



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: Valkyrie Enterprises, LLC--Costs

File: B-415633.2

Date: October 29, 2018

J. Bradley Reaves, Esq., and Beth V. McMahon, Esq., ReavesColey, PLLC, for the protester.

Tiffany Alford, Esq., Department of the Navy, for the agency.

Stephanie B. Magnell, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Reimbursement of costs of filing and pursuing protest is recommended, where we conclude that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, because a reasonable agency inquiry into initial protest allegations would have revealed prejudicial errors in the agency's best-value tradeoff decision.

DECISION

Valkyrie Enterprises, LLC (Valkyrie), of Virginia Beach, Virginia, requests that our Office recommend that the Department of the Navy, Naval Surface Warfare Center Philadelphia, reimburse it for the costs of pursuing its protest of the issuance of a task order to The McHenry Management Group, Inc. (McHenry), of Chesapeake, Virginia, under request for task order proposals (RFTOP) No. N00024-16-R-3157, for integrated logistics support services.

We grant the request.

BACKGROUND

The RFTOP, which was set aside for small businesses, was issued in accordance with Federal Acquisition Regulation subpart 16.5 on October 19, 2016, for the procurement of engineering, logistics and program support services. B-415633, Contracting Officer's Statement (COS) at 1-2; RFTOP at 2, 56. The RFTOP provided for the issuance of a cost-plus-fixed-fee task order with a 12-month base period and four 12-month option periods to the small business contract holder submitting the best proposal, considering

the factors of technical merit, past performance, and cost, in descending order of importance. RFTOP at 2, 56-59.

The Navy received five proposals by the November 30 deadline and issued the task order to McHenry on September 29, 2017. COS at 2. The agency conducted a debriefing on October 23, and Valkyrie filed its protest with our Office on October 30. The protester argued that the agency's past performance evaluation and technical evaluation were inconsistent with the terms of the solicitation. B-415633, Protest at 11-14. In addition, Valkyrie asserted that the agency's cost realism analysis included an improper upward adjustment to Valkyrie's anticipated costs and failed to account for certain costs in McHenry's proposal. Id. at 14-18. Valkyrie also challenged the agency's best-value tradeoff decision as "mechanistic" and defective for failing to evaluate the relative merits of offerors' technical approaches and past performance. Id. at 7-9. Finally, Valkyrie argued that the tradeoff decision was improperly based on the flawed underlying evaluations. Id. at 19.

The Navy filed its agency report on November 28, defending its technical, past performance, and cost realism evaluations and best-value tradeoff decision. See generally B-415633, Memorandum of Law. In its comments, Valkyrie reasserted its challenges to the agency's evaluation and best-value tradeoff decision. See generally B-415633, Comments at 2-14.

On December 19, the agency notified our Office of its intent to take corrective action, stating that it was terminating the contract with McHenry and would "consider all protest grounds raised." Notice of Corr. Action, Dec. 19, 2017. Our Office dismissed the protest as academic. Valkyrie Enters., LLC, B-415633, Dec. 29, 2017 (unpublished decision).

On January 4, 2018, Valkyrie requested that our Office recommend reimbursement of the fees and costs incurred pursuing its protest. Req. for Recommendation of Reimbursement of Costs, Jan. 4, 2018. The agency opposed Valkyrie's request on the basis that the corrective action was not unduly delayed. Opp'n to Req. for Recommendation of Payment of Protest Costs, Jan. 5, 2018, at 1-2. The Navy also claimed that it took corrective action only in response to the challenge to the best-value tradeoff decision, which it conceded was clearly meritorious. Id. at 3.

On February 26, the agency reopened discussions and requested supplemental cost and technical information from the protester. Agency Ltr. Reopening Discussions, Feb. 26, 2018. On April 13, the Navy supplemented its opposition to the protester's request for reimbursement of costs, and the protester submitted a supplemental response. Supp. Opp'n to Req. for Recommendation of Payment of Protest Costs, Apr. 13, 2018; Supp. Resp. to Opp'n to Payment of Protest Costs, Apr. 18, 2018.

DISCUSSION

Valkyrie requests that we recommend that the Navy reimburse it for the costs of filing and pursuing its protest on the basis that the agency unduly delayed taking corrective action in response to Valkyrie's clearly meritorious protest. The Navy contends that it did not unduly delay taking corrective action, and that if our Office finds undue delay, only the best-value challenge was clearly meritorious and reimbursement should be limited to this protest ground.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs where, 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. 4 C.F.R. § 21.8(e); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 5. Thus, as a prerequisite to our recommending the reimbursement of costs where a protest has been resolved by corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious, *i.e.*, not a close question. Overlook Sys. Techs., Inc.--Costs, B-298099.3, Oct. 5, 2006, 2006 CPD ¶ 184 at 6. 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. Office Depot, Inc.--Costs, B-408850.2, Feb. 25, 2014, 2014 CPD ¶ 85 at 5.

Undue Delay

The Navy first argues that, notwithstanding the merits of any protest ground, our Office should not recommend reimbursement of any protest costs because its decision to take corrective action was not unduly delayed. *Opp'n to Req. for Recommendation of Payment of Protest Costs* at 2.

As set forth above, our Office may recommend reimbursement of protest costs if we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. This principle is intended to prevent inordinate delay in investigating the merits of a protest and taking corrective action once an error is evident, so that a protester will not incur unnecessary effort and expense in pursuing its remedies before our Office. East Coast Nuclear Pharmacy--Costs, B-412053.5, Aug. 31, 2016, 2016 CPD ¶ 249 at 5. We generally consider 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.

Here, the Navy submitted an agency report in response to the protest, causing the protester to expend the time and costs to review the report and submit comments. Then, 11 days after the protester submitted its comments on the agency report, *i.e.*, the agency took corrective action, intending to "terminate the existing contract with

[McHenry]” and “consider all protest grounds raised.” Notice of Corr. Action, Dec. 19, 2107. The Navy explains that, despite the fact that Valkyrie’s protest described various errors in the agency’s analysis, it was only when the protester cited to one of our decisions in its comments that the agency was able to recognize these errors. Opp’n to Req. for Recommendation of Payment of Protest Costs at 2, citing Protection Strategies, Inc., B-414648.2, B-414648.3, Nov. 20, 2017, 2017 CPD ¶ 365. The agency argues that it “should not be penalized for the timing of its determination to take corrective action” because its corrective action “came relatively quickly after the SSA [source selection authority] fully understood the extent of his error. . . .” Id.

We find that the agency unduly delayed taking corrective action in response to the protest. Our Office does not use the date when the agency “fully understood the extent of [its] error” as the starting point for calculating undue delay. Id. Instead, we examine whether the agency’s actions caused the protester to expend unnecessary time and resources. AAR Aircraft Servs.--Costs, supra. Nothing prevented the agency from reviewing our prior decisions, including Protection Strategies, supra, prior to submitting its agency report. Instead, the Navy took corrective action well after submitting the agency report, thus requiring the protester to file comments in order to preserve its protest. 4 C.F.R. § 21.3(i). On the facts here, we find that the agency’s corrective action was unduly delayed.

Clearly Meritorious Protest

As discussed above, our Office will recommend reimbursement of a protester’s costs of pursuing its protest where the agency has unduly delayed taking action in the face of a clearly meritorious protest. Office Depot, Inc.--Costs, supra, at 4. Here, the agency concedes the clear merits of the protester’s challenge to the agency’s best-value tradeoff decision. Opp’n to Req. for Recommendation of Payment of Protest Costs at 3 (“[T]he only allegation that was clearly meritorious [in the protest was Valkyrie’s] allegation that the Navy’s best value tradeoff analysis was flawed.”). Based on this unequivocal statement, we conclude that the protest was clearly meritorious.

Severance of Costs

The Navy argues that, despite the fact that the protest was clearly meritorious, Valkyrie’s recovery should nevertheless be “limited to those allegations that caused the [agency to take] corrective action,” i.e. that the protester’s challenge to the best-value tradeoff decision should be severed from the other protest grounds. Opp’n to Req. for Recommendation of Payment of Protest Costs at 1, 3.

Our decisions provide that a protester generally should be reimbursed its costs with respect to all issues pursued and not merely those on which it prevails. See East Coast Nuclear Pharmacy--Costs, B-412053.5, Aug. 31, 2016, 2016 CPD ¶ 249 at 6; Focused Mgmt., Inc.--Costs, B-404029.6, Oct. 3, 2011, 2011 CPD ¶ 204 at 4. While we have, in appropriate cases, limited our recommendation where a part of a successful protester’s cost is allocable to a protest issue that is so clearly severable as to essentially constitute

a separate protest, see, e.g., BAE Tech. Servs., Inc.--Costs, B-296699.3, Aug. 11, 2006, 2006 CPD ¶ 122 at 3, 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 reimbursement provisions of the Competition in Contracting Act of 1984. Fluor Energy Tech. Servs., LLC--Costs, B-411466.3, June 7, 2016, 2016 CPD ¶ 160 at 3.

The protester seeks reimbursement for all protest costs on the assertion that “[a]ll of Valkyrie’s arguments were wrapped up in the best value determination” and “[t]he connection of the arguments was apparent from the outset of the protest.” Protester Resp. to Agency Opp’n to Req. for Costs, Jan. 17, 2018 at 5.

In response, the Navy offers no support for its contention that Valkyrie’s other challenges should be severed from its clearly meritorious challenges to the agency’s best-value tradeoff decision. Absent such support, we are unwilling to deviate from the general premise that a protester is entitled to all costs associated with both successful and unsuccessful allegations. Fluor Energy Tech. Servs., LLC--Costs, supra, at 3-4. Furthermore, Valkyrie’s challenge to the Navy’s best-value tradeoff decision asserted that the decision was flawed because it lacked sufficient detail and was contrary to the terms of the solicitation, and also because it was based on the agency’s flawed technical, past performance and cost evaluations. Protest at 7-11, 19. Because we find that the clearly meritorious protest ground shares common factual and legal bases with the other protest grounds, we conclude that they are sufficiently interrelated such that severance is not appropriate here. Dynaxys LLC--Costs, B-414459.3, Sept. 25, 2017, 2018 CPD ¶ 45 at 4.

RECOMMENDATION

We recommend that Valkyrie be reimbursed the costs associated with filing and pursuing its protest, including reasonable attorneys’ fees. The protester should submit its claim for costs, detailing and certifying the time expended and costs incurred, directly to the Navy within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The request is granted.

Thomas H. Armstrong
General Counsel