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Decision

Matter of: Facility Services Management, Inc.—Costs

File: B-402757.5

Date: September 27, 2010

John C. Dulske, Esq., Joan Kelley Fowler Gluys, Esq., Dulske & Gluys, PC, for the protester.

Wilbert Jones, Esq., and Julia A. Lobosco, Esq., Department of Homeland Security, United States Coast Guard, for the agency.

Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Reimbursement of costs of filing and pursuing protest recommended where reasonable agency inquiry into initial protest allegation would have shown that agency failed to evaluate whether awardee's key personnel met solicitation requirements, and agency delayed taking corrective action until after submission of agency report.

DECISION

Facility Services Management, Inc. (FSI), of Clarksville, Tennessee, requests that we recommend that the Department of Homeland Security, U.S. Coast Guard, reimburse its costs of filing and pursuing its protest in connection with the issuance of a blanket purchase agreement (BPA) to KIRA, Inc., of Miramar, Florida, under solicitation No. HSCG40-10-R-400001, for facility maintenance, repairs and operations services at the Coast Guard Yard in Baltimore, Maryland.

We grant the request.

BACKGROUND

The solicitation, limited to vendors holding General Services Administration Federal Supply Schedule contracts, contemplated issuance—on a “best value” basis—of a fixed-price BPA for a base year, with 4 option years. The solicitation included a performance work statement (PWS) that specified required experience and education requirements for key personnel. Proposals were to be evaluated under three factors (with subfactors): technical capability (capability statement, key

personnel, and management approach/subcontracting plan); past performance; and price. Proposals were rated on an adjectival basis--excellent (defined as exceeds the requirements); satisfactory (meets all requirements); marginal (barely meets minimum requirements); and unsatisfactory (fails to meet the minimum requirements). All non-price factors combined were significantly more important than price.

Three vendors, including FSI and KIRA, submitted proposals, which were evaluated by a technical evaluation team (TET). FSI's proposal was rated [deleted], while KIRA's was rated excellent under all factors and subfactors except key personnel, where it was rated satisfactory. The contracting officer, as source selection authority (SSA), concluded that KIRA's [deleted] and issued it a BPA. After a debriefing, FSI filed its first protest on April 19.

In its initial protest, FSI challenged the selection of KIRA on various grounds, including--(1) KIRA misrepresented the availability of its key personnel or engaged in a "bait and switch" of those personnel; (2) FSI's [deleted] evaluated; (3) the TET unreasonably assigned [deleted] to FSI's proposal under the [deleted]; (4) KIRA's proposal was unreasonably evaluated under the same subfactor based on the allegations in issue 1; and (5) FSI's evaluation under the [deleted].

On April 20, FSI filed its first supplemental protest, raising five additional grounds--(6) KIRA's evaluation under the past performance factor was unreasonable because the agency failed to consider certain negative past performance information; (7) the TET unreasonably [deleted] FSI's proposal under the [deleted] subfactor; (8) the evaluation of KIRA's proposal under the same subfactor was unreasonable based on alleged statements made by KIRA personnel regarding the vendor's ability to perform; (9) the price evaluation was flawed because KIRA's price was unreasonable; and (10) the best value determination was flawed.

On April 22, FSI filed a second supplemental protest, raising one additional ground--(11) in addition to its issue No. 6 allegations, KIRA's past performance evaluation was unreasonable due to the firm's lack of sufficient past performance experience. FSI also supplemented its original issue No. 1 by providing additional evidence of (12) KIRA's alleged misrepresentation of the availability of its proposed key personnel.

Based on our review of the record, we advised the parties that most of FSI's issues (Nos. (2), (6), (9), and (11) above) failed to state valid bases of protest (e.g., because they were based on speculation), or were otherwise subsumed by the valid issues (Nos. (4), (8), and (10)). Accordingly, the agency report, filed on May 19, addressed only the following issues--Nos. (1) and (12) concerning KIRA's alleged personnel misrepresentation/bait and switch; Nos. (3) and (7) concerning the alleged miscalculation of FSI's proposal under the [deleted]; and No. (5) concerning the

alleged misvaluation of FSI's proposal under the [deleted]. The agency report also included KIRA's key personnel resumes.

In its June 1 comments on the agency report, FSI reasserted its grounds of protest and, with regard to the bait and switch issue, alleged that six of KIRA's eight key personnel lacked the requisite PWS experience, [deleted]. FSI Comments at 2-11. Based on this alleged lack of experience, FSI filed a third supplemental protest, also on June 1, separately challenging the evaluation of KIRA's key personnel and past performance.

We requested that the agency provide a supplemental report addressing these issues. Thereafter, the agency notified our Office that it intended to take corrective action, including reopening the procurement to hold discussions, providing an opportunity for submission of revised proposals, and making a new best value determination. We dismissed FSI's protests as academic (B-402757 et al., June 8, 2010). Subsequently, FSI protested the terms of the agency's corrective action, asserting--in part--that the agency did not address KIRA's alleged gathering of non-public information about FSI personnel after issuance of the BPA. We dismissed that protest on the basis that it failed to state valid protest grounds (B-402757.4, June 23, 2010). On June 23, FSI submitted this request that we recommend reimbursement of its costs related to filing and pursuing its various protests.

DISCUSSION

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. Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2010); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. 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. With respect to the promptness of the agency's corrective action under the circumstances, we review the record to determine whether the agency took appropriate and timely steps to investigate and resolve the impropriety. See Chant Eng'g Co., Inc.--Costs, B-274871.2, Aug. 25, 1997, 97-2 CPD ¶ 58 at 4; Carl Zeiss, Inc.--Costs, B-247207.2, Oct. 23, 1992, 92-2 CPD ¶ 274 at 4. While we consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest, we generally do not consider it to be prompt where it is taken after that date. See CDIC, Inc.--Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 2.

The agency opposes the requested recommendation, maintaining that the issues raised in the initial and first two supplemental protests were not clearly meritorious, that FSI's third supplemental protest was the first time FSI challenged the qualifications of KIRA's key personnel and provided specifics about the lack of those qualifications, and that its corrective action thus was prompt, since it was taken prior to its report in response to the third supplemental protest. Agency Response at 3; see AGFA HealthCare Corp.--Costs, B-400733.6, Apr. 22, 2009, 2009 CPD ¶ 90 at 3-4 (corrective action taken on supplemental issues considered prompt where initial issues were not clearly meritorious).

We do not agree with the agency that FSI's challenge to the qualifications of KIRA's key personnel was first raised in the third supplemental protest; rather, we find that this argument was part of FSI's initial protest alleging misrepresentation/bait and switch. In this regard, in its initial protest, FSI listed three possible explanations for KIRA's alleged attempts to replace its proposed assistant project manager (APM), including the assertion that the APM failed to meet the PWS requirements. Initial Protest at 14. FSI also asserted in its original protest that KIRA "wholly failed to propose all eight (8) key personnel that met the [solicitation] requirements and who were available and committed to this contract." Id. at 18. In our view, these allegations were sufficiently specific that a reasonable investigation by the agency would have led it to conclude that some--if not all--of KIRA's proposed key personnel failed to meet the PWS requirements.

For example, while the solicitation [deleted] required [deleted] to have completed a [deleted], the resume for KIRA's [deleted] did not indicate any such [deleted]. Similarly, even though the [deleted] was required to have a minimum of [deleted] the resume for KIRA's [deleted] showed less experience. The resumes of other key personnel (including the [deleted]) also lacked evidence of required [deleted]. We note that, even though the TET rated KIRA's proposal satisfactory (defined as "meets all requirements"), it recognized that KIRA's [deleted], and the SSA recognized [deleted]. Consensus Technical Factor Ratings at 2-3; Vendor Selection Report at 5. Having waited until after the filing of its report and FSI's comments and supplemental protest, we find that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest assertion.

However, we find no undue corrective action delay with regard to the remainder of FSI's protest grounds, because those issues were not clearly meritorious. Prior to receipt of the agency report, we found a number of FSI's initial and supplemental

issues failed to state valid bases of protest.¹ See AGFA HealthCare Corp.--Costs, supra (dismissed issues are not clearly meritorious). We do not find the remaining issues--concerning the evaluation of FSI's proposal--to be clearly meritorious because further development of the record would have been required in order for us to determine their merits. In this regard, the agency provided detailed responses in its report and we were planning to request a supplemental report addressing FSI's comments and supplemental issues at the time of the agency's corrective action.

Our recommendation for reimbursement does not extend beyond FSI's challenge to the evaluation of the qualifications of KIRA's key personnel. While, as a general rule, we consider a successful protester entitled to be reimbursed costs incurred with respect to all issues pursued, not merely those upon which it prevails (Burns and Roe Servs. Corp.--Costs, B-310828.2, Apr. 28, 2008, 2008 CPD ¶ 81 at 2-3), we nevertheless will limit a recommendation for reimbursement of costs where we determine that successful and unsuccessful protest grounds are clearly severable. See, e.g., BAE Tech. Servs., Inc.--Costs, B-296699.3, Aug. 11, 2006, 2006 CPD ¶ 122 at 3. In making this determination, we consider, among other things, the extent to which the claims are interrelated or intertwined, e.g., whether the successful and unsuccessful claims share a common core set of facts, are based on related legal theories, or are otherwise not readily severable. See Sodexo Mgmt., Inc.--Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 29. Here, we conclude that FSI's meritorious issue concerning the evaluation of KIRA's proposed key personnel is factually unrelated to, and therefore clearly severable from, the remaining technical evaluation issues, all of which concern the evaluation of FSI's own proposal. Accordingly, our recommendation for reimbursement is limited to FSI's costs related to the key personnel evaluation issue.

The request is granted.

Lynn H. Gibson
Acting General Counsel

¹ For example, FSI's challenge to KIRA's past performance evaluation was based on its assertion that the agency was aware of negative past performance information on a specific KIRA contract, but failed to take it into account. After seeking input from the parties, we concluded that the issue failed to state a valid basis. In this regard, there was no evidence of any relevant past performance information available on the challenged contract; no evidence that the agency's evaluators had first-hand knowledge of KIRA's alleged poor performance; and no evidence the evaluators were required to seek out the alleged information.