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Decision

Matter of: Sysorex Federal, Inc.--Costs

File: B-310273.2

Date: March 27, 2008

David S. Cohen, Esq., and John J. O'Brien, Esq., Cohen Mohr LLP, for the requester. Sherry Kinland Kaswell, Esq., Department of the Interior, and Paul Oman, Esq., U.S. Customs and Border Protection, for the agency.

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 a protest insofar as they relate to challenge to evaluation of proposed handheld license plate reader systems is recommended where a reasonable agency inquiry into initial protest allegations would have shown facts disclosing absence of a defensible legal basis for finding awardee's solution compliant with the solicitation specifications, but agency delayed taking corrective action until after submission of the agency report.

DECISION

Sysorex Federal, Inc. requests that we recommend that the firm be reimbursed the costs of filing and pursuing its protest challenging the award of a contract to Perceptics, LLC, under request for proposals (RFP) No. 0407RP66155, issued by the Department of the Interior, GovWorks, on behalf of Customs and Border Protection (CBP), for license plate reader (LPR) systems. Sysorex challenged the evaluation of proposals and conduct of the procurement.

We grant the request.

The solicitation provided for award of a primarily fixed-price, level-of-effort contract to produce, install, warrant and maintain a minimum of 54 and a maximum of 770 LPR systems at various CBP facilities, primarily points of entry at U.S. borders. The LPR systems ensure that all vehicles crossing U.S. land borders at points of entry have their license plates automatically queried against law enforcement databases. Several types and configurations of LPRs were specified in the solicitation statement of work (SOW), including: fixed permanent installations at point of entry traffic lanes for commercial vehicles; fixed permanent installations at

point of entry traffic lanes for passenger vehicles; “self-contained” mobile units capable of being deployed (within 2 hours) with an approximation of a typical lane layout; and handheld wireless devices “capable of acting as a fully functioning LPR system.” SOW §§ C.3.1.5.2, C.3.1.4. Award was to be made to the offeror whose proposal represented the “best value” when evaluated against six criteria: key personnel, technical approach, management approach, past experience/performance, transition plan, and price.

Based on its evaluation of the initial proposals received in response to the RFP and oral presentations made by offerors, Interior initially eliminated Sysorex’s proposal from the competition prior to the live test demonstration provided for under the original solicitation. However, the agency subsequently reconsidered its decision and reinstated Sysorex in the competition, amended the solicitation to delete the live test demonstration, and opened discussions with Sysorex, Perceptics, and the other firms whose proposals were included in the competitive range.

Based upon its evaluation of the final proposal revisions (FPR) submitted at the end of discussions, Interior determined that Perceptics’ proposal represented the best value. While Sysorex’s evaluated price (\$1,167,705) was significantly lower than Perceptics’ (\$3,940,954), Perceptics’ proposal was rated very good for overall technical merit, while Sysorex’s was rated only satisfactory. In this regard, the source selection decision generally indicated that the technology proposed by Sysorex “is not well suited to the environment in which CBP operates,” and specifically observed that Sysorex’s handheld solution “compromises officer safety.” Source Selection Decision at 8. Sysorex’s proposed handheld system was comprised of [REDACTED]. Sysorex FPR at I-10 to I-11. As the agency made clear in the detailed technical evaluation and in the debriefing subsequently furnished Sysorex after the award to Perceptics, Sysorex’s handheld solution was determined not to work in the intended environment because it would require officers to carry a [REDACTED] in addition to the bullet-proof vest, gun belt with weapon, additional ammunition clips, baton, handcuffs, and pepper spray officers already carry. FPR Technical Evaluation at 2; Sysorex Debriefing at 3. In contrast, Perceptics proposed as its handheld solution to use a [REDACTED] handheld device that would [REDACTED]. Perceptics FPR at I-15 to I-17.

Upon learning of the award to Perceptics, and after being debriefed, Sysorex filed a protest with our Office. In its initial protest filings, Sysorex challenged the award on the basis that Interior had: failed to conduct meaningful discussions; failed to evaluate price proposals in accordance with the solicitation; treated the offerors unequally in the technical evaluation; and otherwise failed to reasonably evaluate a number of sections of its technical proposal, including key personnel, handheld solution, reading vanity license plates, past experience and performance, transition plan, network monitoring capabilities, and approach to addressing changes in state license plate designs. With regard to the agency’s criticism of its handheld solution, Sysorex asserted that “[t]he requirements of the solicitation drove the equipment

that was required for the handheld solution. All offerors would be required to propose a similar suite of equipment to that proposed by Sysorex and the border officers would use it in a similar fashion.” Sysorex Amended Protest, Sept. 17, 2007, at 18; Sysorex Protest, Sept. 11, 2007, at 17. Sysorex concluded that, since the two handheld solutions therefore must have been similar, downgrading Sysorex’s solution but not Perceptics’ was unreasonable.

In its October 15 report, Interior maintained that it had reasonably evaluated the proposals and requested that we deny Sysorex’s protest in its entirety. Regarding Sysorex’s challenge to the agency’s assessment that Sysorex’s handheld solution would not work in the environment in which CBP officers operate, Interior asserted that:

Sysorex maintains that every offeror had to propose a suite of equipment similar to its own [REDACTED] system, which consists of a [REDACTED]. A review of Perceptics’ technical proposal demonstrates the fallacy of this assertion. Perceptics proposed a true handheld solution, consisting of a [REDACTED] that accomplishes all of the functions of Sysorex’s [REDACTED] “handheld” system. Moreover, Sysorex’s argument indicates its lack of familiarity with the state of the art as represented in the proposals of its competitors.

Agency Report, Oct. 15, 2007, at 8. The agency included among the documents furnished with the report a copy of Perceptics’ proposal.

In its October 22 supplemental protest and October 25 comments on the agency report, Sysorex pointed out that, under the solicitation, all types of LPR systems, including the handheld system, were required to image license plates on vehicles moving at speeds up to 60 miles per hour, with 95 percent accuracy, while handheld LPRs also were required to include a battery with an 8-hour life. SOW §§ 3.1.5.2, C.4.4, C.4.6.3. Sysorex noted that, in Perceptics’ handheld solution, CBP officers would carry [REDACTED] as those that Perceptics proposed for its fixed and mobile LPR systems; thus, according to Perceptics’ FPR, “[REDACTED].” Perceptics FPR at I-6 to I-27, IX-2. Sysorex asserted that Perceptics’ handheld PDA solution therefore did not meet the 60 miles per hour with 95 percent accuracy requirement. Sysorex also raised an additional protest allegation regarding Perceptics’ proposed approach to commercial vehicles. Specifically, Sysorex noted that, while the SOW required that each LPR system “transmit the alphanumerics and state/province of origin for each plate on both the front and rear of the commercial vehicle . . . for at least 95% of all commercial vehicles which pass through the lane,” SOW § C.4.2, Perceptics’ FPR stated that its system would correctly read both the alphanumerics and state/province of origin “[REDACTED].” Perceptics FPR at I-23. Sysorex argued that this statement fell short of meeting the 95 percent requirement.

On November 1, Interior advised our Office that it had determined to take corrective action in response to the grounds raised in Sysorex's second, amended protest filed on October 22. Interior stated that it would amend the solicitation, request new FPRs, suspend performance of all but a limited portion of Perceptics' contract, and, in the event that an offeror other than Perceptics becomes the successful offeror, terminate Perceptics' contract. (Interior also advised that, as an alternative, it may choose to meet its requirements through a different procurement vehicle.) On November 5, we dismissed Sysorex's protest as academic (B-310273).

Sysorex now requests that we recommend reimbursement of the costs of filing and pursuing its protest.

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) (2007); 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.

Sysorex asserts that reimbursement of its protest costs is warranted here because, in its view, three issues raised in its initial protest—unequal evaluation of handheld solutions, misevaluation of cost proposals, and misevaluation of Sysorex's proposed network monitoring capabilities—were clearly meritorious, but the agency nevertheless failed to take corrective action until after the protester had responded to the agency report.

Interior denies that it unduly delayed taking corrective action in the face of clearly meritorious protest grounds. According to Interior, it determined to take corrective action based on problems in two areas identified by Sysorex. Specifically, Interior states that Sysorex's assertion in its October 22 supplemental protest that Perceptics' handheld solution did not fully comply with the solicitation requirements "caused the agency to question both its earlier evaluation of all offerors' handheld solutions as well as the feasibility of the performance requirements . . . for the handheld LPRs."

Interior Comments, Dec. 3, 2007, at 2. In addition, Interior states that Sysorex, in asserting in its October 22 supplemental protest that Perceptics' commercial truck lane did not offer the required 95 percent accuracy read rate, "has identified an area where the agency may have improperly relaxed a solicitation requirement." *Id.* at 3. Interior concludes that, since it first learned the basis for corrective action after it filed its agency report responsive to the initial protest submissions, and it acted promptly thereafter to take corrective action, there is no basis for recommending reimbursement of protest costs.

We agree with Sysorex that its initial challenge to the evaluation of handheld solutions was clearly meritorious. The agency's evaluation of proposals was based in significant measure upon the determination that, while Sysorex's [REDACTED] handheld solution "was not well suited to the environment in which CBP operates" and "compromises officer safety," Source Selection Decision at 8, "Perceptics proposed a true handheld solution, consisting of [REDACTED] that accomplishes all of the functions of Sysorex's [REDACTED] 'handheld' system." Agency Report, Oct. 15, 2007, at 8. However, the solicitation clearly and unambiguously required that the handheld solution be based upon a handheld wireless device that is "capable of acting as a fully functioning LPR system." SOW § C.3.1.5.2. Since Perceptics' proposal described its handheld approach as requiring that [REDACTED], Perceptics FPR at IX-2, it should have been clear to the agency that the approach was not likely to meet the SOW requirement that all types of LPR systems, including the handheld system, be capable of imaging license plates on vehicles moving at speeds up to 60 miles per hour with 95 percent accuracy.

Interior asserts that it understood that its evaluation "might have been flawed" only when Sysorex, in its supplemental protest filed after receipt of a copy of Perceptics' proposal in the agency report, pointed out that Perceptics had proposed the [REDACTED], and asserted that this [REDACTED] could not meet the requirements of the SOW without additional equipment. Interior Comments, Dec. 3, 2007, at 2. Again, however, it was clear that a handheld solution that [REDACTED] was not likely to meet the SOW requirement that the handheld system, like all other LPR systems to be furnished under the contract, be capable of imaging license plates on vehicles moving at speeds up to 60 miles per hour with 95 percent accuracy. In our view, a reasonable investigation of Sysorex's claim in its initial protest filings that all offerors would be required to propose a suite of equipment similar to Sysorex's in order to meet the SOW requirements, should have led the agency to examine the compliance of Perceptics' proposed handheld solution; such examination, reasonably conducted, necessarily would have indicated the noncompliance of Perceptics' proposed handheld solution. Accordingly, we find that Interior unduly delayed taking corrective action in the face of Sysorex's clearly meritorious protest, first raised in its initial protest filings prior to the agency report, against the evaluation of proposed handheld solutions.

As for the two additional protest grounds cited in Sysorex's request for reimbursement, neither was clearly meritorious. In its amended protest filed after its debriefing and prior to receipt of the agency report, Sysorex, having been advised that Perceptics' proposal received a significant strength on account of the ability to [REDACTED], asserted that the agency had improperly failed to credit its proposal for a similar capability, for [REDACTED]. Sysorex Amended Protest, Sept. 17, 2007, at 25-26. Interior responded in its report that, while Perceptics' [REDACTED] were [REDACTED], Sysorex's [REDACTED] was less desirable because it was offered [REDACTED]. Contracting Officer's Statement at 11-12. Sysorex then responded in its comments that the agency had failed to account for the fact that Sysorex's proposed LPR system nevertheless included more robust [REDACTED] than did Perceptics' LPR system. Sysorex Comments, Oct. 25, 2007, at 11-16. In our view, it was a close question that would require further development of the record to resolve, as to whether or not in fact there was a significant difference between the proposals with respect to [REDACTED] such as to warrant a strength for Perceptics but not for Sysorex in this regard. Accordingly, Sysorex's initial challenge to the [REDACTED] evaluation was not clearly meritorious. See Alaska Structures, Inc.--Costs, B-298575.4, Jan. 22, 2007, 2007 CPD ¶ 15 at 6. As for Sysorex's initial challenge to the cost evaluation, we note that the protester itself conceded in its amended protest filed after its debriefing and prior to receipt of the agency report, that "it is not clear how the government evaluated cost/price." Sysorex Amended Protest, Sept. 17, 2007, at 14. Given the lack of clarity in the information available prior to receipt of the agency report as to how the agency evaluated price, we find that Sysorex's initial challenge to the price evaluation was not clearly meritorious.

In conclusion, we recommend that Sysorex be reimbursed the reasonable costs of filing and pursuing its protest insofar as they relate to its challenge to the evaluation of proposed handheld solutions. Sysorex should submit its claim for costs, detailing and certifying the time expended and costs incurred, directly to Interior within 60 days of receipt of this decision. 4 C.F.R. 21.8(f)(1).

The request is granted.

Gary L. Kepplinger
General Counsel