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Decision

Matter of: Science Applications International Corporation--Costs

File: B-410760.5

Date: November 24, 2015

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DIGEST

Request for reimbursement of protest costs is denied where the agency did not unduly delay taking corrective action and the protest grounds were not clearly meritorious.

DECISION

Science Applications International Corporation (SAIC), of McLean, Virginia, requests that it be reimbursed the reasonable costs of filing and pursuing its protest of the award of a contract to Tapestry Solutions, Inc., of San Diego, California, under request for proposals (RFP) No. 00039-14-R-0003, which was issued by the Department of the Navy, Space and Naval Warfare Systems Command (SPAWAR), for systems engineering, test, and integration (SETI) services for the Navy's Tactical Mobile (TacMobile) program.

We deny the request.

BACKGROUND

The RFP, issued on April 17, 2014, contemplated the award of a cost-plus-fixed-fee level-of-effort contract for a base year and four 1-year options. RFP at 26-27, 30. Pursuant to the RFP, proposals were to be evaluated on a best-value basis, considering (in order of importance) technical approach, management approach, past performance, and cost/price. Id. at 113-14. The agency received proposals

from three offerors, including SAIC and Tapestry. Agency Report (AR) at 4. After evaluating proposals, the agency concluded that Tapestry's proposal represented the best value to the government, and the agency awarded the contract to Tapestry on October 21.

On November 4, SAIC filed an initial protest with our Office (B-410760.1), in which it raised the following allegations: (1) SPAWAR unreasonably evaluated Tapestry's past performance because the firm did not possess relevant past performance; (2) SPAWAR unreasonably evaluated SAIC's past performance because one of its references warranted a higher assessment; (3) SPAWAR improperly equalized the weight to be assigned under the technical approach and management approach subfactors; (4) SPAWAR unreasonably evaluated SAIC's proposal under the data rights subfactor; (5) SPAWAR unreasonably evaluated two of SAIC's key personnel; (6) SPAWAR failed to recognize that Tapestry's cost was unrealistically low (based on the fact that the awardee submitted a lower cost than SAIC); and (7) SPAWAR conducted a flawed best value analysis (based on the alleged underlying evaluation improprieties). SAIC also asserted that Tapestry had an unmitigated impaired objectivity organizational conflict of interest (OCI) due to the firm being a wholly-owned subsidiary of The Boeing Company, which manufactured one of the aircraft with the systems that the awardee would be testing under the contract.

With respect to the OCI allegation, on November 19--prior to the submission of the agency's report--the contracting officer issued a determination and findings (D&F) memorandum in which she concluded that the procurement was not tainted by an OCI. Relying on the D&F, the commander of SPAWAR agreed that Tapestry did not possess an OCI; even so, he executed a waiver of "any and all residual OCI concerns." Organizational and Consultant Conflicts of Interest Waiver Determination at 3. Consequently, our Office dismissed as academic SAIC's original OCI complaint, and SAIC subsequently filed its first supplemental protest challenging the OCI waiver (B-410760.2).

On December 3, the Navy filed separate agency reports responding to SAIC's initial protest grounds and the protester's supplemental challenge to the OCI waiver. The Navy countered each of the protester's allegations and submitted a contemporaneous record that detailed its evaluation and award determination.

On December 9, subsequent to receiving the agency's report but prior to submitting comments, the protester filed its second supplemental protest (B-410760.3).¹ In the supplemental filing, SAIC argued that the Navy failed to adhere to the RFP's evaluation criteria when it performed its cost evaluation.

¹ SAIC maintained that the filing was based on information the protester learned during a December 2 telephone conversation with the agency's counsel.

Thereafter, on December 15, SAIC filed its comments in response to the agency's reports and its third supplemental protest (B-410760.4). In this supplemental filing, SAIC raised for the first time numerous additional concerns with respect to the agency's evaluation of Tapestry's proposed cost, as well as the evaluation under the non-cost factors. For instance, SAIC alleged that the Navy failed to properly evaluate cost information for Tapestry's significant subcontractors and that the awardee's cost proposal omitted required information. Among numerous other allegations, SAIC also complained that the Navy failed to assess the past performance of Tapestry's proposed subcontractors and misevaluated Tapestry's proposal under various technical approach and management approach subfactors.

Our Office asked the Navy to submit a supplemental agency report to address the new allegations by December 24. On December 19, prior to submitting a supplemental report, the Navy advised our Office that it intended to take corrective action as a result of SAIC's supplemental protest, which raised "areas of concern." Agency Notice of Corrective Action at 1. Specifically, the agency stated that it intended to "re-evaluate and make a new selection decision, which may include opening discussions and/or the resubmission of proposals." *Id.* On December 23, our Office dismissed the protest as academic. Science Applications Int'l Corp., B-410760 et al., Dec. 23, 2014 (unpublished decision). Thereafter SAIC filed its request for protest costs.

DISCUSSION

SAIC requests that we recommend that it be reimbursed the reasonable costs of filing and pursuing its protests, including attorneys' fees. SAIC contends that its protest grounds--all of them--were clearly meritorious and revealed facts showing the absence of a defensible legal position. SAIC further asserts that the Navy's corrective action was unduly delayed because it was filed after the due date for the initial agency report and after SAIC submitted comments and filed its second and third supplemental protests. For the reasons discussed below, we deny the protester's request for reimbursement of its protest costs with regard to both its initial and supplemental protests.

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, 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. Thus, as a prerequisite to our recommending the reimbursement of costs 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. 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. This imposition of costs is not intended as an award to prevailing protesters or as a penalty to the agency, but rather, is designed to encourage agencies to take prompt action to correct apparent defects in competitive procurements. See Takota Corp.--Costs, B-299600.2, Sept. 18, 2007, 2007 CPD ¶ 171 at 3. Here, we find that reimbursement is not appropriate.

First, with regard to SAIC's initial protest grounds, we find that they were not clearly meritorious. For illustrative purposes, we discuss a few of these allegations below.

As noted above, SAIC objected to the agency's evaluation of Tapestry's past performance, arguing that the awardee failed to possess sufficiently relevant experience to warrant a satisfactory confidence rating. In its report, the Navy explained that Tapestry submitted for review three projects performed by the firm's parent company, Boeing, and that the evaluators assessed the projects as somewhat relevant to the TacMobile SETI requirements. AR (B-410760.1) at 19-21. The agency also maintained that it was proper to attribute Boeing's past performance to Tapestry because Boeing would have "meaningful involvement" in contract performance. Id. at 20. Moreover, the evaluators detailed in the contemporaneous evaluation record why the three projects were considered somewhat relevant--based on a comparison of the scope, complexity, and magnitude of the efforts--and why the evaluators had confidence that Tapestry would successfully perform the contract--based on a review of Contractor Performance Assessment Reports (CPARs). See AR, Tab 6, Source Selection Evaluation Board (SSEB) Report, at 51-53. In its comments, SAIC maintained its disagreement with the evaluators' conclusions; however, in our view, the protester failed to demonstrate that its initial past performance challenge provided a basis to sustain the protest. Thus, we disagree with SAIC that this protest ground was clearly meritorious or that the Navy lacked a defensible legal position.²

SAIC also objected to certain aspects of the agency's evaluation of the firm's proposal under the technical approach and management approach factors. For example, SAIC argued that the agency's assignment of a good rating under the data rights subfactor was unreasonable given the firm's commitment to provide SPAWAR with [DELETED] to data.³ In response, the agency noted that both SAIC

² With respect to SAIC's objection to the agency's evaluation of its own past performance, the protester withdrew this protest ground in its comments. See Comments/Supp. Protest at 15 n.7.

³ We also note that SAIC's complaint focused on the rating assigned, and not the agency's underlying evaluation of the data rights proposed. It is well-established that adjectival ratings are merely guides to intelligent decision-making in the

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and Tapestry offered SPAWAR similar data rights and argued that SAIC failed to demonstrate that it suffered any prejudice as a result of the evaluation. AR (B-410760.1) at 30-32. The agency also highlighted that the solicitation gave the Navy the discretion to give “higher consideration” to proposals that offered greater rights to data, but it did not mandate specific ratings for particular data rights. Id.; see RFP at 114. In its comments, SAIC focused on the fact that Tapestry apparently caveated the [DELETED] provided for one of the more than 30 deliverables under the contract.⁴ Notwithstanding this slight variation in the data rights, we see no basis to conclude that the agency’s evaluation was unreasonable or contrary to the solicitation, particularly where the solicitation stated that an offeror “may receive higher consideration for proposing to provide greater than ‘Government Purpose Rights,’” and did not require specific ratings for certain data rights. See RFP at 114. Consequently, we decline to accept that this protest allegation was clearly meritorious. In addition, we reach the same conclusion with respect to SAIC’s challenges under the key personnel subfactor; the protest allegations reflect disagreement with agency judgments and do not demonstrate clearly meritorious protest grounds.

The protester also asserts that its supplemental protest (B-410760.2) challenging the agency’s OCI waiver was clearly meritorious. We disagree. As discussed above, the protester initially argued that the award was tainted by an unmitigated OCI. The agency promptly investigated the allegations, concluded that Tapestry did not have an OCI, and waived “any and all residual OCI concerns.” See Organizational and Consultant Conflicts of Interest Waiver Determination at 3. In its comments, SAIC argued that the waiver was procedurally defective because the Navy failed to properly acknowledge the extent of the conflict. That is, SAIC continued to maintain that Tapestry had an impaired objectivity OCI despite the agency’s findings otherwise and decision to ultimately waive any OCI. On this record, where the OCI waiver complied with the requirements of Federal Acquisition Regulation § 9.503, we cannot conclude that the protester’s assertions constitute clearly meritorious grounds of protest.

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procurement process. See Epsilon Sys. Solutions, Inc., B-409720, B-409720.2, July 21, 2014, 2014 CPD ¶ 230 at 8. Thus, we disagree that SAIC’s objections were clearly meritorious.

⁴ Specifically, Tapestry offered [DELETED] in source code developed and delivered under the contract, and for one particular deliverable the awardee explained that it would provide SPAWAR [DELETED] related to that deliverable. See AR, Tab 6, SSEB Report, at 44.

As these examples demonstrate, we find that SAIC's initial (B-410760.1) and first supplemental (B-410760.2) bases of protest were not clearly meritorious and decline to recommend reimbursement of costs associated with these allegations.

Next, with respect to SAIC's supplemental challenges (those raised for the first time after the submission of the initial agency report), we find that the agency did not unduly delay in taking corrective action because it acted prior to the deadline for submitting its supplemental report. When an agency takes corrective action before the due date set for receipt of the agency report, our Office views such action as prompt and will not recommend the reimbursement of costs. LGS Innovations LLC, B-405932.3, Apr. 26, 2012, 2012 CPD ¶ 147 at 2; The Sandi-Sterling Consortium--Costs, B-296246.2, Sept. 20, 2005, 2005 CPD ¶ 173 at 2-3. Thus, we have no basis to recommend reimbursement of costs associated with SAIC's second and third supplemental protests.

In addition, we disagree with SAIC that its initial protest allegations sufficiently placed the entirety of the agency's evaluation at issue such that costs would be warranted if any supplemental allegations proved meritorious. In this respect, while the protester raised certain objections in its initial filing, and the agency responded to those specific allegations in its report, SAIC's supplemental challenges raised different concerns with respect to the agency's evaluation of proposals.

For example, with respect to SAIC's cost challenge, the protester initially argued that Tapestry's cost was unrealistically low based solely on the fact that the awardee's offer was 7 percent (\$5.5 million) less than SAIC's. In its report, the Navy defended Tapestry's cost, explaining, for example, that the agency ultimately adjusted the firm's evaluated cost upward by more than [DELETED]. AR (B-410760.1) at 36-40, citing AR, Tab 1, Cost/Price Analysis Report, at 29-47. After receipt of the agency report, SAIC submitted two new and different supplemental challenges to the evaluation of Tapestry's cost. First, in its second supplemental protest (B-410760.3), SAIC asserted that the Navy's cost realism analysis was flawed because, according to the protester, the cost evaluators did not review offerors' technical approaches to determine whether proposed costs reflected an understanding of requirements, as contemplated by the RFP. See RFP at 117. In its third supplemental protest (B-410760.4), after receipt of the cost evaluation, SAIC asserted for the first time that the evaluation of Tapestry's significant subcontractors' costs was improper, among other things.⁵ Because

⁵ As an additional example of SAIC's unique supplemental protest grounds, SAIC also challenged the agency's failure to assess the past performance of Tapestry's significant subcontractors. Because this argument differs from what was challenged initially, it does not support the protester's argument that the agency unduly delayed taking corrective action. In this respect, the corrective action was taken before the agency had an opportunity to respond to the new supplemental allegations.

these supplemental challenges were raised in response to certain elements of the agency record, and because the arguments were not discussed in SAIC's initial protest nor did the agency provide a response to the allegations, we decline to accept that the agency's corrective action was unduly delayed.

In any event, while some of the protester's supplemental allegations raised compelling arguments, we cannot conclude on the record before us that these arguments were clearly meritorious. In this regard, for our Office to have reached a decision about the merits of SAIC's supplemental protest grounds--those filed after submission of the agency's report--we would have had to develop the record further, including, at a minimum, requiring the agency to file a supplemental report and seeking supplemental comments, to weigh the merits of both parties' arguments. Following this further development of the record, we would have had to conduct substantial further analysis of the parties' positions. Because the resolution of these issues required further development, in our view, they presented a close question and therefore we cannot conclude that they were clearly meritorious. Systems Research & Applications Corp.--Costs, B-406775.3, Apr. 10, 2013, 2013 CPD ¶ 99 at 5 (arguments not clearly meritorious where our Office required agency to provide additional explanation); LENS, JV--Costs, B-295952.4, Dec. 12, 2005, 2006 CPD ¶ 9 at 5; see East Penn Mfg. Co., Inc.--Costs, B-291503.4, Apr. 10, 2003, 2003 CPD ¶ 83 at 2-3 (protest not clearly meritorious where decision would have required further steps to complete and clarify the record). We therefore decline to recommend reimbursement of SAIC's protest costs.

The request for costs is denied.

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General Counsel