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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Symvionics, Inc.–Costs

File: B-403230.6

Date: May 16, 2011

Charlotte Rothenberg Rosen, Dickstein Shapiro, for the protester.
Michael G. McCormack, Esq., Department of the Air Force, for the agency.
Mary G. Curcio, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Request for recommendation that agency reimburse the protester's costs associated with filing and pursuing protests is granted where agency took corrective action in response to Government Accountability Office's conduct of "outcome prediction" alternative dispute resolution procedure after record in case was fully developed, even though the merits of the issue should have been clear to the agency prior to the agency report.

DECISION

Symvionics, Inc. requests that we recommend reimbursement of the costs associated with filing and pursuing its protest challenging the Department of the Air Force's award of a contract to Survice Engineering Company, under solicitation No. N00024-08-R-3219, for program support services.

We grant the request.

The agency awarded the contract to Survice on the basis that its proposal offered the best overall value to the government under the stated evaluation factors for cost, past performance and technical acceptability. Symvionics challenged the award decision, asserting that the agency misevaluated its past performance. Specifically, Symvionics asserted that the agency based the evaluation on non-relevant past performance.

The solicitation defined a "relevant" contract as one: (1) with a magnitude greater than \$3 million per year and greater than 25 man year equivalents; and (2) where the "[w]ork required management of personnel performing work in Engineering plus 1 of

the following areas: Mathematical/Statistical Analysis, Computer Science or Information Technology Support.” RFP § M, at 3-4. The agency assigned Symvionics’ past performance an overall rating of satisfactory. This rating was based in part on the evaluation of a contract under which Symvionics performed a number of task orders. The agency considered the contract relevant and assigned the contract a past performance rating of satisfactory based, in part, on Symvionics’ performance of a task order which Symvionics claimed was not relevant to the solicitation. Symvionics protested that as it was not highly rated on this non-relevant task order, consideration of it adversely affected its overall past performance rating.

After developing the record, including obtaining an agency report and comments on the report, our Office conducted an outcome prediction alternative dispute resolution (ADR) conference.¹ In the course of the ADR, the cognizant GAO attorney advised the agency of her view, based on the record, that the agency had misevaluated Symvionics’ past performance. Specifically, the GAO attorney stated that the record indicated that in evaluating Symvionics’ past performance, the agency did not consider whether the task order at issue was relevant as defined by the solicitation, that is whether it satisfied the minimum contract value and man-year requirements and the requirement for management of personnel performing engineering and either mathematical/statistical analysis, computer science or information technology support. The GAO attorney further advised the parties that the protest likely would be sustained on that ground, with the recommendation that the agency reevaluate Symvionics’ past performance in accordance with the solicitation. The agency agreed to take corrective action consistent with the outlined recommendation. The protester now requests that we recommend reimbursement of the costs of filing and pursuing their protests, including reasonable attorneys’ fees.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs, including reasonable attorneys’ fees, 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, thereby causing the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. 31 U.S.C. § 3554(c)(1)(A) (2006); Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2010); 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. Core Tech Int’l Corp.–Costs, B-400047.2, Mar. 11, 2009, 2009 CPD ¶ 59 at 6.

¹ In “outcome prediction” ADR, the GAO attorney handling the case convenes all of the participating parties, usually by teleconference, and advises them of what he or she believes the likely outcome will be and the reasons for that belief.

Here, the Air Force asserts that the RFP indicated that the agency would evaluate past performance on the basis of previous efforts and contracts and never indicated that various task orders would be evaluated as individual or independent efforts.

As an initial matter, we note that our willingness to inform the parties through outcome prediction ADR that a protest is likely to be sustained, as we did here, 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. National Opinion Research Ctr.--Costs, B-289044.3, Mar. 6, 2002, 2002 CPD ¶ 55 at 3. Here, our conclusion that the protest likely would be sustained was not based on any determination that the final rating was to be assigned at the task order level rather than the contract level. Rather, the GAO attorney noted that the record indicated that in evaluating the contract under which the disputed task order was issued, the agency did not consider the relevance of the task order effort as defined by the solicitation, including whether the effort was for management of personnel performing engineering and either mathematical/statistical analysis, computer science or information technology support. Regardless of whether or not the final rating was assigned at the task order level or the contract level, it was inconsistent with the solicitation for the agency to base the rating on an effort that was not evaluated for compliance with the solicitation definition of relevance. Further, we believe a reasonable inquiry would have shown facts disclosing the absence of a defensible legal position.

With regard to whether corrective action is prompt, where, as here, the merits of the issue were clearly discernable prior to the agency report, corrective action taken after the agency report is not prompt. CDIC, Inc.--Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 2.

We therefore recommend that Symvionics be reimbursed the costs associated with filing and pursuing its protest on this issue, including reasonable attorneys’ fees. Symvionics 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).

The request is granted.

Lynn H. Gibson
General Counsel