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Decision

Matter of: Procinctu Group, Inc.--Costs

File: B-416247.4

Date: September 21, 2018

Albert B. Krachman, Esq., and Michael J. Slattery, Esq., Blank Rome LLP, for the protester.

Heather M. Mandelkehr, Esq., and Colonel C. Taylor Smith, Department of the Air Force, for the agency.

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DIGEST

Request for reimbursement of protest costs is denied where the initial protest grounds were not clearly meritorious and where the agency took prompt corrective action in response to the supplemental protest.

DECISION

Procinctu Group, Inc., of Waxhaw, North Carolina, requests that our Office recommend that Procinctu be reimbursed the reasonable costs of filing and pursuing a protest of the award of a contract to Big Lake 2 LLC (BL2), of Lakeside, Montana, under request for quotations (RFQ) No. H92240-18-Q-2007, issued by the Department of the Navy, Naval Special Warfare Command (NSWC), for tactical training support.¹

We deny the request.

BACKGROUND

NSWC set aside the procurement for small businesses and issued the RFQ using the simplified commercial acquisition procedures of Federal Acquisition Regulation (FAR)

¹ NSWC has been represented by the Department of the Air Force throughout these proceedings.

subpart 12.6 and part 13. Agency Report (AR), Tab 15, RFQ at 1.² The solicitation, as amended, provided for award on the basis of a best-value tradeoff among three evaluation factors: technical capability, past performance, and price. Id. at 1-4. The performance work statement (PWS), also amended, required the vendor to provide at least three “direct support operators courses” (DSOC) per fiscal year.³ AR, Tab 14, PWS §§ 1.0-2.0. The vendor was required to provide a minimum of five instructors per class, including at least two lead instructors. Id. § 4.2. The PWS specified that all instructors must possess an understanding of combat support personnel and, of significance here, that lead instructors must have at least 5 years--and all other (“general”) instructors must have at least 3 years--of relevant experience in special operations. Id. §§ 4.5.2-3.

NSWC received quotations from several vendors, including Procinctu (the incumbent) and BL2, whose final revised quotations (FRQs) were evaluated as follows:

	Procinctu	BL2
Technical Capability⁴	Acceptable	Acceptable
Past Performance	High Confidence	Neutral
Total Evaluated Price	\$2,499,848	\$2,306,948

AR, Tab 27, SSD, at 8. Technical quotations were evaluated by a TEB; past performance and price were evaluated by the contracting officer. COS at 5-12, 18-20. The contracting officer reviewed and concurred with the TEB’s conclusions and performed a best-value tradeoff between Procinctu and BL2. AR, Tab 27, SSD, at 9. She concluded that the two quotations were “essentially equal” under the RFQ’s most important evaluation factor, technical capability, and that, although Procinctu’s higher past performance rating made its quotation “technically superior to” BL2’s quotation, the higher past performance rating did not warrant paying the price premium over BL2’s lower-priced quotation. Id.

² Citations to the agency report include the solicitation, contracting officer’s statement (COS), memorandum of law (MOL), and the contemporaneous evaluation record as provided in response to Procinctu’s initial protest, B-416247.

³ The RFQ provided for a performance period of up to 5 years or until the contract’s \$3 million ceiling was reached. RFQ at 1.

⁴ Although the RFQ provided for the evaluation of “technical capability,” the terms technical acceptability, technical ability, and technical approach are also used, interchangeably, throughout the contemporaneous record. See AR, Tabs 24-25, Indiv. Eval. Sheets; Tab 26, Tech. Evaluation Board (TEB) Rep., at 2; Tab 27, Price Reasonableness Determination, at 8-9 (hereafter, Source Selection Decision or SSD). For consistency and ease of reference, we use “technical capability” to refer to any discussion of the technical evaluation factor.

The contracting officer, who was the source selection authority for the procurement, decided that BL2's quotation provided the best value to the government, and NSWC awarded the contract to BL2 on April 4. Id.; COS at 9, 12-13, 20

On April 10, Procinctu timely filed a protest (B-416247) with our Office, challenging NSWC's technical, past performance, and price evaluations, as well as the best-value tradeoff and source selection decision. Protest B-416247, Apr. 10, 2018, at 12-22 (Protest). On May 9, the Air Force filed an agency report on behalf of NSWC defending its evaluations and award. See generally AR; supra n.2.

On May 21, Procinctu filed comments on the agency report that raised supplemental protest grounds (B-416247.2) challenging, among other things, NSWC's evaluation of two of BL2's proposed instructors (a lead and a general instructor), whose resumes did not identify dates or time periods for the two instructors' claimed experience. Comments & Supp. Protest, May 21, 2018, at 18-19 (Supp. Protest); see AR, Tab 23, BL2 FRQ, at 27, 35 (disputed resumes). In its comments, Procinctu also withdrew its initial challenge to NSWC's price evaluations. Id. at 8 n.10.

Prior to submitting a supplemental agency report, the Air Force filed a notice on May 31 informing the parties that

After careful consideration of Procinctu's supplemental protest and the procurement record, the Government has decided to take corrective action. Specifically, the Government will reevaluate the quotations previously determined to be technically acceptable to ensure that proffered resumes meet the solicitation requirements[,] and make a new best value determination.

Notice of Corrective Action, May 31, 2018, at 1.⁵ The Air Force stated that NSWC would stay performance of the contract while the agency conducted the corrective action and that if the current awardee (BL2) was not selected, its contract would be terminated and award made to the newly selected vendor. Id. The Air Force advised that NSWC may take any other corrective action deemed appropriate. Id.

On June 6, our Office dismissed the protest because the agency's corrective action rendered the protest academic. Procinctu Grp., Inc., B-416247, B-416247.2, June 6, 2018 (unpublished decision). Although Procinctu objected that the proposed corrective action did not address all of the protest grounds, we explained that dismissal was nevertheless appropriate because the new award decision could result in a different selection decision. Id. at 2.

⁵ Our Office had set a June 1 deadline for submission of a supplemental agency report. Electronic Protest Docketing System No. 15.

Procinctu now requests that our Office recommend that Procinctu be reimbursed for its costs of filing and pursuing the initial and supplemental protests, including attorney's fees. Req. at 1-25.

DISCUSSION

Our Office may recommend reimbursement of protest costs, including reasonable attorneys' fees, if, 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. Competition in Contracting Act of 1984, 31 U.S.C. § 3554(c)(1)(A); Bid Protest Regulations, 4 C.F.R. § 21.8(e). This does not mean that costs should be reimbursed in every case in which an agency decides to take corrective action; rather, a protester should be reimbursed its costs where an agency unduly delayed its decision to take corrective action in the face of a clearly meritorious protest. NxGen Process Grp., LLC--Costs, B-406650.2, May 24, 2012, 2012 CPD ¶ 163 at 2.

Based on our review of the record, we find that reimbursement of protest costs is not appropriate here, because Procinctu's initial protest grounds were not clearly meritorious and NSWC took prompt corrective action in response to Procinctu's supplemental protest. We considered all of the parties' assertions and address Procinctu's more salient arguments below.

Initial Protest (B-416247)

Procinctu argues it is entitled to reimbursement of its protest costs because NSWC unduly delayed taking corrective action despite Procinctu's clearly meritorious protest grounds. Req. at 1-25. Procinctu contends that a reasonable agency inquiry into the initial grounds would have "revealed the clear merit" of the alleged errors and led NSWC to take corrective action prior to the agency report deadline. Id. at 1, 5. According to Procinctu, "[e]very single prejudicial evaluation error" alleged was in NSWC's evaluation record when Procinctu filed its initial protest, and the only thing that changed between then and the agency's notice of corrective action was that the protester had to expend its resources to "expose" the evaluation errors. Id. at 10, 22.

We disagree. As a prerequisite to our 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. Apptis Inc.--Costs, B-402146.3, Mar. 31, 2010, 2010 CPD ¶ 123 at 4; Triple Canopy, Inc.--Costs, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 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. First Fed. Corp.--Costs, B-293373.2, Apr. 21, 2004, 2004 CPD ¶ 94 at 2. The existence of any defensible legal position or close question is sufficient to show that a protest allegation was not clearly meritorious so as to warrant reimbursement of protest costs. See Triple Canopy, Inc.--Costs, *supra*.

The protest grounds and allegations raised in Procinctu's initial protest did not appear to have any merit, let alone be considered clearly meritorious. For example, with respect to the evaluation of BL2's technical capability, Procinctu maintained that the agency could not have reasonably determined that Procinctu's and BL2's quotations were "essentially equal" because, according to the protester, BL2 had: (1) only existed for less than two years; (2) no identifiable assets; (3) no experience delivering training to NSW;⁶ (4) a single employee; and (5) no instructors with DSOC experience.⁷ Protest at 13-14. Notwithstanding Procinctu's arguments to the contrary, none of these items were required by, or stated as evaluation criteria in, the solicitation.

The RFQ required vendors to submit a detailed narrative describing their technical capability to provide the services described in the PWS, including the vendor's methods, processes, and procedures. RFQ at 3. In addition, vendors were to either affirm they had the resources available to fulfill the requirements and meet delivery timeframe for the first task order, or provide a concise, factual statement describing how long it would take ("ramp-up time") to achieve full performance capability. *Id.* The RFQ stated that NSW would evaluate how well a vendor demonstrated that it could meet or exceed requirements. *Id.* at 3-4. Despite Procinctu's insistence (Protest at 13-14; Supp. Protest at 35; Req. at 10; Rebuttal at 9), nothing in the solicitation explicitly required vendors to describe, or the agency to assess, how long the vendor had been in existence, or its assets, number of employees, or training experience at NSW.

The RFQ also required vendors to submit resumes for all proposed personnel, who would be evaluated under the technical capability factor on how well they demonstrated relevant knowledge and experience to perform the PWS's tasks. RFQ at 3-4. As set forth above, the PWS required the successful vendor to provide a minimum of five instructors for each DSOC class, including at least two lead instructors, which were to meet specified experience requirements. PWS § 4.5. Contrary to Procinctu's assertions, nothing in the solicitation or PWS required vendors to currently employ, or even propose, personnel and instructors with NSW or DSOC training experience. *Id.*; RFQ at 3-4. Insofar as Procinctu disputes BL2's technical capability based on its recruitment efforts (see note 7 above), that contention failed to state a legally sufficient protest ground, and thus was not clearly meritorious. Vendors were only to provide letters of intent for any personnel not currently employed by the vendor, RFQ at 3, and BL2's perceived recruitment efforts prior to submitting its quotation would not have demonstrated that NSW improperly evaluated the awardee's technical capability.

⁶ In actuality, the record shows that BL2 submitted, as part of its past performance information, BL2's current contract with NSW to provide night vision training. AR, Tab 23, BL2 FRQ, at 34-35; see Tab 27, SSD, at 5.

⁷ The protest included various exhibits purporting to support these assertions. For instance, Procinctu submitted a copy of a recruitment e-mail that BL2 had apparently posted on a mass e-mail distribution list prior to submitting its initial quotation. Protest at 14; exh. E, BL2 E-mail, Jan. 12, 2018.

See, e.g., Discover Techs. LLC--Costs, B-413861.3, Mar. 29, 2017, 2017 CPD ¶ 108 at 3-4 (finding protester's challenge to the evaluation of the awardee's key personnel was not clearly meritorious, because it was based entirely on the awardee's recruitment efforts, including publication of job announcements). In short, we agree with the agency's position, as stated in its agency report, that Procinctu essentially created its own evaluation criteria, alleging that vendors were required to have a number of technical capabilities, none of which were set forth in the solicitation. MOL at 15.

Procinctu's protest also failed to state legally sufficient grounds with respect to its past performance evaluation challenge. As an example, Procinctu asserted that the "RFQ required NSWC to assign a neutral rating to BL2 under the Past Performance evaluation factor," because of the awardee's "complete absence of past performance information." Protest at 16-17. NSWC actually assigned a neutral rating for BL2's past performance, as reflected in the table above, and contrary to the protester's assertion, BL2 did, in fact, submit past performance information. AR, Tab 27, SSD, at 5; see supra n.6. Procinctu also complained that "NSWC's determination that [Procinctu] merited a merely 'higher' Past Performance rating than BL2 unreasonably understate[d] the quantitative and qualitative strength of [Procinctu's] Past Performance and improperly lowered [its] non-price rating."⁸ Protest at 17-18. This assertion also lacked merit since it was based entirely on the protester's disagreement with its assessed past performance rating.⁹ Our Office has consistently explained that the essence of an agency's evaluation is reflected in the evaluation record itself, not adjectival ratings, and that ratings, be they numerical, adjectival, or color, are merely guides for intelligent decision-making in the procurement process. See, e.g., Discover Techs., LLC--Costs, supra, at 4 (finding challenge to the agency's evaluation of the protester's relevant experience was not clearly meritorious, because it was based entirely on the protester's disagreement with its assigned evaluation ratings).

To the extent that Procinctu challenged the agency's best-value tradeoff, that challenge was based on two arguments, neither of which was clearly meritorious. First, Procinctu complained that the tradeoff was "fatally flawed" insofar as it relied on the allegedly

⁸ Contrary to the protester's belief that the agency understated the strength of Procinctu's past performance, the record shows that NSWC found Procinctu's past performance: was highly relevant; met solicitation requirements; reflected "very positive" feedback; provided a high degree of performance confidence; and rendered its quotation technical superior to BL2. AR, Tab 27, SSD, at 6.

⁹ We note that the RFQ did not set forth an adjectival evaluation rating scheme. See generally RFQ. The solicitation only stated that vendors with no history of relevant services would be assessed a neutral rating which would not be considered either favorable or unfavorable (and which is consistent with the FAR). Id. at 4; see FAR §§ 12.602(b), 13.106-2(b), 15.305(2)(iv).

unreasonable technical and past performance evaluations.¹⁰ See Protest at 20-22. As we explain above, those evaluation challenges were not legally sufficient, much less clearly meritorious. Second, Procinctu argued that by selecting BL2's lower technically rated, but lower-priced quotation, NSWC's source selection decision was inconsistent with the weighting of the evaluation factors as stated in the RFQ.¹¹ See id. at 21-22. This argument was premised, entirely, on the explanation of the selection decision that the contracting officer provided to Procinctu following award. Id. ("The absence of any justification for its decision to select BL2's lower technically rated proposal . . . renders NSWC's best value determination unreasonable."); see AR, Tab 29, E-mail from CO to Procinctu, April 5, 2018, at 1.

However, the fact that the contracting officer's brief explanation¹² did not provide the level of detail that Procinctu would have preferred, in no way suggests the agency's best-value tradeoff and source selection decision were unreasonable (or "limited to one sentence").¹³ In any event, our Office has explained in numerous decisions that even where price is the least important evaluation factor, an agency properly may select a lower-priced, lower-rated proposal if the agency reasonably concludes, as NSWC did here, that the price premium involved in selecting a higher-rated, higher-priced proposal is not justified in light of the acceptable level of technical competence available at a lower price. See, e.g., American Fed. Contractors, Inc.--Costs, B-413314.4, Apr. 24, 2017, 2017 CPD ¶ 134 at 4.

¹⁰ Procinctu initially included its price evaluation challenge with respect to the allegedly flawed best-value tradeoff, but as noted above, Procinctu later withdrew that challenge.

¹¹ The RFQ stated that technical capability was more important than past performance, and that the two non-price evaluation factors, when combined, were significantly more important than price. RFQ at 4.

¹² Section 13.106-3(d) of the FAR provides that if a supplier requests information on an award that was based on factors other than price alone, a brief explanation of the basis for the contract award decision shall be provided. FAR § 13.106-3(d). As stated above, NSWC conducted the procurement using simplified commercial acquisition procedures under FAR subpart 12.6 and part 13. RFQ at 1.

¹³ Compare Protest at 20 ("NSWC's best value tradeoff consists of a single sentence set forth in the agency's April 5, 2018 justification for award e-mail."), with AR, Tab 27, SSD, at 9; see Evergreen Flying Servs., Inc.--Costs, B-414238.10, Oct. 2, 2017, 2017 CPD ¶ 299 at 5-6; Office Design Grp., Inc.--Costs, B 413166.6, Nov. 17, 2016, 2016 CPD ¶ 336 at 3-4, aff'd on recons., B-413166.7, Mar. 9, 2017, 2017 CPD ¶ 89 (denying request for protest costs based on the protester's allegation that the agency failed to provide a formal debriefing or detailed explanation of the evaluation, because defects in a debriefing or related post-award communications are procedural matters that do not involve the validity of an award).

Like its evaluation challenges, Procinctu's initial challenge to NSWC's best-value tradeoff did not present a close question or foreclose the agency from proffering defensible legal positions supporting its source selection decision. Therefore, since none of Procinctu's initial protest grounds or allegations were clearly meritorious, we have no basis to recommend reimbursement of Procinctu's costs for pursuing its initial protest.

Supplemental Protest (B-416247.2)

Procinctu also maintains that reimbursement of its costs involved in raising supplemental protest grounds is appropriate, because the supplemental issues were factually and legally intertwined with Procinctu's initial protest and "stem from the same core fact -- i.e., NSWC failed to adhere to the evaluation scheme set forth in the RFQ." Req. at 10, 17, 24. In Procinctu's view, its initial and supplemental protest grounds are not readily severable, therefore our Office should recommend NSWC reimburse Procinctu for the costs of pursuing all of its protest grounds. Id. at 24.

The concept of severability has no application here because none of Procinctu's initial protest grounds were clearly meritorious. See, e.g., Remote Diagnostic Techs., LLC--Costs, B-413375.3, Feb. 6, 2017, 2017 CPD ¶ 52 at 5 n.2. Although a successful protester should generally be reimbursed the costs incurred with respect to all the issues pursued, we have, in appropriate cases, properly limited our recommendation for the award of protest costs where a part of those costs is allocable to unsuccessful protest issues that are so clearly severable from the successful issue 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; Interface Flooring Sys., Inc.--Claim for Att'y Fees, B-225439.5, July 29, 1987, 87-2 CPD ¶ 106 at 2-3.

In sum, Procinctu provides no basis for our Office to recommend that the firm be reimbursed the costs of filing and pursuing its protests, because Procinctu's initial protest grounds were not clearly meritorious and NSWC took prompt corrective action in response to Procinctu's supplemental protest. See American Fed. Contractors, supra, at 4-5 (denying protester's request for the costs of pursuing its supplemental protest challenging the qualifications of the awardee's proposed project manager, where the protester's initial protest grounds were not clearly meritorious and related to the awardee's proposed staffing levels, not the qualifications of its proposed personnel); Imagine One Tech. & Mgmt., Ltd.--Costs, B-412860.3, Dec. 9, 2016, 2016 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).

The request is denied.

Thomas H. Armstrong
General Counsel