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Decision

Matter of: CloudFirstJV, LLC--Costs

File: B-416872.4

Date: May 10, 2019

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DIGEST

Request for recommendation that agency reimburse the protester's costs associated with filing and pursuing its bid protest is granted where the agency took corrective action after the issuance of the agency report, and after protester was required to file comments on the agency report, even though the merit of the challenge to the best-value tradeoff should have been clear to the agency prior to its submission of the report.

DECISION

CloudFirstJV, LLC, of McLean, Virginia, requests that we recommend that it be reimbursed the costs associated with filing and pursuing its bid protest against the agency's failure to award CloudFirstJV an indefinite-delivery, indefinite-quantity contract under request for proposals (RFP) No. 73351018R0011, issued by the Small Business Administration (SBA) for engineering and information technology support services.

We grant CloudFirst's request.

BACKGROUND

The solicitation sought proposals for the award of up to three fixed-price indefinite-delivery, indefinite-quantity contracts, as well as proposals for the first task order to be issued under the contract. Agency Report¹ (AR), Tab 3, Final Amended RFP at 4. Award would be made to the firms whose proposals represented the best value to the

¹ All citations are to the record from B-416872.2.

government, considering price and these four non-price factors: technical approach; management approach and quality control assurance plan; key personnel and proposed staffing; and prior experience/past performance. Id. at 43. The non-price factors were approximately equal in importance and, when combined, were significantly more important than price. Id. at 72.

The agency was to assign adjectival ratings of excellent, good, satisfactory, marginal, or poor to all of the non-price factors except prior experience/past performance; the evaluation of prior experience/past performance is not at issue in this protest. Id. at 72-73. Of relevance to this protest, the entire definition of excellent was “[t]he proposal contains no deficiencies or significant weaknesses. The evaluator is confident that the offeror can successfully perform the contract.” Id. at 72. The entire definition of good was “[t]he proposal contains no deficiencies and only a few significant weaknesses. The evaluator is confident that the offeror can successfully perform the contract.” Id.

CloudFirst and a number of other firms submitted proposals. CloudFirst’s proposal was rated good under the technical approach factor, excellent under the other three non-price factors, and good overall. AR, Tab 5, Consensus Evaluation Memorandum, at 24-28. The protester’s proposal was evaluated under the technical approach factor as having “mostly strengths,” a “significant number of weaknesses,” and no deficiencies or significant weaknesses. Id. at 27. The agency evaluated the protester’s price proposal for the included first task order as complete but unrealistic.² Id. at 28.

The agency made award to two firms whose technical proposals were evaluated as excellent overall. AR, Tab 6, Source Selection Authority Memorandum, at 3-4. The source selection authority concluded that the “awardees that received an Excellent overall rating for the non-price factors” represented “the best value to the government.” Id. at 1. In the source selection authority’s view, the “best value determination was based on the firms that offered the best technical solutions at a fair price to the government.” Id. at 2.

On September 26, 2018, CloudFirst filed a protest with this Office challenging the agency’s failure to award CloudFirst an indefinite-delivery, indefinite-quantity contract. CloudFirst alleged the following: the agency unreasonably rated the protester’s technical proposal as good rather than excellent; the agency unreasonably assigned CloudFirst a good rating overall when it received an excellent rating for three of the four equally-rated non-price factors; the agency unreasonably determined that CloudFirst’s

² With regard to price, the solicitation instructed offerors to complete a pricing sheet with labor rates for various labor categories for each year of performance, as well as a separate sheet providing a fixed price for the first task order. RFP at 70. Offerors were to provide supporting cost information for the task order, i.e., labor categories, labor rates, and hours. Id. The evaluators found the protester’s proposed price for the task order to be [DELETED]. AR, Tab 5, Consensus Evaluation Memorandum, at 28.

pricing of the task order demonstrated a lack of understanding of the requirement; and the agency failed to conduct a proper best-value tradeoff analysis that considered both technical capability and price.³

On October 26, the agency provided a report responding to the protest allegations. The protester filed its comments on the agency report, which raised no supplemental protest allegations, on November 8. On November 9, GAO requested that the agency produce the consensus evaluation memorandum and the source selection memorandum with only the names of the other offerors redacted; GAO renewed that request on November 14.

On November 14, over 2 weeks after the issuance of the agency report, and almost a week after the protester filed comments, the SBA notified our Office of its intent to take corrective action. The agency advised GAO that it would “re-evaluate CloudFirst’s proposal in light of its protest and issue a new source selection decision in accordance with the re-evaluation.” Agency Notice of Corrective Action, Nov. 14, 2018. As a result, we dismissed the protest. CloudFirstJV, LLC, B-416872.2, Nov. 16, 2018 (unpublished decision). This request for a recommendation for reimbursement of costs followed.

DISCUSSION

The protester requests that we recommend that it be reimbursed protest costs with respect to all issues pursued. CloudFirst argues that all of its allegations were clearly meritorious and none was severable from the others. Request at 8.

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. Pemco Aeroplex, Inc.-Recon. & Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 5. When an agency takes corrective action before the due date set for receipt of an agency report, our Office views such action as prompt and will not recommend the reimbursement of costs. Science Applications Int’l Corp.--Costs, B-410760.5, Nov. 24, 2015, 2015 CPD ¶ 370 at 6. Where, on the other hand, an agency takes corrective action after the agency report due date, we will generally consider the corrective action to have been unduly delayed. Blackstone Consulting, Inc., B-405909.2, Jan. 31, 2012, 2012 CPD ¶ 168 at 3-4. A protest is clearly meritorious when a reasonable agency inquiry into the protest allegations would show facts disclosing the absence of a defensible legal position. The Real Estate Ctr.--Costs, B-274081.7, Mar. 30, 1998, 98-1 CPD ¶ 105 at 3.

³ The protester withdrew its allegation that [DELETED]. Comments at 1 n.1.

Further, as a general rule, we recommend that a successful protester be reimbursed its incurred costs with respect to all issues pursued and not merely those upon which it prevails. AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 9. In appropriate cases, however, we have limited our recommendation where a part of a successful protester's costs is allocable to an unsuccessful protest issue that is so clearly severable from the successful issues as to essentially constitute a separate protest. BAE Tech. Servs., Inc.--Costs, B-296699.3, Aug. 11, 2006, 2006 CPD ¶ 122 at 3. That said, limiting recovery of protest costs in all cases to only those issues on which the protester prevailed would be inconsistent with the broad, remedial Congressional purpose behind the cost reimbursement provisions of the Competition in Contracting Act, 31 U.S.C. § 3554(c)(1)(A). Fluor Energy Tech. Servs., LLC--Costs, B-411466.3, June 7, 2016, 2016 CPD ¶ 160 at 3. In determining whether protest issues are so clearly severable as to essentially constitute separate protests, we consider, among other things, the extent to which the issues are interrelated or intertwined--i.e., the extent to which successful and unsuccessful arguments share a common core set of facts, are based on related legal theories, or are otherwise not readily severable. Basic Commerce and Indus., Inc.--Costs, B-401702.3, Feb. 22, 2010, 2010 CPD ¶ 258 at 4.

The agency argues that it did not unduly delay in taking corrective action, and asserts that, in any event, the arguments raised by the protester were not clearly meritorious. We address these arguments in turn.

With respect to whether the agency's corrective action was unduly delayed, the SBA notified the parties of its intent to take corrective action over 2 weeks after the filing of the agency report. The agency argues that two main factors contributed to the timing of the notice: the increased need to start the information technology support services that were the subject of the procurement; and the anticipated delay in the protest's resolution caused by this Office's request for additional documentation. Opposition to Entitlement Request at 4. According to the agency, it concluded that it could produce the requested documentation and still prevail in defense of this protest; however, additional document production would further extend the timeframe for a decision, and the agency asserts that it could not afford a prolonged timeline, given the compounding information technology issues resulting from the stay of performance. Id.

An agency's assertion that time constraints compelled corrective action is immaterial to a determination of whether the corrective action was unduly delayed. Here, the agency took corrective action after the issuance of the agency report, and after the protester was required to prepare comments in answer to the report. We therefore consider the action to have been unduly delayed, notwithstanding the agency's rationale for taking corrective action when it did. Moreover, Congress provided agencies with authority to override a stay of performance. While any delay caused by GAO's review is generally limited by statute, the SBA had ample authority to move forward with this procurement rather than wait for a decision from GAO. See 31 U.S.C. § 3553(d)(3)(C) (providing head of procuring activity authority to authorize contract performance notwithstanding notice of protest). SBA chose not to use that authority.

With respect to whether the arguments raised by CloudFirst were clearly meritorious, we note that one involved the price realism analysis and three involved how the proposals were rated, how the ratings were rolled into an overall rating, and how the overall rating was used to conduct the best-value tradeoff here.

The protester asserted that its proposal was unreasonably evaluated as good rather than excellent, even though the agency did not evaluate CloudFirst's proposal as containing any deficiencies or significant weaknesses. Protest at 10. Per the solicitation definitions, CloudFirst argued that the difference between an excellent and good rating was the identification of proposal deficiencies or significant weaknesses. Id. CloudFirst also asserted that the agency unreasonably rated its proposal as good overall when it was rated excellent under three factors and good under one, and when it should have been rated excellent under the first factor. When the agency was assigning an overall rating here, it was faced with one rating of good and three ratings of excellent--in a procurement where the four evaluation factors were approximately equal in weight. RFP at 72. Finally, CloudFirst argued that the agency failed to conduct a proper best-value tradeoff analysis.

We need only address the best-value tradeoff decision, as we view that challenge as clearly meritorious, and the other challenges to the ratings are closely related to the issue of the reasonableness of the tradeoff. As noted above, the contracts were to be awarded on a best-value tradeoff basis, considering technical factors and price. RFP at 43. The agency made award to two firms whose technical proposals were assigned several ratings of excellent, evaluated as excellent overall, followed by a decision of the source selection authority that the "awardees that received an Excellent overall rating for the non-price factors" represented "the best value to the government." AR, Tab 6, Source Selection Authority Memorandum, at 1. According to the source selection authority, the "best value determination was based on the firms that offered the best technical solutions at a fair price to the government." Id. at 2.

Here, we think that the agency lacked a defensible legal position regarding the protester's allegation that the best-value tradeoff was unreasonable. First, there is no evidence that the agency considered the relative strengths and weaknesses of the proposals--other than the overall rating of excellent--and there is likewise no evidence that the agency considered price in its tradeoff analysis. The language of the source selection authority memorandum provides no support for the agency's contention that the tradeoff was proper. Rather, the memorandum confirms the protester's allegation that award was made to the highest-rated proposals (based solely on their rating of excellent) offering a "fair price." Because the agency lacked a defensible legal position for its tradeoff decision, we find this allegation to be clearly meritorious.

We also consider the protester's challenges to the ratings and to the best-value tradeoff to be intertwined. In this regard, the protester argued that its adjectival rating under the technical approach factor should have been excellent, and that its overall rating--comprised of the four factor ratings--should also have been excellent. These arguments ultimately led to the protester's contention that the agency made no attempt to assess

“the underlying merits of the offerors’ proposals,” instead basing contract award “strictly on the adjectival ratings of the technical factors.” Comments at 25. Together, the challenges to the technical evaluation and the best-value tradeoff comprised a significant portion of the protest, while the allegation that the agency unreasonably determined that the protester’s pricing demonstrated a lack of understanding of the requirement was a comparatively minor issue. In light of that, we will not depart from our general rule that a successful protester be reimbursed its costs incurred with respect to all issues pursued.

RECOMMENDATION

We recommend that CloudFirst be reimbursed the costs associated with filing and pursuing its protest, including reasonable attorneys’ fees. CloudFirst should submit its certified claim, detailing the time spent and costs incurred, directly to the agency within 60 days of its receipt of this decision. 4 C.F.R. § 21.8(f)(1).

CloudFirst’s request for a recommendation that it be reimbursed its protest costs is granted.

Thomas H. Armstrong
General Counsel