

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Odle Management Group, LLC--Costs

File: B-404855.2

Date: March 26, 2012

Cynthia Malyszek, Esq., Malyszek & Malyszek, for the protester.
Peter J. Dickson, Esq., Department of Labor, for the agency.
Scott H. Riback, Esq., and David A. Ashen, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

1. GAO recommends reimbursement of the costs of filing and pursuing protest challenging the agency's conduct of misleading discussions, where issue was clearly meritorious but agency unduly delayed taking corrective action.
2. Protest costs are not recommended with respect to issues concerning agency's evaluation of proposals and source selection decision where such issues were readily severable from challenge to agency's conduct of misleading discussions, the only issue found to be clearly meritorious at Government Accountability Office "outcome prediction" alternative dispute resolution conference.

DECISION

Odle Management Group, LLC (OMG) requests that we recommend that it be reimbursed the costs associated with filing and pursuing its bid protest against the Department of Labor's (DOL) award of a contract to CHP International under solicitation No. DOLJ10UA00032, for outreach and admissions, and career training services.¹

¹ In its initial submission, OMG also requested that we recommend that it be reimbursed its proposal preparation costs. The agency responded to OMG's request and, in its subsequent submission to our Office, OMG made no further mention of its request for proposal costs. We consider this aspect of OMG's request abandoned. Recreation Resource Mgmt. of America, Inc., B-406072, Feb. 1, 2012, 2012 CPD ¶ 60 at 6 n.3.

We grant OMG's request in part and deny it in part.

OMG initially protested the agency's award of a contract to CHP, arguing that the agency miscalculated proposals and made an unreasonable best value source selection decision. OMG also asserted that the agency misled it during discussions. Specifically, the agency advised OMG during discussions that its proposed staffing appeared to be high; in response to the agency's discussion question, OMG lowered its proposed staffing, and the agency ultimately identified OMG's proposed staffing as a weakness.

Subsequent to the development of the record, including the filing of an agency report and receipt of comments, our Office conducted an "outcome prediction" alternative dispute resolution (ADR) conference. In the course of that ADR, the cognizant Government Accountability Office (GAO) attorney advised the agency that GAO likely would sustain OMG's protest on the basis that the agency had misled OMG during discussions. The GAO attorney recommended that the agency reopen discussions, obtain and evaluate revised proposals, and make a new source selection decision. Because our recommendation involved the agency reopening the acquisition, we did not reach the merits of OMG's other issues.

In response to the ADR, DOL advised our Office that it intended to take corrective action. In particular, the agency advised that it would reopen discussions with the competitive range offerors, obtain and evaluate revised proposals and make a new source selection decision. Based on the agency's proposed corrective action, we dismissed OMG's protest as academic. B-404855, May 18, 2011.

In response to OMG's request for reimbursement, DOL concedes that the protester is entitled to a recommendation that it be reimbursed its protest costs. Agency Report at 2. The agency argues, however, that OMG's recovery should be limited to those costs that were incurred in connection with its allegation relating to misleading discussions. According to the agency, although we found this aspect of the protest to be clearly meritorious (as evidenced by the view expressed during the ADR), we did not find the remainder of OMG's allegations clearly meritorious. The agency further maintains that the facts and legal theories underpinning OMG's misleading discussions argument are distinct from the facts and legal theories underpinning the remainder of its protest, such that the costs incurred in connection with the former allegation are clearly severable from the costs incurred in connection with the latter allegations.

We agree with the agency that reimbursement of OMG's protest costs should be confined to the costs incurred in connection with its misleading discussions issue. As noted by the agency, and as reflected in the views of the GAO attorney expressed during the ADR, the only protest issue that we found clearly meritorious was that of misleading discussions. Although as a general rule, we may recommend that a successful protester be reimbursed its incurred costs with

respect to all issues pursued and not merely those upon which it prevails, AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 9, in appropriate cases we have limited our recommendation for the award of protest costs where a part of those costs is allocable to an unsuccessful protest issue that is so clearly severable from the successful issues as to essentially constitute a separate protest. BAE Tech. Servs., Inc.--Costs, B-296699.3, Aug. 11, 2006, 2006 CPD ¶ 122 at 3; Interface Flooring Sys., Inc.-Claim for Attorneys' Fees, B-225439.5, July 29, 1987, 87-2 CPD ¶ 106 at 2-3. In determining whether protest issues are so clearly severable as to essentially constitute 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. See Sodexho Mgmt., Inc.--Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 29.

Here, OMG's technical evaluation and source selection issues were not clearly intertwined with its misleading discussions issue. Whether the agency's evaluation of proposals and source selection decision were reasonable concern legal theories and underlying facts that are distinct and severable from those relevant to OMG's misleading discussions issue. Focused Mgmt., Inc.--Costs, B-404029.6, Oct. 3, 2011, 2011 CPD ¶ 204 at 4-5. Under these circumstances, we conclude that OMG's reimbursement of protest costs should be limited to those costs incurred in connection with its misleading discussions protest basis.

RECOMMENDATION

We recommend that OMG be reimbursed the costs associated with filing and pursuing its protest on the issue of misleading discussions, including reasonable attorneys' fees. OMG 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. Bid Protest Regulations, 4 C.F.R. § 21.8(f)(1) (2011).

The request is granted in part and denied in part.

Lynn H. Gibson
General Counsel