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**Comptroller General
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Decision

Matter of: Core Tech International Corporation--Costs

File: B-400047.2

Date: March 11, 2009

Brian A. Darst, Esq., for the protester.
Kenneth M. Racette, Jr., Esq., Naval Facilities Engineering Command, for the agency.
David A. Ashen, 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 is recommended where a reasonable agency inquiry into protest allegations would have shown that agency had failed to reasonably evaluate awardee's past performance and experience, and had conducted disparate, unequal discussions, but agency delayed taking corrective action until after submission of agency report responding to allegations and GAO conducted "outcome prediction" alternative dispute resolution.

DECISION

Core Tech International Corporation (CTIC) of Guam requests that we recommend that the firm be reimbursed the costs of filing and pursuing its protest challenging the Naval Facilities Engineering Command's (NAVFAC) award of a contract to DCK Pacific, LLC, under request for proposals (RFP) No. N62742-08-R-1307, for design and construction of replacement, larger size water lines and related work at the Naval Base, Guam. CTIC challenged the agency's evaluation of proposals and conduct of discussions.

We grant the request that we recommend reimbursement of costs.

BACKGROUND

The RFP, issued on an unrestricted basis, provided for award of a fixed-price contract for replacement of existing water lines with larger sized lines, construction of a concrete enclosure for the Fena Lake Pump Station standby generator, installation of zone meters for various areas, replacement of vertical pumps and upgrade of motors, and installation of pressure reducing valves. The RFP specified an estimated cost of between \$20 to \$30 million. RFP at 1.

Award was to be made to the responsible offeror whose conforming offer was determined to be the most advantageous and represent the “best value” based on the evaluation of price and the following four, equally weighted technical evaluation factors: (1) past performance (Factor A), including (in descending order of importance) subfactors for the offeror’s past performance and the design firm’s past performance; (2) experience/qualifications (Factor B), including (in descending order of importance) subfactors for (a) the offeror’s experience and key personnel experience/qualifications and (b) the design firm’s experience and key personnel experience/qualifications; (3) management plan/project schedule (Factor C), including subfactors (of equal importance) for management plan and project schedule; and (4) small business subcontracting (Factor D). The technical evaluation factors, when combined, were approximately equal to price.

Of particular importance here, the solicitation defined both the contracts to be considered relevant, and the entities other than the offeror itself whose contracts (if relevant) would be taken into account, for purposes of the evaluation under the past performance and experience/qualifications factors. Specifically, the RFP provided that the past performance and experience evaluations would be based on relevant contracts, defined as contracts for the construction or design of water pump stations and water distribution lines (approximately 300 mm or larger) completed or substantially completed within the past 10 years. RFP, Evaluation Factors for Award, at 3. In addition, the RFP provided for evaluation not only of the past performance and experience of the offeror or entity submitting the proposal, but also of subcontractors committed to the project, and other affiliated entities as follows:

If an Offeror is utilizing past performance and experience information of affiliates/subsidiaries/parent /LLC/LTD member companies (name is not exactly as stated on the SF1442), the Factor C, Management Plan, proposal shall clearly demonstrate that the affiliate/subsidiary/parent/LLC/LTD member companies will have meaningful involvement in the performance of the contract in order for the past performance and experience information of the affiliate/subsidiary/parent/LLC/LTD member companies to be considered.

Id. at 4.

Proposals were received from six offerors including CTIC and DCK Pacific. Following discussions and the receipt of final proposal revisions, the source selection authority determined that DCK Pacific’s proposal represented the best value notwithstanding its higher price. In this regard, while both CTIC’s and DCK Pacific’s technical proposals were rated satisfactory overall, and both were rated satisfactory for the past performance and experience/qualifications factors, the agency determined that DCK Pacific’s proposal was superior to CTIC’s under these factors. Regarding past performance, the SSB noted that while DCK Pacific had

demonstrated experience with five relevant projects (contracts), four of which involved construction of water pump stations, with its performance rated satisfactory for four and above average for the fifth contract, CTIC had only demonstrated experience with two relevant projects, only one of which involved construction of a water pump, with one satisfactorily completed and another that met its objectives. In addition, while DCK Pacific's lead designer had demonstrated satisfactory performance with four relevant projects involving water lines, one of which involved design of water pump stations, CTIC's lead designer had demonstrated satisfactory performance on two projects, both of which involved design of water pumps. The SSB concluded that DCK Pacific's superior past performance proposal offered a higher probability of successfully performing the project based upon DCK Pacific and its lead designer having successfully completed numerous projects of similar scope.

Likewise, although both DCK Pacific's and CTIC's proposals were rated overall satisfactory under the experience/qualifications factor, the SSB determined that DCK Pacific had demonstrated more relevant experience and a stronger design team. In this regard, the SSB noted that DCK Pacific had submitted five "offeror" projects that were different from those submitted under the past performance factor, that four were determined relevant, and that three involved construction of water pump stations. In contrast, CTIC submitted the same five projects it submitted under the past performance factor, such that only two projects were considered relevant, of which only one involved construction of a water pump, and that by a subcontractor rather than by CTIC. In addition, DCK Pacific's proposal was rated outstanding under the lead designer/design team subfactor, while CTIC's was rated only satisfactory.

In addition, DCK Pacific's proposal was rated outstanding under the management plan/schedule factor on the basis of the agency's conclusion that DCK Pacific furnished a highly detailed management strategy, organization, project approach, and detailed project schedule. In contrast, CTIC's proposal was rated only satisfactory under this factor, based on a satisfactory management plan and a much less detailed schedule. Both firms' proposals received overall satisfactory ratings under the small business factor.

The source selection authority determined that the "benefits associated with DCK [Pacific's] technical proposal such as its past performance, extensive construction experience, together with a design team with extensive experience, and its comprehensive management plan and project schedule," warranted payment of the 10-percent price premium associated with DCK Pacific's proposal. Source Selection Decision at 2.

In its initial, April 7, 2008, protest of the resulting award to DCK Pacific, CTIC asserted that the agency: improperly credited DCK Pacific, a recently formed entity, with the past performance and experience/qualifications of affiliated companies

without consideration of whether there would be meaningful involvement of those companies in contract performance; improperly failed to consider as relevant several of the projects cited by CTIC in the past performance and experience/qualifications sections of its proposal; improperly failed to apply a percent price evaluation factor in favor of CTIC to which it was entitled under the terms of the solicitation based upon its asserted status as a Historically Underutilized Business Zone (HUBZone) small business concern; and failed to conduct meaningful discussions regarding CTIC's price (misleading CTIC into erroneously believing that its price was too low) and its small business status. In its May 6 agency report, NAVFAC maintained that it had reasonably evaluated CTIC's and DCK Pacific's past performance and experience/qualifications; reasonably accepted CTIC's representations during the procurement that it was becoming other than small, and thus properly declined to credit CTIC with the 10-percent price HUBZone evaluation credit; and conducted meaningful discussions.

In its May 15 comments on the agency report, CTIC asserted that several of the contracts cited in DCK Pacific's proposal and which were evaluated as relevant were in fact performed by corporate entities that, while related to DCK Pacific's parent corporation, nevertheless were not proposed to have a meaningful role in DCK Pacific's performance of the contract here. CTIC maintained that, therefore, such contracts should not have been considered to be relevant here. CTIC further challenged other specifics of the evaluation of the past performance and experience/qualifications proposals. CTIC also asserted that the agency had conducted unequal discussions, advising DCK Pacific but not CTIC of informational deficiencies regarding the nature of prior contracts cited in the proposals, with the result that several of CTIC's cited contracts were found to be not relevant. In addition, CTIC continued to assert that NAVFAC had misled it during discussions regarding its price, and that CTIC was entitled to a 10-percent HUBZone price evaluation credit. In its May 23 response, NAVFAC continued to maintain that the evaluation was reasonable.

On June 25, 2008, our Office conducted "outcome prediction" alternative dispute resolution (ADR), during which the cognizant GAO attorney stated that it was likely that CTIC's protest would be sustained based on several deficiencies in the conduct of the procurement.¹ In this regard, the GAO attorney advised during the ADR that the agency's evaluation of past performance and experience/qualifications appeared unreasonable. As noted above, while the evaluation of DCK Pacific's past performance was based on an evaluated five relevant projects (contracts), four of which involved construction of water pump stations, with its performance rated satisfactory for four and above average for the fifth contract, CTIC's past

¹ In "outcome prediction" ADR, the GAO attorney handling the case convenes all of the participating parties, usually by teleconference, and advises them of what he or she believes the likely outcome will be and the reasons for that belief.

performance was evaluated on the basis of only two relevant projects, only one of which involved construction of a water pump, with one satisfactorily completed and another that met its objectives. However, the record showed that three of the five evaluated relevant projects cited by DCK Pacific in its proposal, including three of the four water pump projects and the three largest projects, were in fact performed by Dick Corporation of Puerto Rico, rather than by the offeror here, DCK Pacific.

An agency properly may attribute the experience or past performance of a parent or affiliated company to an offeror where the firm's proposal demonstrates that the resources of the parent or affiliate will affect the performance of the offeror. Perini/Jones, Joint Venture, B-285906, Nov. 1, 2000, 2002 CPD ¶ 68 at 4. The relevant consideration is whether the resources of the parent or affiliated company—its workforce, management, facilities or other resources—will be provided or relied upon for contract performance, such that the parent or affiliate will have meaningful involvement in contract performance. Ecompex, Inc., B-292865.4 et al., June 18, 2004, 2004 CPD ¶ 149 at 5.

As our attorney explained during the ADR, the record showed that DCK Pacific, when questioned by NAVFAC as to why Dick Corporation of Puerto Rico's past performance and experience should be imputed to DCK Pacific, advised that DCK Pacific (through two intermediate companies, Dick Pacific Construction Co., Ltd., and Dick Worldwide Pacific Region, LLC) and Dick Corporation of Puerto Rico were affiliates of DCK Worldwide. However, nothing in DCK Pacific's response or elsewhere in its proposal demonstrated that Dick Corporation of Puerto Rico would have any meaningful involvement in contract performance. It was for this reason that our attorney indicated during the ADR that it was improper to attribute Dick Corporation of Puerto Rico's past performance to DCK Pacific, with the result that no more than two contracts (one involving construction of a water pump), rather than the five contracts (four involving construction of a water pump) that were considered, should have been considered for purposes of the past performance evaluation. For the same reason, our attorney indicated that it was improper for the agency to base its evaluation of DCK Pacific's experience/qualifications in part on a contract performed by Dick Corporation of Puerto Rico, with the result that no more than three contracts (two involving construction of a water pump), rather than the four contracts (three involving construction of a water pump) that were considered, should have been considered for purposes of the experience/qualifications evaluation.

Furthermore, as the GAO attorney advised during the ADR, it appeared from the record that the agency had acted improperly during discussions such that the past performance and experience/qualifications evaluations were affected. In this regard, discussions must be meaningful, equitable, and not misleading. ACS Gov't Solutions Group, Inc., B-282098 et al., June 2, 1999, 99-1 CPD ¶ 106 at 13-14. Here, the record showed that the agency conducted discussions with DCK Pacific regarding the contracts it cited in its past performance and experience/qualifications

proposals--“[y]our proposal does not clearly demonstrate why the past performance and experience of Dick Corporation of Puerto Rico and Dick Pacific Construction Co., Ltd. Guam should be imputed to DCK Pacific, LLC”--with the result that based on DCK Pacific’s discussion response, the contracts were imputed to DCK Pacific. DCK Pacific Discussion Questions. In contrast, however, the agency failed to advise CTIC of informational deficiencies that precluded consideration as part of the evaluation of CTIC’s past performance and experience/qualifications of two of the contracts cited by CTIC, including at least one contract (for the Ironwood Estates project) for which the protester’s performance was reported as outstanding. Thus, it appeared from the record that the agency had engaged in improper, disparate treatment of the competing offerors during discussions. Since the results of the above deficiencies potentially called into question the agency’s determination that DCK Pacific’s proposal was superior to CTIC’s under the past performance and experience/qualifications factors, and thus called into question part of the basis for the determination that the advantages offered by DCK Pacific’s proposal warranted payment of the price premium associated with that proposal, the GAO attorney indicated during the ADR that it was likely that we would sustain the protest.

NAVFAC thereupon advised our Office that it intended to undertake corrective action. Specifically, the agency indicated that the agency would either terminate the contract awarded to DCK Pacific and resolicit, or in the alternative, reopen discussions with offerors and request revised proposals. See E-mails from NAVFAC to GAO, June 25, June 26, and July 7, 2008. GAO then dismissed the protest as academic (B-400047, July 7, 2008). CTIC thereupon requested that GAO recommend that the firm be reimbursed the costs of filing and pursuing its protest. Although the parties then entered into extended negotiations regarding CTIC’s entitlement to protest costs, NAVFAC ultimately advised our Office that a GAO decision would be necessary.

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, 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) (2008); 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 protest allegations would have shown facts disclosing the absence of a defensible legal position. AVIATE L.L.C., B 275058.6, B-275058.7, Apr. 14, 1997, 97-1 CPD ¶ 162 at 16. 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.

Here, according to NAVFAC, “the Agency does not argue that [CTIC] should be completely deprived of attorney fees.” Agency Response, July 25, 2008, at 4. Rather, the agency asserts that the initial protest did not include the operative facts that resulted in the ADR, and, as a result, “was not persuasive and certainly not ‘clearly meritorious.’” Id. at 3-4. The agency concludes that the award of attorneys’ fees therefore should be “chiefly limited” to the period after submission of the agency report during which the protester was preparing its comments. Id.

We find NAVFAC’s position unpersuasive. As an initial matter, we note that our willingness to inform the parties through outcome prediction ADR that a protest is likely to be sustained, as we did here as a result of the deficiencies in the technical evaluation and conduct of discussions, is generally an indication that the protest is viewed as clearly meritorious, and satisfies the “clearly meritorious” requirement for purposes of recommending reimbursement of protest costs. National Opinion Research Ctr.–Costs, B-289044.3, Mar. 6, 2002, 2002 CPD ¶ 55 at 3. (As for the remaining protest issues raised by the protester, none was clearly meritorious.)

Furthermore, we find the agency’s corrective action, occurring only after the agency report and the ADR, to have been unduly delayed. In this regard, CTIC’s initial protest asserted that NAVFAC had improperly credited DCK Pacific, a recently formed entity, with the past performance and experience/qualifications of affiliated companies without consideration of whether there would be meaningful involvement of those companies in contract performance. Not only were the determinative facts regarding this issue apparent on the face of DCK Pacific’s proposal, but, in addition, CTIC’s concern in this regard was the same concern that NAVFAC itself raised during its discussions with DCK Pacific. In these circumstances, we think it to be beyond any reasonable dispute that a reasonable agency inquiry into CTIC’s protest allegation would have shown facts disclosing the absence of a defensible legal position. See AVIATE L.L.C., supra, at 16.

We likewise find the agency’s corrective action to be unduly delayed with respect to CTIC’s challenge to the conduct of discussions regarding relevant contracts. In this regard, CTIC first asserted in its May 15 comments on the agency report that the agency had conducted unequal discussions, advising DCK Pacific, but not CTIC, of informational deficiencies regarding the nature of prior contracts cited in the proposals, with the result that several of CTIC’s cited contracts were found to be not relevant. Although it was apparent from the procurement record that NAVFAC had conducted disparate discussions in this manner, the agency, in its May 23 response, nevertheless disputed the assertion that discussions regarding relevant contracts were unequal or otherwise improper. It was only after the ADR conducted by GAO more than a month later, that NAVFAC proposed corrective action. In these circumstances, since corrective action was proposed only after the agency report

responding to the protest ground, we do not consider the corrective action to be prompt. See CDIC, Inc.—Costs, *supra*, at 2.

NAVFAC further asserts that CTIC should not recover protest costs related to its assertion that CTIC was entitled to a 10-percent HUBZone price evaluation credit. 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. Nevertheless, in appropriate cases, we have limited our recommendation for the award of protest costs where a part of those costs is allocable to an unsuccessful protest issue that is so clearly severable from the successful issues 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; Interface Floorings Sys., Inc.—Claim for Attorneys’ Fees, B-225439.5, July 29, 1987, 87-2 CPD ¶ 106 at 2-3. In determining whether protest issues are so clearly severable as to essentially constitute separate protests, we consider, among other things, the extent to which the issues are interrelated or intertwined—*i.e.*, the successful and unsuccessful arguments share a common core set of facts, are based on related legal theories, or are otherwise not readily severable. See Sodexho Mgmt., Inc.—Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 29.

Here, CTIC’s challenge to the agency’s determination that CTIC was not entitled to a 10-percent HUBZone price evaluation credit did not involve the same set of core facts as did its clearly meritorious challenge to the technical evaluation and conduct of discussions. These protest grounds were also not based on related legal theories. Accordingly, we recommend that CTIC be reimbursed the reasonable costs of filing and pursuing its protest only as related to its challenge to the technical evaluation and conduct of discussions regarding relevant contracts. CTIC 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 is granted.

Gary L. Kepplinger
General Counsel