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Decision

Matter of: VSolvit, LLC

File: B-422114.3

Date: May 23, 2024

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Azine Farzami, Esq., Department of Agriculture, for the agency.
Glenn G. Wolcott, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where solicitation's provisions regarding citizenship of proposed personnel contained some ambiguity, and the agency took corrective action following a conference call in which our Office expressed concern about the awardee's compliance with the citizenship provisions, we reject protester's request that we recommend reimbursement of protest costs on the basis that the protest grounds were not clearly meritorious.

DECISION

VSolvit, LLC, of Ventura, California, requests that we recommend reimbursement of the costs VSolvit incurred in filing and pursuing its protests challenging the U.S. Department of Agriculture's (USDA) issuance of a task order to Sohum Systems, LLC, pursuant to task order request for proposals (TORP) No. 123144-23-R-0009¹ for information technology support services.² We dismissed VSolvit's protests following the agency's

¹ The TORP was issued as a small business set-aside to contractors holding indefinite-delivery, indefinite-quantity (IDIQ) multiple-award contracts under the National Institutes of Health's Chief Information Officer Solutions and Partners 3 Small Business (CIO-SP3-SB) program.

² As discussed below, VSolvit filed an initial protest and a supplemental protest docketed as B-422114, and B-422114.2, respectively.

statement that it would recompete phase II of the procurement.³ VSolvit asserts that its protests were clearly meritorious and that the agency unduly delayed taking corrective action.

We deny the request.

BACKGROUND

On June 16, 2023, the agency issued the solicitation, seeking task order proposals to “develop modernized solutions to meet the needs of the nation’s farmers and ranchers” using commercial off-the-shelf (COTS) and hybrid solutions that “integrate custom software components to maximize the benefits of both COTS and custom development platforms.” Agency Report (AR), Tab 7, Initial TORP at 5.⁴

The solicitation contemplated the single award of a task order with both fixed-price and labor-hour line items and required offerors to submit labor rates for various labor categories and levels of effort. With regard to source selection, the solicitation provided for a best-value tradeoff between the following evaluation factors: prior experience; oral presentations;⁵ and price.⁶ In this regard, the solicitation stated:

All non-price factors are more important than Price. The evaluation factors are listed in descending order of importance: Prior Experience and Oral Presentation.^[7] Price is an important factor and will be considered in the best value determination.

Id. at 51.

³ The solicitation provided for a two-phase procurement. In phase I, offerors provided information regarding their prior experience; thereafter, offerors that were invited to proceed to phase II made oral presentations and submitted price proposals. VSolvit and Sohum were the only offerors invited to proceed to phase II.

⁴ Our citations to the agency report in this decision refer to the agency’s prior submissions responding to VSolvit’s protests.

⁵ The solicitation provided that during oral presentations, each offeror would discuss its technical approach; team composition; how it will work with other vendors; and its management plan. AR, Tab 7, Initial TORP at 50.

⁶ With regard to evaluation of price, the solicitation provided: “USDA will examine the level of effort and the mix of labor proposed to perform the task for determining the total price is reasonable.” *Id.* at 47, 50-51.

⁷ The solicitation provided that, under each of the non-price factors, the agency would assign confidence ratings of “high confidence,” “some confidence,” or “low confidence.” *Id.* at 47.

Of relevance here, the initial solicitation also stated: “Contractors must identify in their proposals the names and citizenship of all non-U.S. citizens proposed to work under the contract.” *Id.* at 45.

On or before the July 5, 2023, closing date for submission of phase I proposals (addressing prior experience), initial proposals were submitted by 14 offerors, including VSolvit and Sohum.⁸ Thereafter, the agency invited VSolvit and Sohum to participate in phase II.⁹ AR, Tab 24, Contracting Officer’s Decision at 3-4.

On July 24 and July 25, VSolvit and Sohum each made an oral presentation to the agency and submitted their initial price proposals. The oral presentations were attended by the agency’s technical evaluation panel (TEP), the contracting officer, and the contracting officer’s representative. Thereafter, in evaluating the proposals under the oral presentation evaluation factor, the TEP assigned ratings of “high confidence” to Sohum’s proposal and “some confidence” to VSolvit’s proposal. In assigning a “some confidence” rating to VSolvit’s proposal, the TEP identified various aspects of its proposed approach that lowered the agency’s confidence, including concerns regarding the size, structure, and composition of VSolvit’s proposed teams. AR, Tab 22, TEP Report at 25-27.

In submitting its initial price proposal, Sohum identified 76 incumbent personnel that it proposed for task order performance. Sohum’s proposal also noted that a portion of its proposed personnel were not United States citizens and stated that Sohum would “apply for [citizenship] waiver[s] as needed.” Sohum’s Initial Price Proposal at 7-9.

On August 24 and 25, the agency issued solicitation amendments 0003 and 0004. As amended, the solicitation repeated the statement that “[c]ontractors must identify in their proposal the names and citizenship of all-non-U.S. citizens proposed to work under the contract,” but added the following:

NO VISA HOLDERS ARE PERMITTED TO WORK ON THIS CONTRACT IAW [in accordance with] Executive Order 11935.^[10] At this time FPAC [the Farm Production and Conservation Mission Area of

⁸ VSolvit states that, previously, VSolvit and Sohum “participated in the SBA [Small Business Administration’s] Mentor-Protégé Program” and, together, supported various USDA contracts. Protest at 3-4. VSolvit further states that, based on that prior relationship, VSolvit and Sohum entered into a teaming agreement in June 2022 to pursue the task order at issue here and, in October 2022, began to develop a proposal. *Id.* VSolvit states that, in February 2023, “Sohum terminated the teaming agreement,” and, thereafter, VSolvit and Sohum pursued the task order separately. *Id.*

⁹ Both offerors received ratings of “high confidence” under the prior experience evaluation factor.

¹⁰ Executive Order 11935 is titled, “Citizenship Requirements for Federal Employment.”

USDA] is NOT issuing waivers for this requirement as the work has been determined not to be eligible for waivers.

AR, Tab 10, TORP amend. 0003 at 45.

Nonetheless, the amended solicitation also stated:

Under exceptional circumstances, the Government may request a waiver when a prospective contractor or subcontractor does not meet the citizenship or lawful permanent resident alien status requirement. Request for waivers to the citizenship requirement must be submitted in writing. Non-U.S. citizens employed as contractors or subcontractors shall not be allowed access to USDA Mission Areas, Agency and Staff Offices, or controlled facilities, IT systems, or security items or products prior to the issuance of a waiver.

AR, Tab 11, TORP amend. 0004, attach. 11 at 1.

On or before August 28, VSolvit and Sohum submitted their final revised price proposals. In its proposal, Sohum stated that only 50 of its 76 proposed employees were U.S. citizens or had permanent resident status, elaborating that:

Team Sohum currently has 26 other staff members who are H1B visa holders. However, per the recent change in policy at USDA and Amendment 3 of the [TORP], Team Sohum will replace them with qualified citizens or Green card holders. We will ensure that all required new hires will either be U.S. Citizens or Green card holders to comply with 48 CFR 3052.204-71.^[11]

AR, Tab 20, Sohum Final Revised Price Proposal at 6-8.

Notwithstanding Sohum's representation that it would replace all previously proposed personnel that did not meet the citizenship requirements, Sohum's final revised proposal also contained the same provision that it had included in its initial price proposal, stating that Sohum would "apply for [citizenship] waiver[s] as needed." *Id.*

On September 26, the contracting officer performed an independent analysis of the final proposal submissions. In performing this analysis, the contracting officer considered the TEP's earlier assessments, but did not reconvene the TEP. AR, Tab 24, Contracting Officer's Decision at 1. In evaluating price, the contracting officer analyzed each offeror's proposed price with regard to reasonableness and balance, as contemplated by the solicitation. See AR, Tab 10, amend. 0003 at 49-50. Based on his

¹¹ This section of the Code of Federal Regulations, titled "Contractor Employee Access," establishes restrictions regarding access to information for certain contractor employees.

analysis, the contracting officer concluded that Sohum's proposal was superior under the non-price factors; offered a fair and reasonable price; and offered a price that was lower than VSolvit's price.¹² AR, Tab 24, Contracting Officer's Decision at 1-6; AR, Tab 23, Price Analysis at 4-7. On this basis, the contracting officer determined that Sohum's proposal offered the best value to the government and selected Sohum for issuance of the task order. AR, Tab 24, Contracting Officer's Decision at 5-6. On September 29, the agency notified VSolvit of its source selection decision.

On October 10, VSolvit filed its initial protest asserting that two of the agency's evaluators had "clear conflicts of interest in favor of Sohum,"¹³ and complained that the agency unreasonably evaluated various aspects of VSolvit's oral presentation. Protest at 11-15. VSolvit's initial protest also speculated that Sohum may have proposed personnel that were not U.S. citizens. *Id.* at 15-18.

On November 20, following receipt of the agency report responding to its initial protest and disclosure of Sohum's proposal, VSolvit filed a supplemental protest asserting that Sohum's proposal should have been found "ineligible for award" on the basis of the solicitation's provisions regarding U.S. citizenship.¹⁴ Comments and Supp. Protest at 2-6. While acknowledging that Sohum's proposal stated that it would replace all of the non-U.S. citizens it initially proposed, VSolvit's supplemental protest noted that Sohum's proposal also stated that it would apply for citizenship waivers "as needed." *Id.*

Following submission of a supplemental agency report and supplemental comments, the GAO attorney assigned to the protest advised the parties that our Office would conduct a conference call to "seek[] clarity regarding the bases for the award decision." Electronic Protest Docketing System No. 36. On January 8, 2024, during that call, the GAO attorney expressed concern regarding Sohum's compliance with the solicitation's provisions regarding citizenship,¹⁵ specifically referencing the provision that stated:

NO VISA HOLDERS ARE PERMITTED TO WORK ON THIS CONTRACT IAW [in accord with] Executive Order 11935. At this time FPAC is NOT issuing waivers for this requirement as the work has been determined not to be eligible for waivers.

¹² Sohum's total evaluated price was \$74,959,864; VSolvit's total evaluated price was \$87,324,266. AR, Tab 23, Price Analysis at 5.

¹³ This allegation was based on information that VSolvit gained during its prior relationship with Sohum. Protest at 7-11.

¹⁴ VSolvit's supplemental protest also asserted that the agency's assignment of confidence ratings to the two proposals reflected unequal treatment. Comments and Supp. Protest at 6-16.

¹⁵ Specifically, GAO advised the agency that it had "substantial litigation risk" in this matter. Statement for Release Outside of Protective Order at 1.

See AR, Tab 10, RFP amend. 0003 at 45.

By letter dated January 9, the agency stated that it would take corrective action, elaborating that:

The Agency will recompete Phase II of [the procurement]. The agency will issue an amended Solicitation to the offerors who participated in Phase II. Each offeror will be invited to submit a revised price proposal and to participate in an oral presentation.

Agency's Corrective Action Letter at 1.

On January 10, we dismissed VSolvit's protests as academic. *VSolvit, LLC*, B-422114, B-422114.2, Jan. 10, 2024 (unpublished decision). On January 23, VSolvit submitted this request for our recommendation that the agency reimburse VSolvit for its protest costs.¹⁶

DISCUSSION

VSolvit asserts that all of its protest allegations were clearly meritorious and maintains that the agency unduly delayed taking corrective action. Request for Recommendation at 6-9.

Under the Competition in Contracting Act of 1984 (CICA), our Office is authorized to recommend reimbursement of protest costs where we find that an agency's actions violated a procurement statute or regulation. 31 U.S.C. § 3554(c)(1). Our Bid Protest Regulations further provide that we may similarly recommend reimbursement of protest costs where the contracting agency takes corrective action in response to a protest. 4 C.F.R. § 21.8(e). Nonetheless, our Regulations do not contemplate a recommendation for reimbursement of protest costs in every case where an agency takes corrective action, but rather only where an agency unduly delays taking corrective action in the face of a clearly meritorious protest. *Information Ventures, Inc.--Costs*, B-294580.2 *et al.*, Dec. 6, 2004, 2004 CPD ¶ 244 at 2. In this context, a protest meets the "clearly meritorious" standard when a reasonable agency inquiry into the protester's allegations would have revealed facts showing the absence of a defensible legal position--that is, the protest does not present "close questions." *Triple Canopy, Inc.--Costs*, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 3-4; *Yardney Technical Prods., Inc.*, B-297648.3, Mar. 28, 2006, 2006 CPD ¶ 65 at 4.

¹⁶ The awarded value of the task order exceeded \$10 million. Accordingly, this procurement was within our statutory grant of jurisdiction to hear protests in connection with task and delivery orders valued in excess of \$10 million issued under civilian agency multiple-award IDIQ contracts. 41 U.S.C. § 4106(f).

In short, as a prerequisite to our recommending the reimbursement of costs where an agency has taken corrective action, the protest must not only have merit--it must have been *clearly* meritorious, that is, not present close questions. *Id.*; see also *Science Applications Int'l Corp.--Costs*, B-410760.5, Nov. 24, 2015, 2015 CPD ¶ 370 at 3; *PADCO, Inc.--Costs*, B-289096.3, May 3, 2002, 2002 CPD ¶ 135 at 3. In this context, we have specifically stated that, where a solicitation contains ambiguity regarding proposal requirements for proposed personnel, and the record provides some support for the agency's conclusion that the awardee intended to comply with the solicitation requirements, a protest challenging the awardee's commitment to properly perform was not "clearly meritorious" but, rather, presented "close questions" and, thus, did not warrant reimbursement of protest costs. *Triple Canopy, Inc.--Costs, supra*.

Here, in responding to VSolvit's assertion that all of its protest allegations were clearly meritorious, we first reject this assertion regarding VSolvit's allegations that two of the agency evaluators were biased due to "close relationships" with Sohum personnel. The agency responded with declarations from both evaluators asserting that they did not have any "close relationships" with Sohum personnel. Based on the parties conflicting factual representations regarding the existence of the alleged relationships, VSolvit's allegations of bias were not clearly meritorious.

Similarly, based on our review of the record, VSolvit's complaints regarding the alleged unreasonableness or inequality of the agency's subjective confidence assessments in its evaluation of the competing proposals reflect the protester's disagreement with the agency's judgments.¹⁷ Accordingly, based on our review of the agency's explanations regarding its assessments, VSolvit's allegations challenging those assessments did not meet the "clearly meritorious" standard.¹⁸

Finally, with regard to Sohum's compliance with the solicitation's citizenship provisions, the final amended solicitation contains conflicting provisions that created some ambiguity. As noted above, on the one hand, the solicitation stated:

NO VISA HOLDERS ARE PERMITTED TO WORK ON THIS CONTRACT IAW [in accord with] Executive Order 11935. At this time FPAC is NOT issuing waivers for this requirement as the work has been determined not be eligible for waivers.

¹⁷ VSolvit's protest challenged five specific agency assessments that lowered the agency's confidence in VSolvit's proposed approach. Protest at 11-15. The agency responded by providing explanatory support for each of the five assessments. Contracting Officer's Statement at 8-13.

¹⁸ As noted above, to be "clearly meritorious," a protest allegation must have presented an issue for which the agency should have realized there was "no defensible legal position." *Triple Canopy, Inc.--Costs, supra*.

AR, Tab 10, TORP amend. 0003 at 45.

On the other hand, the amended solicitation also contemplated waivers in certain circumstances, stating:

Under exceptional circumstances, the Government may request a waiver when a prospective contractor or subcontractor does not meet the citizenship or lawful permanent resident alien status requirement. Request for waivers to the citizenship requirement must be submitted in writing. Non-U.S. citizens employed as contractors or subcontractors shall not be allowed access to USDA Mission Areas, Agency and Staff Offices, or controlled facilities, IT systems, or security items or products prior to the issuance of a waiver.

AR, Tab 11, TORP amend. 0004, attach. 11 at 1.

As discussed above, in determining whether to recommend cost reimbursement, our Office considers whether the protest presented issues for which there was no defensible legal position. *Triple Canopy, supra*. Here, while our Office expressed concern regarding Sohum's compliance with the solicitation provision that stated the agency was "NOT issuing [citizenship] waivers for this requirement, the solicitation also contained a provision indicating that such waivers might be issued "under exceptional circumstances." Based on these facially conflicting provisions, we cannot conclude that the agency did not have any defensible legal position. Accordingly, based on our review of the record as a whole, we decline to conclude that VSolvit's allegations regarding Sohum's compliance with the solicitation's citizenship requirements were clearly meritorious.

The request is denied.

Edda Emmanuelli Perez
General Counsel