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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Al Qabandi United Company; American General Trading & Contracting—Costs

File: B-310600.3; B-310600.4

Date: June 5, 2008

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Maj. Christina McCoy and Raymond M. Saunders, Esq., Department of the Army, for the agency.

Frank Maguire, Esq., 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 protests is recommended where a reasonable agency inquiry into initial protest allegations would have shown that agency had failed to conduct price realism evaluation required by solicitation, but agency delayed taking corrective action until after submission of the agency report.

DECISION

Al Qabandi United Company and American General Trading & Contracting (AGT) request that we recommend that they be reimbursed the costs of filing and pursuing their protests against the Department of the Army's award of a contract to International Link Trading, Establishment of Kuwait (ILTE), under request for proposals (RFP) No. W912D1-07-R-0047, for laundry services at military camps in Kuwait.

We grant the requests.

BACKGROUND

The RFP provided for award of a fixed-price contract to furnish laundry services in Kuwait commencing on October 1, 2007 to the offeror with "the lowest realistically priced offer judged to have a 'Responsible' or 'Neutral' past performance rating." RFP, amend. 0001, at 19. With regard to price realism, the RFP specifically provided

that an “[u]nrealistically low proposed price may be grounds for eliminating a proposal from competition.” RFP, amend. 0001, at 23.

Fifteen timely proposals were received in response to the solicitation; seven proposals were included in the competitive range for purposes of discussions. Based on the revised proposals subsequently received from the offerors, the Army determined that ILTE had submitted the lowest-priced, technically acceptable offer. Since ILTE’s past performance was evaluated as “Neutral” (based on its lack of relevant past performance history), thus qualifying it for award under the terms of the solicitation, ILTE was awarded the contract on September 25. ILTE, however, did not commence work on October 1 as required under the solicitation.

On October 9, Al Qabandi filed a protest with our Office challenging the award to ILTE on several grounds generally related to ILTE’s alleged inability to meet the RFP’s performance requirements, as allegedly shown by ILTE’s failure to begin performance on October 1. Specifically, Al Qabandi asserted that: (1) the Army improperly relaxed the performance requirements after award by extending the October 1 start date, resulting in an improper modification outside the scope of the contract; (2) the Army lacked sufficient information to support its responsibility determination; (3) the Army failed to consult required information sources in making its responsibility determination; (4) the affirmative determination of responsibility was improper because ILTE lacked relevant past performance; (5) the award price was unrealistic; and (6) the affirmative determination of responsibility lacked a rational basis. Al Qabandi Protest at 3-6.

On October 9, AGT likewise filed a protest (dated October 8) with our Office challenging the award to ILTE. AGT generally asserted that: (1) the Army’s evaluation of ILTE’s proposal was unreasonable as demonstrated by the fact that ILTE was unable to perform as required under the RFP; (2) the Army failed to make a proper responsibility determination; and (3) the Army did not provide AGT with an adequate debriefing in that it failed to furnish required information regarding the price evaluation. AGT Protest at 8-17.

On November 2, the Army requested summary dismissal of both protests on the grounds that they were speculative or challenged the Army’s responsibility determination without alleging facts sufficient to meet GAO’s standard for review of affirmative determinations of responsibility. The Army also requested dismissal of AGT’s third ground of protest, its alleged failure to receive an adequate debriefing, on the ground that GAO generally does not consider challenges to the adequacy of debriefings. We dismissed the protest as to this latter ground but denied the Army’s overall dismissal requests.

In the agency report, filed on November 8, the Army raised essentially the same defenses, but also contended that neither protester was an interested party, since neither was the next lowest price offeror, so that their proposals would not be in line for award if their protests were sustained. Additionally, with regard to Al Qabandi’s

price realism argument, the Army contended that “there was no requirement in the solicitation to conduct a price realism analysis.” Agency Report at 12.

In its November 21 comments on the agency report, Al Qabandi reasserted its grounds of protest. Al Qabandi specifically rebutted the Army’s assertion that “there was no requirement in the solicitation to conduct a price realism analysis,” pointing out that the solicitation provided that award was to be made to the “lowest realistically priced” offeror. RFP, amend. 0001, at 19.

In its November 19 comments, AGT reasserted its initial challenge to the technical evaluation and affirmative determination of responsibility. In addition, AGT raised two supplemental protest grounds, asserting that ILTE’s proposal did not meet RFP requirements for a “surge capacity” and for the capability to furnish cold water for washing.

On November 29, the Army advised GAO that it would take corrective action. The agency proposed to set aside the award, conduct a price realism analysis, and make a new source selection decision. We dismissed the protests as academic on December 3 (B-310600, B-310600.2). Al Qabandi and AGT thereupon requested that we recommend that they be reimbursed the costs of filing and pursuing their protests.

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.

AL QABANDI'S REQUEST

Al Qabandi asserts that reimbursement of its protest costs is warranted here because all of the issues raised in its initial protest, other than its claim that the start date in its contract was inconsistent with the solicitation, were clearly meritorious.

The Army concedes that its report incorrectly stated that there was no requirement for a price realism analysis. Army Comments, Jan. 7, 2008, at 4. The agency agrees with the protester that, under the terms of the solicitation, it was required to conduct a price realism analysis but failed to do so. Army Comments, Jan. 7, 2008, at 4-5. In these circumstances, Al Qabandi's assertion that the agency had failed to conduct a required price realism analysis was clearly meritorious.

The Army contends, however, that its corrective action was taken promptly, making reimbursement of the costs associated with this issue inappropriate. In this regard, the agency asserts that it was only after the November 8 agency report had been filed that Al Qabandi first raised the issue of the Army's failure to conduct a price realism analysis.

The Army's position is incorrect. In its initial, October 9 protest, Al Qabandi asserted that the "award price is not realistic" since it "apparently does not factor in the increased cost of beginning performance in a few days." Al Qabandi Protest, Oct. 9, 2008, at 6. The agency maintains that this language does not represent an assertion that the agency failed to conduct a price realism analysis, but instead "essentially allege[s] that the Army conducted a flawed, or unrealistic, analysis because the awardee's pricing proposal did not reflect contract performance beginning on October 1, 2007." Agency Comments, Jan. 7, 2008, at 8. In our view, however, the allegation was sufficiently specific that a reasonable investigation into the assertion would have led the agency to conclude that, contrary to the agency's initial position, the solicitation in fact required a price realism analysis, and that it improperly failed to perform such an analysis. Accordingly, we find that the Army unduly delayed taking corrective action in the face of this clearly meritorious protest assertion.

As for the additional protest grounds cited in Al Qabandi's request for reimbursement, none was clearly meritorious. All but one of the remaining arguments concern its challenge to the affirmative determination of ILTE's responsibility. We will consider protests challenging affirmative determinations of responsibility where: (1) where it is alleged that definitive responsibility criteria in the solicitation were not met, or (2) where evidence is identified that raises serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation. 4 C.F.R. § 21.5(c); American Printing House for the Blind, Inc., B-298011, May 15, 2006, 2006 CPD ¶ 83 at 5-6; Government Contracts Consultants, B-294335, Sept. 22, 2004, 2004 CPD ¶ 202 at 2.

Al Qabandi did not assert that definitive responsibility criteria in the solicitation were not met. Nor was it clear from Al Qabandi's initial protest that there was a serious concern that the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation. Such circumstances could occur where the protester presents evidence, for example, that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. See, e.g., Southwestern Bell Tel. Co., B-292476, Oct. 1, 2003, 2003 CPD ¶ 177 at 7-11 (GAO reviewed allegation where evidence was presented that the contracting officer failed to consider serious, credible information regarding awardee's record of integrity and business ethics); Verestar Gov't Servs. Group, *supra*, at 4; Universal Marine & Indus. Servs., Inc., B-292964, Dec. 23, 2003, 2004 CPD ¶ 7 at 2-4. However, other than its speculation as to the information the agency may not have considered, Al Qabandi's initial protest in this regard amounted to little more than the assertion that the agency could not make award to a firm with no relevant past performance (resulting in a neutral rating) without a preaward survey. Al Qabandi Protest, Oct. 9, 2007, at 4-6. Al Qabandi cited no authority for this assertion. See Federal Acquisition Regulation § 9.104-1(c) (prospective contractor generally shall not be determined responsible or nonresponsible solely on the basis of a lack of relevant performance history), and § 15.305(a)(2) (comparative assessment of past performance information is separate from the responsibility determination). Further, a dispute over the amount of information upon which an affirmative responsibility determination was based, or disagreement with the contracting officer's determination, does not fall within the circumstances under which our Office will review such a determination. Nilson Van & Storage, Inc., B-310485, Dec. 10, 2007, 2007 CPD ¶ 224 at 4; see, e.g., Brian X. Scott, B-298568, Oct. 26, 2006, 2006 CPD ¶ 156 at 4. Accordingly, we find that Al Qabandi's initial challenge to the affirmative determination of ILTE's responsibility was not clearly meritorious.

Our view is the same with regard to Al Qabandi's initial assertion that the Army improperly relaxed performance requirements--the start date--after award, constituting an improper modification outside the scope of the contract. In this regard, the Army explained in the agency report that a delay occurred when the government discovered on September 26 that it was unable to make available the sites to be used by the new contractor for customer turn-in and pickup of laundry because they were occupied by the incumbent contractors (Al Qabandi and AGT); according to the agency, ILTE could not begin its setup until the incumbent contractors vacated the sites. The Army stated that it initially extended the incumbent contracts only in order to allow the government sufficient time to arrange for a smooth transition between contractors, without disruption to continuing laundry service, and then was required to further stay performance as a result of the protests filed on October 9. Agency Legal Memorandum, Nov. 8, 2007, at 11; Contracting Officer's Statement, B-310600, B-310600.2, at 4. Since, in our view, further development of the record would have been necessary in order to resolve the merits of the issue, we do not consider the issue clearly meritorious.

In conclusion, we find that while the Army unduly delayed taking corrective action in the face of Al Qabandi's clearly meritorious initial challenge to the price evaluation, the other issues raised in Al Qabandi's initial protest were not clearly meritorious.

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, Al Qabandi's challenge to the affirmative determination of ILTE's responsibility and its assertion that the Army improperly relaxed performance requirements after award did not involve the same set of core facts as did its clearly meritorious challenge to the price evaluation. Neither were these protest grounds based on related legal theories. Accordingly, we recommend that AGT be reimbursed the reasonable costs of filing and pursuing its protest only as related to its challenge to the price evaluation. Al Qabandi 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).

AGT'S REQUEST

AGT asserts that it also challenged the agency's price evaluation in its initial protest such that we should find that the Army unduly delayed taking corrective action in the face of a clearly meritorious protest by AGT against the price evaluation. We agree.

As discussed above, AGT generally asserted in its initial protest that the Army did not provide AGT an adequate debriefing in that it failed to furnish information regarding the price evaluation. In the course of setting forth its concerns in this regard, AGT noted in its initial protest that, under the solicitation, "the government was required to analyze whether an offeror's price was fair and reasonable An unrealistically low price was grounds for elimination." AGT Protest, Oct. 8, 2008, at 16. Further, AGT specifically "question[ed] whether the government properly followed procedures related to assessing reasonableness and fairness of the awardee's price given that ILTE's price was . . . about half the price of AGT's as the

incumbent.” Id. Although the focus of AGT’s discussion in this area of its protest was on the alleged deficiencies in the agency’s debriefing, in our view, the above language was sufficient to constitute a protest ground that called into question the realism of ILTE’s price. Further, we think a reasonable investigation of this argument would have led the agency to conclude that the solicitation required a price realism analysis and that the agency improperly failed to perform such an analysis. Accordingly, we conclude that the Army unduly delayed taking corrective action in the face of this clearly meritorious protest ground. We therefore recommend that AGT be reimbursed the reasonable costs of filing and pursuing its protest as related to its challenge to the price evaluation.

We note that, for purposes of determining entitlement to 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. See The Salvation Army Community Corrections Program—Costs, B-298866.3, Aug. 29, 2007, 2007 CPD ¶ 165 at 7; Blue Rock Structures, Inc.—Costs, B-293134.2, Oct. 26, 2005, 2005 CPD ¶ 190 at 3. Here, both AGT’s challenge to the price evaluation and its challenge to the technical evaluation involved the same set of core facts, that is, whether ILTE’s proposal adequately accounted for the significant work required before a nonincumbent contractor could marshal the resources necessary to commence performance in accordance with the requirements of the solicitation within a few days after award in a difficult environment such as Kuwait. Accordingly, we further recommend that AGT also be reimbursed the reasonable costs of filing and pursuing its protest as related to its challenge to the technical evaluation. AGT 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 requests are granted.

Gary L. Kepplinger
General Counsel