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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: New England Radiation Therapy Management Services, Inc.--Costs

File: B-297397.3

Date: February 2, 2006

John J. Field, Esq., Jacob B. Pankowski, Esq., and Stephen D. Zubiago, Esq., Nixon Peabody LLP, for the protester.

Dennis Foley, Esq., Phillip Kaufman, Esq., and Phillipa L. Anderson, Esq., Department of Veterans Affairs, for the agency.

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DIGEST

Reimbursement of the costs of filing and pursuing multiple protests is not recommended where, even if the protester is correct that the agency took corrective action in response to the first protest filed, that protest was not clearly meritorious.

DECISION

New England Radiation Therapy Management Services, Inc. (NERT) requests that we recommend that the firm be reimbursed the costs of filing and pursuing its protests of the award of a contract to Radiation Oncology Associates (ROA) under request for proposals (RFP) No. 00241-05-00289, issued by the Department of Veterans Affairs (VA) for radiation therapy services at the VA Medical Center in Providence, Rhode Island.

We deny the request.

The RFP provided for award of a 1-year, fixed-price requirements contract. RFP at 2. Offerors were informed that award would be made on a best-value basis, considering price, past performance, qualifications of key personnel, geographic location, and capabilities. Price was stated to be approximately 50 percent of the evaluation, and all other factors, when combined, were stated to be approximately 50 percent of the evaluation. Id. at 28.

With regard to price, the RFP requested that offerors submit unit prices for radiation treatments to be provided to VA patients in the following three categories: radiation

treatments including radiation therapy; “3D” planning treatments; and “IMRT” (that is, intensity modulated radiation therapy) treatments for “prostate” patients and for “head and neck” patients. The RFP stated that “UNIT PRICE is defined as radiation treatment to the VA patient. Included in the UNIT PRICE are the initial consult, treatment plan and follow-up exams.” Based on these unit prices, the RFP requested total fixed prices for these efforts given the solicitation’s stated estimated quantities of 2,200 radiation treatments, 65 “3D” planning treatments, and 30 IMRT treatments (20 “prostate” treatments and 10 “head and neck” treatments). RFP at 2.

Prior to the date set for receipt of proposals, the agency sent to offerors a “clarification” of the services required. This clarification stated that “[t]reatments are based on approximately 100 patients referred per year,” and that “[p]rostate are included in the 100 patients” and “[h]ead and neck are included in the 100 patients.” Agency Motion to Dismiss, exh. 2, E-mails to Offerors (Aug. 31, 2005). Offerors were later advised that, of these 100 patients, 20 patients were prostate patients, and 10 patients were head and neck patients. *Id.*, exh. 5, E-mail to Offeror (Sept. 19, 2005).

Three offerors responded to the RFP. ROA’s proposal was given the highest technical rating and had the lowest overall price of \$805,500. NERT’s proposal received the second highest technical rating, but had a higher overall price of \$1,145,635. Agency Report at 2-3. Award was made to ROA and NERT protested.

In its protest, NERT argued that ROA ignored the agency’s “clarification” regarding patient treatments and provided for an insufficient number of IMRT treatments, basing its price on 30 IMRT “treatments” rather than 30 IMRT “patients,” thus offering a level of service that was different from, and far less than, that offered by NERT. In this regard, NERT raised six grounds of protest concerning ROA’s price: (1) the agency failed to perform a price analysis that would have revealed the “true cost” of ROA’s proposal, (2) the agency failed to consider performance risk associated with ROA’s low price, (3) the agency failed to evaluate offers on an “equal” basis since NERT’s and ROA’s proposed prices were based on different assumptions, (4) the agency failed to exclude ROA’s deficient and unacceptable offer in light of the VA’s clarification that offerors’ prices were to be based on 30 IMRT “patients” and not “treatments,” (5) the agency failed to recognize that ROA’s price was unbalanced, and (6) the solicitation’s “specifications” were unclear and confusing insofar as VA’s IMRT requirements were concerned. Protest at 9-13; NERT’s Request for Reimbursement, at 1-2.

The agency requested dismissal of the protest. In response, the protester reiterated its arguments and also asserted that ROA’s offer was “technically unacceptable” in that it violated VA Acquisition Regulation (VAAR) § 852.216-70, which stated that “[b]ids offering less than 75 percent of the estimated requirements or which provide that the Government shall guarantee a definite quantity, will not be considered.” NERT’s Response to Motion to Dismiss, at 9. After we denied the agency’s motion to dismiss, the VA filed an agency report that addressed all six arguments raised in

NERT's protest but did not respond to the new argument raised in NERT's response to the motion to dismiss. In response to the agency's report, NERT filed comments and a supplemental protest, asserting that (1) ROA's price was "nonconforming" in that it included a "base charge" that was not called for in the RFP, (2) ROA's proposal violated VAAR § 852.216-70 in that it did not meet the 75 percent requirement discussed above, and (3) the agency held improper discussions with ROA concerning its price. Supplemental Protest at 2-6.

GAO established a briefing schedule for responding to both NERT's supplemental protest and comments and orally advised the parties that a hearing in this case was likely necessary because the record was unclear as to how the offerors priced their proposals. In a notice dated November 21, 2005, GAO stated that the hearing, if necessary, would be held the week of December 12. We requested that the agency further explain, in its supplemental report, "its understanding of ROA's proposal and how ROA's explanation of its proposal . . . is consistent with the solicitation." GAO Notice (Nov. 21, 2005).

Prior to the date established for receipt of the supplemental agency report, the VA advised our Office that it was taking corrective action in response to the supplemental protest. In response to our request for further clarification as to the nature of this corrective action, VA explained that, based on the allegations of improper discussions and noncompliance with VAAR § 852.216-70, the agency was amending the solicitation to delete VAAR § 852.216-70, reopening discussions, and seeking revised proposals. In addition, the VA stated that it would "amend the solicitation regarding the nature and amount of IMRT treatments to remedy alleged improper discussions." Letter from VA to GAO (Nov. 29, 2005), at 2. We dismissed the protest on November 30.

NERT requests that we recommend that it be reimbursed the reasonable costs of filing and pursuing its protests, including reasonable attorneys' fees. It contends that there "can be no serious dispute that NERT's protest is clearly meritorious," NERT's Request for Reimbursement, at 5, and that it is entitled to the reimbursement of its costs because the corrective action was taken after the agency filed its agency report in response to the first protest. According to NERT, the corrective action is "plainly intended to remedy the problems surrounding 'treatment' quantities" raised in the first protest. NERT's Supplemental Response to Request for Reimbursement, at 2.

Under the Competition in Contracting Act of 1984, our Office may recommend that protest costs be reimbursed only where we find that an agency's action violated a procurement statute or regulation. 31 U.S.C. § 3554(c)(1) (2000). Our Bid Protest Regulations provide that where the contracting agency decides to take corrective action in response to a protest, we may recommend that the protester be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(e) (2005). This does not mean that costs should be reimbursed in every case in which an agency decides to take corrective action; rather, a protester should be reimbursed its costs where an agency unduly delayed its decision to take

corrective action in the face of a clearly meritorious protest. Griner's-A-One Pipeline Servs., Inc.--Entitlement to Costs, B-255078.3, July 22, 1994, 94-2 CPD ¶ 41. Thus, as a prerequisite to our recommending that costs be reimbursed where a protest has been settled by corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious, *i.e.*, not a close question. J.F. Taylor, Inc.--Entitlement to Costs, B-266039.3, July 5, 1996, 96-2 CPD ¶ 5 at 3; Baxter Healthcare Corp.--Entitlement to Costs, B-259811.3, Oct. 16, 1995, 95-2 CPE ¶ 174 at 4-5; GVC Cos.--Entitlement to Costs, B-254670.4, May 3, 1994, 94-1 CPD ¶ 292 at 3. A protest is “clearly meritorious” when a reasonable agency inquiry into the protester’s allegations would show facts disclosing the absence of a defensible legal position. Department of the Army--Recon., B-270860.5, July 18, 1996, 96-2 CPD ¶ 23 at 3. The mere fact that an agency decides to take corrective action does not establish that a statute or regulation clearly has been violated. Spar Applied Sys.--Declaration of Entitlement, B-276030.2, Sept. 12, 1997, 97-2 CPD ¶ 70 at 5.

Here, we conclude that it is not appropriate to recommend that NERT recover its protest costs because, even if the corrective action was in response to NERT’s original protest, as NERT alleges, that protest was not clearly meritorious. In its original protest, NERT asserted that either ROA’s price failed to account for the number of treatments required by the RFP or, in the alternative, the solicitation requirements were ambiguous. The agency denied that the solicitation was ambiguous and asserted that ROA’s price was in accordance with the RFP’s price schedule. Which party’s position is correct is not apparent from the record, which is why GAO informed the parties that a hearing was likely going to be necessary to complete and clarify the record. See LENS, JV--Costs, B-295952.4, Dec. 12, 2005, 2005 CPD ¶ __ at 5 (protest was not clearly meritorious where resolution of the protest required further record development such as a hearing to complete and clarify the record). The fact that NERT asserts that the agency’s corrective action, filed after submission of the agency report, was in response to its original protest does not entitle it to its costs where, as here, that protest was not clearly meritorious. See East Penn Mfg. Co., Inc.--Costs, B-291503.4, Apr. 10, 2003, 2003 CPD ¶ 83 at 2-3; J.F. Taylor, Inc.--Costs, B-266039.3, July 5, 1996, 96-2 CPD ¶ 5 at 3.

The request for a recommendation that costs be reimbursed is denied.

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General Counsel