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Decision

Matter of: Tom & Jerry, Inc.--Costs

File: B-417474.2

Date: November 20, 2019

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

DIGEST

Reimbursement of protest costs following an agency's corrective action is unwarranted, where the protest was not clearly meritorious.

DECISION

Tom & Jerry, Inc., an 8(a) small business of Kansas City, Kansas requests that our Office recommend it be reimbursed the reasonable costs of filing and pursuing its protest challenging the terms of request for quotations (RFQ) No. W9124719Q1888, issued by the Department of the Army, Mission and Installation Contracting Command Center-Ft. Bragg for non-personal services in support of a Yellow Ribbon Reintegration Program (Yellow Ribbon) event.

BACKGROUND

On April 5, 2019, the agency issued the RFQ as a set-aside for economically disadvantaged women-owned small businesses. Agency Report (AR), Tab 3, RFQ at 1.¹ The solicitation contemplated the award of a fixed-price contract for non-personal services in support of a Yellow Ribbon event to be performed from May 1 to May 6, in

¹ Citations to the AR refer to filings made in response to the underlying protest (B-417474).

Denver, Colorado. *Id.* at 1, 16. The Yellow Ribbon program is designed to prepare and sustain soldiers in the Army Reserve and their families during all phases of a soldier's deployment. RFQ at 16.

Prior to the time set for receipt of quotations, Tom & Jerry filed a protest with our Office arguing that the agency's failure to set aside the solicitation for 8(a) small businesses violated 13 C.F.R. § 124.504(d)--known as the "once 8(a), always 8(a)" rule--which states that where a procurement is awarded as an 8(a) contract, its follow-on or renewable acquisition must remain in the 8(a) program unless the Small Business Administration (SBA) agrees to release it from the 8(a) program for non-8(a) competition.² Protest at 6 citing 13 C.F.R. § 124.504(d). Tom & Jerry explained that the SBA Kansas City, Kansas District Office informed the Army, prior to the issuance of the solicitation, that it understood that Yellow Ribbon work had been accepted into the 8(a) program. *Id.* at 7. The record showed that "SBA's position" regarding Yellow Ribbon work was that all Yellow Ribbon work had been accepted into the 8(a) program in 2015 and awarded to Tom and Jerry.³ AR, Tab 46, Email from SBA to Agency, Nov. 5, 2018 (9:15 A.M.). In this regard, the District Office informed the Army that Yellow Ribbon work must be awarded to only 8(a) firms or released for non-8(a) procurement pursuant to Federal Acquisition Regulation § 19.815. *Id.* Thus, Tom & Jerry argued that there was "no doubt" that Yellow Ribbon events issued after October 2015 had been accepted into the 8(a) program and could not be removed from the 8(a) program without SBA's approval. Protest at 7.

In its agency report, the Army asserted it was not required to set aside the procurement for 8(a) small businesses and did not need SBA's permission to issue the solicitation outside of the 8(a) program. Memorandum of Law (MOL) at 7. In this regard, the agency explained that the Yellow Ribbon work had been neither awarded exclusively to Tom and Jerry, nor awarded solely under the 8(a) program. *Id.* at 13; AR, Tab 10, Yellow Ribbon Awards, at 1. In support of this assertion, the agency offered a chart showing that since 2015, 95 contracts for Yellow Ribbon events had been awarded with some being procured on an unrestricted basis and others set aside for various small-business categories, including Historically Underutilized Business-Zone and 8(a) small businesses.⁴ MOL at 3; AR, Tab 10, Yellow Ribbon Awards, at 1. The Army also

² Section 8(a) of the Small Business Act authorizes SBA to contract with other government agencies and to arrange for the performance of those contracts by awarding subcontracts to socially and economically disadvantaged small businesses. 15 U.S.C. § 637(a). The Act affords SBA and contracting agencies broad discretion in selecting procurements for the 8(a) program. *Id.*

³ The record showed that Tom & Jerry had been awarded two 8(a) sole-source contracts in 2015 and 2018 to perform a total of 16 Yellow Ribbon events. AR, Tab 19, 2018 Offering Letter, at 1; Tab 56, 2015 Offering Letter, at 1-2.

⁴ The chart also showed that of the eight awarding entities under the MICC (Mission and Installation Contracting Command), only two, Ft. Gordon and Ft. Bragg, made awards
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asserted that the current requirement was not a follow-on contract to a previous 8(a) requirement because each Yellow Ribbon event is considered a stand-alone event, unrelated to any past Yellow Ribbon event. MOL at 7. Additionally, the agency indicated that it was not aware of any statutory or regulatory definition for a follow-on contract. Contracting Officer's Statement at 15.

In its comments on the agency's report, Tom & Jerry continued to assert that the agency acted unreasonably. While the protester did not provide a definition for a follow-on contract, it instead asserted that the Denver event was a follow-on acquisition because it was in a group of Yellow Ribbon events previously solicited by the Army under the 8(a) program. Protester's Comments at 2.

After receiving the parties' filings, the record did not clearly indicate whether the solicitation at issue should be identified as a follow-on requirement to a contract that had previously been accepted into the 8(a) program. Accordingly, our Office sought additional information on the matter from the SBA. Notice of SBA Participation in Protest (B-417474). In response, SBA explained that from 2015 to 2018, SBA accepted a number of Yellow Ribbon events into the 8(a) program to be performed by Tom & Jerry and other 8(a) participants, and that any follow-on acquisition to an acquisition accepted by the SBA would be subject to the once 8(a), always 8(a) rule. SBA Comments at 3. Additionally, the SBA took issue with both the protester and agency's positions. Id. In this regard, the SBA stated that it did not agree with the protester's position that all Yellow Ribbon events had been accepted into the 8(a) program. Id. The SBA also stated that the Army's argument that the Denver event was a new requirement was not convincing enough to allow the SBA to overlook the Army's disregard for the SBA District Office's guidance. Id. Despite not specifically identifying the requirement at issue as a follow-on requirement and noting that the protester and Army "disagree as to what constitutes a 'follow-on' acquisition in the context of Yellow Ribbon events," the SBA concluded that the agency should have either sought release from the SBA or sought further guidance regarding the Denver event before issuing the solicitation outside the 8(a) program.⁵ Id. at 3-4.

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on an 8(a) basis. AR, Tab 10, Yellow Ribbon Awards, at 1. The contracting support previously provided by Fort Gordon in support of Yellow Ribbon events was transitioned to Fort Bragg prior to the issuance of the RFQ at issue. MOL at 3. The chart also showed that a company other than Tom & Jerry had been awarded an 8(a) sole-source contract in 2017 to perform Yellow Ribbon work. AR, Tab 10, Yellow Ribbon Awards, at 1.

⁵ The SBA also stated that in May 2019, during the pendency of the protest, the SBA and Yellow Ribbon staff met to discuss how the 8(a) program would determine whether future Yellow Ribbon events would qualify as follow-on requirements, and that this guidance was inapplicable to the protest. SBA Comments at 4.

On July 2, the Army requested that our Office conduct outcome prediction alternative dispute resolution (ADR).⁶ Request for Outcome Prediction (B-417474). Our Office declined to engage in outcome prediction ADR and instead offered litigation risk ADR.⁷ During the ADR, the GAO attorney provided the parties with her assessment of risk in the protest, indicating that based on the information before her, the protest would likely be sustained because it was unreasonable for the agency to disregard SBA's guidance regarding the program, which SBA is responsible for administering. The GAO attorney also requested additional documents for the record and indicated that any additional filings made by the parties would need to be submitted promptly. Notice of Summary of Conference Call (B-417474).

On July 9, the Army notified our Office of its intent to take corrective action by canceling the RFQ, reassessing the scope of the Army's actual needs for this requirement, and coordinating with the SBA, as appropriate.⁸ Notice of Corrective Action, July 9, 2019, at 1. We concluded that the cancellation of the RFQ rendered Tom & Jerry's protest academic, and on July 11, we dismissed the protest. Tom & Jerry, B-417474, July 11, 2019, (unpublished decision). Thereafter, Tom & Jerry timely filed this request.

DISCUSSION

Tom & Jerry requests that our Office recommend that it be reimbursed the reasonable costs of filing and pursuing its protest because the Army unduly delayed taking corrective action in the face of a clearly meritorious protest. Request for Reimbursement at 1. In this regard, Tom & Jerry contends that its protest was clearly meritorious and that the Army unreasonably defended a flawed procurement rather than take corrective action before the filing of the agency report. Id.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs 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

⁶ Our Bid Protest Regulations allow GAO to use flexible alternative procedures, such as ADR, to promptly and fairly resolve a protest. 4 C.F.R. § 21.10(e).

⁷ In outcome prediction ADR, the GAO attorney advises the parties of the attorney's view of the likely outcome of the protest in order to allow the party likely to be unsuccessful to take appropriate action (that is, either the agency takes corrective action or the protester withdraws the protest); in a litigation risk assessment, the GAO attorney gives an informal view of the possible range of outcomes. Bid Protests at GAO: A Descriptive Guide (Tenth Edition, 2018) at 27.

⁸ The Army's reassessment would include, at a minimum, determining how many persons require training, the dates for such training, the appropriate geographic location for such training, and whether a procurement is necessary to fulfill the Army's revised requirement. Notice of Corrective Action at 1.

time and resources to make further use of the protest process in order to obtain relief. Bid Protest Regulations, 4 C.F.R. § 21.8(e); Herren Assocs., Inc.--Costs, B-414792.4, Nov. 21, 2017, 2018 CPD ¶ 122 at 3. As a prerequisite to our recommending the reimbursement of costs where a protest has been settled 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. Science Applications Int'l Corp.--Costs, B-410760.5, Nov. 24, 2015, 2015 CPD ¶ 370 at 3. 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. Yardney Tech. Prods., Inc., B-297648.3, Mar. 28, 2006, 2006 CPD ¶ 65 at 4. Additionally, 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. AGFA HealthCare Corp.--Costs, B-400733.6, Apr. 22, 2009, 2009 CPD ¶ 90 at 3-4.

In asserting that its protest was clearly meritorious, Tom & Jerry relies on decisions in which our Office recommended reimbursement where the GAO attorney informed the parties through outcome prediction ADR that the underlying protest was likely to be sustained. See e.g., Deque Sys., Inc.--Costs, B-415965.5, Aug. 23, 2018, 2018 CPD ¶ 304 at 4; EG Mgmt. Servs. Inc.; Desbuild Inc.--Costs, B-415797.3, B-415797.4, Oct. 25, 2018, 2019 CPD ¶ 39 at 3. In such cases, we have found that a GAO attorney will conduct an outcome prediction ADR conference only if he or she has a high degree of confidence regarding the outcome; therefore, the willingness to do so is generally an indication that the protest is viewed as clearly meritorious, and may satisfy the "clearly meritorious" requirement for purposes of recommending reimbursement of protest costs. Id.

The Army contends that our Office should not use statements made during litigation risk as the basis to satisfy the clearly meritorious requirement for purposes of recommending costs because "formal outcome prediction" is a type of ADR distinct from "informal litigation risk." Response to Request for Costs at 5 (Oct. 7, 2019).

In response, the protester argues that our litigation risk assessment demonstrated the merit of the protest and relies on our decision in ActioNet, Inc.--Costs, B-416557.3, Feb. 4, 2019, 2019 CPD ¶ 32 at 5 for support (finding reimbursement of costs appropriate after the GAO attorney conducted a conference call and indicated that the protest was likely to be sustained). See Comments on Response to Request for Reimbursement, October 9, 2019, at 3.

Here, because our Office specifically declined to engage in outcome prediction, and instead offered litigation risk ADR to the parties, Tom & Jerry's reliance on outcome prediction ADR decisions to show that the protest was clearly meritorious is misplaced. See Alaska Structures, Inc.--Costs, B-298575.4, Jan. 22, 2007, 2007 CPD ¶ 15 at 5-6. However, while the agency properly recognizes a distinction between these two forms of ADR, any argument that a protest allegation cannot be clearly meritorious where the GAO attorney offers an assessment of its litigation risk, rather than outcome prediction ADR, lacks support in GAO decisions. PricewaterhouseCoopers Public Sector, LLP--

Costs, B-415205.3, May 9, 2018, 2018 CPD ¶ 185 at 7. Similarly, while there may be instances where our Office offers ADR to the parties after identifying a clearly meritorious protest issue, it does not follow that ADR is only offered when a protest is clearly meritorious. In this regard, the offer of ADR does not automatically translate to the conclusion that the protester should be awarded costs. See e.g., JRS Staffing Servs.--Costs, B-410708.3, Nov. 9, 2015, 2015 CPD ¶ 349 at 5; Glen Mar Constr.--Costs, B-410603.4, Apr. 5, 2016, 2016 CPD ¶ 107 at 8. Instead the determination of whether to recommend the reimbursement of costs rests on the factual and legal posture of each individual protest, which must be analyzed on a case-by-case basis. JRS Staffing Servs.--Costs, *supra*.

With regard to the merits of the protest, even if we agreed that the agency's corrective action was not prompt, we conclude that the protest was not clearly meritorious. Here, based on the record presented, we cannot conclude that reimbursement of Tom & Jerry's protest costs is appropriate. While the protester raised compelling concerns in its protest, our Office could not determine which party's position was correct from the record and pleadings provided by the parties. Rather, we required further development of the record in the form of a response from the SBA to assist our Office in fully assessing the merits of the protest grounds. In this regard, because the ultimate resolution of this claim required further development, in our view, this protest claim presented a close question, and therefore was not clearly meritorious. Systems Research & Applications Corp.--Costs, B-406775.3, Apr. 10, 2013, 2013 CPD ¶ 99 at 5. Apptis Inc.--Costs, B-402146.3, Mar. 31, 2010, 2010 CPD ¶ 123 at 4. We therefore decline to recommend reimbursement of Tom & Jerry's protest costs.

The request for costs is denied.⁹

Thomas H. Armstrong
General Counsel

⁹ Tom & Jerry argues that in instances where an agency promises corrective action that results in dismissal of a protest and the agency subsequently fails to adequately implement the promised corrective action, we have recommended the reimbursement of protest costs. See, i.e., Louisiana Clearwater, Inc.--Recon. and Costs, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209 at 5-6 (reimbursement of protest costs may be appropriate where the agency has promised to take corrective action leading to dismissal of a clearly meritorious protest and either (1) does not timely implement the promised corrective action, or (2) implements inadequate corrective action). Given that the protester filed only one challenge to the solicitation here and was not put to the expense of filing a second protest of this solicitation, we do not find the rationale of Louisiana Clearwater, Inc. and similar decisions applicable here.