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Decision

Matter of: Auxilio FPM JV, LLC--Costs

File: B-415215.4

Date: April 27, 2018

Phillip R. Seckman, Esq., Thomas F. Rath, Esq., and J. Quincy Stott, Esq., Dentons US LLP, for the protester.

Connie L. Baran, Esq., Department of the Army, for the agency.

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DIGEST

GAO recommends reimbursement of the costs of filing and pursuing challenges against the agency's evaluation of technical proposals, past performance, and the source selection decision, where the evaluation challenges were clearly meritorious, or intertwined with clearly meritorious issues.

DECISION

Auxilio FPM JV, LLC, an 8(a) small business located in Denver, Colorado, requests that we recommend that it be reimbursed the costs associated with filing and pursuing its protest against the award of four indefinite-delivery, indefinite-quantity contracts, pursuant to request for proposals (RFP) No. W912HN-15-R-0035, issued by the Department of the Army, Corps of Engineers (Corps) for environmental investigation and remediation services at military munitions response program sites.

We grant the request.

BACKGROUND

On October 10, 2017, Auxilio filed a protest with our Office challenging the agency's evaluation of technical proposals, past performance, and the agency's source selection. Specifically, Auxilio argued that the agency failed to credit its proposal with two strengths and improperly combined two other strengths into a single strength. Auxilio also alleged that the agency's past performance evaluation failed to consider past performance questionnaires (PPQs) and contractor performance assessment report (CPAR) information, applied an unstated evaluation criterion by assessing separate

complexity ratings, and improperly reduced its confidence rating based on one CPAR rating. The protester also alleged that the agency's best-value decision was unreasonable because it was based upon a flawed evaluation. On November 20, Auxilio filed supplemental protests expanding its challenges to the agency's evaluation of technical proposals, past performance, and the source selection decision.

After development of the protest record, the cognizant Government Accountability Office (GAO) attorney conducted an "outcome prediction" alternative dispute resolution (ADR) conference. In the course of that ADR, the GAO attorney advised the parties that GAO would likely sustain Auxilio's protest on the following bases: (1) the source selection decision was improperly based upon a mechanical comparison of the offerors' adjectival ratings; (2) the source selection authority's (SSA's) decision to increase the technical ratings for three offerors, including one awardee, was unreasonable; and (3) the agency's past performance evaluation failed to follow the RFP evaluation criteria.

Specifically, the GAO attorney explained that the best-value decision failed to include a comparative analysis of the offerors' proposals and was not adequately documented. With respect to the SSA's change in technical rating, the GAO attorney explained that the SSA's documented rationale for increasing three offerors' ratings was not a reasonable basis to disregard the ratings of the technical evaluators. In this regard, the record demonstrated that even though the SSA agreed with the evaluator's rationale for the ratings, the SSA concluded that "in fairness to the offeror[s]" he would not accept the evaluator's ratings because the offerors were not told that their strengths would be revised downward. Agency Report, Tab 6, Source Selection Decision, at 4. With respect to the past performance evaluation, the GAO attorney explained that the evaluation was flawed because the evaluators improperly elevated the consideration of complexity contrary to the stated evaluation criteria. The GAO attorney also explained that the agency had separately analyzed complexity contrary to the RFP criteria, which provided for an evaluation of complexity as part of the relevancy determination and not a separate analysis.

In response to the ADR, the agency informed our Office that it intended to take corrective action consisting of, reevaluating the technical approach factor and past performance, and making a new source selection decision. Based on the agency's proposed corrective action, GAO dismissed Auxilio's protest as academic. Auxilio FPM JV, LLC, B-415215.2, B-415215.3, Dec. 21, 2017 (unpublished decision). Following the dismissal of the protest, Auxilio filed this request that GAO recommend the reimbursement of its costs of filing and pursuing its protest.

DISCUSSION

Auxilio asks our Office to recommend that the Corps reimburse it for the costs associated with its protests.¹ In response, the Corps does not dispute that the protester should be reimbursed the costs of its challenges to the adequacy of the source selection decision but maintains that Auxilio's reimbursement should be limited to this issue. Accordingly, the remaining question for resolution by our Office is whether the protester should be reimbursed for all of the remaining challenges to the agency's evaluation of proposals raised in the protest.

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. 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.

In considering whether to recommend the reimbursement of protest costs, we generally consider all issues concerning the evaluation of proposals to be intertwined--and thus not severable--and therefore, generally will recommend reimbursement of the costs associated with both successful and unsuccessful challenges to an evaluation. Coulson Aviation (USA) Inc.; 10 Tanker Air Carrier, LLC--Costs, B-406920.6, B-406920.7, Aug. 22, 2013, 2013 CPD ¶ 197 at 5. While we have, in appropriate cases, limited our recommendation where a part of a successful protester's costs is allocable to a protest issue that is so clearly severable as to essentially constitute a separate protest, see, e.g., BAE Tech. Servs., Inc.--Costs, B-296699.3, Aug. 11, 2006, 2006 CPD ¶ 122 at 3;

¹ Auxilio filed an initial protest with our Office on September 5, 2017. This protest was dismissed as premature because the protester had not received a debriefing. See Auxilio FPM JV, LLC, B-415215, Sept. 25, 2017 (unpublished decision). To the extent that Auxilio requests costs associated with this filing, we find no basis to recommend reimbursement because the agency did not take corrective action. See 4 C.F.R. § 21.8(e) (If the agency decides to take corrective action in response to a protest, GAO may recommend that the agency pay the protester the reasonable costs of filing and pursuing the protest.).

Interface Flooring Sys., Inc.--Claim for Attorneys' Fees, B-225439.5, July 29, 1987, 87-2 CPD ¶ 106 at 2-3, 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.

The Corps argues that all issues other than the adequacy of the source selection decision are not clearly meritorious and are clearly severable from the concerns identified in the outcome prediction ADR. We disagree.

First, Auxilio's challenge to the adequacy of the source selection decision was not the only clearly meritorious protest issue. As stated above, the GAO attorney conducting the ADR predicted that the protest would be sustained because (1) the source selection decision was improperly based upon a mechanical comparison of the offerors' adjectival ratings; (2) the SSA's decision to increase the technical ratings for three offerors, including one awardee, was unreasonable; and (3) the agency's past performance evaluation failed to follow the RFP evaluation criteria. Each of these issues was clearly meritorious. Contrary to the agency's assertion, our ADR sustain prediction was not limited to the adequacy of the source selection decision.

With regard to Auxilio's challenges to the technical evaluation of proposals--i.e., failure to credit Auxilio's proposal with various strengths under the solicitation's technical factor, and unequal treatment in the evaluation of the offerors' technical factor, including the evaluation of offerors' schedules--we consider these issues to share common factual and legal bases with the clearly meritorious protest grounds. In this regard, both the meritorious and non-meritorious issues are intertwined and interrelated with the agency's flawed consideration of the relative merits of proposals and the SSA's improper change in technical ratings. See Sevatec, Inc.--Costs, B-407880.3, June 27, 2013, 2013 CPD ¶ 163 at 3-4. As such, we decline to sever the costs of any protest grounds.

RECOMMENDATION

We recommend that Auxilio be reimbursed the costs associated with filing and pursuing its protests (B-415215.2, B-415215.3), including reasonable attorneys' fees. Auxilio should submit its certified claim, detailing the time and costs incurred, directly to the agency within 60 days of its receipt of this decision. Bid Protest Regulations, 4 C.F.R. § 21.8(f)(1).

The request is granted.

Thomas H. Armstrong
General Counsel