U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Avon Protection Systems, Inc.--Costs

File: B-421102.5

Date: August 9, 2023

Jonathan D. Shaffer, Esq., and Michael J. Maroulis, Esq., Haynes and Boone, LLP, for the protester.
Stuart J. Anderson, Esq., and Gwendolyn A. Iaci, Esq., Department of the Navy, for the agency.
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DIGEST

Request that GAO recommend reimbursement of protest costs is granted where challenge to the agency's conduct of discussions as part of corrective action taken in response to an earlier protest was clearly meritorious and the agency unduly delayed taking corrective action.

DECISION

Avon Protection Systems, Inc. (Avon), of Cadillac, Michigan, requests that we recommend the firm be reimbursed the reasonable costs of filing and pursuing its protest challenging the scope of the agency's corrective action taken in response to Avon's previous protest challenging the agency's evaluation and award made under request for proposals (RFP) No. N00024-21-R-6410. The Department of the Navy issued the RFP for the production of a multi-mission underwater breathing apparatus and associated services. The requester contends the agency failed to take prompt corrective action in response to a clearly meritorious protest ground.

We grant the request.

BACKGROUND

The agency issued the solicitation on June 24, 2021, pursuant to the procedures in Federal Acquisition Regulation (FAR) part 15, seeking the production of a Multi-Mission Underwater Breathing Apparatus (MMUBA), required support equipment, and associated engineering support services. Agency Report (AR) for B-421102 *et al.*,

encl. 2.0, Conformed RFP at 1, 172. The Navy explained that the MMUBA is an underwater breathing apparatus required to support a variety of military diving operations and practices, such as deep or shallow water diving, managing heavy and stationary workloads, and swimming appreciable distances. Contracting Officer's Statement for B-421102 *et al.*, at 1. The RFP contemplated the award of a single contract, with fixed-price, cost-plus-fixed-fee, and cost-reimbursable contract line items, with a 1-year base period of performance and six, 1-year option periods. *Id*. at 1. The solicitation provided for award on a best-value tradeoff basis, considering three evaluation factors: (1) technical/management;[1] (2) past performance; and (3) cost/price. RFP at 174. The RFP explained that the technical/management factor was more important than past performance, and both factors, when combined, were significantly more important than cost/price. *Id*.

The Navy previously determined that the final proposal submitted by Chase Defense Partners, Inc. (Chase), of Hampton, Virginia, represented the best value to the agency; the Navy made award to Chase on or about September 9, 2022. Following a debriefing, Avon filed a protest with our Office on September 26. Avon argued, among other things, the Navy's evaluation of Chase's proposal was unreasonable and inconsistent with the terms of the RFP, where multiple aspects of Chase's technical solution failed to meet the minimum performance requirements identified in the solicitation.

Following several rounds of briefing, our Office held an outcome prediction alternative dispute resolution (ADR) teleconference call with the parties. During this call, the GAO attorney assigned to the protest advised that the protest would likely be sustained, in part, with respect to the Navy's evaluation of Chase's proposal, and specifically, whether the agency reasonably determined that Chase's technical solution met various performance specifications or other solicitation requirements. Following the ADR teleconference call, the Navy subsequently represented that it intended to take actions that would render the protest academic, specifically, that the agency would reevaluate both Avon's and Chase's technical proposals. Our Office dismissed Avon's protest as academic on December 20. *Avon Protection Systems, Inc.*, B-421102 *et al.*, Dec. 20, 2022 (unpublished decision).

On February 10, 2023, Avon filed another protest with our Office, challenging the agency's implementation of its corrective action. Specifically, Avon argued the Navy's decision to hold discussions with, and accept final proposal revisions from, only Chase, and not Avon, was unreasonable, contrary to law and regulation, and fundamentally unfair. In response, the Navy argued that its decision to engage in discussions and request final proposal revisions from Chase, exclusively, was reasonable because the Navy, following its reevaluation of proposals during corrective action, only identified

[1] The agency's evaluation of the technical/management factor included distinct "elements," each with its own proposal submission requirements and bases for evaluation: (a) underwater breathing apparatus (UBA) technical performance; (b) certification and production; (c) future capability integration; (d) sustainment; and (e) management approach. RFP at 176-178.

weaknesses and deficiencies in Chase's proposal, not Avon's proposal. Accordingly, Avon, having already received the benefit of discussions following the Navy's initial evaluation of proposals, did not need to submit a revised proposal.

On March 28, 2023, following the production of the agency's report and the Navy's filing of a response to Avon's comments, our Office held a litigation risk ADR teleconference call with the parties. During this call, the GAO attorney assigned to the protest explained that, based on his review of the record, the Navy's rationale for holding limited discussions and allowing proposal revisions from a single offeror was unreasonable.

On April 6, 2023, the agency represented that it intended to take actions that would render the protest academic. Specifically, the agency explained that it would review the solicitation to determine whether it met the current needs of the Navy, and, if not, the Navy would amend the solicitation. The Navy further explained that after its review and possible amendment of the solicitation, the Navy would engage in discussions with, and accept unrestricted revised proposals from, both Chase and Avon. Our Office dismissed Avon's protest as academic on April 10. *Avon Protection Systems, Inc.*, B-421102.4, Apr. 10, 2023 (unpublished decision).

On April 20, Avon timely filed the instant request with our Office, requesting that we recommend the firm be reimbursed the reasonable costs of filing and pursuing its protest of the agency's corrective action (B-421102.4).

DISCUSSION

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); *AAR Aircraft Servs.--Costs*, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 5. As a prerequisite to our recommending that costs be reimbursed where an agency takes corrective action in response to a protest, not only must the protest have been meritorious, but it also must have been clearly meritorious, *i.e.*, not a close question. *InfraMap Corp.--Costs*, B-405167.3, Mar. 26, 2012, 2012 CPD ¶ 123 at 3. 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. *Procinctu Grp. Inc.--Costs*, B-416247.4, Sept. 21, 2018, 2019 CPD ¶ 36 at 4. Once our Office determines that a protest is clearly meritorious, 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. *Alsalam Aircraft Co.--Costs*, B-401298.3, Nov. 5, 2009, 2009 CPD ¶ 208 at 3.

The question at issue in this request is whether Avon's protest challenging the Navy's implementation of its corrective action constitutes a clearly meritorious protest. The agency argues it does not. First, the Navy contends the mere fact that GAO conducted litigation risk ADR does not necessarily mean that Avon's protest was clearly meritorious. Moreover, in the agency's view, the issue of whether the Navy's limitations

on discussions and final proposal revisions was reasonable and represented a "close question" turned on an application of GAO's prior decisions. Resp. to Req. for Costs at 4. That is, whether the Navy's underlying conduct was reasonable, in this instance, turned on an application of GAO's prior decisions that allow for an exception to the general rule that when an agency conducts discussions, it must hold them with all offerors, and allow each to submit a revised proposal. Accordingly, the Navy's position remains that its reliance on our decisions that have found an exception to this general rule was reasonable, and that "a reasonable inquiry at the time of protest would not have revealed that [Avon's] protest was meritorious." *Id*.

The requester disagrees with the agency's position. First, Avon contends the fact that GAO conducted litigation risk ADR warrants a finding that the protest was clearly meritorious. In addition, Avon argues its protest was not a close call, but instead, was based on the Navy's clear error of law. Thus, in the requester's view, given the "overwhelming weight of authority" that contradicted the Navy's litigation position, the agency's decision to limit discussions was indefensible. Resp. to Agency's Resp. to Req. at 5.

As explained below, we find that Avon's challenges were clearly meritorious and that the agency unduly delayed taking corrective action. Accordingly, we recommend that Avon be reimbursed its costs with respect to filing and pursuing its protest challenging the Navy's corrective action.

As an initial matter, we note that the mere fact that GAO conducts litigation risk ADR does not, in and of itself, mandate a determination that a protest allegation is clearly meritorious. Indeed, as we have explained:

> [T]he offer of ADR--especially ADR that is limited to an assessment of litigation risk, or negotiation assistance--does not automatically translate to the conclusion that the protester should be awarded costs. Instead[,] the determination of whether to recommend the reimbursement of costs rests on the factual and legal posture of each individual protest, which must be analyzed on a case-by-case basis.

JRS Staffing Servs.--Costs, B-410708.3, Nov. 9, 2015, 2015 CPD ¶ 349 at 5. *See also Tom & Jerry, Inc.--Costs*, B-417474.2, Nov. 20, 2019, 2019 CPD ¶ 405 at 6 (explaining that the conduct of a litigation risk ADR neither requires nor precludes GAO from finding that a protest allegation is clearly meritorious); *PricewaterhouseCoopers Public Sector, LLP--Costs*, B-415205.3, May 9, 2018, 2018 CPD ¶ 185 at 7 (concluding that the choice of conducting litigation risk ADR, as opposed to outcome prediction ADR, does not foreclose a finding that a protest was clearly meritorious).

Concerning the merits of Avon's protest, we conclude the requester's challenge was clearly meritorious. As was explained during the ADR teleconference call, and as the parties correctly understood as evidenced in their underlying briefing on the merits of the protest, as a general matter, reopening discussions with one firm generally triggers

an obligation to reopen discussions with all offerors in the competitive range. FAR 15.306(d); *see Solution One Indus., Inc.*, B-409713.3, Mar. 3, 2015, 2015 CPD ¶ 167 at 5. Moreover, as the GAO attorney also explained during the teleconference call, exceptions to this general standard are very rare. The Navy argues that, in the instant request, the question of whether Avon's protest challenging the Navy's scope of corrective was clearly meritorious turns on whether the facts supported the application of an exception to this general rule, and this was a close call. We disagree with the Navy's assessment.

The Navy's legal position, in essence, rested on one decision and one advisory opinion from our Office, both of which we found materially distinguishable from the facts of the underlying protest. First, in *Environmental Chemical Corp.*, B-416166.3, *et al.*, Jun. 12, 2019, 2019 CPD ¶ 217, our Office found reasonable, based on "the unique circumstances presented" in that case, the agency's decision to hold discussions with a single offeror as part of its corrective action. However, as explained during the ADR teleconference call, the facts of *Environmental Chemical Corp*. were so substantially different from the facts of Avon's protest that any comparison was inapposite. Indeed, *Environmental Chemical Corp*. concerned a multiple-award competition, as opposed to the single-award at issue here.

More materially, in *Environmental Chemical Corp*., the agency's rationale for limiting discussions when implementing its corrective action was to remedy a single, discrete, and previously unidentified weakness in a single offeror's proposal. Specifically, in order to place all offerors on an equal footing, the agency in *Environmental Chemical Corp*. limited its discussions, following corrective action, to allow a single offeror to address a previously undisclosed and unidentified weakness not raised during earlier discussions. Our Office concluded that in "the unique circumstances presented" in that protest, the agency's approach was reasonable where (a) the protester already received the benefit of meaningful discussions and was afforded a full and fair opportunity to address issues in its proposal; (b) in order to place the other disappointed offeror on equal competitive footing, the agency would allow the offeror to address a single previously undisclosed assessed weakness; and (c) the scope of the agency's intended discussions with the awardee would be limited to presenting only the previously undisclosed concern, and in turn limited the awardee's response to addressing only that specific concern. *Environmental Chemical Corp.*, *supra* at 21.

In contrast, the Navy's conduct of discussions fell well outside the rationale expressed in *Environmental Chemical Corp*. First, rather than limiting discussions following corrective action to a single discrete issue arising under a single evaluation subfactor, the Navy's discussions with Chase concern at least eleven assessed weaknesses and deficiencies spanning across at least three of the five elements evaluated under the technical/management factor, several of which concern central technical features of the offered product. Second, rather than limiting Chase to addressing only specific concerns raised during discussions (as was the case in *Environmental Chemical Corp*.), the Navy allowed Chase to revise other aspects of its proposal outside of those issues, to include modifying the format of its proposal. *See* AR for B-421102.4, encl. 26, Email

Between Agency and Chase Regarding Proposal Revisions, Feb. 3, 2023 at 1 (where the Navy explains to Chase that it "may modify the formatting of all areas" of its technical proposal during revisions).

Third, and most critical to our conclusion, unlike *Environmental Chemical Corp*., the scope of the Navy's discussions following corrective action went beyond allowing Chase to address only proposal concerns that should have been raised by the Navy during initial discussions, but were not. For example, the Navy, during the initial evaluation, assigned Chase's proposal with a weakness under the UBA technical performance element because the proposal did not fully address battery capacity requirements. AR for B-421102.4, encl. 36, Initial Chase Evaluation at 3. The Navy raised this issue with Chase during discussions, and Chase provided a response. *See* AR for B-421102.4, encl. 35, Initial Chase Discussion Letter at 1 ("Chase's response to this letter shall address all the weaknesses documented" by the Navy); encl. 40, Chase Tech. Proposal Revisions at 1-3 (responding to the Navy's concerns concerning Chase's battery capacity).

Notwithstanding that the Navy had previously raised the concern during prior rounds of discussions, during discussions with Chase following the Navy's corrective action, the agency again raised its concerns with Chase's battery capacity. AR for B-421102.4, encl. 20, Chase Discussion Letter Following Corrective Action at 10-12 (raising similar concerns concerning Chase's battery capacity performance and testing as was raised during initial discussions). Allowing Chase to correct an aspect of its technical proposal for which the agency already provided discussions gave the awardee a second opportunity to revise its proposal, and is far removed from the limited exception allowed for in *Environmental Chemical Corp*. Thus, unlike the situation in *Environmental Chemical Corp.*, the Navy's discussions and requested proposal revisions from only a single offeror were not tailored to putting Chase in the same competitive position as Avon following its receipt of meaningful discussions. Rather, the Navy's proposed approach here gave Chase additional opportunities to improve its proposal beyond those also afforded to Avon, which is the very principle for the default rule established by FAR section 15.306(d).

In addition, the GAO attorney assigned to the protest explained during the ADR conference call that our advisory opinion in *Logistics Health, Inc. v. U.S.*, B-416145.7, Mar. 2, 2021, 2021 CPD ¶ 184, was also materially distinguishable from Avon's protest. In *Logistics Health, Inc.*, GAO would have found unobjectionable the agency's decision to conduct an additional round of discussions with a single offeror to resolve a single deficiency in that firm's proposal. Again, contrary to Avon's protest, the limited discussions concerned a single, discrete issue with a single offeror's proposal, namely, a previously unidentified and undisclosed deficiency. Moreover, GAO noted in *Logistics Health, Inc.* that the protester (unlike the facts at hand) was not deprived of an opportunity to submit a final revised proposal following these limited discussions, and could not otherwise demonstrate competitive prejudice.

With these stark factual dissimilarities manifestly clear, we cannot agree with the Navy that the agency's legal position was reasonable. Specifically, the Navy's discussions were not tailored to address a single discrete issue that the agency failed to raise during earlier discussions, but instead, concerned numerous weaknesses and deficiencies, some of which were previously raised during earlier rounds of discussions. Moreover, Chase's revisions extended beyond the areas identified during the Navy's post-corrective action discussions, to include reformatting its entire technical proposal to provide additional details concerning its approach. On these facts, we conclude the Navy's argument was not legally defensible, and as such, we find Avon's protest clearly meritorious.

Lastly, given that the agency's corrective action occurred following the production of the agency report, we similarly conclude that the Navy unduly delayed taking corrective action in the face of a clearly meritorious protest. *See AAR Aircraft Servs.--Costs*, *supra* at 4; *The Jones/Hill JV--Costs,* B-286194.3, Mar. 27, 2001, 2001 CPD ¶ 62 at 13 (undue delay found where agency took corrective action after litigation risk ADR).

RECOMMENDATION

We recommend that Avon be reimbursed its reasonable protest costs, including attorneys' fees, related to filing and pursuing its protest B-421102.4. Avon 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).

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General Counsel