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Comptroller General
of the United States

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Decision

Matter of: Glevum Associates, LLC--Costs

File: B-405860.3

Date: April 23, 2012

Daniel J. Kelly, Esq., and Bonnie Vanzler, Esq., McCarter & English, LLP, for the protester.

Tina Marie Pixler, Esq., Department of the Army, for the agency.

Cherie J. Owen, Esq., Glenn G. Wolcott, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request that GAO recommend reimbursement of costs for filing and pursuing a protest against the agency's evaluation of offerors is granted where the protester raised a clearly meritorious protest and the agency did not take prompt corrective action.

DECISION

Glevum Associates, LLC, of Burlington, Massachusetts, requests that our Office recommend the reimbursement of Glevum's costs of filing and pursuing its protest challenging the award of a contract by the Department of the Army, Army Materiel Command, to Metrica, Inc., of San Antonio, Texas, under request for quotations (RFQ) No. 597367, for military information support operations survey services in Afghanistan.

We grant the protester's request.

The Army issued the RFQ on August 18, 2011, seeking quotations to provide survey services in Afghanistan, including market and field research, development of enhanced target audience profiles, and conducting surveys to assist the government in developing messages and themes that will resonate positively with the Afghan population. The RFQ contemplated the award of a fixed-price contract for a base period of six months with four six-month options.

Award was to be made to the best-value offeror based upon the evaluation of technical, past performance, and price factors. All proposals that received an

“acceptable” technical factor rating would be evaluated for past performance and price. RFQ at 3. The RFQ stated that the agency would conduct a tradeoff analysis based on a comparative assessment of the past performance and price factors, with past performance significantly more important than price. Id. The RFQ also stated that “[s]ince the Past Performance factor is an important consideration in the award decision, the Government reserves the right to make an award to an offeror with a higher priced quote that is superior in the Past Performance Factor.” RFQ at 3.

With regard to past performance, the RFQ stated that the agency would evaluate recent, relevant past performance as an indicator of the offeror’s ability to perform the contract successfully. RFQ at 10. The RFQ required that offerors submit documentation of three prior contracts, along with past performance questionnaires to demonstrate their recent, relevant past performance. The term “relevant” was defined as same or similar actions in terms of size, complexity, scope, and contract type performed under previously awarded contracts. RFQ at 10. Offerors were instructed to submit documentation outlining their past performance with a list of three similar contracts performed as prime contractors or major subcontractors within the past three years. Id.

In evaluating the relevance of past performance, the evaluators were to assign adjectival ratings of very relevant, relevant, somewhat relevant, or not relevant. RFQ at 16. The solicitation stated that a rating of very relevant should be assigned to past performance references involving essentially the same scope, magnitude of effort, and complexities as this solicitation. Id.

After determining the recency and relevance of the offerors’ past performance references, agency evaluators were to assign past performance adjectival ratings of substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown confidence (neutral). As pertinent to this protest, a rating of substantial confidence was to be assigned when the evaluators concluded, “[b]ased on the Offeror’s recent/relevant performance record, that the Government has a high expectation that the Offeror will successfully perform the required effort.” RFQ at 16.

The RFQ also required that a past performance questionnaire be completed and submitted for each past performance reference. Id. at 11. Offerors were instructed to complete the first portion of the questionnaire, then email the questionnaire to the representative responsible for the past/current contract. The contract representatives were to be instructed to electronically complete the second part of the questionnaire and email the completed questionnaire directly to the agency. Id.

Prior to the due date for receipt of quotations, the agency posted a number of questions and answers regarding the solicitation. With regard to past performance, the agency received a question asking whether past performance questionnaires could be submitted for projects that had been performed by subcontractors. AR, Tab 9a, RFQ Attach. 10, RFQ Questions and Answers, at 4. The agency responded

that contractors should provide only past performance questionnaires that would support prime contractor past performance. Id.

The agency received two timely and responsive quotations by the response due date, submitted by the protester and the awardee. The agency determined that both proposals were technically acceptable and assigned a past performance rating of substantial confidence to both proposals. Since both proposals received the same past performance rating, the agency selected Metrica for award, noting that it offered a significantly lower price. AR, Tab 30, Source Selection Decision Document, at 9.

Glevum filed its initial protest with our Office on September 20, 2011. In its protest, Glevum challenged the agency's evaluation of Metrica's past performance, asserting that the agency failed to properly evaluate the awardee's past performance in accordance with the solicitation's stated evaluation criteria. Protest at 9-13. Glevum also argued that the awardee lacked the technical capability required under the RFQ. Protest at 13-14.

On October 31, the agency filed a report responding to the protest allegations defending its evaluation of Metrica. On November 10, Glevum filed a supplemental protest and comments on the agency report. In its supplemental protest and comments, Glevum enhanced its initial arguments based upon its review of the evaluation documentation.

With regard to past performance, the protester argued that Metrica's past performance rating of substantial confidence was wholly unsupported by the record. Specifically, for one reference, Metrica had submitted (and the agency had considered) a past performance reference for one of its subcontractors in place of its own past performance reference, despite the RFQ's specific instructions to the contrary. Supp. Protest & Comments at 16. With regard to Metrica's second past performance reference, a completed past performance questionnaire was never received. Id. With regard to Metrica's final past performance reference, the protester noted that it was valued at only \$30,000,¹ did not involve any work performed in Afghanistan, and had no relevance to the services to be performed under the contract at issue here. Id. Accordingly, the protester argued that the agency acted unreasonably in assigning Metrica a rating of substantial confidence under the past performance evaluation factor. Rather, the protester argued, the awardee's past performance should have received a rating of no confidence or, at best, neutral. Supp. Protest & Comments at 16-19. Glevum also refined its challenge to the agency's technical evaluation in its November 10 filing, arguing that the awardee's proposal was technically unacceptable for failure to meet several of the RFQ's requirements.

¹ The value of the awarded contract was approximately \$9 million. AR, Tab 30, Source Selection Decision Document, at 9.

After reviewing the protester's November 10 filing, GAO requested that the agency submit a supplemental report by close of business on November 23. On November 18, prior to the submission of a supplemental report, the agency notified our Office of its intent to take corrective action regarding Glevum's protests. Our Office dismissed the protests as academic on November 29. Glevum filed this request for reimbursement of its protest costs on December 14.

Where, as here, an agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs, including reasonable attorneys' fees, 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, 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)(2011); Friendship Dental Laboratories, Inc., B-404741.4, Aug. 24, 2011, 2011 CPD ¶ 189 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. Id.; Yardney Tech. Prods., Inc.--Costs, B-297648.3, Mar. 28, 2006, 2006 CPD ¶ 65 at 4. Additionally, 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. Basic Commerce & Indus., Inc.--Costs, B-401702.3, Feb. 22, 2010, 2010 CPD ¶ 258 at 4; AGFA HealthCare Corp.--Costs, B-400733.6, Apr. 22, 2009, 2009 CPD ¶ 90 at 3-4.

Glevum asserts that reimbursement of its protest costs is warranted here because its initial protest raised issues that were clearly meritorious regarding the agency's failure to evaluate Metrica's proposal in accordance with the stated evaluation criteria. Further, Glevum notes that the agency failed to take corrective action until after the protester had been required to respond to the agency report in which the agency defended its procurement actions. The agency argues that it did not unduly delay corrective action because, according to the agency, it determined to take corrective action based on Glevum's supplemental protest, not its initial protest. Agency's Response to Request for Costs at 1.

We agree with the protester that the agency failed to take prompt corrective action in the face of a clearly meritorious protest. After the agency's investigation into the protester's initial protest grounds, the agency determined that its evaluators had improperly based Metrica's past performance rating of substantial confidence on the past performance of Metrica's subcontractor. After this discovery, rather than taking corrective action, the agency filed a report attempting to defend its actions. In its report, the agency asserted that Glevum was not prejudiced by the agency's evaluation since Metrica would have received the same past performance rating even if the reference for the subcontractor had been ignored. That is, the agency argued that it would have assigned Metrica the highest possible past performance rating based on a past performance reference for a contract valued at less than one percent

of the contract at issue here, and based on a contract that did not involve work performed in Afghanistan.

We conclude that Glevum's challenge to the agency's evaluation of Metrica's quotation raised a clearly meritorious basis of protest that the agency could have resolved prior to submitting its initial agency report and receiving Glevum's comments; we also conclude that there was a reasonable possibility that Glevum was prejudiced by the errors in the agency's evaluation. See, Friendship Dental, supra, at 4. We therefore recommend that Glevum be reimbursed the costs of pursuing its protest with our Office. Glevum 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 that we recommend reimbursement of protest costs is granted.

Lynn H. Gibson
General Counsel