



Decision

Matter of: Herai Alpha Construction--Costs

File: B-414558.2

Date: September 26, 2017

William J. Spriggs, Esq., Spriggs Consulting Services, for the protester.
Rachel B. Cochran, Esq., United States Agency for International Development, for the agency.

Mary G. Curcio, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reimbursement of costs relating to the protester's challenge to a nonresponsibility determination is recommended where the procuring agency took corrective action after the parties were informed through alternative dispute resolution procedures that the protest ground would likely be sustained.

DECISION

Herai Alpha Construction, of Kabul, Afghanistan, requests that our Office recommend that it be reimbursed the costs associated with filing and pursuing its protest against the rejection of the offer it submitted in response to basic ordering agreement (BOA) request for proposals (RFP) No. SOL-306-16-000049, issued by the United States Agency for International Development (USAID) for emergency road services.

We grant the request.

BACKGROUND

USAID issued the RFP on August 25, 2016, for the purpose of establishing multiple BOAs for emergency road services. The solicitation advised offerors that the agency would establish BOAs using a lowest-priced, technically-acceptable method. Agency Report (AR), Tab 3, RFP, at 62. The evaluation factors, which were evaluated on an acceptable/unacceptable basis were: (1) local entity requirements; (2) past experience; (3) technical capability; (4) financial capability; and (5) past performance. *Id.* at 62-63. Past performance was also used to determine whether the offeror was a responsible

firm. Id. at 63. As relevant here, the agency informed Herai Alpha that it was eliminated from the competition after concluding that the firm was nonresponsible because it did not have a consistent satisfactory performance record and it was terminated for default on one contract. AR, Tab 15, Herai Alpha Debriefing, at 2.

Herai Alpha filed a protest with our Office arguing that the contracting officer unreasonably determined that it was not a responsible business. In this regard, Herai Alpha explained that the termination for default had been changed to a termination for convenience. Protest at 3. With respect to all of its other contracts, Herai Alpha noted it received all satisfactory and one very good final rating. Id. at 2.

On May 8, the agency submitted its agency report. According to the agency, Herai Alpha was found nonresponsible based on two past performance contracts, one which was terminated for default and one which received an interim rating of unsatisfactory. Contracting Officer's Statement at 7. According to the documents submitted with the agency report, with respect to the contract in which it received an unsatisfactory interim rating, Herai Alpha submitted a past performance questionnaire showing the final rating was satisfactory. AR, Tab 8a, Herai Alpha Technical Proposal, at 30-33; Tab 8c, Herai Alpha Past Projects, at 1. Herai Alpha submitted past performance information for other contracts showing ratings of satisfactory or higher. Id. In addition, in the agency's responsibility documentation for Herai Alpha, with respect to the contract in which it received an unsatisfactory interim rating, there is a copy of the past performance questionnaire showing the final rating was satisfactory. Id., Tab 10, Responsibility Documents, at 25-27.

On June 1, 2017, after the protest record was developed, the cognizant Government Accountability Office (GAO) attorney conducted an "outcome prediction" alternative dispute resolution (ADR) conference with the parties. In the course of that conference, the GAO attorney advised the agency that GAO would likely sustain Herai Alpha's protest concerning the negative responsibility determination. The attorney noted that the agency based the negative responsibility determination, in part, on an unsatisfactory evaluation for one contract. However, the unsatisfactory rating was an interim rating. The record before the agency at the time it evaluated past performance also included the final evaluation as satisfactory for that contract. The attorney also noted that while the responsibility determination indicated that Herai Alpha did not have a good record of past performance, the record before the agency at the time it conducted its responsibility determination included multiple contracts for Herai Alpha with satisfactory ratings. GAO was concerned that the agency did not fully consider the record when it assigned the negative responsibility rating.

In response to the ADR conference, the agency informed our Office that it intended to take corrective action consisting of reevaluating Herai Alpha's responsibility and making any necessary modifications to the source selection decision. Based on the agency's proposed corrective action, our Office dismissed the protest as academic. Herai Alpha Construction, B-414558, June 13, 2017, (unpublished decision). Following dismissal of

the protest, Herai Alpha requested that our Office recommend that it be reimbursed the costs of filing and pursuing its protest.

DISCUSSION

Herai Alpha argues that it is entitled to reimbursement because the protest was meritorious, as demonstrated by the GAO attorney's views expressed during the ADR outcome prediction conference call.

When a procuring agency takes corrective action in response to a protest, our Office may recommend 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 protesters 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. 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. A GAO attorney will inform the parties through outcome prediction ADR that a protest is likely to be sustained only if he or she has a high degree of confidence regarding the outcome; therefore, the willingness to do so is generally an indication that the protest is viewed as clearly meritorious, and satisfies the "clearly meritorious" requirement for the purpose of recommending reimbursement of protest costs. National Opinion Research Ctr.--Costs, B-289044.3, Mar. 6, 2002, 2002 CPD ¶ 55 at 3; Inter-Con Sec. Sys., Inc.; CASS, a Joint Venture--Costs, B-284534.7, B-284534.8, Mar. 14, 2001, 2001 CPD ¶ 54 at 3. As discussed above, we explained during ADR that we found clearly meritorious the protester's complaint that USAID unreasonably determined that Herai Alpha was not a responsible business.

With respect to whether the corrective action was taken promptly, we consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest. However, we generally do not consider it to be prompt where it is taken after that date, including following outcome prediction ADR. CACI Techs., Inc.--Costs, B-407923.3, Aug. 14 2014, 2014 CPD ¶ 321 at 5; Burns & Roe Servs., Corp.--Costs, B-310828.2, Apr. 28, 2008, 2008 CPD ¶ 81 at 2 n.2. Here, since the agency did not take corrective action until after it submitted its agency report, we find that the agency unduly delayed taking corrective action in response to this meritorious protest.

We recommend that USAID reimburse Herai Alpha for the costs of filing and pursuing its protest challenging the agency's decision to eliminate Herai Alpha from the competition as nonresponsible. Herai Alpha 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).

The request for reimbursement of costs is granted.

Susan A. Poling
General Counsel