion offered the best value to the agency and made award to Criterion, and notified US&S on April 3. AR, Tab 25, Award Notice at 1. US&S received a debriefing on April 8, in which it learned that Criterion had been rated technically acceptable and given a rating of satisfactory confidence. AR, Tab 30, Debriefing at 2.

On April 12, US&S filed a protest with our Office asserting that the agency improperly failed to conduct a price realism analysis. Protest at 7. The protester filed a supplemental protest on April 18, asserting that the agency unreasonably assigned Criterion's past performance a rating of satisfactory confidence because Criterion could not have submitted at least two recent, relevant, and quality past performance references. Supp. Protest at 7.

On May 13, the agency filed its agency report, arguing that per the terms of the solicitation, a price realism evaluation was not required, it was discretionary, and the agency reasonably determined that one was not necessary. Memorandum of Law (MOL) at 17-19. The agency also asserted that it reasonably evaluated the awardee's four past performance references as recent, relevant, and good quality performance. *Id.* at 23-28.

On May 23, the protester filed its comments on the agency's report and a second supplemental protest. Regarding its initial protest ground, the protester asserted that the solicitation required the agency to perform a price realism analysis because of the significant difference between the proposed prices of US&S and Criterion. Regarding its challenge to the agency's evaluation of Criterion's past performance as set forth in the first supplemental protest, the protester altered its position to raise new arguments about why the agency should have discounted the past performance references submitted by Criterion asserting: (1) the awardee did not perform 100 percent of the work in each of its references; (2) the awardee's teaming partner performed 100 percent of the work in one of the references; and (3) significant portions of one of the awardee's references was performed by a subcontractor that the awardee did not propose to include in this contract. Protester's Comments & 2nd Supp. Protest at 1-4; 13-19.

On June 3, the agency informed our Office that it was taking corrective action by reconsidering whether a price realism analysis would be conducted for the lowest-priced proposals, reevaluating the past performance of proposals for which past performance was previously evaluated, and making a new award determination. *US&S-Pegasus JV, LLC, B-421681.4 et al.*, June 5, 2024 (unpublished decision). On June 5 we dismissed the protest as academic. *Id.* This request followed.

DISCUSSION

US&S requests that we recommend that it be reimbursed the reasonable costs of filing and pursuing its initial and supplemental protests. The firm argues that all of its protest grounds were clearly meritorious and that the agency unduly delayed taking corrective action. We consider each of the requester's arguments in turn.

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); *STG, Inc.*, B-415580.3, Mar. 27, 2018, 2018 CPD ¶ 221 at 3. 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. *STG, supra*. 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. *Id.* The mere fact that an agency decides to take corrective action does not establish that a statute or regulation clearly has been violated. *Diligent Consulting, Inc.--Costs*, B-299556.3, June 26, 2007, 2007 CPD ¶ 125 at 4.

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. *Id.* While we usually consider corrective action to be prompt if 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. *Id.* However, where an agency reviews an initial protest ground and reasonably concludes that it has a defensible legal position, but subsequently concludes that corrective action is required in response to different arguments concerning the same initial ground first raised in the comments or a supplemental protest argument, we will not conclude that the agency unreasonably delayed in taking corrective action. *Bay West, LL--Costs; Bhate Zapata LLC--Costs*, B-418960.6 *et al.*, Mar. 3, 2021, 2021 CPD ¶ 112 at 7.

Here, as discussed below, we conclude that reimbursement is not appropriate.

Price Realism

US&S's original protest ground asserted that the agency was required to perform a price realism analysis. Protest at 7-11. The agency responded that the solicitation did not require the agency to perform one, but, rather, left it to the agency's discretion whether to do so, and that the agency reasonably determined that it was not necessary. MOL at 16-20. In its comments, the protester conceded that the solicitation merely provided that the government reserved the right to conduct a price realism analysis but asserted that it was necessary here because the awardee's price was substantially lower than the prices of the other offerors. Protester's Comments and 2nd Supp. Protest

at 4. The only evidence the requester offered to support its claim that the agency abused its discretion in deciding not to conduct a price realism analysis was to point out that Criterion's price was [REDACTED] percent lower than the independent government cost estimate and "substantially lower" than the other offerors' prices. Protester's Comments and 2nd Supp. Protest at 3-4.

Here, we find that the requester's argument regarding price realism was not clearly meritorious. The solicitation gave the agency discretion whether to conduct a price realism analysis by reserving to the agency the right to conduct such an evaluation, rather than requiring it. Specifically, as described above, the solicitation stated as follows:

The Government reserves the right to conduct a price realism analysis on the lowest price proposal(s). Proposals are understood to reflect the Offerors' understanding of the technical requirements of the PWS in its entirety. Proposals with an unrealistic price (price too low) may be determined ineligible for award.

AR, Tab 12, RFP, amend. 0007 at 38.

While the solicitation stated several times that a proposal's price may be determined to be unrealistic, this language was always coupled with the condition that such a determination would only be made "if necessary," which is consistent with the statement quoted above that the agency reserved the right to conduct a price realism analysis. AR, Tab 12, RFP amend. 0007 at 27, 28, 38. Our decisions have explained that where, as here, an agency states in a solicitation that it "reserves the right" to conduct a price realism analysis, the decision to conduct such an analysis is a matter within the agency's discretion. *Guident Techs., Inc.*, B-405112.3, June 4, 2012, 2012 CPD ¶ 166 at 13 n.9.

Further, the requester did not demonstrate that the agency abused its discretion by deciding not to conduct a price realism analysis. Where, as here, an RFP contemplates the award of a fixed-price contract, a realism evaluation is for the limited purpose of assessing offerors' understanding of the solicitation's requirements or the risk inherent in offerors' proposals. *Triad Logistics Servs. Corp.*, B-407842.2, Apr. 22, 2013, 2013 CPD ¶ 106 at 4; see Federal Acquisition Regulation 15.404-1(d)(3). The requester points only to the difference between Criterion's price, US&S's price, and the independent government cost estimate, and asserts that the differences alone evince that a price realism analysis was necessary. Such an assertion does not demonstrate that the agency abused its discretion but rather amounts to disagreement with the agency's decision. As argued by the agency, the mere fact that the awardee's price is lower than the independent government cost estimate and the requester's price does not evince that Criterion did not understand the solicitation's requirements, and therefore does not demonstrate that the agency unreasonably determined that a price realism analysis was unnecessary. *Id.*; see *HP Enter. Servs., LLC*, B-413888.2 *et al.*, June 21, 2017, 2017 CPD ¶ 239 at 5 (explaining that the fact that an offeror's price is

below a government cost estimate does not require the agency to conclude that the price is unrealistically low since we have recognized that an agency may find even a below-cost price to be realistic.). Therefore, on this record, we find that the agency articulated a defensible legal position, and this protest ground was not clearly meritorious.

Past Performance

US&S next asserts that its first and second supplemental protests challenging the agency's evaluation of Criterion's past performance were clearly meritorious, and the agency unduly delayed taking corrective action in response to those protests.

In its first supplemental protest, the protester asserted that the agency unreasonably assigned a rating of satisfactory confidence to Criterion's past performance because Criterion could not have submitted at least two recent, relevant, and quality past performance references. The protester found five contracts the awardee had previously performed and asserted that three were not similar in magnitude and the other two were not similar in complexity. Supp. Protest at 7-8.

The agency responded that three of the contracts US&S relied on to support this argument were not part of the evaluation and were irrelevant. MOL at 24. The agency then explained that the awardee had submitted four past performance references, two of which were contracts US&S challenged. The agency detailed how it determined each of Criterion's four references met the past performance requirements. *Id.* at 23-38.

We find that US&S has not demonstrated that its first supplemental protest is clearly meritorious. An agency's evaluation of past performance, including its consideration of the relevance, scope, and significance of an offeror's performance history, is a matter of discretion which we will not disturb unless the agency's assessments are unreasonable or inconsistent with the solicitation criteria. *Noble Supply & Logistics, Inc--Costs*, B-417571.4, Nov. 27, 2019, 2019 CPD ¶ 411 at 6. Here, the agency articulated a defensible legal position by pointing out that three of the references US&S relied on to support its arguments were not even part of the evaluation, and explaining how it evaluated the remaining two in accordance with the terms of the solicitation. Therefore, we conclude that US&S's first supplemental protest was not clearly meritorious.

In its comments and second supplemental protest, as noted above, US&S articulated new arguments regarding the references Criterion submitted with its proposal. Instead of a filing a supplemental agency report, the agency notified our Office that it intended to take corrective action by, among other things, reevaluating the past performance of proposals for which past performance was previously evaluated. *US&S-Pegasus, supra*. We note that regardless of whether US&S's second supplemental protest was clearly meritorious, the protester must show that the agency unduly delayed taking corrective action. The agency's decision to take corrective action, rather than filing a supplemental agency report responding to the new allegations, constitutes the prompt

action that our protest procedures contemplate with respect to the supplemental protest grounds. *STG, supra* at 5.

US&S asserts that, although the agency took corrective action before filing a supplemental agency report, it still unduly delayed taking corrective action because its first and second supplemental protest grounds are so intertwined that a reasonable investigation by the agency into the first supplemental protest would have revealed the flaws identified later in the second supplemental protest. Requester's Comments at 5-6. We disagree. US&S's first supplemental protest alleged generally that the agency unreasonably evaluated the awardee's past performance, and three of the five references the protester relied on to support this argument were not even part of the agency's evaluation. Further, the challenge the protester raised regarding one contract was not renewed in its comments.

The only challenge remaining from US&S's first supplemental protest was its challenge to another reference arguing that it lacked the complexity of the solicitation's requirements. The protester did not renew its original challenge to this reference but rather altered its argument. The protester originally asserted that this reference did not include all of the tasks described in the five tabs of the PWS. Supp. Protest at 8-9. In its second supplemental protest, the protester argued that the agency should not have considered the reference because the work required by two of the five tabs was performed by a subcontractor that the awardee did not propose to use for this requirement. Comments and 2nd Supp. Protest at 14-15. The protester's original assertion concerned what tasks the reference included in general, while the protester's new assertion concerned which parties performed which tasks and to what degree. Therefore, we conclude that the protester's first and second supplemental protests were not so intertwined that the agency's investigation into the first challenges would have revealed the alleged flaws the protester asserted in its second supplemental protest.

Even if we were to conclude that the first and second supplemental protest grounds are intertwined, the agency did not unduly delay taking corrective action in response to the second supplemental protest because the initial supplemental protest grounds were not clearly meritorious as described above. See *Imagine One Tech. & Mgmt., Ltd.--Costs*, B-412860.3, Dec. 9, 2016, 2018 CPD ¶ 80 at 6 (concluding that corrective action taken in response to supplemental protest grounds that arguably have a nexus to initial protest grounds is not unduly delayed where the related initial protest grounds were not clearly meritorious). Therefore, because the protester's initial supplemental protest was not clearly meritorious and the agency's corrective action was not unduly delayed with respect to the second supplemental protest, reimbursement is not appropriate here.

The request is denied.

Edda Emmanuelli Perez
General Counsel