



Decision

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Matter of: CWU, Inc.--Costs

File: B-417015.17

Date: March 4, 2020

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DIGEST

Protester's request that GAO recommend the reimbursement of protest costs is granted in part where the record shows that the agency unduly delayed taking corrective action in response to clearly meritorious protest grounds, and denied in part where one of the protest grounds is not clearly meritorious and is readily severable from the clearly meritorious protest grounds.

DECISION

CWU, Inc., of Tampa, Florida, requests that we recommend the Department of the Army reimburse it for the reasonable costs of filing and pursuing its protest of the agency's decision to issue a task order to Valiant Government Services, LLC, of Hopkinsville, Kentucky, under request for task order proposals (RTOP) No. W911W4-17-R-ARCENT. The Army issued the RTOP for linguist support services for the Army's Central Command area of responsibility. The protester contends that the agency failed to take prompt corrective action in response to clearly meritorious protest grounds.

We grant the request in part and deny the request in part.

BACKGROUND

On September 21, 2017, the Army issued the RTOP under the Department of Defense's Language Interpretation and Translation Enterprise II (DLITE II) contract vehicle. The Army issued the RTOP to acquire linguist support capability in support of the Combined Joint Task Force-Operation Inherent Resolve, the Department of State Office of Special Cooperation-Iraq, and the U.S. Army Central Command. The RTOP contemplated that

the resulting cost-plus fixed-fee task order would have a 1-year base period and four 1-year option periods.

On July 31, 2019, the Army notified CWU that the task order had been issued to Valiant. Following a debriefing, CWU filed a timely protest, which our Office docketed as B-417015.5, challenging the agency's evaluation of Valiant's cost and technical proposals, its failure to credit CWU's proposal with additional strengths, its evaluation of risk as required by the solicitation, its unequal evaluation treatment of offerors' proposals, its discussions with CWU, and its best-value tradeoff determination. On September 16, the Army provided an agency report responding to these protest grounds.

On September 23, CWU filed comments on the agency report and a supplemental protest (docketed as B-417015.12), raising arguments challenging the agency's cost realism analysis, the technical evaluation of proposals, the discussions with Valiant and CWU, the risk evaluation, and the best-value determination.

On October 4, the Army announced it would take corrective action in response to CWU's protest. The agency stated it would reevaluate proposals and make a new source selection decision. The agency also reserved the right to reopen discussions, if necessary, and solicit revised proposals.

Based on the corrective action, we dismissed the protests as academic. This request for a recommendation on reimbursement follows.

DISCUSSION

The protester argues that the agency unduly delayed taking corrective action in response to CWU's clearly meritorious protest grounds by waiting until after the protester had submitted comments on the agency report before taking corrective action. The Army does not dispute that several of the initial protest's arguments were clearly meritorious. These arguments include contentions that: (1) the agency conducted a flawed cost realism analysis, (2) the agency unreasonably evaluated the awardee's proposal under the staffing plan subfactor, and that, (3) as a result of these errors, the agency's best-value determination was flawed. The agency argues that the remainder of CWU's protest grounds were not clearly meritorious and are readily severable from any meritorious grounds. Army Resp. to Cost Request at 15.¹

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

¹ As detailed below, because we find (with one exception) that the remaining protest arguments are not severable from CWU's clearly meritorious protest grounds, we need not decide whether these issues were also clearly meritorious.

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 contends that the remaining protest issues are severable because they are based on different facts and legal theories than CWU's successful protest grounds. Based on our review of the record, we disagree. In this regard, we find that--with one exception--the protester's arguments (both successful and unsuccessful) share common core facts and common legal theories and therefore are not severable from one other.

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, however, 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. In making this determination, we consider, among other things, the extent to which the claims are interrelated or intertwined, e.g., whether the successful and unsuccessful claims share a common core set of facts, are based on related legal theories, or are otherwise not readily severable. See Sodexho Mgmt., Inc.--Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 29.

Here, many of CWU's protest grounds are based on the same core facts as its meritorious complaint regarding the cost realism analysis. That is, they allege errors stemming from the Army's failure to identify and account for Valiant's unrealistically low costs within its evaluation.

For example, in CWU's initial protest it asserted that the agency failed to evaluate the high risk of unsuccessful performance presented by Valiant's low total cost. Protest at 39. The protester noted that Valiant's cost was almost \$100 million less than the previous awardee's evaluated cost, a cost that Valiant itself had challenged as unrealistically low. Id. (emphasis omitted). As another example, CWU's supplemental protest alleged that the agency unreasonably evaluated Valiant's retention plan, because it credited Valiant with providing competitive compensation. Comments and Supp. Protest at 23. The protester argued that this was unreasonable because Valiant actually proposed lower effective compensation for incumbent personnel. Id.

Similarly, the protester's other technical evaluation challenges are intertwined with its challenge to the evaluation of Valiant's staffing plan, which the agency has conceded was clearly meritorious. For example, the protester argued that the Army disparately and unreasonably evaluated other areas of Valiant's and CWU's management plans,

such as both offerors' existing infrastructure. See id. at 32-33. In our view, this and CWU's other technical evaluation challenges share a common factual basis with the protester's successful challenge; both the meritorious and the non-meritorious issues are intertwined and interrelated with the agency's flawed evaluation of Valiant's technical proposal. We therefore conclude that, under the circumstances here, these technical evaluation issues are not severable. See Sevatec, Inc.--Costs, B-407880.3, June 27, 2013, 2013 CPD ¶ 163 at 3-4.

As noted above, we consider one protest issue to be not clearly meritorious and also to be severable from CWU's clearly meritorious protest grounds. In its initial protest, the protester argued that the agency conducted unequal and misleading discussions because "[d]uring discussions, the [a]gency never gave any indication that CWU's costs were too high." Protest at 42. The protester asserted that the agency's failure to raise its concerns "regarding the unreasonableness of CWU's prices" was an error. Id. We find this protest ground to be without merit. Indeed, the evaluation record provided by the agency in response to the protest demonstrated that the Army did not consider CWU's total cost to be unreasonable. See Agency Report, Tab 177, CWU Final Cost Evaluation, at 24. Where, as here, an offeror's total cost is high in relation to competitors' costs, without being evaluated as unreasonable, the agency may, but is not required to, inform the offeror during discussions that its costs are not as competitive as those of its competitors. Integrated Concepts & Research Corp., B-309803, Oct. 15, 2007, 2008 CPD ¶ 117 at 5. Accordingly, we find no merit to the protester's contention that the agency should have informed CWU that its costs were too high.

We also find that the unequal and misleading discussion protest ground does not share a common legal theory with CWU's clearly meritorious protest grounds and, at best, shares very few facts. In contrast to the protester's successful challenges to the evaluation of Valiant's proposal, this challenge relates to alleged errors in the agency's discussions stemming from the agency's evaluation of price reasonableness. This protest ground is therefore distinct from CWU's other protest grounds, and accordingly we decline to recommend reimbursement of CWU's protest costs with respect to this protest issue.²

² In its comments and supplemental protest, CWU again asserted that the agency had conducted unequal and misleading discussions. This protest ground, however, contained new arguments, such as a contention that the agency's discussions with CWU and Valiant were unequal with respect to the evaluation of each offeror's proposed key personnel. CWU Comments and Supp. Protest at 39. With the addition of these new arguments, this protest ground was almost entirely different from the original discussions challenge raised in CWU's initial protest, which had asserted misleading and unequal discussions only with respect to the reasonableness of CWU's total cost. Since the new argument raised challenges to discussion items stemming from the evaluation of Valiant's technical and cost proposals, we find this later-raised argument to be intertwined with CWU's clearly meritorious protest grounds. Accordingly, we recommend the severing of only the unequal discussions argument raised in CWU's initial protest.

RECOMMENDATION

For the protest grounds noted above, we recommend that the Army reimburse CWU the reasonable costs of filing and pursuing its protest challenging the agency's decision to issue a task order to Valiant. CWU 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 in part and denied in part.

Thomas H. Armstrong
General Counsel