



Decision

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This version has been approved for public release.

Matter of: Centurum, Inc.--Costs

File: B-415070.2

Date: March 8, 2018

Richard B. O'Keeffe, Jr., Esq., George E. Petel, Esq., and William A. Roberts, III, Esq., Wiley Rein LLP, for the protester.

Colonel C. Taylor Smith, Lieutenant Colonel Byron G. Shibata, and Major Ryan P. Payne, Department of the Air Force, for the agency.

Alexander O. Levine, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's request that GAO recommend reimbursement of protest costs is granted where the record shows that the agency unduly delayed taking corrective action in response to a clearly meritorious protest ground, and where the remaining protest ground was not severable from the clearly meritorious ground.

DECISION

Centurum, Inc., of McLean, Virginia, requests that we recommend that the Department of the Air Force reimburse it for the reasonable costs of filing and pursuing its protest of the agency's decision to issue solicitation No. FA4890-17-R-0018, which contemplates the issuance of a task order for engineering and installation support services using the General Services Administration's (GSA) One Acquisition Solution for Integrated Services (OASIS) contract program. Centurum argues that the Air Force failed to take prompt corrective action in response to a clearly meritorious protest ground.

We grant the request.

BACKGROUND

The instant request for reimbursement arises following Centurum's¹ protest of the Air Force's efforts to procure engineering and installation support services for its U.S. Central Command's geographic area of responsibility. Contracting Officer's Statement (COS) at 1-2.² At the time of the underlying protest, this requirement was being performed by Centurum Technical Solutions, Inc., an affiliate of the protester, via a task order issued pursuant to the U.S. Navy's SeaPort-e multiple award contract. Id. at 2.

To determine its follow-on acquisition strategy, the Air Force researched different methods to fulfill the requirement. On March 15, 2017, the Air Force posted a sources sought notice on the Federal Business Opportunities website. Id. at 3. The agency received responses from six small businesses and two large businesses. Id. The agency reviewed the capability statements of the six small businesses and determined that four of them had the capability to meet the requirements. Id.

That same month, the agency sought a determination from GSA on whether the requirement fell within the scope of GSA's OASIS program. Id. at 5-6. In May, GSA determined that the requirement was within the scope of the OASIS program. Id. at 6. GSA's determination was based on cost estimates provided by the Air Force that estimated that a majority of labor dollars for the requirement would come from professional services, rather than non-professional services. Id.

On May 19, the Air Force issued another sources sought notice, this time to holders of a GSA OASIS indefinite-delivery, indefinite-quantity (IDIQ) contract, under small business contract pools 1 and 3. Id. at 4. The agency received responses from four small businesses, and determined that all four had the capability to meet the requirement. Id. On July 20, the Air Force issued solicitation No. FA4890-17-R-0018, seeking to issue a task order for the requirement to a holder of an OASIS small business pool 3 contract. Id. at 6.

On August 11, Centurum, Inc. filed a protest, which our Office docketed as B-415070.1, of the agency's decision to procure the requirement via a task order solicitation under the OASIS program. In this regard, the protester argued that the requirement was beyond the scope of the OASIS contract, since that contract is limited to services that are "executive, administrative, or professional." Protest at 11. The protester contended that the instant requirement consists "primarily of blue collar jobs, such as electricians and electronics technicians." Id. The protester acknowledged that GSA had found the

¹ References to "Centurum" in this decision refer to the protester, Centurum, Inc., unless otherwise noted.

² Citations to the COS, the Memorandum of Law, the Protest, and the Agency Report (AR) refer to documents submitted in the underlying protest, which our Office docketed as B-415070.1.

requirement to fall within the scope of the OASIS contract, but attributed this determination to a misunderstanding or miscommunication between GSA and the Air Force. Id. at 14.

In addition to challenging the agency's scope determination, Centurum argued that the agency's decision to set aside the requirement for small businesses was unreasonable. In this regard, the protester challenged the agency's market research, which consisted of surveying OASIS small business contract holders, and also asserted that the unique difficulties of the requirement elevated the risks of designating the procurement as a small business set-aside.

On September 11, the Air Force submitted an agency report responding to the protest. The agency argued that its decision to use the OASIS contract vehicle was reasonable in light of the agency's scope determination, which estimated that a majority of the anticipated costs for the requirement would stem from professional services. The agency also argued that its decision to set aside the requirement for small businesses was reasonably based on its market research, which included receiving and evaluating capability statements from multiple small businesses.

On November 3, the GAO attorney handling this matter requested additional briefing from the agency on several issues. Among other items, the attorney asked the agency to explain the basis for the estimated total hours per labor category that were used in the Air Force's independent government cost estimate (IGCE). The attorney noted that, for at least one labor category, there appeared to be an error in the hours used by the agency. For that labor category, the estimated total hours used in the IGCE calculation did not match the estimated hours for that labor category found in the agency's underlying documentation, which listed such hours across the bases included in the requirement's scope of work.

On November 8, the agency's counsel emailed our Office, stating that:

We need to inform the GAO that, in the course of researching the records in response to the GAO's questions, it appeared that an inadvertent clerical error might have previously occurred, possibly resulting in inaccurate data in the Agency's Independent Government Cost Estimate.

November 8 Agency Email at 1. The agency therefore advised that it would take corrective action by cancelling the solicitation in its entirety and reassessing its requirements.

Following the agency's notice of corrective action, our Office dismissed Centurum's protest as academic. On November 28, the protester timely filed the instant request that we recommend the reimbursement of protest costs.

DISCUSSION

The protester argues that the agency unduly delayed taking corrective action in response to Centurum's clearly meritorious protest. Specifically, Centurum argues that its protest asserted, from the outset, that the Air Force had mistakenly determined the actual labor mix and scope of the requirement for engineering and installation support services, "specifically the estimated mix of professional versus non-professional labor categories." Protester's Reply to Agency Resp. to Req. for Costs at 2. The protester asserted that this error led the agency to issue the solicitation under GSA's OASIS program, even though the scope of that program is limited to professional services. Centurum further argues that the agency failed to reasonably investigate this allegation, and instead unduly delayed taking corrective action. The Air Force opposes the request for reimbursement, arguing that the initial protest was not clearly meritorious and that the agency promptly took corrective action once potential problems with the IGCE were raised by our Office.

Our Office may recommend the 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. Competition in Contracting Act of 1984, 31 U.S.C. § 3554(c)(1)(A); Bid Protest Regulations, 4 C.F.R. § 21.8(e). 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. Triple Canopy, Inc.--Costs, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 3.

The agency argues that Centurum's initial protest was not clearly meritorious, asserting that it did not present a prima facie case that could form a valid basis for sustaining the protest. In support of this argument, the agency notes that the protest did not specifically challenge the agency's labor hours estimate. The Air Force contends that because of this, further record development was needed before errors in these estimates could be discovered.

Based on our review of the record, we find Centurum's challenge to the agency's scope determination to be clearly meritorious. In this regard, the initial protest asserted that the Air Force had made an error in determining that the requirement was suitable for procurement through the OASIS contract, because that contract is reserved for services that are "executive, administrative, or professional." Protest at 11. The protest also asserted that the requirement being solicited consisted "primarily of blue collar jobs." Id. While this protest argument did not specifically challenge the agency's labor hour estimates--since the protester did not know that the labor hour estimates were the basis for the agency's erroneous determination that a majority of the anticipated costs for the requirement would stem from professional services--we nevertheless find that a reasonable agency inquiry into this argument would have revealed facts disclosing the absence of a defensible legal position.

In its agency report, the Air Force responded to the above argument by asserting that the requirement was primarily for professional services, as shown by the agency's IGCE, which estimated that the majority of the costs of the requirement would stem from professional services. See Memorandum of Law at 10 ("The labor cost percentage was the probative factor in the GSA's determination that the Air Force's task order falls within the scope of the OASIS IDIQ, a determination that was subsequently affirmed at multiple meetings between the Air Force and GSA").

In reviewing the validity of this assertion, however, our Office found large discrepancies between the hours used to calculate the IGCE and the underlying hours estimated by the agency for the respective labor categories. Specifically, the hours used in the IGCE for two of the nonprofessional labor categories were vastly understated in comparison to the actual hours estimated for these categories, while the hours used for two of the professional labor categories were vastly overstated.

For example, in option year one, the IGCE was calculated, in part, using a combined estimate of 87,540 hours for two of the nonprofessional labor categories, I/O Cable Engineer CAD Tech and I/O Cable Engineer Tech II. See AR, Tab 3, IGCE, at 6; see also AR, Tab 11, Memo. For Record, at 1 (describing which labor categories were considered "professional categories" versus "non-professional" categories). Yet, the underlying documentation for the IGCE showed that the agency actually estimated the hours for these two labor categories as 122,400 hours. See AR, Tab 3, IGCE, at 19. Conversely, for two of the professional labor categories, I/O Cable Engineer and I/O Cable Engineer Tech III (Sup/Comm Planner), the IGCE was calculated using an hour estimate of 77,260 hours. See id. at 6. Yet, the actual hours estimated for these two labor categories amounted to only 38,400. See id. at 19.

We think that a reasonable inquiry by the Air Force into the allegations raised by the initial protest would have led the agency to discover the widespread errors contained in the IGCE. In our view, a reasonable inquiry would have entailed, at a minimum, an investigation into the protest grounds raised by the protester, including a meaningful review of the agency's basis for disputing such grounds. There is no evidence in the record, however, that the agency conducted such a review.

For instance, the protester asserted that the requirement, as performed by Centurum Technical Solutions, Inc., involved mostly non-professional services, and that the follow-on requirement had not significantly changed in scope. Had the Air Force examined this allegation, e.g., by reviewing the scope of the services being provided on the prior effort in relation to the scope of services estimated for the follow-on effort, the agency would almost certainly have discovered a discrepancy caused by key errors found in the agency's IGCE. We therefore conclude that a reasonable agency inquiry into this argument would have revealed facts disclosing the absence of a defensible legal position. See Triple Canopy, Inc.--Costs, supra.

The agency additionally contends that it did not unduly delay taking corrective action because the initial protest failed to specifically challenge the agency's cost estimates.

The agency notes that it took corrective action within five days of the GAO pointing out the errors in the IGCE.

Here, we find that the agency did not take prompt corrective action. In this regard, our Office generally considers corrective action to be prompt if it is taken before the due date for the agency report responding to the protest but not prompt where it is taken after that date. Alsalam Aircraft Co.--Costs, B-401298.3, Nov. 5, 2009, 2009 CPD ¶ 208 at 3. In this case, the due date for the agency report was September 11, yet the agency did not take corrective action until nearly two months later, *i.e.*, November 8. While the agency asserts that it took corrective action within a week of our Office flagging the errors in the IGCE, as discussed above, we find that a reasonable agency inquiry into the protester's challenge to the Air Force's scope determination would have led the agency to discover that the determination was based on faulty labor hour estimates. Accordingly, we conclude that the agency unduly delayed taking corrective action in response to a clearly meritorious protest ground.

The protester did not argue that its other protest ground, which challenged the Air Force's decision to set aside the requirement for small businesses, was clearly meritorious, and we therefore will not consider this issue. Accordingly, we will consider whether the reimbursement of only a portion of the protester's costs is proper.

As a general rule, a successful protester should be reimbursed the costs incurred with respect to all the issues pursued, not merely those upon which it has prevailed. The Salvation Army Cmty. Corr. Program--Costs, B-298866.3, Aug. 29, 2007, 2007 CPD ¶ 165 at 7. 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. Burns & Roe Servs. Corp.--Costs, B-310828.2, Apr. 28, 2008, 2008 CPD ¶ 81 at 3.

Here, we do not find--nor does the agency argue--that Centurum's second protest argument is clearly severable from its meritorious challenge to the agency's scope determination. In this regard, both arguments arose from a similar core set of facts and are based on related challenges to the agency's decision to use the OASIS contract vehicle. In the first protest argument, Centurum challenged the agency's use of the OASIS contract vehicle, because the requirement did not fall within that contract's scope. In the second protest argument, the protester challenged the agency's decision to set aside the requirement for small businesses under the OASIS contract. In both cases, the protester argued that the OASIS contract vehicle was not an appropriate mechanism to fulfill the requirement. Accordingly, we conclude that the two protest grounds are intertwined, and that Centurum should therefore be reimbursed its protest costs arising from raising both protest arguments.

RECOMMENDATION

We recommend that the Air Force reimburse Centurum the reasonable costs of filing and pursuing its protest challenging the agency's decision to issue a task order solicitation under GSA's OASIS contract. Centurum should file its claim for costs, detailing and certifying the time expended and costs incurred, with the agency within 60 days of receipt of this recommendation. 4 C.F.R. § 21.8(f)(1).

The request is granted.

Thomas H. Armstrong
General Counsel