



DOCUMENT FOR PUBLIC RELEASE

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

Decision

Matter of: PricewaterhouseCoopers Public Sector, LLP--Costs

File: B-415205.3

Date: May 9, 2018

Paul A. Debolt, Esq., Emily A. Unnasch, Esq., Michael T. Francel, Esq., and James Y. Boland, Esq., Venable LLP, for the protester.
April Breck, Esq., Department of Defense, for the agency.
Kenneth Kilgour, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

GAO recommends reimbursement of protest costs where the agency unduly delayed taking corrective action in response to a clearly meritorious protest where the agency failed to properly assess whether the awardee had an unmitigated organizational conflict of interest.

DECISION

PricewaterhouseCoopers Public Sector, LLP (PwC), of McLean, Virginia, requests that our Office recommend that the Department of Defense (DoD), Defense Finance and Accounting Service (DFAS), reimburse the protester's cost of filing and pursuing its protest of the issuance of a task order to RMA Associates, LLC, of Arlington, Virginia, under request for quotations (RFQ) No. HQ0423-17-Q-0009, for audit readiness and remediation services.

We grant the request.

BACKGROUND

The National Defense Authorization Act for Fiscal Year 2010 (the Act) required that DoD develop and maintain the Financial Improvement and Audit Readiness Plan. The Act required DoD to set forth in the plan specific actions and costs associated with correcting the financial management deficiencies that impair DoD's ability to prepare timely, reliable, and complete financial management information and ensuring that

DoD's financial statements were validated as ready for audit by September 30, 2017.¹ Agency Report (AR), Exh. 13, RFQ, Performance Work Statement (PWS) at 1. To help accomplish these financial management goals, DoD issued this solicitation to address the need for a certified public accounting firm with financial audit readiness and/or audit/examination experience with large federal agencies or organizations of comparable size and complexity to address issues impeding auditability of appropriations. Id. at 1-2.

DFAS issued the RFQ pursuant to the procedures of Federal Acquisition Regulation (FAR) subpart 8.4, to firms holding a General Services Administration Federal Supply Schedule contract referred to as the Professional Services Schedule for Financial Business Solutions. RFQ at 3. The RFQ contemplated the award of a fixed-price and labor hour task order for a base term of 12 months, with four 12-month options. PWS at 2, 13. Award was to be made to the vendor whose quotation represented the best value to the government, based on a consideration of the following evaluation factors, listed in descending order of importance: experience, past performance, project management plan (PMP), peer review report, price, and small business participation. RFQ at 6-8. All non-price factors, when combined, were significantly more important than price. Id. at 8.

With respect to project management, offerors were to describe their approach to meeting the solicitation's requirements, and provide an organization chart and staffing plan. RFQ at 4-5. As relevant to the protest, the RFQ required that at least four members of the proposed contractor team possess an active top secret/sensitive compartmented information (TS/SCI) clearance with a completed background investigation in order to access secure sites/information. PWS at 14.

The RFQ also required the vendor's future performance and work products to "be in compliance and consistent with [a list of] Federal and [DoD] regulations, directives, guidance and all industry specific requirements." PWS at 18. These compliance requirements included the Government Management Reform Act of 1994 and the Chief Financial Officers Act of 1990. Id. at 18-19. According to the RFQ, those two Acts "require the annual preparation and audit of Federal agency financial statements in accordance with generally accepted accounting principles (GAAP) and generally accepted government auditing standards (GAGAS)." Id. at 1.

The RFQ advised firms that if they were currently providing support or anticipated providing support to DFAS that created or represented an actual or potential organizational conflict of interest (OCI), they must disclose this actual or potential OCI in

¹ Subsequent to the issuance of the solicitation, the National Defense Authorization Act for Fiscal Year 2018 repealed those requirements and codified a substantially similar provision for DoD to maintain a Financial Improvement and Audit Remediation Plan. See Pub. L. No. 115-91, div. A, title X, § 1002(c)(1)-(3), 131 Stat. 1538 (2017), codified at 10 U.S.C. § 252.

accordance with FAR subpart 9.5. PWS at 17. Firms were also required to complete and sign an OCI statement, in which the firm and its subcontractors or teaming partners agreed to disclose information concerning the actual or potential conflict with any quotation or any solicitation relating to any work in the task order. Id. In addition, the RFQ authorized contractor teaming agreements (CTAs) “to potentially avoid an organizational conflict of interest.” RFQ at 5. The solicitation required quotations to fully explain any CTAs and to include signed copies. Id.

RMA and PwC submitted quotations. AR, Tab 17, Best-Value Decision Memorandum at 1. RMA’s quotation included OCI certificates for RMA and its three teaming partners. AR, Tab 15, RMA Quotation at C-1-C-4. Each of the certificates contained the following statement, followed by a relevant list of agencies: “Agencies for which [the firm] will NOT receive allocated work share as part of the CTA structure under RMA.*” Id. (emphasis in original). The footnote at the asterisk stated: “*This list will be updated as required based on new client acceptances, waivers, and any changes in internal/external independence policies and regulations.” Id.

The OCI agreements did not provide specifics on the teaming partners’ contracts with the listed agencies, or identify the nature of the work being performed or the contract number of the requirement. See id. PwC did not propose CTAs.

The table below summarizes the evaluation results.

Factor	PwC	RMA
Experience	Good	Good
Past Performance	Substantial	Substantial
Project Management Plan	Good	Outstanding
Peer Review Report	Acceptable	Acceptable
Price	\$48,860,097	\$48,161,180
Small Business Participation	Pass	Pass

AR, Tab 17, Best-Value Decision Memorandum, at 7. The agency issued the task order to RMA, and PwC protested the award to this Office.

PwC’s initial protest included allegations that the awardee had an unmitigated impaired objectivity OCI that precluded it from task order award and that the awardee was incapable of performing the work under the RFQ’s independence standards. Protest at 14-22. The protester also challenged the reasonableness of the agency’s evaluation of PwC’s quotation, arguing that the assignment of a weakness for failure to propose leads and task leads with TS/SCI clearances was unreasonable where the solicitation was amended to remove that requirement, and arguing that the agency unreasonably failed to assign additional strengths to PwC’s quotation. Id. at 20-25. PwC further asserted that the agency unreasonably failed to assess RMA’s quotation a weakness for its proposed use of CTAs. Id. at 25-26. Finally, PwC argued that, given these varied

evaluation errors, it was clear that the agency's evaluations reflected disparate treatment and that the agency's best-value decision was flawed.² See id. at 26-28.

The agency refuted the allegation that the awardee had an unmitigated impaired objectivity OCI by pointing out that the RFQ "explicitly allowed quoters to propose a CTA to avoid or mitigate any such OCIs." Memorandum of Law (MOL) at 4 (emphasis in original). With respect to PwC's contention that the awardee would be unable to perform the work under the RFQ's independence standards, the agency argued that, because this was a task order for readiness and remediation work and not the audit itself, "'independence' was not an evaluation factor for this [task order], and was not mentioned in the RFQ." Id. at 5 (emphasis in original). To the extent that independence issues arose in the course of performance, the agency asserted that such issues would be matters of task order administration. Id. at 5, n.3.

With respect to the protester's contention that its quotation had been improperly assessed a weakness for failure of its leads and task leads to possess TS/SCI clearances, the agency acknowledged that an amendment to the RFQ had removed the requirement that at least two senior managers and one senior analyst possess a TS/SCI clearance. Id. at 9. The agency explains, however, that it assessed the protester's quotation a weakness because PwC's proposed quality control plan provided for its leads and task leads to review the work of subordinates, which would require PwC's employees to have clearances they did not possess. AR, PwC Non-Price Factors 3, 4 & 6 Rating Sheet at 2-3; MOL at 9.

The agency also argued that the protester's allegations concerning failure to assess additional strengths in PwC's quotation amounted to mere disagreement with the evaluation. MOL at 10-11. The agency asserted the same defense against PwC's allegation that the agency should have assessed a weakness in RMA's quotation for proposing the use of CTAs. Id. at 11-12. Finally, the agency asserted that, because the underlying bases of protest lacked merit, PwC's allegation that the agency engaged in disparate treatment of the offerors also lacked merit. Id. at 13.

PwC's response to the agency report included three supplemental protest allegations, the first of which was a multi-faceted assertion that the agency's assessment of RMA's OCI mitigation plan was unreasonable. See Comments and Supp. Protest at 7-29. PwC first argued that the awardee failed to adequately acknowledge and describe the nature of its OCIs. Id. at 9-12. PwC next asserted that RMA's mitigation plan was inadequate, id. at 12-24, and that the agency did not meaningfully assess the OCIs associated with the awardee's team. Id. at 24-28. Finally, PwC contended that the agency's understanding of the RFQ and OCI regulations was flawed. Id. at 28-29.

² PwC also asserted that DFAS should have assigned PwC's proposal strengths under the past performance factor, and failed to conduct a reasonable price realism analysis. PwC withdrew these allegations in its comments on the agency report. Comments at 48, n.9, and 49, n.10.

PwC's second supplemental protest argument alleged that the agency unreasonably evaluated the awardee's past performance. In this regard, PwC contended that the agency unreasonably considered the past performance of all of RMA's teaming partners, even though only one could perform the audit readiness and remediation work for DFAS, due to conflicts on the part of the other teaming partners. Id. at 30-32. PwC further argued that the awardee's quotation did not demonstrate that the one CTA partner that could perform this work had the capability to perform the amount of work required.

The protester's final supplemental allegation was that the agency unreasonably assigned a strength to RMA's quotation for use of an Executive Level Steering Committee (ELSC), which consisted of personnel from each of RMA's CTA partners. The protester argued that the ELSC undercut the awardee's intent to mitigate the OCI through CTAs. The use of CTAs, where program management would be performed by a committee comprised of personnel from each of the teaming partners, would, the protester argued, make meaningful separation unachievable. Without that separation of effort, there could be no effective OCI mitigation. See id. at 29-30.

In its comments on the agency report, PwC did not contest the agency's rationale for assessing a weakness in PwC's quotation for failure to have supervisory staff with TS/SCI clearances. See id. at 42-43. The protester argued instead that the agency engaged in disparate treatment, because RMA's quotation also called for personnel without TS/SCI clearances to review work performed by persons with clearances and RMA's quotation was not assessed a comparable weakness. Id. at 43-48. PwC continued to assert that the agency's evaluation unreasonably failed to assign certain strengths to the protester's quotation. Id. at 48-49.

The agency's reply to the protester's comments and supplemental protests argued only that the supplemental protest repeated arguments set forth in the initial protest and therefore, the agency had already responded to the arguments in its request for dismissal and initial agency report.³ See Agency Response to Supp. Protest. The agency reply also stated that the awardee's ELSC allows for DFAS to receive the contributions of numerous team members and that this is, "along with mitigating OCIs, largely the purpose of the Contractor Teaming Arrangement that the RFQ contemplated." Id. at 3.

³ The agency argued that specific examples of general allegations that PwC raised in its original protest were untimely, where GAO does not permit the staggered presentation of such examples. Agency Response to Supp. Protest at 3, quoting Alliance Tech. Servs., Inc., B-311329, B-311329.2, May 30, 2008, 2008 CPD ¶ 108 at 4 n.2. Where, as here, a protester's timely comments on an agency report expand on a timely initial protest allegation, and the protester's new arguments are based on documents produced in the agency report, those new arguments are timely. See DRS Tech. Servs., Inc., B-411573.2, B-411573.3, Nov. 9, 2015, 2015 CPD ¶ 363 at 12.

After review of the parties' submissions, the GAO attorney assigned to the protest convened a litigation risk alternative dispute resolution (ADR) teleconference. During that teleconference, the GAO attorney advised the agency of a significant risk that the protest would be sustained on the basis that the agency failed to meaningfully consider whether the awardee had an impaired objectivity OCI, and, if so, whether the awardee had proposed an adequate mitigation plan. The GAO attorney further advised the agency that it was difficult to separate issues related to the OCIs from the issue of whether the agency had properly evaluated the awardee's ability to complete task order performance in accordance with the solicitation's independence standards. The attorney pointed out that the RFQ contained explicit independence requirements and that the awardee's quotation itself was replete with references to the need for independence.⁴

Following the teleconference, the agency filed a notice of intent to take corrective action, namely, canceling award to RMA, holding discussions with both offerors, and requesting and evaluating final quotations. We dismissed the protest as academic. PricewaterhouseCoopers Public Sector LLP, B-415205, B-415205.2, Nov. 30, 2017 (unpublished decision).

DISCUSSION

PwC requests that our Office recommend that the agency reimburse PwC the reasonable costs of filing and pursuing its protests (B-415205, B-415205.2). Request at 4-8, 12. PwC argues that its protest allegations were clearly meritorious and that the agency unduly delayed in taking corrective action. The agency asserts that the allegations were not clearly meritorious, because the GAO attorney conducted litigation risk ADR and not outcome prediction ADR. Opposition to Request for Costs at 2-3.

Under the Competition in Contracting Act of 1984 (CICA), our Office may recommend that protest costs be reimbursed where we find that an agency's action violated a procurement statute or regulation. 31 U.S.C. § 3554(c)(1). Our Bid Protest Regulations further provide that where the contracting agency decides to take corrective action in response to a protest, we may recommend that the protester be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(e). Our Regulations do not contemplate a recommendation for the reimbursement of protest costs in every case in which an agency takes corrective action, but rather only where an agency unduly delays 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. Chase Supply, Inc.--Costs, B-411849.3, May 17, 2016, 2016 CPD ¶ 134 at 4-5.

⁴ See AR, Tab 15, RMA Quotation at 37, 77-80, 83, 164, 169, 192-94, 202, 211-13, 221-22, 246. In many instances, the need for independence is explicitly linked to a discussion of OCI avoidance or mitigation. See id.

A protest is clearly meritorious where a reasonable agency inquiry into the protester's allegations would reveal facts showing the absence of a defensible legal position. Overlook Sys. Techs., Inc.--Costs, B-298099.3, Oct. 5, 2006, 2006 CPD ¶ 184 at 6. With respect to the promptness of the agency's corrective action, we review the record to determine whether the agency took appropriate and timely steps to investigate and resolve the impropriety. Chant Eng'g Co., Inc.--Costs, B-274871.2, Aug. 25, 1997, 97-2 CPD ¶ 58 at 4. While we consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest, we generally do not consider it to be prompt where it is taken after that date. CDIC, Inc.--Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 2. Where a new protest allegation is raised in the comments to the agency report, corrective action is prompt if taken prior to the deadline set by our Office for the agency's response to the protester's comments. See Alliant SB CTA, LLC--Costs, B-411842.5, Nov. 4, 2016, 2016 CPD ¶ 323 at 2-3.

As an initial matter, the agency asserts that the protester's claim that its allegations were clearly meritorious is belied by the fact that GAO conducted litigation risk ADR, rather than outcome prediction ADR. Opposition to Request for Costs at 2-3. The agency properly recognizes a distinction between these two forms of ADR, but any argument that a protest allegation cannot be clearly meritorious where the GAO attorney offers the agency an assessment of its litigation risk, rather than outcome prediction ADR, lacks support in GAO decisions. See Protection Strategies, Inc., B-414573.3, Nov. 9, 2017, 2017 CPD ¶ 348 at 6 (recommending that protester be reimbursed costs of bringing a meritorious protest allegation, after agency took corrective action in response to litigation risk ADR teleconference); Loyal Source Gov't Servs., LLC--Costs, B-407791.4, Feb. 14, 2014, 2014 CPD ¶ 139 at 4 (same); The Jones/Hill Joint Venture--Costs, B-286194.3, Mar. 27, 2001, 2001 CPD ¶ 62 at 13-14 (same); cf., Inter-Con Security Sys., Inc.; CASS, a Joint Venture--Costs, B-284534.7, B-284534.8, Mar. 14, 2001, 2001, CPD ¶ 54 at 3 (noting that GAO's "willingness to provide an outcome prediction is generally an indication that the protest is viewed as clearly meritorious"); York Bldg. Servs., Inc.; Olympus Bldg. Servs., Inc.--Costs, B-282887.10, B-282887.11, Aug. 29, 2000, 2000 CPD ¶ 141 at 4 (same). Because the GAO attorney's choice to conduct litigation risk rather than outcome prediction ADR does not demonstrate that the allegations were not clearly meritorious, we turn to a consideration of the merits of the protest allegations.

OCI and Compliance with Solicitation Independence Standards

The protester asserted that RMA was precluded from contract award due to an unmitigatable OCI. Protest at 14-16. Throughout the course of record development, the agency maintained that a finding by the agency that the awardee had an unmitigated OCI, despite having CTAs, would conflict with the terms of the RFQ. See, e.g., MOL at 4. Such an assertion is not supported by the plain language of the solicitation, which authorizes the creation of CTAs for the potential avoidance of OCIs. See RFQ at 5 (noting that offerors could propose CTAs "to potentially avoid an organizational conflict of interest").

Nothing in the RFQ supports the agency's claim that CTAs, in and of themselves, mitigate possible OCIs. Further, nothing in the record demonstrates that the agency considered anything other than the CTAs when assessing the OCIs. Rather, there is only a note in the record stating that on July 19, 2017, the contracting officer asked the technical evaluation team if the CTAs, OCI letters, and mitigation approach provided by RMA adequately addressed potential conflicts of interest. AR, Exh. 22, Conversation Record, July 19, 2017. According to the note, the technical evaluation team (TET) responded that the "RMA quote was fine and they had no concerns regarding OCI or independence based on the information provided by RMA and its CTA members." Id. Accordingly, there is nothing in the record demonstrating that the agency meaningfully considered RMA's potential OCI. See NCI Information Sys., Inc., B-412870.2, Oct. 14, 2016, 2016 CPD ¶ 310 at 13. The agency's argument is not legally defensible, and we find the allegation that the agency failed to assess the potential for an OCI in RMA's quotation to be clearly meritorious.

Relatedly, the protester also argued that RMA was also incapable of meeting a material requirement of the RFQ, that performance of the work meet certain independence standards. Protest at 17-19. The agency maintained that the solicitation contained no independence requirements. See, e.g., MOL at 5 (noting that "'independence' was not an evaluation factor for this contract, and was not mentioned in the RFQ") (emphasis in original). However, the RFQ required that vendor performance be in compliance and consistent with various federal regulations, directives, and "all industry specific requirements," including compliance with the Government Management Reform Act of 1994, and Chief Financial Officers Act of 1990. PWS at 18. The RFQ explained that those two Acts require the use of GAGAS for audits of financial statements. Id. at 1. The protester argued that Chapter 3 of GAGAS, also known as the GAO Yellow Book, establishes general standards and provides guidance for performing financial audits. Protest at 12 (citing Government Auditing Standards, Chap. 3, Introduction at 27). The standards "emphasize the importance of the independence of the audit organization and its individual auditors." Id. (quoting Government Auditing Standards, Chap. 3, at 27).

As noted above, the awardee's quotation made numerous references to independence, frequently in the context of avoiding OCIs. Therefore, the plain language of the solicitation and the content of the awardee's proposal both contradict the agency's assertion that performance of this requirement would not implicate independence requirements. Accordingly, we also find the allegation that the agency failed to consider the awardee's ability to perform the task order in accordance with the RFQ's independence standards to be clearly meritorious.

Challenges to the Technical Evaluation and Supplemental Protest Allegations

As discussed above, the protester challenged various aspects of the agency's technical evaluations, including whether the agency engaged in disparate treatment by assigning the protester a weakness for failure to propose task leads with the required clearance while the awardee's quotation was not assessed a similar weakness. The protester

also argued that the agency failed to assign certain strengths to the protester's quotation. Further, the protester asserted the following three supplemental protest grounds: the awardee failed to adequately acknowledge and describe the nature of its OCIs; the agency unreasonably evaluated the awardee's past performance; and the agency unreasonably assigned a strength to RMA's quotation for use of an ELSC that undercut the awardee's intent to mitigate the OCI through apportioning the tasks to teaming partners with no conflicts. The agency elected to respond to the protest and supplemental protests rather than take corrective action.

As a general rule, we recommend that a successful protester be reimbursed its incurred costs with respect to all issues pursued, and not merely those upon which it prevails. This is because limiting recovery of protest costs to only those issues on which the protester prevailed would be inconsistent with the broad remedial congressional purpose behind the cost reimbursement provisions of the bid protest provisions of CICA. See 31 U.S.C. § 3554(c)(1)(A); Fluor Energy Tech. Servs., LLC--Costs, B-411466.3, June 7, 2016, 2016 CPD ¶ 160 at 3.

In appropriate cases, we limit 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. In determining whether protest issues are so clearly severable as to essentially constitute separate protests, our Office considers, among other things, whether the successful and unsuccessful arguments share a common core set of facts, are based on related legal theories, or are otherwise not readily severable. Id.

Here, some of PwC's challenges to the agency's technical evaluation relate directly to the protest allegations that the agency did not reasonably assess whether the awardee had an impaired objectivity OCI. For example, the protester's assertion that the agency unreasonably evaluated the awardee's past performance--ignoring each teaming partner's conflicts in performance--implicates the awardee's organizational structure that gave rise to the initial protest concerning the OCI allegation. Similarly, the protester alleged that the agency unreasonably awarded RMA's proposal a strength for its ELSC, where, PwC argued, the ELSC--which was comprised of personnel from all of the teaming partners--served to undermine RMA's attempt to mitigate the OCI by precluding teaming partners with conflicts from performing certain portions of the requirement. Comments and Supp. Protest at 30. These challenges to the agency's technical evaluation are subsumed into the larger issue of the agency's failure to reasonably assess whether the awardee had an unmitigated impaired objectivity OCI. Because we find that the challenges to the agency's technical evaluation are not readily severable from the issue of whether the awardee had an OCI, we see no reason to deviate from our general rule that a successful protester be reimbursed its incurred costs with respect to all issues pursued, and we recommend that the agency also reimburse PwC the costs of pursuing those allegations, as well. See T Square Logistics Servs. Corp., Inc.--Costs, B-297790.6, June 7, 2007, 2007 CPD ¶ 108 at 8-9 (protest costs for issues other than those directly addressed by GAO during ADR need not be severed from

costs for other protest grounds found to be clearly meritorious, where the issues are interconnected and based on common factual underpinnings).

RECOMMENDATION

We recommend that PwC be reimbursed the reasonable costs of filing and pursuing its protest and supplemental protest, including reasonable attorneys' fees because the agency unduly delayed taking corrective action in response to clearly meritorious protest allegations. The protester should file its claim for costs, detailing and certifying the time expended and costs incurred, directly 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