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Decision

Matter of: Sumaria Systems, Inc.--Costs

File: B-418440.3

Date: July 16, 2020

James Y. Boland, Esq., and Michael T. Francel, Esq., Venable LLP, for the protester. Colonel Patricia S. Wiegman-Lenz and Isabelle P. Cutting, Esq., Department of the Air Force, for the agency.

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DIGEST

Request for recommendation that protest costs be reimbursed is denied where the protester's single remaining initial protest ground was not clearly meritorious, and where the agency took prompt corrective action in response to supplemental protest grounds.

DECISION

Sumaria Systems, Inc., of Danvers, Massachusetts, requests that we recommend reimbursement of the costs it incurred in filing and pursuing its protests challenging the issuance of a task order to Odyssey Systems Consulting Group, Ltd., of Wakefield, Massachusetts, under fair opportunity proposal request (FOPR) No. FA8622-20-F-8236, issued by the Department of the Air Force for advisory and assistance services to support the agency's medium altitude unmanned aircraft systems program office.

We deny the request.

BACKGROUND

The agency issued the FOPR on September 16, 2019, to holders of the General Services Administration's One Acquisition Solution for Integrated Services Small Business (OASIS-SB) multiple-award, indefinite-delivery, indefinite-quantity (IDIQ) contracts. The procurement was conducted pursuant to Federal Acquisition Regulation section 16.505 procedures. Agency Report (AR), Tab 6, FOPR Cover

Letter.¹ The FOPR sought a contractor to provide advisory and assistance services to support the agency's medium altitude unmanned aircraft systems program office, which is responsible for "arming the warfighter with Unmanned Aerial Vehicle [(UAV)] solutions." Contracting Officer's Statement at 2; see also AR, Tab 7a, FOPR Performance Work Statement, at 8. The estimated value of the task order over the possible 5-year period of performance is \$248,000,000. AR, Tab 3, Independent Government Cost Estimate, at 1.

The FOPR provided for award to the highest technically rated offeror with a realistic and reasonable price, based on two evaluation factors: contractor rating system² and cost/price. AR, Tab 7d, FOPR Evaluation Criteria, Oct. 1, 2019, at 1, 3-4. For the first factor, the FOPR established criteria for assigning points out of a maximum of 68,000 possible points, based on 32 subfactors grouped in the following four rating areas: general, technical, Defense Security Services vulnerability assessment, and work sample contractor performance assessment report. *Id.* at 4-18. The FOPR provided that each offeror was to self-score its proposal against these 32 subfactors and submit, among other things, a self-scoring matrix worksheet and work samples to be used as substantiating data. AR, Tab 7c, FOPR Instructions, Oct. 1, 2019, at 8; see also AR, Tab 7e, Self-Scoring Matrix, Oct. 1, 2019.

The FOPR provided that the agency would rank the offerors by highest to lowest point score using the offerors' self-scoring matrix worksheets, and first evaluate the proposal with the highest self-score and validate its self-score. The FOPR included the following warning: "Unsubstantiated and/or misleading claims, for even a single criterion, could result in the [evaluation t]eam determining that the [o]fferor's proposed self-score is disingenuous and/or artificially inflated and the proposal would be unawardable." AR, Tab 7d, FOPR Evaluation Criteria, at 4-5. If that proposal's self-score was validated, the agency would then evaluate that offeror's cost/price and, if its cost/price was found to be realistic and reasonable, issue the task order to that offeror. *Id.* at 3.

On or before October 18, 2019, the agency received proposals from three offerors: Sumaria, Odyssey, and a third offeror. In accordance with the FOPR's evaluation scheme, the agency ranked the proposals by highest to lowest point score using the offerors' self-scoring matrix worksheets. After noting that Odyssey's proposal had the

¹ Unless otherwise indicated, citations to the protest record are to documents submitted by the protester and agency during the development of Sumaria's January 31, 2020 protest (B-418440) and March 12, 2020 supplemental protest (B-418440.2). Also, the agency amended the FOPR three times; all citations are to the most recent version of the relevant sections of the FOPR.

² The FOPR refers to this first factor as the "contractor rating system" or "technical" factor. See AR, Tab 7d, FOPR Evaluation Criteria at 3-4.

highest proposed self-score,³ the agency evaluated the proposal and validated Odyssey's self-score at 66,869 points with no decrements. AR, Tab 27, Fair Opportunity Decision Document at 14-19; see, *generally*, AR, Tab 22, Odyssey Technical Evaluation Report, Jan. 14, 2020. The agency proceeded to evaluate Odyssey's price and found that it was realistic and reasonable, and selected Odyssey for award. AR, Tab 27, Fair Opportunity Decision Document at 19-24.

On January 31, 2020, Sumaria filed a protest⁴ with our Office in which it claimed generally that "[t]he Air Force conducted an unreasonable technical evaluation under Factor 1 by failing to properly evaluate and validate Odyssey's self-scores." Protest at 15. Sumaria raised four specific protest grounds challenging the agency's evaluation under the contractor rating system factor, only one of which remains relevant--that is, Sumaria argued that Odyssey should not have received maximum points under Subfactor 3.2.7, for which the FOPR provided that the agency would consider the "number of positions whose primary purpose is performing acquisition management support for [Department of Defense] UAVs." *Id.* at 20-21, *citing* AR, Tab 7d, FOPR Evaluation Criteria at 14. The rest of Sumaria's arguments from its initial protest were subsequently withdrawn or dismissed.⁵

³ Initially, the agency concluded that a third offeror, not Sumaria or Odyssey, submitted the highest proposed self-score. However, the agency found that the proposal did not meet the agency's requirements and reduced that offeror's score, resulting in the third offeror's validated score being lower than Odyssey's proposed self-score, and putting Odyssey's proposal first in line for evaluation. AR, Tab 27, Fair Opportunity Decision Document, Jan. 16, 2020, at 6; Contracting Officer's Statement at 8-9.

⁴ Sumaria's protest was within our jurisdiction to hear protests of task orders placed under civilian agency multiple-award IDIQ contracts valued in excess of \$10 million. 41 U.S.C. § 4106(f)(1)(B).

⁵ Sumaria raised three additional complaints about the agency's evaluation under the contractor rating system factor that were subsequently withdrawn or dismissed, including: the agency failed to validate Odyssey's work samples; failed to verify Odyssey's proposed self-score and unreasonably failed to consider Odyssey's submission of inflated scores under a parallel procurement in its responsibility determination; and failed to consider past performance information that the agency knew, or should have known. See Protest at 15-22; Electronic Protest Docketing System Docket No. 17, Feb. 11, 2020 (indicating, after briefings on a request for dismissal, that our Office viewed two protest grounds as dismissible and that the agency need not address these grounds in its agency report); Comments and Supp. Protest at 1 n.1 (acknowledging the dismissal and withdrawing other protest grounds). Under these circumstances, we need not further address these arguments, as they do not establish a basis for recommending reimbursement of costs. See, e.g., *STG, Inc.--Costs*, B-414265.8, July 7, 2017, 2017 CPD ¶ 216 at 3 (costs associated with abandoned allegations will not be reimbursed). In addition, in its initial protest, Sumaria raised, but subsequently withdrew, a separate challenge to the agency's price

On March 2, the agency filed its report responding to Sumaria's initial protest, in which it defended its evaluation and award decision. In its report, the agency generally asserted that "[a]ll of the criteria were evaluated in accordance with the evaluation criteria." Memorandum of Law (MOL) at 7. The agency specifically explained how it validated Odyssey's self-score under Subfactor 3.2.7, and argued that it "conducted a thorough technical evaluation of Odyssey's proposal in accordance with [Subfactor] 3.2.7 and reasonably concluded and documented that Odyssey was entitled to maximum points for this subfactor." *Id.* at 18; *see also* AR, Tab 22, Odyssey Technical Evaluation Report, at 44.

On March 12, Sumaria filed comments that addressed "its one remaining original protest ground . . . relating to the Air Force's evaluation and validation of Odyssey's self-score under Subfactor 3.2.7[.]" Comments and Supp. Protest at 1 n.1. Sumaria also filed a supplemental protest, in which it again claimed generally that "[t]he Air Force conducted an unreasonable technical evaluation under Factor 1 by failing to properly evaluate and validate Odyssey's self-scores." *Id.* at 8. Specifically, Sumaria challenged the agency's evaluation with regard to 16 additional subfactors under the contractor rating system factor. *Id.* at 8-57. Sumaria also argued that the agency "engaged in an inconsistent and unfair technical evaluation and validation of Odyssey's self-scores[.]" and that the agency "abandoned the FOPR's evaluation criteria by failing to consider the impact of Odyssey's inflated claims." *Id.* at 57-63.

On March 24, prior to the due date for filing its supplemental report, the agency advised our Office that it intended to take corrective action. Notice of Corrective Action, Mar. 24, 2020, at 1. Specifically, the agency advised that, "[a]fter careful consideration of the supplemental protest," the agency had decided to, among other things, "reevaluate Odyssey's proposal and properly evaluate and validate Odyssey's self-scores to ensure that the evaluation is performed in accordance with the terms of the solicitation." *Id.* Accordingly, we dismissed the protest as academic. *Sumaria Sys., Inc.*, B-418440, B-418440.2, Mar. 25, 2020 (unpublished decision). Thereafter, Sumaria filed this request for our recommendation that it be reimbursed for its protest costs.

DISCUSSION

Sumaria contends that reimbursement is warranted because "[t]he Air Force unduly delayed taking corrective action in the face of a clearly meritorious protest" and that "a reasonable inquiry by the Air Force into Sumaria's core allegations at the outset would have revealed the lack of a defensible legal position." Request for Costs at 1. Based on our review of the record and all of the parties' arguments, we find no basis to recommend that the protester be reimbursed for any of its costs.

reasonableness evaluation that it now concedes is clearly severable and, therefore, not a basis for recommending reimbursement of costs. Protest at 13; Comments and Supp. Protest at 1 n.1; Request for Costs at 1, 6-7.

Where 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. 4 C.F.R. § 21.8(e); *AAR Aircraft Servs.--Costs*, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 5. That is, as a prerequisite to our recommendation that protest costs be reimbursed, the protest must not only 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. 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*, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 3.

Here, we conclude that the protester's initial arguments were not clearly meritorious, and that the agency took prompt corrective action in response to supplemental protest grounds. With regard to the initial protest, as noted above, all of the initial protest grounds were either withdrawn or dismissed, with the exception of the single argument that Sumaria continued to pursue in its comments. See Comments and Supp. Protest at 1 n.1. That is, notwithstanding Sumaria's broad claim that "[t]he Air Force conducted an unreasonable technical evaluation under Factor 1 by failing to properly evaluate and validate Odyssey's self-scores," Protest at 15, the only surviving issue from Sumaria's initial protest was its allegation concerning the agency's evaluation under a single subfactor under the contractor rating system factor. As noted above, Sumaria challenged the agency's evaluation of Odyssey's proposal under Subfactor 3.2.7, under which the FOPR provided that the agency would consider "the number of positions whose primary purpose is performing acquisition management support for [Department of Defense] UAVs." *Id.* at 20-21; see AR, Tab 7d, FOPR Evaluation Criteria at 14.

In its report responding to the initial protest, the agency argued that it "conducted a thorough technical evaluation of Odyssey's proposal in accordance with [Subfactor] 3.2.7 and reasonably concluded and documented that Odyssey was entitled to maximum points for this subfactor." MOL at 18. The agency further explained the following:

As documented by the Agency, Odyssey's Work Sample 4 provided detailed information substantiating its self-score through the utilization of required [Performance Work Statement] paragraphs, monthly status reports, and employee rosters that were determined relevant in the evaluation of this criteri[on]. [internal citation omitted] Furthermore, the Government was able to validate that all 57 positions for this criteri[on] were included in Work Sample 4. [internal citation omitted] [. . .] The technical evaluator confirmed that the work sample includes several Navy UAV platforms and meets the criteria of 3.2.7.

Id. at 17-18, *citing* AR, Tab 22, Odyssey Technical Evaluation Report, at 44. Sumaria then continued to argue that the agency's evaluation is "a conclusion without any basis or analysis" and that there is "no documentation from Odyssey substantiating that the claimed positions had acquisition management support as their 'primary purpose'[" Comments and Supp. Protest at 6.

Here, we cannot conclude that Sumaria's challenge to the agency's evaluation was clearly meritorious, *i.e.*, that it was not a close question or that the agency lacked a legally defensible position. In reviewing protests challenging an agency's evaluation of proposals, our Office does not reevaluate proposals or substitute our judgment for that of the agency, but rather examines the record to determine whether the agency's judgment was reasonable and in accord with the stated evaluation criteria and applicable procurement laws and regulations. *MicroTechnologies, LLC*, B-413091, B-413091.2, Aug. 11, 2016, 2016 CPD ¶ 219 at 4-5. A protester's disagreement with an agency's judgment, without more, is not sufficient to establish that an agency acted unreasonably. *STG, Inc.*, B-405101.3 *et al.*, Jan. 12, 2012, 2012 CPD ¶ 48 at 7.

In this regard, we note that Sumaria's challenge to the agency's evaluation appears to be based on its misinterpretation of the FOPR. For example, Sumaria contends that the agency's evaluation is unreasonable because "the agency never contacted the work sample [contracting officer's representatives] to validate Odyssey's claims." Comments and Supp. Protest at 6. We note that the FOPR permits, but does not require, the agency to contact the points of contact provided in the work samples. See AR, Tab 7d, FOPR Evaluation Criteria at 4 (advising that the agency "reserves the right to contact the points of contact [] provided in the work sample . . . for any or all criteria during validation of self-scores"). As another example, while Sumaria contends that the agency's evaluation of Odyssey's proposal under this single subfactor should have resulted in finding Odyssey's proposal unawardable, Protest at 21, we note that the FOPR did not require such a result. See AR, Tab 7d, FOPR Evaluation Criteria at 4-5 (advising that "[u]nsubstantiated and/or misleading claims, for even a single criterion, could result in the [evaluation t]eam determining that the [o]fferor's proposed self-score is disingenuous and/or artificially inflated and the proposal would be unawardable").

On this record, we do not find that Sumaria's single remaining initial protest ground meets the high bar set by the clearly meritorious standard. See, *e.g.*, *Oready, LLC--Costs*, B-418297.2, Mar. 30, 2020, 2020 CPD ¶ 131 at 5, *citing Northrop Grumman Sys. Corp.--Costs*, B-412278.6, Feb. 7, 2017, 2017 CPD ¶ 68 at 5. Accordingly, we do not recommend reimbursement of these protest costs.

Next, with regard to the supplemental protest, notwithstanding Sumaria's repeated general claim that "[t]he Air Force conducted an unreasonable technical evaluation under Factor 1 by failing to properly evaluate and validate Odyssey's self-scores," the record shows that Sumaria challenged, for the first time in its supplemental protest, the agency's evaluation of Odyssey's proposal under 16 additional subfactors under the contractor rating system factor. Comments and Supp. Protest at 8-57. Sumaria also argued that the agency "engaged in an inconsistent and unfair technical evaluation and

validation of Odyssey's self-scores[.]" and that the agency "abandoned the FOPR's evaluation criteria by failing to consider the impact of Odyssey's inflated claims." *Id.* at 57, 60.

Here, we find no basis to conclude that Sumaria's supplemental protest grounds were clearly meritorious or that it would be appropriate to measure the promptness of the agency's corrective action with regard to the supplemental protest grounds from the filing date of the initial protest. See, e.g., *Diligent Consulting, Inc.--Costs*, B-299556.3, June 26, 2007, 2007 CPD ¶ 125 at 5 ("the fact that the agency decided to take corrective action does not also establish that a statute or regulation has been violated . . . let alone that a protest ground was clearly meritorious"), 5-6 ("there is no basis in the record here to conclude that the initial protest identified the issue on which the corrective action was based, such that it would be appropriate to measure the promptness of the agency's corrective action from the filing date of the initial protest").

In this regard, we are unpersuaded by Sumaria's view that its initial argument regarding Subfactor 3.2.7 raised "the exact issue that later formed the basis of the agency's corrective action[.]" Protester's Response to Agency's Response to Request for Costs at 3. As noted above, under the contractor rating system factor, the FOPR established criteria for assigning points based on 32 subfactors grouped into four rating areas: general, technical, Defense Security Services vulnerability assessment, and work sample contractor performance assessment report. AR, Tab 7d, FOPR Evaluation Criteria at 4-18. The FOPR provided that offerors were to self-score their proposals against each of these individual 32 subfactors. AR, Tab 7c, FOPR Instructions at 8; see also AR, Tab 7e, Self-Scoring Matrix. Under these circumstances, we do not think that Sumaria's initial challenge to the agency's evaluation of a single subfactor put the agency on notice to review other aspects of its evaluation, including--as Sumaria challenges in its supplemental protest--the agency's evaluation of 16 additional subfactors or alleged inconsistencies spanning multiple subfactors.

We also disagree that what Sumaria characterizes as its "general ground[] of protest[.]" Request for Costs at 3--that is, its repeated sweeping claims about the agency's "technical evaluation under Factor 1," Protest at 15, Comments and Supp. Protest at 8--was sufficient to meet this standard. In this regard, while our Office has recognized that a protester may not be able to raise more specific issues prior to receiving and reviewing the agency's report, we have also rejected arguments that a "general ground" of protest is sufficient to put the agency on notice of specific issues that are not raised until a later protest. See, e.g., *Procinctu Grp., Inc.--Recon.*, B-416247.5, Mar. 15, 2019, 2019 CPD ¶ 109 at 5 (rejecting protester's "apparent view that its very general challenge to the agency's technical evaluation in its initial protest should be deemed clearly meritorious" and finding no basis to conclude that a reasonable inquiry by the agency into the protester's initial arguments should have led the agency to identify the basis for the supplemental protest that prompted the agency to take corrective action).

Here, the record is clear that the agency took prompt corrective action prior to the due date for its supplemental agency report. Because the agency did not unduly delay taking corrective action in response to the supplemental protest, we also find no basis to recommend reimbursement of these protest costs.

The request is denied.

Thomas H. Armstrong
General Counsel