



Decision

Matter of: KAES Enterprises, LLC--Protest and Costs

File: B-402050.4

Date: February 12, 2010

Bruce P. Babbitt, Esq., Jameson Babbitt Stites & Lombard, PLLC, for the protester. Michael McCabe, Esq., Federal Emergency Management Agency, for the agency. Frank Maguire, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of cancellation of solicitation is denied where agency determined that its needs had changed, such that solicitation no longer met its needs, and protester failed to show otherwise.
 2. Request that GAO recommend reimbursement of costs of filing and pursuing protest is granted with regard to argument that protester's proposal improperly was excluded from competitive range without consideration of price; GAO considers that protest ground clearly meritorious, as evidenced by advice from GAO attorney during alternative dispute resolution conference that protest likely would be sustained on that ground.
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DECISION

KAES Enterprises, LLC, of Puyallup, Washington, protests the cancellation of Federal Emergency Management Agency (FEMA) request for proposals (RFP) No. HSFEHQ-09-R-0137, for generator maintenance. KAES also requests that we recommend that it be reimbursed the costs of pursuing its prior protest, which led to the cancellation, as well as its proposal preparation costs.

We deny the protest of the cancellation and the request for reimbursement of proposal preparation cost, but recommend reimbursement of KAES's costs of filing and pursuing its original protest with regard to its challenge to the exclusion of its proposal from the competitive range without consideration of its price.

In its protest, KAES challenged several aspects of the agency's evaluation of its proposal, the exclusion of its proposal from the competitive range, and the award to

another vendor. On December 8, 2009, after receipt of the agency report, our Office conducted an “outcome prediction” alternative dispute resolution (ADR) conference, during which the cognizant GAO attorney advised the parties that the record indicated that the protester’s proposal improperly had been excluded from the competitive range without consideration of its price. See Arc-Tech, Inc., B-400325.3, Feb. 19, 2009, 2009 CPD ¶ 53. The GAO attorney advised the parties that the protest likely would be sustained on that ground and the decision would likely recommend that the agency reassess whether KAES’s proposal should be included in the competitive range, taking price into consideration.

On December 10, FEMA advised GAO that, “following discussions involving members of the FEMA Acquisition team and the applicable program office,” it would take corrective action in response to the December 8 conference, as follows:

FEMA will be canceling the contract award in its entirety, canceling the solicitation and re-soliciting the requirement. This action is being taken for the following reasons:

- (1) FEMA’s technical needs have changed increasing beyond what the contract award would have provided.
- (2) The Statement of Work (SOW) submitted in RFP HSFEHQ-09-R-0137 and HSFEHQ-09-R-0021/09-R-0021A by Logistics Management Directorate (LMD) has changed from its original intent and does not meet the government’s current needs.
- (3) The competition of a new solicitation will be amongst all SDVOB potential offerors and the government will notify the previously submitted offerors of the solicitation’s release date.

FEMA E-Mail to GAO, Dec. 10, 2009. We dismissed the protest as academic based on this proposed corrective action (B-402050, Dec. 10, 2009).

PROTEST

KAES asserts that the cancellation was improper. In a negotiated procurement, a contracting agency has broad discretion in deciding whether to cancel a solicitation, and need only establish a reasonable basis for doing so. USA Elecs., B-283269.2, Oct. 5, 1999, 99-2 CPD ¶ 67 at 3. A reasonable basis to cancel exists when, for example, an agency determines that a solicitation does not accurately reflect its needs. Logistics Solutions Group, Inc., B-294604.7, B-294604.8, July 28, 2005, 2005 CPD ¶ 141 at 3 n.1.

FEMA has set forth a facially reasonable basis for cancellation—that its technical needs have changed, increasing beyond what the contract award would have provided, and that the statement of work (SOW) also no longer reflects the

government's needs. KAES does not dispute the agency's specific factual assertions regarding the cancellation; that is, it does not assert that the agency's needs have not changed or that the original SOW will meet the agency's needs. Thus, there is no basis for us to question the agency's justification for the cancellation, and since cancellation of an RFP is permissible where the agency's needs have changed, we have no basis to object to the cancellation here.

KAES asserts that the cancellation decision lacked credibility and was a "pretext" to avoid having to make award to KAES and to "avoid resolution of the protest." Protest at 3-4. Procurement authorities are presumed to act in good faith, however, and in order for our Office to conclude otherwise, the record must show that procuring officials intended to injure the protester. Cycad Corp., B-255870, Apr. 12, 1994, 94-1 CPD ¶ 253 at 5. The protester's general assertion of bad faith notwithstanding, there is no evidence of such intent here. KAES cites the timing of the cancellation--it followed shortly the December 8 conference--as evidence of bad faith. However, since a solicitation properly may be canceled whenever the information precipitating the cancellation first surfaces or should have been known, Daston Corp., B-292583, B-292583.2, Oct. 20, 2003, 2003 CPD ¶ 193 at 3, the timing of the cancellation, by itself, in no way evidences agency bad faith.

KAES asserts that it will be prejudiced by the cancellation because its prices presumably have been exposed. However, there is no evidence or reason to believe that KAES's prices have been exposed. There also is no indication that KAES was otherwise prejudiced by the cancellation to an extent greater than other offerors. As discussed at the December 8 ADR conference, if the protest were sustained on the issue identified by GAO--exclusion of KAES's proposal from the competitive range without consideration of its price--the probable recommended corrective action would have been for the agency to reassess KAES's exclusion considering price. Thus, there was no assurance that KAES would have been included in the competitive range but for the cancellation, and there certainly is no basis to assume that it would have had a greater chance of receiving the award than other offerors.

KAES asserts that the cancellation is inconsistent with the corrective action recommended by GAO during the ADR conference. However, the GAO attorney did not recommend corrective action at the conference; rather, he advised the parties of the likely recommendation if we issued a decision sustaining the protest. In any case, even had the GAO attorney provided such a recommendation, that would not have precluded the agency from canceling the RFP upon subsequently determining--properly, we have found--that the RFP did not meet its current needs. We conclude that there is no basis for us to object to the cancellation of the RFP.

COSTS

KAES requests that we recommend that it be reimbursed both the costs of pursuing its prior protest challenging its exclusion from the competitive range, and the costs of preparing its proposal.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs if, 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. 4 C.F.R. § 21.8(e) (2009); 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. Core Tech Int'l Corp.--Costs, B-400047.2, Mar. 11, 2009, 2009 CPD ¶ 59 at 6. Here, our willingness to inform the parties through outcome prediction ADR that the protest was likely to be sustained on the identified ground was an indication that we view that ground as clearly meritorious for purposes of recommending reimbursement of protest costs. National Opinion Research Ctr.--Costs, B-289044.3, Mar. 6, 2002, 2002 CPD ¶ 55 at 3. Further, 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 if it is taken after that date. CDIC, Inc.--Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 2. Here, FEMA did not take corrective action until after the filing of its agency report and the subsequent December 8 ADR conference.

While we therefore recommend that KAES be reimbursed its costs, we do so only with regard to the issue identified during the ADR conference--exclusion of KAES's proposal from the competitive range without consideration of its price. In this regard, when appropriate, we will limit a recommendation for reimbursement of protest costs where we determine that the successful and unsuccessful protest grounds are clearly severable. See, e.g., BAE Tech. Servs., Inc.--Costs, B-296699.3, Aug. 11, 2006, 2006 CPD ¶ 122 at 3. In making this determination, we consider, among other things, the extent to which the claims are interrelated or intertwined, e.g., whether the successful and unsuccessful claims share a common core set of facts, are based on related legal theories, or are otherwise not readily severable. See Sodexo Mgmt., Inc.--Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 29. Here, we conclude that KAES's challenges to the agency's technical evaluation of its proposal, which constituted the bulk of its protest, were clearly severable from the specific ground on which, as we advised the parties, KAES was likely to prevail, i.e., the agency's failure to consider price when excluding the firm's proposal from the competitive range. This ground was based on a legal theory and facts sufficiently different from those on which KAES's other evaluation arguments were based that severing the issues is appropriate in this case. Accordingly, our recommendation of KAES's entitlement to protest costs is limited to costs related to this issue.

KAES also requests we recommend that it be reimbursed the costs of proposal preparation in light of the cancellation. However, the expenses KAES incurred in preparing its proposal are typical costs of doing business and competing for government contracts. Rice Servs., Inc.; Watson Servs., Inc., B-293861 et al., June 15, 2004, 2004 CPD ¶ 167 at 5 n.3. Under the circumstances here, where we have found that the cancellation of the solicitation was unobjectionable, there is no basis for us

to recommend reimbursement of those costs. See Kos Kam Pelasgus, Joint Venture, B-225841, Apr. 1, 1987, 87-1 CPD ¶ 370 at 3.

The protest of the cancellation and the request for proposal preparation costs are denied. The request that we recommend reimbursement of protest costs is granted as to the issue of the exclusion of the KAES proposal from the competitive range without consideration of its price, as discussed above.

Lynn H. Gibson
Acting General Counsel