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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Red River Waste Solutions, LP--Costs

File: B-411760.4

Date: August 21, 2017

Johnathan M. Bailey, Esq., Bailey & Bailey, PC, for the protester.
Major Stephen P. Smith, Lieutenant Colonel Jose A. Cora, and Scott N. Flesch, Esq., Department of the Army, for the agency.
Glenn G. Wolcott, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation that procuring agency reimburse a greater portion of protester's costs than the agency has offered to pay is denied where the disputed costs are associated with protest allegations that were neither meritorious nor intertwined with the protester's single meritorious protest allegation.

DECISION

Red River Waste Solutions, LP (RRWS), of Dripping Springs, Texas, requests that we recommend reimbursement of all the costs it incurred in pursuing a protest that challenged the terms of request for proposals (RFP) No. W91247-15-R-0026, issued by the Department of the Army to provide solid waste management services at or near Fort Polk, Louisiana.¹ The agency acknowledges that reimbursement of a portion of RRWS's protest costs is appropriate, but maintains that reimbursement should be limited to costs associated with the protest issue on which RRWS prevailed. As discussed below, we deny RRWS's request to the extent it seeks our recommendation of reimbursement beyond the costs that have been offered by the agency.

We deny the protest.

¹ RRWS was the incumbent contractor for these requirements.

BACKGROUND

On October 13, 2015, RRWS filed a protest with our Office challenging the terms of RFP No. W91247-15-R-0026, which required the successful offeror to collect and dispose of solid waste in designated areas in and around Fort Polk, Louisiana.² In summarizing its protest, RRWS stated that its protest allegations “fall into two general categories,” describing the first category as challenges to provisions of the solicitation that were “contrary to standard commercial practices”,³ and the second category as challenges to solicitation provisions that were “impermissibly ambiguous or otherwise irrational.”⁴ RRWS Protest, Oct. 13, 2015, at 2-3.

In January 2016, we sustained the portion of RRWS’s protest that challenged the per-ton pricing requirements, concluding that the agency had failed to support its conclusion that such pricing reflected customary commercial practice. Red River Waste Solutions, LP, *supra*, at 3-7. More specifically, we rejected the agency’s assertions that: it properly relied on other government contracts to determine customary commercial practice; the feedback received in response to the agency’s sources-sought notice supported the agency’s determination that per-ton pricing in refuse contracts reflected customary commercial practice; and there was credible market research supporting the agency’s determination.⁵ *Id.* at 6-7. We denied all

² Earlier, in July 2015, RRWS had filed a similar protest. In response to that protest, the agency took corrective action by issuing various solicitation amendments; providing additional information to offerors; and responding to offeror questions. See Red River Waste Solutions, LP, B-411760.2, Jan. 20, 2016, 2016 CPD ¶ 45 at 3. The costs associated with that protest are not at issue here.

³ In this regard, the solicitation required offerors to submit fixed prices on a per-ton basis for various contract line item numbers (CLINs), including collection/disposal of solid waste; collection/disposal of mixed field waste; and collection/delivery of various recycled materials. See Agency Report (AR), Tab 6, RFP at CLINs 0002, 0004, 0006. There is no dispute that the services contemplated by the solicitation are commercial services subject to the requirements of the Federal Acquisition Regulation (FAR) part 12. RRWS protested that the solicitation’s per-ton pricing requirement failed to comply with those FAR requirements.

⁴ Among other things, RRWS protested that the solicitation’s estimated quantities were flawed in that they differed from RRWS’s projection of quantities. Protest at 13-31.

⁵ We recommended that the agency either: conduct appropriate market research regarding customary commercial practice; properly execute a waiver of the applicable FAR requirements; or revise the solicitation to eliminate per-ton pricing. Red River Waste Solutions, LP, *supra*, at 10.

of RRWS's remaining protest allegations.⁶ Thereafter, the agency requested reconsideration of our decision. We denied the agency's request. Department of the Army--Reconsideration and Request for Modification of Recommendation, B-411760.3, June 15, 2016, 2016 CPD ¶ 162.

RRWS subsequently submitted a request for our recommendation that RRWS be reimbursed for all of its protest costs, including the costs associated with responding to the agency's request for reconsideration. In documents dated August 9 and 19, 2016, the agency responded to RRWS's request, maintaining that RRWS was only entitled to the costs of pursuing its protest that challenged the agency's compliance with the commercial practice requirements and its costs associated with responding to the agency's request for reconsideration. The agency further noted that RRWS's claim for costs did not segregate the costs associated with the different protest issues. Accordingly, the agency applied the "page count" approach to allocate costs⁷ and, on that basis, offered to reimburse RRWS \$6,776.81--which reflected all of RRWS's costs associated with its response to the agency request for reconsideration (\$3,577.50) and 34 percent of its other protest costs (\$3,199.31). Agency's Response to Protester's Request, Aug. 19, 2016, at 6. On August 26, RRWS reaffirmed its request for reimbursement of all protest costs.⁸ We deny RRWS's request.

While it is generally our view that a successful protester should recover the costs incurred with respect to all issues, not merely those upon which it prevailed, see, e.g., Sodexo Mgmt., Inc.--Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 29, we will limit our reimbursement recommendation to costs associated with issues on which the protest was sustained where the unsuccessful issues are clearly severable so as to essentially constitute a separate protest. Id. Issues are severable where they do not share a common core of facts and are not based on related legal theories. Id.

⁶ RRWS abandoned several of its initial protest arguments following its receipt and review of the agency report.

⁷ In similar situations, we have endorsed calculating the reimbursable percentage by dividing the number of pages in a protest that addressed the basis on which the protest was sustained by the total number of pages. See, e.g., DynCorp Int'l LLC--Costs, B-409874.4, Dec. 15, 2016, 2016 CPD ¶ 367 at 3; JRS Staffing Services--Costs, B-410098.6 et al., Aug. 21, 2015, 2015 CPD ¶ 262 at 7 n.1; Intermarkets Global--Costs, B-400660.14, July 2, 2014, 2014 CPD ¶ 205 at 4.

⁸ RRWS acknowledged the existence of one "erroneously charged item for \$135.00" which should not have been included in the cost calculation. RRWS Reply to Army Response to Protester's Request for Reimbursement, Aug. 26, 2016, at 1.

Here, we conclude that RRWS's various challenges to the terms of the solicitation that RRWS characterizes as "impermissibly ambiguous or otherwise irrational" are largely unrelated factually and legally to the issue on which we sustained the protest. Specifically, as noted above, we sustained RRWS's protest on the basis of the agency's failure to reasonably support its conclusion that per-ton pricing of refuse collection contracts reflected customary commercial practice. In contrast, the remainder of RRWS's protest was comprised of complaints that the solicitation's estimated quantities did not coincide with RRWS's own projection of those quantities; that the solicitation contained provisions that were inconsistent with a requirements contract; that the type of containers required by the solicitation was unreasonable; and that the solicitation provisions regarding recycling were flawed.

On the record here, we conclude that all of RRWS's protest allegations, other than its challenge to the agency's basis for concluding that per-ton pricing was consistent with customary commercial practice, were unrelated factually and legally to the basis on which we sustained the protest. According, to the extent RRWS seeks our recommendation of reimbursement in an amount that exceeds what the agency has offered, the request is denied.

Susan A. Poling
General Counsel