



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: American Systems Corporation; BAE Systems Information Solutions, Inc.--Costs

File: B-408386.5; B-408386.7

Date: December 9, 2015

Joseph G. Billings, Esq., and Katherine B. Hill, Esq., Miles & Stockbridge PC, for American Systems Corporation; and Michael R. Charness, Esq., David R. Johnson, Esq., and Erin N. Rankin, Esq., Vinson & Elkins LLP, for BAE Systems Information Solutions, Inc., the protesters.

Abigail A. Nawrocki, Esq., Department of Homeland Security, for the agency. Glenn G. Wolcott, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where, in response to protests and following GAO's determination that a hearing was necessary to clarify the protest records, the procuring agency took corrective action, protesters' requests for GAO's recommendation that protest costs be reimbursed are denied on the basis that the protests were not clearly meritorious.

DECISION

American Systems Corporation (ASC) and BAE Systems Information Solutions, Inc. (BAE) request that we recommend reimbursement of the costs they incurred in filing and pursuing their protests challenging the Department of Homeland Security's award of a task order to Ideal Innovations, Inc. (I3) for biometric support services pursuant to request for quotations (RFQ) No. HSHQDC-13-Q-00002.

We deny the requests.

In January 2013, the agency published the solicitation at issue to contractors holding federal supply schedule (FSS) contracts No. 874, mission oriented business integrated services (MOBIS), seeking quotations for biometric support services.¹

¹ The solicitation stated that award of the task order was "to obtain highly-specialized fingerprint analysis to support the Biometric Support Center." RFQ at 1.

The solicitation provided for award on a best-value basis and established the following evaluation factors: technical approach, personnel, past performance, and cost/price. RFQ, encl. 3, at 6-8. Pursuant to the personnel evaluation factor, the solicitation required vendors to submit staffing plans to identify the labor categories the vendor intended to use in performing the required tasks and to “[d]emonstrate that the proposed manning/personnel skill levels, expertise, and experience are adequate to perform the work required by this statement of work.” Id. at 3.

In February 2013, quotations were submitted by ASC, BAE, and I3. In May 2013, the agency notified the offerors that I3 had been selected for award. Thereafter, BAE and ASC filed protests challenging the award. In June 2013, the agency took corrective action, advising GAO and the parties that it would request additional information from the vendors and would reevaluate their quotations. Thereafter, the agency amended the solicitation and requested quotation revisions; revised quotations were submitted on August 23, 2013. In evaluating the revised quotations under the personnel factor, the agency criticized both ASC’s and BAE’s quotations with regard to various aspects of their proposed staffing plans. Agency Report (AR) for ASC’s Protest, Tab 11, Technical Evaluation Report, at 12-13; AR for BAE’s Protest, Tab 16, Technical Evaluation Report, at 18.

On January 30, 2014, the agency again selected I3 for award. In selecting I3, the source selection authority recognized that I3’s quotation reflected a higher cost/price than either of ASC’s or BAE’s quotations, but concluded that the superiority of I3’s quotation under the non-cost/price evaluation factors outweighed its higher cost/price. AR for ASC’s Protest, Tab 14, Source Selection Decision, at 6-7; AR for BAE’s Protest, Tab 19, Source Selection Decision, at 6-7.

In February 2014, ASC and BAE again filed protests challenging the award to I3. ASC’s protest asserted that its quotation should have been rated higher under the personnel factor and challenged the reasonableness of the agency’s tradeoffs between cost/price and non-cost/price evaluation factors. BAE’s protest asserted that certain solicitation requirements were not contained in I3’s FSS contract; that the agency improperly evaluated BAE’s quotation with regard to its staffing plan; that the agency conducted inadequate discussions with BAE regarding its staffing plan; and that the agency’s tradeoffs between cost/price and non-cost/price evaluation factors were unreasonable.

On March 10, the agency submitted separate reports responding to ASC’s and BAE’s protests. On March 20, the protesters submitted their comments on the agency’s reports and, thereafter, the agency requested an opportunity to respond to the protesters’ comments. GAO granted the agency’s request and, on March 31, the agency submitted separate responses to ASC’s and BAE’s prior submissions. On April 4, the protester’s submitted their supplemental comments on the agency’s March 31 submissions.

On April 10, this Office consolidated ASC's and BAE's protests and conducted a conference call with counsel for the parties during which the parties were advised that GAO intended to conduct a hearing in connection with the consolidated protests. During the conference call, the GAO attorney responsible for the protests discussed his concerns regarding the agency's evaluation of the staffing requirements and questioned whether the requirements had been rationally and equally applied. Thereafter, GAO issued a hearing notice establishing April 17 as the hearing date. In its hearing notice, GAO identified various agency officials from whom testimony would be sought, summarized the intended scope of that testimony, and stated: "the record is unclear as to what the agency's evaluators and source selection officials viewed as mandatory solicitation requirements, and whether the solicitation's requirements were rationally and equally applied." GAO Hearing Notice, Apr. 10, 2014, at 2.

By letters dated April 16 and April 18, the agency advised our Office and counsel for the parties that it would take corrective action in response to the protests.² In this regard, the agency stated that it would reconsider the solicitation requirements, issue a solicitation amendment if necessary, seek revised and updated quotations, reevaluate the quotations and make a new source selection decision. Based on the agency's corrective action, we dismissed ASC's and BAE's protests. Thereafter, ASC and BAE submitted requests for our recommendation that they be reimbursed for their protest costs.

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. Bid Protest Regulations, 4 C.F.R. § 21.8(e); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. That is, as a prerequisite to our recommendation that protest costs be reimbursed, the protest must be clearly meritorious. J.F. Taylor, Inc.--Entitlement to Costs, B-266039.3, July 5, 1996, 96-2 CPD ¶ 5 at 3; Baxter Healthcare Corp.--Entitlement to Costs, B-259811.3, Oct. 16, 1995, 95-2 CPD ¶ 174 at 5. 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. As a general rule, we do not regard a protest as clearly meritorious when further record development, such as a hearing, is necessary to complete and clarify the record. See, e.g., URS Federal Servs., Inc.--Costs, B-406140.4, July 17, 2012, 2012 CPD ¶ 223 at 4; Boston Harbor Dev. Partners, LLC--Costs, B-404614.5, Feb. 17, 2012, 2012 CPD ¶ 74 at 2-3; Distributed Solutions, Inc.--Costs, B-403566.2, Feb. 14, 2011, 2011 CPD ¶ 41 at 4.

² Based on the agency's April 16 notification regarding its pending corrective action, GAO postponed and, thereafter, cancelled the protest hearing.

As discussed above, after reviewing the agency's responses to the protesters' allegations, this Office had concerns regarding the reasonableness and consistency of the agency's evaluation and source selection decision. Indeed, in discussing the issues with counsel for the parties, the GAO attorney responsible for these protests questioned whether the agency's separate reports responding to the protests took conflicting views regarding certain staffing requirements. Nonetheless, in making the determination to conduct a hearing to complete and clarify the record, GAO expressly stated: "the record is unclear as to what the agency's evaluators and source selection officials viewed as mandatory solicitation requirements, and whether the solicitation's requirements were rationally and equally applied." GAO Hearing Notice, Apr. 10, 2014, at 2. Since further clarification of the record was necessary to resolve the protests, we cannot conclude that the protesters' allegations were clearly meritorious and, accordingly, we do not recommend reimbursement of protest costs.

The requests are denied.

Susan A. Poling
General Counsel