



Decision

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Matter of: Herren Associates, Inc.--Costs

File: B-414792.4

Date: November 21, 2017

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DIGEST

Request for recommendation that protest costs be reimbursed is denied where agency did not unduly delay taking corrective action in the face of a clearly meritorious protest.

DECISION

Herren Associates, Inc., a small business of Washington, D.C., requests that it be reimbursed the reasonable costs of filing and pursuing its protest of the issuance of a task order to Falconwood, Inc., of Norfolk, Virginia, pursuant to request for proposals (RFP) No. N00024-15-R-3393, which was issued by the Department of the Navy, Space and Naval Warfare Systems Command (SPAWAR), for technical, engineering, and logistics support services for the Navy's Program Executive Office for Enterprise Information Systems. Herren contends that the agency unduly delayed taking corrective action in the face of its clearly meritorious protest.

We deny the request.

BACKGROUND

On June 24, 2016, SPAWAR issued the RFP for the contractor support services to small businesses that held contracts under the Navy's SeaPort-e indefinite-delivery, indefinite-quantity multiple award program. Agency Report (AR) (B-414792), exh. 1, RFP, at 1, 65. The RFP contemplated the issuance of a cost-plus-fixed-fee, level-of-effort task order for a base year and four option years. *Id.* at 20-23, 65. The solicitation anticipated that the order would be issued to the firm whose proposal represented the

best value to the government, considering the following evaluation factors: (1) technical approach, capabilities, and experience; (2) management approach and key personnel; (3) past performance; and (4) cost/price. Id. at 65-66.

The agency received proposals from seven firms, including Herren and Falconwood. A technical evaluation board (TEB) evaluated proposals under the non-cost factors by identifying strengths, weaknesses, and proposal risks, and then assigning adjectival ratings under the factors. Contracting Officer's Statement/Memorandum of Law (COS/MOL) (B-414792) at 11. A cost evaluation team (CET) evaluated cost proposals, making cost adjustments as warranted to calculate a most probable cost for each offer. Id. at 13. The source selection authority (SSA) reviewed the TEB report and the cost evaluation report and concluded that Falconwood's higher-cost, higher-rated proposal represented the best value to the government. AR (B-414792), exh. 5, Source Selection Decision Document (SSDD), at 1-14. SPAWAR issued the task order to Falconwood on May 25, 2017.

On June 12, following a written and telephonic debriefing, Herren filed an initial protest with our Office. In its protest, Herren challenged the agency's evaluation of its proposal under the technical approach and management approach factors. Herren also protested numerous aspects of the SSA's source selection decision, including, for example, the SSA's assessment of a cost risk to Herren's proposal based in part on the variance between Herren's evaluated costs and the government's cost estimate.

The Navy submitted its agency report on July 12. In its report, the Navy countered each of the protester's allegations and submitted a contemporaneous record that detailed its evaluation and award determination. The agency maintained that it reasonably evaluated Herren's proposal, including the assignment of weaknesses under the technical approach and management approach factors. COS/MOL at 19-28. The Navy also defended its source selection decision, including the SSA's assessment of a cost risk to Herren's proposal. Id. at 29-52.

In its comments on the agency's report, Herren continued to challenge the reasonableness of the Navy's evaluation of its proposal and source selection decision. In addition, Herren raised supplemental protest grounds, including that the agency evaluated Herren's and Falconwood' proposals disparately.

Our Office asked the Navy to submit a supplemental agency report to address Herren's new arguments by August 4. On August 3, prior to submitting a supplemental report, the Navy advised our Office that it intended to take corrective action "to address the supplemental protest." Notice of Corrective Action at 1. Specifically, the agency committed to reevaluate Herren's technical proposal and make a new best-value tradeoff decision. On August 9, our Office dismissed the protest as academic. Herren Associates, Inc., B-414792, B-414792.3, Aug. 9, 2017 (unpublished decision). Thereafter, Herren filed its request for the reimbursement of protest costs.

DISCUSSION

Herren requests that our Office recommend that the protester be reimbursed the reasonable costs of filing and pursuing its initial and supplemental protests. Herren argues that its protest grounds were clearly meritorious, particularly its objection to the SSA's imposition of a cost risk to Herren's proposal. Request for Costs at 1. Herren further maintains that reimbursement of costs is warranted because the Navy unduly delayed taking its corrective action.

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. 4 C.F.R. § 21.8(e); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. Thus, as a prerequisite to our recommending the reimbursement of costs where a protest has been settled by corrective action, 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.

We find that reimbursement is not appropriate in this case. In this regard, we disagree with the protester that it raised clearly meritorious allegations in its initial protest. More specifically, while the protester raised some compelling concerns, particularly with respect to the agency's source selection decision, the protester's arguments necessitated a substantive response from the agency for our Office to fully assess the merits of the protest grounds. That is, in our view, the agency was not without a defensible legal position. Indeed, because the allegations raised, and the agency's responses thereto, presented a close question that warranted further research and analysis to determine the merits of the issues presented, the reimbursement of costs is not warranted. See InfraMap Corp.--Costs, *supra*, at 4 (declining to recommend reimbursement of protest costs where the matter was a close call that would have required substantial further analysis of the parties' positions to determine which party was correct).

By way of example, we discuss Herren's complaint that the SSA unreasonably assigned a cost risk to its proposal. In its initial protest, Herren argued that the SSA improperly "double-counted" cost adjustments previously made by the cost evaluation team. Protest, June 12, 2017, at 12. More specifically, the protester complained that it was improper for the SSA to focus on a labor rate issue that the CET had already factored in as part of its most probable cost adjustment, and that the SSA "created out of thin air" a supposed cost risk based on the variance between Herren's adjusted cost and the government's cost estimate. Id. at 12-13.

The record reflected that Herren had proposed [DELETED] named individuals for performance (at the prime contractor level) and provided payroll data for [DELETED] of those personnel. AR (B-414792), exh. 4, CET Report, at 58. In assessing the realism of Herren's proposed rates, the CET calculated a most probable hourly rate using the payroll data for those [DELETED] personnel. Id. at 58-59. With respect to the rates for the remaining [DELETED] labor categories, the CET utilized Bureau of Labor Statistics (BLS) data and upwardly adjusted rates to the 25th percentile range of the BLS data.¹ Id. at 60-61. Ultimately, due to the labor rate adjustments and adjustments to other cost elements, for evaluation purposes the CET upwardly adjusted Herren's proposed costs by [DELETED] percent. Id. at 16, 57.

As part of his source selection decision, the SSA compared the evaluation findings of Falconwood's and Herren's proposals. The SSA detailed advantages offered by Falconwood, some of which were described as "significant," and highlighted areas where Herren's proposal was lacking. AR (B-414792), exh. 5, SSDD, at 11-13. The SSA expressly noted that the "key discriminator" between the proposals was Falconwood's "superior" proposal under the technical approach factor. Id. at 11-13. With respect to proposed costs, the SSA highlighted that while the CET relied on actual payroll data provided in their proposal to verify all of Falconwood's proposed direct labor rates, Herren had failed to explain how rates for [DELETED] labor categories were established. Id. at 13. The SSA explained as follows:

Based on this, the Government has less confidence that Herren's proposed direct labor rates for those individuals without verified payroll data accurately reflect the rates that will be incurred during the performance of work.

Id. The SSA then pointed out that Herren's evaluated cost was 23 percent lower than the independent government cost estimate (IGCE), a difference the SSA characterized as "significant." Id. The SSA concluded that there was a "risk of cost growth associated with Herren's proposal." Id.

Ultimately, the SSA determined that Herren's cost advantage was overcome by Falconwood's technical advantages under the non-cost factors, particularly the technical approach factor, which was the most important evaluation factor. Id.; see RFP at 66-67. Because Herren's proposal was assessed as more of a "cost and performance risk" than Falconwood's proposal, the SSA deemed Falconwood's proposal the best value to the agency. AR (B-414792), exh. 5, SSDD, at 13-14.

As previously explained, Herren objected to the SSA's consideration of, and conclusions regarding, the cost issues described above, and maintains that this

¹ Rates for [DELETED] of Herren's labor categories already fell within the 25th to 75th percentile range of the BLS data and, as a result, no adjustments were made to those rates. AR (B-414792.1), exh. 4, CET Report, at 60.

challenge was clearly meritorious. Our Office disagrees that the particular allegation is clearly meritorious, *i.e.*, not a close call, such that Herren should be reimbursed the costs of pursuing its protest. In this respect, Herren did not conclusively establish that it was improper for the SSA to highlight the fact that the labor rates for more than [DELETED] of Herren's proposed workforce were not supported by payroll documentation. That the CET had already considered this as part of its cost realism analysis does not require that the SSA adopt the evaluators' findings without commentary or analysis. On the contrary, given that cost evaluators need not obtain scientific certainty as to the most probable anticipated cost of performance, *see Smartronix, Inc.; ManTech Advanced Sys. Int'l, Inc.*, B-411970 *et al.*, Nov. 25, 2015, 2015 CPD ¶ 373 at 10, we decline to accept that it was wholly inappropriate for the SSA to document his own assessment of a risk of cost growth associated with Herren's proposal. *See* AR (B-414792), exh. 5, SSDD, at 13.

In addition, the SSA's consideration of the government estimate in his best-value decision is also not without a defensible legal position, as the protester contends. The record showed that, despite the CET not dwelling on the IGCE in its analysis, the SSA discussed the estimate in some detail early in the source selection decision document. He elaborated as to how the cost estimate was derived and explained that he had a "high level of confidence in the IGCE because multiple sources of data were utilized to establish it." *Id.* at 3. He also cited the "very large variances" between the evaluated costs of [DELETED] and the IGCE. *Id.* Given this, he found that there was a "significant cost risk" [DELETED]. *Id.*

Contrary to Herren's argument, that the CET did not raise a similar cost risk does not mean that it was improper for the SSA to have documented his concerns regarding the disparity between the offerors' evaluated costs and the IGCE. In this respect, the SSA analyzed and discussed how the IGCE was calculated, and he assessed the delta between the offerors' evaluated costs and the estimate. Given that Herren's evaluated cost was 23 percent below the IGCE, and that the SSA placed high confidence in the estimate, we have no basis to conclude that it was unreasonable for the SSA to highlight this delta, and the risks associated with it, in his source selection decision. In sum, the SSA's decision to look beyond the CET's conclusions and document additional concerns with respect to Herren's costs is not without a defensible legal position such that our Office should recommend the reimbursement of protest costs.

Next, with respect to Herren's supplemental challenges alleging disparate treatment, we find that the agency did not unduly delay in taking corrective action because it acted prior to the deadline for submitting its supplemental report. 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. *LGS Innovations LLC*, B-405932.3, Apr. 26, 2012, 2012 CPD ¶ 147 at 2. Here, the Navy filed a notice of corrective action instead of a supplemental agency report. Under these

circumstances, we consider the corrective action to be prompt. Thus, we have no basis to recommend reimbursement of costs associated with Herren's supplemental protest.

The request for costs is denied.

Susan A. Poling
General Counsel