



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: JRS Staffing Services--Costs
File: B-410098.6; B-410100.6; B-410101.6
Date: August 21, 2015

Jacqueline R. Sims, for the protester.
Lt. Col. Roger G. Palmer, United States Marine Corps, for the agency.
Evan D. Wesser, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Reimbursement of costs relating to the protester's challenge to a worker's compensation insurance provision in three solicitations is recommended where the procuring agency took corrective action after the parties were informed through alternative dispute resolution procedures that the protest ground would likely be sustained; reimbursement is not recommended with regard to the protester's other protest grounds, because those grounds are severable from the protester's challenge to the insurance provision.

DECISION

JRS Staffing Services, a small business, of Lawrenceville, Georgia, requests that our Office recommend that it be reimbursed the reasonable costs of filing and pursuing its protests challenging the terms of requests for quotations (RFQ) Nos. M67001-14-T-1188, M67001-14-T-1191, and M67001-14-T-1192, issued by the United States Marine Corps, for religious education and music services.

We grant the request in part and deny it in part.

BACKGROUND

On June 13, 2014, the Marine Corps issued three RFQs as small business set-asides, each of which anticipated the award of an indefinite-delivery, indefinite-quantity contract for religious education and music services at Marine Corps Air Station, New River, North Carolina. JRS Staffing Servs., B-410098 et al., Oct. 22, 2014, 2014 CPD ¶ 312 at 2. All three RFQs stated that the solicitations and resulting contracts would utilize simplified acquisition procedures, in accordance

with Federal Acquisition Regulation (FAR) part 13 and FAR subpart 16.5. Id. Furthermore, the RFQs contemplated that the services being acquired were commercial items in accordance with FAR part 12. Id.

On July 16, JRS filed three pre-award protests with our Office challenging various terms of the RFQs. JRS alleged that: two of the three RFQs included an ambiguous provision regarding contract termination (protest ground No. 1); the RFQs' worker's compensation insurance provision was ambiguous (protest ground No. 2); the RFQs' insurance requirements were contrary to customary commercial practice and not supported by adequate market research (protest ground No. 3); the RFQs' automobile liability insurance requirements were unduly restrictive of competition (protest ground No. 4); the RFQs' provision regarding the permanent substitution of personnel was unduly restrictive of competition (protest ground No. 5); and, the RFQs' provision regarding the permanent substitution of personnel was contrary to customary commercial practice and not supported by adequate market research (protest ground No. 6). The Marine Corps notified our Office that it would take corrective action in response to protest ground No. 1 prior to the submission of the initial agency report. See Letter from Agency Counsel (July 17, 2014) at 1-2. On August 15, the agency submitted its report in response to the other five initial protest grounds.

On August 22, based on new information provided in the agency report, JRS filed a supplemental protest alleging that the RFQs' background check requirements were inadequate because they failed to reasonably convey to offerors the agency's actual requirements (protest ground No. 7). Prior to the response date set by our Office for the agency to submit a supplemental agency report, the Marine Corps notified our Office that it would take corrective action in response to protest ground No. 7 by amending the RFQs. See Letter from Agency Counsel (Aug. 28, 2014) at 2.

On September 2, JRS filed a second supplemental protest alleging that the amended background check requirements were inadequate because they again failed to reasonably convey to offerors the agency's actual requirements, and were unduly restrictive of competition (protest ground Nos. 8 & 9). After the agency submitted a supplemental agency report in response to JRS's second supplemental protest and the protester submitted its comments in response thereto, the protester filed its third supplemental protest on September 12, alleging that the RFQs' background check requirements were ambiguous and improper because they failed to notify offerors of a definitive responsibility criterion (protest ground Nos. 10 & 11). On September 19, the Marine Corps notified our Office that it would take corrective action in response to protest ground Nos. 8-11 by amending the RFQs. See Letter from Agency Counsel (Sept. 19, 2014) at 3-4.

As a result of the Marine Corps' corrective action taken throughout the protest, the only protest grounds remaining were protest ground Nos. 2-6, which alleged that: the workers' compensation insurance provision was ambiguous; the insurance

requirements were contrary to customary commercial practice and unsupported by adequate market research; the automobile liability insurance requirements were unduly restrictive of competition; and the permanent substitution of personnel requirements were both unduly restrictive of competition and contrary to customary commercial practice and unsupported by adequate market research. The GAO attorney assigned to the protests conducted an “outcome prediction” alternative dispute resolution (ADR) conference and informed the parties in a detailed discussion that, in his view, our Office was likely to sustain in part and deny in part the protests. Specifically, he indicated that our Office would likely sustain protest ground No. 2, which argued that the RFQs’ worker’s compensation insurance provision was ambiguous, and would likely deny the remaining four protest grounds. In response to the ADR, the Marine Corps notified our Office that it would take corrective action in response to protest ground No. 2 by amending the RFQs. JRS withdrew protest ground Nos. 3 and 5, but requested that our Office issue a written decision regarding protest ground Nos. 4 and 6. Our Office subsequently issued a decision denying the two remaining protest grounds. JRS Staffing Servs., supra, at 2.

On October 3, JRS filed a fourth supplemental protest challenging the Marine Corps’ corrective action taken in response to the outcome prediction ADR. Specifically, JRS alleged that the amended worker’s compensation provision was ambiguous and unduly restrictive of competition, impermissibly deviated from FAR § 28.307-2(a), and was contrary to customary commercial practice and not supported by adequate market research (protest ground Nos. 12-14). On October 9, the Marine Corps notified our Office that it would take corrective action in response to protest ground Nos. 12-14 by amending the RFQs. See Letter from Agency Counsel (Oct. 9, 2014) at 3-4. This timely request for a recommendation for reimbursement of protest costs followed.

DECISION

JRS requests that our Office recommend that it be reimbursed the costs of filing and pursuing its protests based on the agency’s corrective action taken after our Office indicated through outcome prediction ADR that it was likely that we would sustain JRS’s protest allegation that the RFQs’ original worker’s compensation insurance provision was ambiguous (protest ground No. 2). See Request for Protest Costs (Oct. 9, 2014) at 1-2; Supp. Request for Protest Costs (Oct. 14, 2014) at 1-2. JRS does not contend that any of its other protest grounds were clearly meritorious or that the agency unduly delayed taking corrective action in response to the other protest grounds. Nonetheless, JRS contends that we should recommend reimbursement of the costs of filing and pursuing the other protest grounds on the basis that it prevailed on its challenge to the original worker’s compensation insurance provision. See Supp. Request for Costs at 4. For the reasons that follow, we grant in part and deny in part the request.

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); Pemco Aeroplex, Inc.--Recon. and Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 5. 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. Carney, Inc.--Costs, B-408176.13, Feb. 14, 2014, 2014 CPD ¶ 82 at 4. A GAO attorney will inform the parties through outcome prediction that a protest is likely to be sustained only if he or she has a high degree of confidence regarding the outcome; therefore, the willingness to do so is generally an indication that the protest is viewed as clearly meritorious, and satisfies the “clearly meritorious” requirement for purposes of recommending reimbursement of protest costs. JV Derichebourg-BMAR & Assocs., LLC--Costs, B-407562.3, May 3, 2013, 2013 CPD ¶ 108 at 3.

Here, the Marine Corps acknowledges that it took corrective action in response to JRS’s allegation that the RFQs’ original worker’s compensation provision was ambiguous (protest ground No. 2) after we indicated during outcome prediction ADR that our Office was likely to sustain the protests on that basis. The agency, however, argues that our Office’s outcome prediction was predicated on a “distinguishable matter from that raised by the Protester in her original filing.” Agency Response to Request for Protest Costs (Oct. 29, 2014) at 4. Specifically, the agency argues that JRS’s initial protests alleged that the worker’s compensation insurance provision was ambiguous because it appeared to be inconsistent with North Carolina law, but our Office identified a separate concern regarding the agency’s apparent conflation of two related, but separate insurance requirements. Id. at 3-4. The agency contends that recommending reimbursement of protest costs is not appropriate because, once the “distinguishable” concern with the provision was identified during our outcome prediction ADR, the agency promptly took corrective action. Id.

We do not agree with the Marine Corps’ contention that JRS’s argument was not clearly meritorious as raised in the initial protest. Here, JRS alleged that the worker’s compensation insurance provision was ambiguous regarding the agency’s requirements because it appeared to require an offeror to provide worker’s compensation insurance even if not required by applicable federal or state law. E.g., Protest of RFQ No. M67001-14-T-1188 (July 16, 2014) at 3. The agency report included an argument that appeared to conflate the solicitations’ worker’s compensation and employer’s liability insurance requirements. See Consolidated Agency Report (Aug. 15, 2014) at 2-3. The protester timely submitted comments explaining how the agency’s interpretation of the provision, as set forth in the agency report, further demonstrated the ambiguous nature of the provision. See

Consolidated Comments (Aug. 22, 2014) at 3-5. While the protester's comments further supported its argument that the provision was ambiguous based on the agency's arguments in the agency report, we conclude that the initial protest argument sufficiently put the agency on notice of the issue, namely the ambiguous nature of the provision, and that a reasonable inquiry by the agency should have led the agency to conclude that it did not have a defensible legal position. See Carney, Inc.--Costs, supra. On this record, we conclude that this argument was clearly meritorious as raised in JRS's initial protest.

With respect to the Marine Corps' argument that it promptly took corrective action after the outcome prediction ADR, we review the record to determine whether the agency took appropriate and timely steps to investigate and resolve the impropriety without litigating the case; we do not review simply the promptness in taking action after the ADR. CACI Techs., Inc.--Costs, B-407923.3, Aug. 13, 2014, 2014 CPD ¶ 321 at 5; Marine Design Dynamics, Inc.--Costs, B-407816.2, July 3, 2013, 2013 CPD ¶ 168 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, including following outcome prediction ADR. CACI Techs., Inc.--Costs, supra; Burns & Roe Servs. Corp.--Costs, B-310828.2, Apr. 28, 2008, 2008 CPD ¶ 81 at 2 n.2. Therefore, we find that the agency unduly delayed taking corrective action in response to this meritorious protest ground.

In contrast to the original worker's compensation insurance provision challenge, however, we find that reimbursement of the costs associated with filing and pursuing JRS's other protest grounds is not warranted. As a general rule, we consider a successful protester entitled to costs incurred with respect to all issues pursued, not merely those upon which it prevails. In our view, limiting recovery of protest costs in all cases to only those issues on which the protester prevailed would be inconsistent with the broad, remedial Congressional purpose behind the cost reimbursement provisions of the Competition in Contracting Act. AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 9. Nevertheless, failing to limit the recovery of protest costs in all instances of partial or limited success by a protester may result in an unjustified windfall to the protester and cost to the government. Accordingly, in appropriate cases we have limited the recommended reimbursement of protest costs where a part of the costs is allocable to a losing protest issue that is so clearly severable as to essentially constitute a separate protest. See, e.g., VSE Corp.; The Univ. of Hawaii--Costs, B-407164.11, B-407164.12, June 23, 2014, 2014 CPD ¶ 202 at 8; Honeywell Tech. Solutions, Inc.--Costs, B-296860.3, Dec. 27, 2005, 2005 CPD ¶ 226 at 3-4. In determining whether protest issues are so clearly severable as to constitute essentially separate protests, we consider, among other things, the extent to which the issues are interrelated or intertwined--i.e., the extent to which successful and unsuccessful arguments share a common core set of facts, are based on related legal theories, or

are otherwise not readily severable. JV Derichebourg-BMAR & Assocs., LLC--Costs, supra, at 3-4.

Here, we find that JRS's additional protest grounds are severable from its challenge to the RFQs' original worker's compensation insurance provision. Many of the protester's other protest grounds challenged provisions of the RFQs that were wholly unrelated to the original worker's compensation insurance provision, including protest ground No. 1, which challenged the RFQs' contract termination provision, and protest ground Nos. 7-11, which challenged the RFQs' background check requirements. JRS's other protest grounds also relied on different legal theories that were unrelated to the basis for the challenge to the original worker's compensation insurance provision, including protest ground Nos. 3 and 6, which challenged other provisions as being contrary to commercial practice and unsupported by adequate market research, and protest ground Nos. 4 and 5, which challenged other provisions as being unduly restrictive of competition. JRS ultimately withdrew two of these protest grounds, and our Office subsequently denied the remaining two grounds on the merits. See JRS Staffing Servs., supra. Therefore, we find that the protester's other protest grounds are factually and legally severable from the challenge to the RFQs' original worker's compensation insurance provision, and thus we do not recommend reimbursement of the costs to file and pursue those protest grounds.

Moreover, JRS does not advance any argument that the Marine Corps unduly delayed taking corrective action in response to any other clearly meritorious protest ground. Indeed, the record demonstrates that the agency promptly took corrective action in response to many of the protest grounds raised by JRS. We do not find that recovery for the costs of pursuing those protest grounds for which the agency took prompt corrective action is warranted or would be equitable.

In this regard, we recognize that protest ground Nos. 12-14 raised in JRS's fourth supplemental protest challenged the RFQs' amended worker's compensation insurance provision, but we find that these protest grounds are severable from JRS's challenge to the RFQs' original worker's compensation insurance provision that we found to be clearly meritorious. Specifically, as discussed above, our Office notified the parties during outcome prediction ADR that we would likely sustain JRS's protest alleging that the RFQs' original worker's compensation insurance provision was ambiguous. The Marine Corps promptly implemented corrective action based on the outcome prediction ADR by amending the original worker's compensation insurance provision. JRS then filed its fourth supplemental protest challenging on different legal grounds the agency's implementation of corrective action in response to our outcome prediction ADR (protest ground Nos. 12-14). The Marine Corps promptly took further corrective action by amending the solicitations in response to JRS's fourth supplemental protest. Under these circumstances, we find that recommending reimbursement of JRS's costs of pursuing these supplemental

protest grounds would result in an unjustified windfall to JRS and cost to the government.

RECOMMENDATION

We recommend that the Marine Corps reimburse JRS only for the costs of filing and pursuing its protest challenging the RFQs' original worker's compensation insurance provision. JRS 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).¹

The request is granted in part and denied in part.

Susan A. Poling
General Counsel

¹ While we do not address herein the amount of costs recommended for reimbursement, we suggest that a total page basis method of allocation (e.g., total protest costs x (number of briefing pages addressing the RFQs' original worker's compensation provision/total briefing pages)) or a similar allocation method may assist the parties in the resolution of JRS's claim. See, e.g., Intermarkets Global--Costs, B-400660.14, July 2, 2014, 2014 CPD ¶ 205; BAE Tech. Servs., Inc.--Costs, B-296699.3, Aug. 11, 2006, 2006 CPD ¶ 122.