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## Decision

**Matter of:** Agile-Bot II, LLC--Costs

**File:** B-418264.4

**Date:** July 30, 2020

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Diana L. King, Esq., Department of the Navy, for the agency.  
Uri R. Yoo, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Request for recommendation for reimbursement of costs of filing and pursuing protest issues beyond those the agency has agreed to pay is denied where the remaining contested protest issue was untimely; a prerequisite to recovery of protest costs related to agency corrective action is a timely filed protest allegation.

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### DECISION

Agile-Bot II, LLC, a small business concern of Reston, Virginia, requests that our Office recommend that it be reimbursed the reasonable costs of filing and pursuing its protest challenging the award of a contract to FreeAlliance.com, LLC, a small business concern of McLean, Virginia, under request for proposal (RFP) No. N66001-18-R-0011, issued by the Department of the Navy on behalf of the United States Marine Corps for advanced cyber support services. The requester contends that the agency failed to take prompt corrective action in response to clearly meritorious protest grounds. Although the Navy agrees to reimburse the requester for costs related to certain of its protest grounds, it does not agree to reimburse the protester for the cost of pursuing an issue that was not timely raised.

We deny the request to recommend that the agency reimburse costs related to pursuing protest issues beyond those the agency has agreed to pay.

## BACKGROUND

The RFP, issued on September 5, 2018, contemplated the award of a cost-plus-fixed-fee contract to provide advanced cyber support services for the U.S. Marine Corps Cyberspace Operations Group. Agency Report (AR), Tab 4, RFP at 1, 7, 109. The RFP was issued as a small business set-aside and contemplated a period of performance of one base year and four 1-year option periods. *Id.* at 63, 123.

Award was to be made to the offeror whose proposal provided the best value to the government, considering three factors: organizational experience, past performance, and cost. *Id.* at 123. The RFP informed offerors that organizational experience was more important than past performance. *Id.* The non-cost factors, when combined, would be significantly more important than cost. *Id.*

Five offerors submitted proposals in response to the solicitation. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 13. On October 24, 2019, the Navy notified Agile-Bot that the contract had been awarded to FreeAlliance. Following a debriefing that concluded on November 4, Agile-Bot filed a protest with our Office on November 8 (docketed as B-418264), challenging the agency's cost realism adjustment to Agile-Bot's proposed direct and indirect rates and the resulting award decision. Protest (B-418264) at 9-14. On November 12, Agile-Bot filed a supplemental protest (docketed as B-418264.2), challenging the agency's evaluation of Agile-Bot's and FreeAlliance's technical proposals under the organizational experience factor, and Agile-Bot's proposal under the past performance factor.<sup>1</sup> Supp. Protest (B-418264.2) at 9-15. On December 9, the Navy provided a consolidated agency report responding to the protest grounds raised in the initial and supplemental protests. COS/MOL at 14-34.

On December 19, Agile-Bot filed comments on the agency report and a second supplemental protest (docketed as B-418264.3), raising further challenges to the agency's evaluation of FreeAlliance's proposal under the organizational experience and past performance factors. Comments and 2nd Supp. Protest at 3-24. On January 2, 2020, the Navy provided a supplemental agency report responding to the protest grounds raised in the comments and second supplemental protest. Supp. COS/MOL at 1-20. On January 9, Agile-Bot filed comments on the supplemental agency report. Our Office requested additional briefing from the agency addressing issues related to the agency's evaluation of organizational experience and prejudice. The agency filed its additional briefing on January 21, and Agile-Bot filed its comments to the agency's additional briefing on January 24.

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<sup>1</sup> Agile-Bot's supplemental protest was timely because the fifth day after the conclusion of the debriefing on November 4 fell on November 9, a Saturday, and the following Monday, November 11, was Veteran's Day, a federal holiday. See 4 C.F.R. § 21.0(d).

On January 29, the Government Accountability Office (GAO) attorney assigned to this protest conducted an outcome prediction alternative dispute resolution (ADR) teleconference with the parties.<sup>2</sup> During the ADR, the GAO attorney advised the parties that our Office was likely to sustain the protest on the bases that the agency evaluated proposals in a manner inconsistent with the stated evaluation criteria under the organizational experience factor and treated offerors disparately in a way that prejudiced Agile-Bot. Specifically, the GAO attorney explained that although the RFP stated the agency would evaluate cited references for “collectively demonstrat[ing]” relevant experience, RFP at 119, the record showed that the agency assigned weaknesses to Agile-Bot’s proposal where one of the references did not demonstrate a particular experience, even as it noted that another of Agile-Bot’s references demonstrated that same experience. AR, Tab 7, Source Selection Evaluation Board (SSEB) Report at 4-6.

The GAO attorney also found that the agency treated the offerors disparately because the agency, upon finding that one of the awardee’s cited references failed to demonstrate a particular experience, did not assign a weakness but merely noted that another reference demonstrated that same experience. *Id.* at 23-24. The agency argued that the difference in the evaluations stemmed from the differences in the offerors’ proposals, contending that Agile-Bot’s insufficient description of relevant experience under one reference presented a risk that Agile-Bot did not understand the requirements. Supp. COS/MOL at 5. However, the GAO attorney noted that the RFP did not inform offerors that proposals under the organizational experience factor would be evaluated for understanding of the requirements. Furthermore, the GAO attorney explained that Agile-Bot was prejudiced by the agency’s errors.

The GAO attorney conducting the ADR also noted that the remaining arguments raised by Agile-Bot lacked merit. For example, Agile-Bot argued that the agency’s evaluation was flawed because the solicitation stated that offerors should demonstrate organizational experience operating enterprise-level wide area networks worth at least \$10.5 million a year, and FreeAlliance’s references did not meet this requirement. Comments and 2nd Supp. Protest at 15-18. The agency responded that the solicitation did not establish \$10.5 million for the value of experience references as a mandatory requirement but, rather, specified the value of the cited experience as one of a number of aspects that the agency may consider in its assessment of relevance of cited organizational experience. Supp. COS/MOL at 12.

The GAO attorney concluded that Agile-Bot’s argument was an untimely challenge to the solicitation terms. Specifically, the GAO attorney noted that the RFP stated that

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<sup>2</sup> In an outcome prediction ADR conference, the GAO attorney assigned to the protest will inform the parties as to his or her views regarding whether the protest is likely to be sustained or denied. See Bid Protest Regulations, 4 C.F.R. § 21.10(e); *First Coast Serv. Options, Inc.*, B-409295.4, B-409295.5, Jan. 8, 2015, 2015 CPD ¶ 33 at 3. The purpose of outcome prediction conferences is to facilitate the resolution of a protest without a formal decision on the merits by our Office. See *id.*

references “should demonstrate organizational experience . . . worth at least \$10.5 [million] per year” and that the evaluation of relevance “may include” similarity in value to the work contemplated under the solicitation. RFP at 119, 125. Although Agile-Bot argued that the agency referred to the dollar limit as a “threshold” in its responses to questions, Supp. Comments at 17, the GAO attorney stated that the language in later amendments at best presented a patent ambiguity in the solicitation’s terms that should have been protested prior to the deadline for submission of proposals. In addition, the GAO attorney noted that Agile-Bot’s challenges to the agency’s cost realism adjustments were without merit, and that Agile-Bot abandoned or withdrew its challenges to the agency’s evaluation of proposals under the past performance factor.

In response to the ADR, the Navy informed our Office that it intended to take corrective action consisting of reevaluating the offerors’ proposals under the organizational experience factor and making a new source selection decision. Notice of Corrective Action, Jan. 30, 2020, at 1. Based on the agency’s proposed corrective action, we dismissed Agile-Bot’s protest as academic. *Agile-Bot II, LLC, B-418264 et al.*, B-418264.2, B-418264.3, Feb. 3, 2020 (unpublished decision). Following the dismissal of the protest, Agile-Bot filed this request that GAO recommend the reimbursement of its costs. The Navy agreed to reimburse Agile-Bot for its costs related to certain protest issues, but not for others. As set forth below, Agile-Bot requests costs related to pursuing protest issues beyond those to which the Navy has agreed to pay.

## DISCUSSION

Agile-Bot asks our Office to recommend that the Navy reimburse the requester for the costs associated with filing and pursuing its protest with respect to the protest allegations concerning the agency’s evaluation under the organizational experience factor and prejudice. Req. for Reimbursement at 3-6.

When a procuring agency takes corrective action in response to a protest, our Office may recommend that the agency pay the protester its reasonable costs of filing and pursuing the protest. 4 C.F.R. § 21.8(e). However, our Bid Protest Regulations do not contemplate a recommendation for the reimbursement of protest costs in every case where an agency takes corrective action, but rather only where an agency unduly delays taking corrective action in the face of a clearly meritorious protest. *Information Ventures, Inc.--Costs, B-294580.2 et al.*, Dec. 6, 2004, 2004 CPD ¶ 244 at 2. 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. *Harley Marine Servs., Inc.--Costs, B-416033.4*, Mar. 15, 2019, 2019 CPD ¶ 121 at 4.

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. *Id.* A GAO attorney will inform the parties through outcome prediction ADR that a protest is likely to be sustained 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 satisfies the “clearly meritorious” requirement for the purpose of recommending reimbursement of protest costs. *Auxilio FPM JV, LLC--Costs*, B-415215.4, Apr. 27, 2018, 2018 CPD ¶ 162 at 3.

Here, Agile-Bot argues that the agency unduly delayed taking corrective action in the face of its clearly meritorious protest grounds. The Navy states that it “agrees to reimburse Agile-Bot for work related to protest grounds that concerned the Agency’s evaluation of the Organizational Experience factor, and Prejudice.” Agency Resp. at 4. However, the agency opposes reimbursement for costs related to the following protest grounds: (1) the agency’s direct and indirect cost realism analyses; (2) the agency’s evaluation under the past performance factor; and (3) whether the \$10.5 million threshold for organizational experience references was a mandatory requirement of the solicitation. *Id.* In response, Agile-Bot clarifies that it is not requesting reimbursement for costs related to its challenges to the agency’s cost realism adjustment, which it acknowledges are factually distinct from challenges to the agency’s evaluation of proposals under the non-cost/price factors. Resp. to Agency at 2. Agile-Bot also notes that it is not seeking reimbursement for costs related to its challenges to the agency’s evaluation of offerors’ past performance, which it abandoned. *Id.*

Thus, the only dispute remaining before our Office is Agile-Bot’s request for reimbursement of costs related to “whether the \$10.5 million threshold was a mandatory requirement of the Solicitation” under the organizational experience factor. Agency Resp. at 4; Resp. to Req. for Clarification at 1. The agency contends that since this protest allegation was untimely, it cannot be included with the other clearly meritorious protest grounds. Agency Resp. at 4. Based on our review of the record, the protest allegation was untimely and we do not recommend reimbursement of Agile-Bot’s costs related to pursuing this argument.

A protest based on alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of proposals must be filed by that time. 4 C.F.R. § 21.2(a)(1). An ambiguity exists if a solicitation term is susceptible to more than one reasonable interpretation that is consistent with the solicitation, when read as a whole. *Poly-Pacific Techs., Inc.*, B-293925.3, May 16, 2005, 2005 CPD ¶ 100 at 3. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, while a latent ambiguity is more subtle. *Democracy Int’l, Inc.*, B-415243, B-415243.2, Dec. 13, 2017, 2018 CPD ¶ 293 at 7. Where a patent ambiguity in a solicitation is not challenged prior to the submission of proposals, we will dismiss as untimely any subsequent challenge to the meaning of the solicitation term. 4 C.F.R. § 21.2(a)(1); *Democracy Int’l, Inc.*, *supra*; *see also Competitive Range Sols., LLC*, B-415274.2, Apr. 4, 2018, 2018 CPD ¶ 137 (where protester believed a question and answer response stated an intent that was inconsistent with the terms of the solicitation, the vendor must file a protest before receipt of quotations).

With respect to the organizational experience factor, the solicitation required that offerors submit up to three reference information sheets to explain the breadth, depth and relevance of their organizational experience on government contracts in certain key areas of the performance work statement. RFP at 119. As relevant here, the

solicitation initially stated that offerors should demonstrate organizational experience operating enterprise-level wide area networks worth at least \$12.5 million per year. See Supp. Comments, exh. A, Questions and Answers (Q&A) No. 2 at 1. During questions and answers, one potential offeror stated that it would be unlikely that small business offerors would be able to meet the \$12.5 million per year requirement. *Id.* In response, the agency issued an amendment changing this requirement, and stating the following with respect to relevant experience under this factor:

(e) Relevant experience is considered to be network operation and maintenance services projects of a similar magnitude to this acquisition. The offeror should demonstrate organizational experience operating enterprise-level wide area networks worth at least \$10.5 [million] per year. Offerors are not allowed to aggregate multiple task orders on to one Reference Information Sheet. Offerors should clearly describe the size and complexity of the network, including number of end users supported, number of locations supported, number of locations supported, number of endpoints/devices supported, and how many [full-time equivalents] FTE's were employed on the contract. Proposals that fail to meet these criteria may be rated lower.

RFP at 119; Supp. Protest, exh. I, amend. 0001 at 11. In addition, the solicitation stated the agency would evaluate organizational experience as follows:

1.2.1 Organizational Experience: Experience is the opportunity to learn by doing. An offeror's organizational experience is relevant when it has been confronted with the kinds of challenges it will likely face under the contract contemplated by this RFP. This evaluation will consider the breadth, depth and relevance of offeror work performed since 01 January 2013 in the [performance work statement] key areas identified in provision L-TXT-12. Relevance may include, but is not limited to, similarity to work contemplated under the solicitation with respect to complexity, length of performance, number of tasks, scope, type of work, and value.

RFP at 125.

During another round of Q&As, a potential offeror asked whether the collective team or prime contractor must meet this requirement, and whether each task order reference or the collective reference must demonstrate this requirement. Supp. Comments, exh. B, Q&A No. 14 at 1. In response, the agency stated that the "\$10.5 [million] threshold needs to be met on a per reference basis (regardless of whether it is from the prime offeror or a proposed subcontractor)." *Id.*

In its protest, Agile-Bot argued that the agency's evaluation of the awardee's proposal under the organizational experience factor was unreasonable. Agile-Bot also argued that the solicitation required offerors to demonstrate organizational experience operating enterprise-level wide area networks worth at least \$10.5 million a year, and

FreeAlliance's references did not meet this requirement. Comments and 2nd Supp. Protest at 15-18. Agile-Bot contended that the RFP "established the minimum size for relevance" of \$10.5 million, based in part on the agency's responses to offerors' questions. Supp. Comments at 18.

As noted above, before final proposals were due, the agency responded to questions, several of which concerned the dollar value of references. See Supp. Comments, exhs. A, B. Specifically, when responding to a question about whether "collective references" could be used to demonstrate experience worth the specified dollar value, the Navy stated that "[t]he \$10.5 [million] threshold needs to be met on a per reference basis." Supp. Comments, exh. B, Q&A No. 14 at 1. The agency also responded to a question about small businesses' ability to meet the "minimum threshold" for dollar value by stating that "the scope and scale of the requirement warrants the need for an equivalence of this size." Supp. Comments, exh. A, Q&A No. 2 at 1.

The agency argued that the solicitation did not specify that the \$10.5 million threshold was a mandatory minimum requirement for relevance of the organizational experience references. Supp. COS/MOL at 12. Instead, the agency explained that rather than stating offerors "shall" demonstrate organizational experience of a certain threshold, the solicitation instructed offerors that references "should demonstrate organizational experience . . . worth at least \$10.5 [million] per year" and that the evaluation of relevance "may include" similarity in value to the work contemplated under the solicitation, among other considerations such as complexity, length of performance, number of tasks, scope, and type of work. *Id.* (quoting RFP at 119, 125). Therefore, the agency argued, it reasonably considered FreeAlliance's references even though they were valued at less than \$10.5 million. *Id.*

The agency also contends that its answers to questions, when read in the context of the questions they addressed, did not conflict with this interpretation of the solicitation language. Agency's Additional Briefing at 1-2. For example, the agency argued that when it answered that the dollar value threshold "needs to be met" on a per reference basis, the mandatory portion of its answer was that offerors could not use collective references to demonstrate their similarity in value to the work contemplated under the solicitation. *Id.* The agency further supported its argument by noting that, after issuing its answers to questions, the agency revised the solicitation to decrease the specified reference size from \$12.5 million to \$10.5 million but chose to retain the "should" and "may include" language.<sup>3</sup> *Id.* at 2.

We agree with the agency that the language of the solicitation did not establish the \$10.5 million value for references as a mandatory requirement. The solicitation, by instructing offerors that their references "should demonstrate" experience worth at least

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<sup>3</sup> The agency also noted that, since one of Agile-Bot's references was valued at below \$10.5 million per year, had the agency interpreted the evaluation criteria in the manner Agile-Bot advocated in its protest, the reference in question would not have been considered relevant. Agency's Additional Briefing at 2; AR, Tab 7, SSEB Report at 4.

\$10.5 million and that the relevance evaluation “may include” similarity in value, should have indicated to offerors that the dollar value was not a minimum requirement. However, in light of the solicitation language, the agency’s responses to questions created a patent ambiguity in the solicitation. Specifically, the agency responded to questions about the value of references--many of which raised concern with the small businesses’ ability to meet the specified dollar value--by discussing the dollar value in terms of a “threshold.” The contrast between the threshold language used by the agency to answer questions, with the permissive language used in the solicitation, made it reasonable for an offeror to interpret the dollar value as a mandatory threshold requirement for a relevant experience reference.

Because this alternate interpretation conflicted with the solicitation’s permissive language, the error should have been obvious, and the ambiguity patent. Accordingly, Agile-Bot was required to challenge this provision of the solicitation prior to the submission of proposals, and its arguments raised during the protest amounted an untimely challenge to the meaning of the solicitation term. 4 C.F.R. § 21.2(a)(1); *Democracy Int’l, Inc., supra*. This protest ground is therefore untimely.<sup>4</sup>

Regardless of the fact that the protest issue is untimely, Agile-Bot argues that its allegations with respect to the dollar value threshold for relevant references are sufficiently interrelated to its meritorious protest grounds under the same evaluation factor of organizational experience and therefore not clearly severable. Resp. to Agency at 3. Our Office will limit a successful protester’s recovery of protest costs

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<sup>4</sup> We note that Agile-Bot further objects to the agency’s opposition to its request for reimbursement of costs related to the issue of the \$10.5 million threshold because the agency never filed a request for dismissal on this protest allegation. In Agile-Bot’s view, since the agency never argued that the protest allegation was untimely until now, it deprived Agile-Bot of the opportunity to respond to the issue of timeliness. Resp. to Agency at 3. Agile-Bot had two opportunities to address the issue of timeliness and consequently, mischaracterizes the record on this issue. Specifically, while the agency did not assert that this allegation was untimely during the protest, the parties addressed the language of the solicitation and the agency’s interpretation thoroughly during the course of the protest, including supplemental briefings at the request of our Office.

Moreover, during the ADR, the GAO attorney specifically told the parties that she concluded this argument was an untimely challenge to the solicitation’s terms. The requester failed to address this issue in its request for reimbursement of costs. In the agency’s response to the request for reimbursement of costs, the agency argued that because the issue was untimely, it cannot be included with the other clearly meritorious grounds of protest. Agency Resp. at 4. In its response to the agency’s filing, rather than addressing the timeliness of this allegation, the requester instead asserted that the agency’s silence on the issue during the protest undercut the agency’s argument in responding to the request for reimbursement of costs. Notwithstanding the protester’s assertion, the protester again failed to respond to the contention that this allegation was untimely.

where a part of its costs is allocable to a losing protest issue that is so clearly severable as to essentially constitute a separate protest. *Sodexo Mgmt., Inc.--Costs*, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 29. In making this determination, we consider, among other things, the extent to which the issues are interrelated or intertwined--i.e., 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. *Lockheed Martin Corp.; Northrop Grumman Sys. Corp.--Costs*, B-410719.8, B-410719.9, Dec. 12, 2016, 2017 CPD ¶ 8 at 8.

Here, the allegation was untimely, regardless of whether the allegation was interrelated with other allegations for purposes of a recommendation for reimbursement of costs. Our Office has concluded before that a protester is not entitled to recover protest costs where the record shows that the protest ground was in fact untimely. *Allied Materials & Equip. Co.--Costs*, B-243631.3, Oct. 31, 1991, 91-2 CPD ¶ 412 at 3. Accordingly, a prerequisite to recovery of protest costs is a timely filed protest issue pending before our Office at the time the procuring agency takes corrective action. As a result, we find that Agile-Bot is not entitled to recover those costs incurred in pursuit of its untimely protest issue.

The request that GAO recommend reimbursement of protest costs for issues beyond those which the agency has already agreed to pay is denied.

Thomas H. Armstrong  
General Counsel