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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Department of the Navy--Request for Reconsideration and for Modification of Remedy

File: B-246784.4

Date: February 17, 1993

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DIGEST

1. Agency's request for reconsideration of initial decision sustaining in part a protest challenging as ambiguous the terms of a solicitation is denied where request contains no statement of facts or legal grounds warranting reversal but merely restates arguments made by the agency in response to the original protest and previously considered by the General Accounting Office.

2. The General Accounting Office will not limit the award of attorneys' fees to successful protesters unless part of their fees is allocable to a protest issue which is so clearly severable as to essentially constitute a separate protest.

DECISION

The Department of the Navy requests that we reconsider our decision in Sea-Land Serv., Inc., B-246784.2, Aug. 24, 1992, 92-2 CPD ¶ 122, in which we sustained in part and denied in part Sea-Land's protest challenging as ambiguous the terms of request for proposals (RFP) No. N00033-91-R-2400(F), issued by the Military Sealift Command (MSC) for ocean and intermodal transportation of Army and Air Force Exchange Service (AAFES) cargo. The agency specifically requests that we reconsider our conclusion that certain aspects of the RFP are ambiguous. The agency also requests that we modify our finding that the protester be reimbursed the costs of filing and pursing the protest, including reasonable attorneys' fees.

We deny the request for reconsideration and affirm our prior finding with regard to recovery of bid protest costs.

BACKGROUND

The RFP, issued on March 26, 1992, contemplates awarding a firm, fixed rate, indefinite delivery, indefinite quantity contract, for a 12-month period. Offerors are required to submit rates for transporting specific commodities from two designated AAFES distribution points in the continental United States to designated inland destinations in Germany, the Netherlands, Belgium and the United Kingdom, where AAFES retail facilities are located. The RFP states that AAFES will ship a minimum of 3,500 40-foot equivalent units of cargo during the term of the contract, and provides for liquidated damages if AAFES fails to meet that commitment. Attachment No. 7 to the RFP provides an estimated number of containers AAFES expects to ship during the life of the contract from each of the two distribution facilities to each of approximately 28 destinations in Europe. Offerors are required to submit rates for shipping the containers from the domestic origin points to European destinations, and separate ocean rates for shipping containers from domestic origin base ports to European destination base ports, for a total of approximately 200 separate rates.[1] The RFP contemplates award to the overall low cost, responsible offeror.

PROTEST BASIS

Sea-Land specifically challenged as ambiguous the evaluation criterion at paragraph C.2 of the RFP, which states in full:

> "The contracting officer will make a comparison of the ocean and single factor rates of the overall low cost evaluated offer . . . to the corresponding ocean and combined ocean/linehaul multifactor rates contained in [the Worldwide Agreement]. Any overall low cost offer that contains rates equal

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[1]Briefly, under the current procurement method, MSC may accept more than one carrier's rates for transporting cargo between the same points. MSC publishes the carriers's names and their accepted rates in the Worldwide Container Agreement and Rate Guide and the Worldwide Shipping Agreement and Rate Guide. The corresponding ocean route covering the origin and destination ports (Route Index 05), and current rates are contained in the Worldwide Container Agreement and Rate Guide (RG 38). The agreement in effect at the time MSC issued the AAFES RFP lists the protester and Lykes Bros. Steamship Co., Inc., as the only two carriers whose ocean rates MSC accepted on Route Index 05.

> to or greater than the rates for the same movements under [the Worldwide Agreement] will be rejected."

Sea-Land argued that the RFP failed to indicate which agreement rates must not be exceeded to be considered acceptable, and also alleged that it was not clear whether the phrase "will be rejected" in paragraph C.2 of the RFP meant that MSC would reject initial offers that exceed the comparison rates, or whether offerors would be given an opportunity to revise any excessive rates.

During the hearing held in this protest, the contracting officer testified that in evaluating rates under paragraph C.2 of the RFP, MSC intends to use for comparison the lowest rates it accepted under the Worldwide Agreement in effect when the RFP was issued (i.e., RG 38). The contracting officer also testified that although MSC does not intend to reject initial offers which contain rates that exceed the agreement rate for comparable movement, it is MSC's intention to ultimately reject those offers if they still contain the excessive rates in the best and final offer.

We found that offerors could have been led to prepare proposals based upon different assumptions of how their offered rates would be evaluated under paragraph C.2, rendering the RFP ambiguous. Specifically, we found that the RFP provides offerors insufficient information with respect to which Worldwide Agreement rates MSC intends to use in the evaluation, because the solicitation did not state that MSC intends to use only the lowest agreement rates in computing through rates as the contracting officer testified. Since approximately 6 months earlier, MSC had accepted all of the Worldwide Agreement rates--including the highest rates listed in that document--as fair and reasonable and in compliance with all applicable laws and regulations, offerors could reasonably interpret the AAFES RFP as announcing that MSC will not reject offers which contain through rates that are lower than the highest agreement rates for comparable movements.

We sustained the protest because offerors could be led to believe that MSC would accept offers which contain through rates that fall within a range of prices that MSC accepted for comparable movements under the Worldwide Agreement, rendering the RFP ambiguous. See US Sprint Com. Co. Ltd. Partnership, B-243767, Aug. 27, 1991, 91-2 CPD ¶ 201. Accordingly, we recommended that MSC amend the AAFES RFP to specify which rates MSC intends to use in evaluating offers under the AAFES solicitation. We also noted that, since it is not clear whether the phrase "will be rejected" in paragraph C.2 means that MSC will reject initial offers, or permit revisions, MSC should clarify its intent with regard

to allowing revisions of initial offers which contain rates that exceed the applicable ceilings. We also found that Sea-Land was entitled to recover the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1992).[2]

RECONSIDERATION REQUEST

The Navy argues that the RFP is not ambiguous because Sea-Land understood that MSC would use the lowest Worldwide Agreement rates in evaluating offers under the AAFES RFP.[3] The agency also argues that the RFP was not defective with respect to its treatment of initial offers because MSC did not intend to automatically reject initial proposals which contained rates higher than the ceiling rates in the agreement. The agency also requests that we modify our finding that the protester be reimbursed all of its costs of pursuing the protest, including reasonable attorneys' fees.

DISCUSSION

The agency argues that both MSC and Sea-Land had the same understanding regarding which agreement rates MSC would use in evaluating offers under the AAFES RFP. In support of its position, the Navy quotes from a section in the protest letter where Sea-Land referred to a competitor's then current agreement rate for Route Index 05, and argued that the agency was conducting an impermissible auction because in order to be considered under the AAFES RFP, Sea-Land must bid below its competitor's lower rate. The agency thus contends that since Sea-Land knew that MSC intended to use the lowest agreement rates in evaluating offers, the RFP is not ambiguous.

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[2]After we issued our decision, the contracting officer notified offerors that MSC "will use rates of the low cost carrier in RG-38/first cycle," and that offerors would be allowed to revise those initial rates that exceed the designated ceilings to comply with paragraph C.2 of the RFP. Sea-Land has since withdrawn its offer.

[3]The agency also argues that the issue regarding the ambiguity in paragraph C.2 of the RFP concerning the use of the lowest Worldwide Agreement rates for comparison was untimely raised. Since Sea-Land filed its protest specifically challenging RFP's evaluation factors, including paragraph C.2 of the RFP on April 17, 1992, prior to the April 24 closing date for receipt of initial proposals, the protest was timely. See 4 C.F.R. § 21.2(a)(1).

Sea-Land does not agree that the protest passage cited by MSC shows that Sea-Land, contrary to its arguments during the protest, really shared MSC's understanding of the challenged provision. When read in context, Sea-Land states, the passage was clearly intended only as an illustration of Sea-Land's argument that the RFP would result in a prohibited auction.

The mere fact that Sea-Land referred to its competitor's agreement rate in its protest is not dispositive of whether, as a legal matter, paragraph C.2 was susceptible to two or more reasonable interpretations regarding which rates MSC would use in evaluating offers, rendering the RFP ambiguous. We found the RFP deficient because it provided insufficient information with respect to which Worldwide Agreement rates MSC intends to use in evaluating proposals. Since the RFP did not state that MSC intends to use only the lowest agreement rates, offerors could reasonably be led to prepare offers based on different assumptions of how their rates will be evaluated. The agency has not shown that our finding in this regard contains either errors of fact or of law, nor has it presented any information that warrants reversal of our decision. See 4 C.F.R. § 21.12(a).[1]

The agency further argues that it did not intend to automatically reject initial proposals which contained rates higher than the agreement ceiling rates. The agency states that if MSC holds discussions, then it intends to include all offerors that have a reasonable chance of being selected for award in those discussions. The agency asserts that since it has always been the contracting officer's intent to hold discussions with offerors in order to obtain rates that comply with the ceilings established by paragraph C.2 of the RFP, and since initial offers here were included in the competitive range, even if some ambiguity existed initially, it did not prejudice any offeror.

The agency's intentions were not apparent from the face of the solicitation; nor does the agency's treatment of initial offers--after Sea-Land filed the protest complaining that the RFP was defective in this regard--clarify how initial

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[1]We note that the agency's arguments and analysis on reconsideration that Sea-Land "knew" which agreement rates MSC would use in evaluating offers, could have and should have been provided in the agency's report in response to the initial protest. The agency also had ample opportunity to, but did not, present this argument during the hearing held in this case, which focused almost exclusively on how offers would be evaluated under paragraph C.2 of the RFP, but it failed to do so.

offers would be treated under paragraph C.2 of the RFP. However, this issue was not an independent basis for sustaining the protest. Since we recommended that the RFP be amended to specify which rates MSC intends to use in evaluating offers, and given MSC's admittedly novel approach to contracting for its transportation requirements, we simply noted that the RFP could also be made clearer with respect to how MSC intended to treat initial offers.

REQUEST FOR MODIFICATION OF FINDING REGARDING RECOVERY OF BID PROTEST COSTS

The agency requests that we modify our finding that the protester is entitled to recover all of its costs of pursuing the protest. The agency argues that we should limit Sea-Land's recovery of protest costs because, "in light of the number and magnitude of the [other] substantive matters raised in the case," the protester spent "[p]recious little effort and time" in litigating the issues upon which we sustained the protest.

The underlying purpose of the provisions in the Competition in Contracting Act (CICA) relating to the entitlement to bid protest costs is to relieve protesters of the financial burden of vindicating the public interest as defined by Congress in the Act. Hydro Research Science, Inc.--Claim for Costs, 68 Comp. Gen. 506 (1989), 89-1 CPD ¶ 572. In this regard, the bid protest process, as mandated by CICA, "was meant to compel greater use of fair, competitive bidding procedures 'by shining the light of publicity on the procurement process, and by creating mechanisms by which Congress can remain informed of the way current legislation is (or is not) operating.'" Lear Siegler, Inc., Energy Prods. Div. v. Lehman, 842 F.2d 1102, 1104 (9th Cir. 1988), quoting Ameron v. U.S. Army Corps of Eng'rs, 809 F.2d 979, 984 (3rd Cir. 1986). Congress believed that the prospect of successful protesters being reimbursed their bid protest costs was necessary to enhance the effectiveness of the bid protest process. See H.R. Rep. No. 98-1157, 98th Cong., 2nd Sess. 24-25 (1984).

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 entitlement provisions of CICA. We limit the award of protest costs to successful protesters where a part of their costs is allocable to a protest issue which is so clearly severable as to essentially constitute a separate protest. See, e.g., CBIS Fed., Inc., 71 Comp. Gen. 319 (1992), 92-2 CPD ¶ 308.

This approach is consistent with the guidance provided by Supreme Court precedent with respect to other fee shifting

statutes. In Hensley v. Eckerhart, 461 U.S. 424 (1983), the Court defined the conditions under which a plaintiff who prevails on only some of its claims may recover attorneys' fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1988).[5] With respect to lawsuits raising multiple issues, the Court noted that, "[l]itigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." Id. at 435. More specifically, recovery should not be limited if the claims are interrelated--i.e., the successful and unsuccessful claims share a common core of facts or are based on related theories. See id. at 434-435; George Hyman Constr. Co. v. Brooks, 963 F.2d 1532 (D.C. Cir. 1992). A similar approach is followed by the General Services Board of Contract Appeals, which limits the scope of recovery of protest costs only where an issue is readily severable from the issues the protester prevailed on; the severable issue is a significant one; and there is a reasonable rationale for severance and fee reduction. See Rocky Mt. Trading Co., Systems Div., GSBCA No. 9750-C(9569-P), June 8, 1990, 90-3 BCA ¶ 23,040; Computervision Corp., GSBCA No. 8838-C(8709-P), Apr. 30, 1987, 87-2 BCA ¶ 19,818.

Here, Sea-Land filed a good faith protest raising several significant issues[6] which warranted further development and our review; each of the protester's arguments revolved to some degree around the basic assertion that the RFP was defective;[7] and the protester prevailed with respect to its allegation that the RFP was ambiguous. In our view, the fact that Sea-Land did not prevail on every allegation related to its basic assertion that the RFP was defective makes the protester no less entitled to full recovery; rather, since the successful and unsuccessful contentions share a common core of facts and are based on related legal theories, they cannot reasonably be viewed as a series of

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[5]This Act provides that in federal civil rights action, the court may allow the prevailing party to recover reasonable attorneys' fees as part of its costs.

[6]In fact, soon after Sea-Land filed its protest, the agency amended the RFP to correct several defects identified by the protester.

[7]Sea-Land also argued that the RFP improperly sets a ceiling on rates it may offer to be considered acceptable, tantamount to a prohibited auction; that various other terms and conditions of the RFP are unclear; that the RFP imposed unreasonable risks on the contractor; and that MSC intends to employ a negotiation strategy prejudicial to offerors. We denied these aspects of the protest.

discrete claims. Accordingly, we conclude that the issue upon which we sustained the protest is not readily severable from those on which Sea-Land was unsuccessful, compare Komatsu Dresser Co., 71 Comp. Gen. 260 (1992), 92-1 CPD ¶ 202, and we affirm our prior finding with regard to the award of costs. See Department of Commerce--Recon., B-238452.3, Oct. 22, 1990, 90-2 CPD ¶ 322 (successful protesters are entitled to protest costs even where protests are sustained on a ground which was not argued by the protesters).

We deny the request for reconsideration and affirm our prior finding regarding recovery of protest costs. We also find that the protester is entitled to recover the costs incurred in responding to this unsuccessful reconsideration request by the agency, including reasonable attorneys' fees. Pacific Northwest Bell Tel. Co., Mountain States Bell Tel. Co.--Claim for Bid Protest Costs, 67 Comp. Gen. 442 (1988), 88-1 CPD ¶ 527.

for Milton J. Socolar
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