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## Decision

**Matter of:** Arrow Security & Training, LLC--Costs

**File:** B-418720.11

**Date:** October 29, 2020

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Gunjan R. Talati, Esq., Lawrence M. Prosen, Esq., Benjamin L. Williams, Esq., and Caitlin Trevillyan, Esq., Kilpatrick Townsend & Stockton, LLP, for the protester. Alexis J. Bernstein, Esq., Isabelle P. Cutting, Esq., Major Michelle Gregory, and Captain Allison Johnson, Department of the Air Force, for the agency. Evan D. Wesser, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Reimbursement of costs relating to the protester's challenges to the agency's evaluation of certain awardees' responsibility and technical capabilities is not recommended where the challenges, which were dismissed by our Office prior to the deadline for the submission of the agency report, were clearly not meritorious, and are severable from the protester's other meritorious protest grounds.

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### DECISION

Arrow Security & Training LLC, a small business of Nashua, New Hampshire, requests that our Office recommend that it be reimbursed the reasonable costs of filing and pursuing its protest challenging its non-selection for a multiple-award indefinite-delivery, indefinite-quantity (IDIQ) contract under request for proposals (RFP) No. H92400-19-R-0003, which was issued by the U.S. Special Operations Command (USSOCOM), for subject matter expertise and knowledge-based services in support of USSOCOM's enterprise requirements for U.S.-based and globally-aligned Special Operations Forces missions. Subsequent to the filing of Arrow's request, the agency represented that it "does not object to [Arrow's] request for reasonable costs," with the exception of the allegations that our Office dismissed on June 4, 2020, prior to the deadline for the submission of the agency's report in response to the protest. USSOCOM Response to Arrow's Request at 1. Arrow requests that our Office recommend that it be reimbursed for the costs of the dismissed protest grounds, arguing that they are not reasonably severable from its meritorious protest grounds.

The request is denied.<sup>1</sup>

## BACKGROUND

The RFP, which was issued as a total small business set-aside on June 14, 2019, and subsequently amended one time, sought proposals for multiple IDIQ contracts to provide USSOCOM with Special Operations Forces Core Services Support, including: education and training services; management support services; program management; engineering, technical and professional services; and administrative and other services. The RFP contemplated that the resulting IDIQ contracts will have a potential 10-year period of performance, comprised of a 5-year base period, an initial 3-year option period, and an additional 2-year option period. RFP at 34.<sup>2</sup> Orders against the IDIQ contracts may be placed on a labor-hour, time-and-material, fixed-price, or cost-plus-fixed-fee basis, with an aggregate ceiling for all contracts of \$950 million. *Id.* at 2-9.

The RFP provided that award would be made to all “qualifying offerors,” defined as offerors that received a pass rating for administrative and responsibility matters, an acceptable rating for an IDIQ management evaluation factor, and a substantial confidence rating for past performance.<sup>3</sup> *Id.* at 56.

As to the administrative and responsibility material factor, which was to be evaluated on a pass/fail basis, the agency was to evaluate whether the offeror provided: (1) proof of

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<sup>1</sup> As addressed above, the agency represented that it does not object to reimbursing Arrow for its reasonable costs incurred in pursuing all of its protest grounds other than those that were dismissed by our Office prior to the submission of the agency report. As the agency has represented that it will reimburse Arrow’s reasonable costs incurred in pursuit of certain protest grounds, the protester’s request for a recommendation from our Office with respect to those uncontested grounds is moot. Our Office will not render to a protester what would be, in effect, an advisory opinion. *Ferris Optical*, B-403012.2, B-403012.3, Oct. 21, 2010, 2010 CPD ¶ 265 at 2. Arrow should submit its certified claim for its costs incurred in pursuing the uncontested grounds, detailing the time spent and costs incurred, directly to the agency within 60 days of its receipt of this decision.

<sup>2</sup> References to the RFP herein are to the conformed version of the solicitation that was produced by the agency with its report responding to the protest. Additionally, references herein to page numbers for the RFP and agency report (AR) exhibits are to the Bates numbering provided by the agency.

<sup>3</sup> The agency did not request, or otherwise evaluate, proposed costs or prices, as this procurement was conducted in accordance with Section 825 of the National Defense Authorization Act (NDAA) for Fiscal Year 2017, Class Deviation 2018-O0006. That authority, which was issued pursuant to 10 U.S.C. § 2305(a)(3)(C), provides that when issuing a solicitation that will result in multiple-award contracts issued for the same or similar services, entities subject to Title 10 of the U.S. Code may exclude price or cost as an evaluation factor for the contract awards, if the solicitation states that the government intends to make an award to each and all qualifying offerors.

a cleared top secret facility clearance; (2) proof of a line of credit of at least \$1 million; (3) adequate information to avoid and/or mitigate any current organizational conflicts of interest; (4) required signatures, representations, and certifications; and (5) valid documentation from the Defense Contract Management Agency, Defense Contract Audit Agency, or other Federal Audit Agency that it has an adequate accounting system for operating government cost type contracts or, alternatively, a completed preaward accounting system checklist with supporting documentation. *Id.* at 53-54.

As to the IDIQ management factor, which was to be evaluated on an acceptable/unacceptable basis, the agency was to evaluate the offeror's: (1) program management plan; (2) breadth and depth of experience in providing support of similar scope and size to similar organizations; (3) management approach and structure; (4) methods to recruit, hire, train, and retain a capable workforce; (5) approach to providing appropriately cleared facilities and personnel; (6) approach to identify, evaluate, and resolve any organizational conflict of interest that may occur through the life of the contract; and (7) approach to providing sound business processes for monitoring contract performance. *Id.* at 54-55.

As to past performance, which was to be qualitatively evaluated, the agency was to evaluate the offeror's demonstrated record of performance in providing the services in the RFP's statement of work on efforts meeting the solicitation's recency and relevancy requirements. *Id.* at 55.

USSOCOM ultimately received 86 timely proposals from eligible small business offerors, including Arrow. AR, Tab 6, Source Selection Evaluation Board (SSEB) Report, at 2-3. The agency found that Arrow passed the administrative and responsibility material factor, and was acceptable under the IDIQ management factor. USSOCOM, however, found that Arrow's past performance only warranted a satisfactory confidence assessment, and, therefore, Arrow was ineligible for award because it was not a qualifying offeror under the RFP's basis for award criteria. *Id.* at 12. The SSEB ultimately evaluated 46 other offerors as being eligible for award based on their technical acceptability and substantial confidence past performance assessments. AR, Tab 6, SSEB Report, at 24-26. The source selection advisory council (SSAC) reviewed the SSEB's evaluation and findings for accuracy, consistency, and supportability in accordance with the evaluation criteria, and concurred with the SSEB's findings. AR, Tab 8, SSAC Recommendation, at 3. The source selection authority adopted the SSAC's recommendation, and made award to the 46 qualifying offerors. AR, Tab 10, Source Selection Decision, at 3, 6-8.

On May 12, Arrow filed its initial protest with our Office. In addition to raising a number of challenges to the agency's evaluation of Arrow's proposal under the past performance factor, the protester also raised several challenges to the agency's evaluation of certain awardees' proposals under the administrative and responsibility materials and IDIQ management factors. Of these latter allegations, the protester alleged that five awardees were either "newly formed or essentially bare companies" that could not have met the RFP's qualifying criteria. See Protest at 22-27. Next, Arrow

alleged, based on publically available information, that several awardees lacked relevant past performance to warrant a substantial confidence rating, specifically alleging that those awardees did not have past performance efforts: (i) valued in excess of \$3 million; (ii) demonstrating performance in five or more locations; or (iii) demonstrating extensive past contracting experience. *Id.* at 27-32. These specific protest allegations were predicated on a comparison between publically available information about the affected awardees and Arrow's self-described past performance; therefore, our Office viewed these allegations as setting forth alleged disparate treatment in the agency's evaluation. Finally, Arrow also argued, based on the above-described allegations, that the agency made unreasonable affirmative responsibility determinations as to the affected awardees. *Id.* at 33-34.

Subsequent to the filing of the protest, USSOCOM and one of the intervenors respectively filed requests for partial dismissal of the protest. Among other bases, the requests argued that Arrow was not an interested party to challenge the agency's evaluation and ultimate awards to the affected awardees. Specifically, the parties argued that even if Arrow prevailed on its challenges, it would not be next in line for award in light of the RFP's unique basis for award under which all qualifying offerors would receive an award. In this regard, even if the protester prevailed on establishing that the agency erred in evaluating the eligibility of the affected awardees, Arrow would nevertheless still be ineligible for award because of its satisfactory confidence past performance assessment. See Intervenor IronEagleX, Inc.'s Req. for Partial Dismissal; USSOCOM Req. for Partial Dismissal.

In separate non-digested dismissal decisions dated May 26 and June 4, we granted in part the requests for partial dismissal. Specifically, we agreed with the agency's and intervenor's arguments that Arrow was not an interested party to challenge the agency's evaluation of the affected awardees' proposals under the IDIQ management and administrative and responsibility materials factors, and the subsequent awards made to those awardees.<sup>4</sup> Therefore, we dismissed the protester's arguments challenging the agency's evaluation of the affected awardees' proposals under those evaluation factors, as well as the resulting awards made to them. In contrast, however, we expressly declined to dismiss the protest allegations challenging the agency's evaluation of the affected awardees' proposals under the past performance factor to the extent that they were the basis for the protester's disparate treatment arguments, as the challenges were germane to the protester's legally and factually sufficient allegations challenging the agency's evaluation of the protester's proposal under the past performance factor.

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<sup>4</sup> We further explained that even if Arrow were to prevail on its other protest grounds challenging the evaluation of its proposal under the past performance factor and ultimately was found to be a qualifying offeror, it would nevertheless still not be interested to challenge the awards made to other offerors. See, e.g., *National Air Cargo Grp., Inc.*, B-411830.2, Mar. 9, 2016, 2016 CPD ¶ 85 at 4 (“[W]here the solicitation contemplates multiple awards, an existing contract awardee is not an interested party to challenge the agency's decision to award another contract.”).

See Notice of Decision on Intervenor's Req. for Partial Dismissal; Notice of Decision on Agency's Req. for Partial Dismissal.

On June 15, USSOCOM submitted its agency report responding to the remaining protest allegations. On June 25, Arrow filed its comments on the agency report, which included supplemental protest allegations. The protester supplemented its initial protest grounds by challenging the methodology utilized by the agency to evaluate the relevancy of past performance efforts, as well as for reaching a final confidence assessment rating. Additionally, Arrow asserted additional discrete alleged errors committed by the agency in evaluating past performance. For example, the protester contended that the agency erred in relying on an outdated contractor performance assessment report for an Arrow reference to downgrade the relevance of one of Arrow's past performance efforts, as opposed to relying on more up-to-date information contained in the protester's proposal, while the agency inconsistently resolved disparities between certain awardees' proposals and other government past performance information in favor of those awardees. See Arrow Comments & Supp. Protest at 23-24. As another example, Arrow alleged that for certain awardees the agency unreasonably considered performance on multiple contracts or multiple task orders under a single contract to evaluate the relevance of those awardees' past performance. The protester alleged that such an approach was inconsistent with the RFP's direction that past performance be submitted for a specific contract or task order, as opposed to aggregating multiple related past performance efforts. See *id.* at 25.

After the completion of briefing, the GAO attorney assigned to the protest conducted an "outcome prediction" alternative dispute resolution (ADR) conference, and informed the parties in a detailed discussion that, in his view, our Office was likely to sustain in part Arrow's protest. Specifically, he indicated that our Office would likely sustain Arrow's protest to the extent it challenged the methodology utilized by USSOCOM to reach a final past performance confidence assessment rating of satisfactory for the protester. In this regard, the record showed that Arrow did not receive a substantial confidence past performance rating because one of its efforts, which was rated as only somewhat relevant, "offset" Arrow's other very relevant and relevant rated references. The GAO attorney explained that the "offsetting" methodology utilized by USSOCOM was not likely to be found reasonable because the methodology had the effect of penalizing the protester merely because it submitted an additional, less relevant reference, when its other references were otherwise very relevant or relevant and of high quality. See, e.g., *Shaw-Parsons Infrastructure Recovery Consultants, LLC; Vanguard Recovery Assistance, Joint Venture*, B-401679.8 *et al.*, Sept. 8, 2010, 2010 CPD ¶ 211 (sustaining protest where the agency's past performance evaluation unreasonably penalized the protester based on its submission of performance information for additional less relevant contracts).

In addition to this likely sustain basis, the GAO attorney indicated that the agency faced litigation risk arising from the protester's supplemental protest allegations alleging discrete past performance evaluation errors. In this regard, the GAO attorney noted concern with how the agency considered the contract value for one of Arrow's

references, and whether the agency consistently considered multiple contracts and/or task orders for certain awardees in light of the RFP's evaluation criteria. Based on the analysis provided during the outcome prediction ADR, the agency notified our Office of its intent to take corrective action, including reevaluating Arrow's proposal and making a new award decision. Based on the agency's proposed corrective action, our Office dismissed the protest as academic. See *Arrow Security & Training, LLC*, B-418720.6, B-418720.10, Aug. 4, 2020 (non-digested decision). This timely request followed.

## DISCUSSION

As addressed above, USSOCOM does not object to reimbursing Arrow for the costs of filing and pursuing the majority of its protest allegations, including for several protest grounds that the GAO attorney, during the ADR session, indicated would likely be denied by our Office. Rather, the agency only objects to reimbursing the protester for the costs associated with Arrow's dismissed challenges to the agency's evaluation of certain awardees' proposals under the administrative and responsibility materials and IDIQ management factors. USSOCOM argues that these issues are readily severable from Arrow's clearly meritorious protest allegations, and the intertwined unsuccessful past performance and disparate treatment arguments that the agency similarly has agreed to reimburse the protester for filing and pursuing.

Arrow disagrees with USSOCOM's objections, arguing that the dismissed protest allegations are inextricably intertwined with its clearly meritorious protest allegations. The protester contends that its allegations regarding the affected awardees share a common legal and factual basis with its allegations that the agency failed to reasonably evaluate the affected awardees' relevant past performance. For the reasons that follow, we find that the protest allegations challenging the agency's evaluation of certain awardees' proposals under the administrative and responsibility materials and IDIQ management factors that were dismissed prior to the deadline for the submission of the agency's report are readily severable from Arrow's clearly meritorious past performance challenges.

As a general rule, we consider a successful protester entitled to costs incurred with respect to all issues pursued, not merely those upon which it prevails. In our view, 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. *AAR Aircraft Servs.--Costs*, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 9. Nevertheless, failing to limit the recovery of protest costs in all instances of partial or limited success by a protester may result in an unjustified windfall to the protester and cost to the government. Accordingly, in appropriate cases we have limited the recommended reimbursement of protest costs where a part of the costs is allocable to a losing protest issue that is so clearly severable as to essentially constitute a separate protest. See, e.g., *VSE Corp.; The Univ. of Hawaii--Costs*, B-407164.11, B-407164.12, June 23, 2014, 2014 CPD ¶ 202 at 8; *Honeywell Tech. Solutions, Inc.--Costs*, B-296860.3, Dec. 27, 2005, 2005 CPD ¶ 226 at 3-4. In determining whether protest issues are so

clearly severable as to constitute essentially separate protests, we consider, among other things, the extent to which the issues are interrelated or intertwined--*i.e.*, the extent to which successful and unsuccessful arguments share a common core set of facts, are based on related legal theories, or are otherwise not readily severable. *JV Derichebourg-BMAR & Assocs., LLC--Costs*, B-407562.3, May 3, 2013, 2013 CPD ¶ 108 at 3-4.

Here, we decline to recommend reimbursement for Arrow's challenges to the agency's evaluation of the affected awardees' proposals under the administrative and responsibility materials and IDIQ management factors. As addressed above, the protester was not an interested party to challenge the evaluation of the awardees' proposals and resulting award decisions in these areas in light of the RFP's unique basis for award. Additionally, the protester's broad allegations that the awardees lacked any relevant experience, to the point that they should have been found to be not responsible, bears no meaningful relationship to the discrete evaluation concerns identified by our Office. Indeed, prior to development of the merits of the protest, our Office dismissed these discrete issues, indicating that they were materially distinct--both in terms of factual and legal bases--from the remaining protest grounds. Therefore, we find the dismissed protest grounds are severable from the other protest grounds, and we do not recommend that Arrow be reimbursed for filing and pursuing the dismissed protest grounds.<sup>5</sup>

The request is denied.

Thomas H. Armstrong  
General Counsel

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<sup>5</sup> Arrow also argues that it would be impracticable to segregate the costs associated with the dismissed protest grounds from the other protest grounds. See Arrow Reply in Support of its Request at 4. We find no merit to these arguments. While we do not address herein the amount of costs recommended for reimbursement, we have seen parties agree to several methods to address this issue, including a total page basis method of allocation (*e.g.*, total protest costs x (number of briefing pages addressing the uncontested issues/total briefing pages)) or a similar allocation method. See, *e.g.*, *JRS Staffing Servs.--Costs*, B-410098.6 *et al.*, Aug. 21, 2015, 2015 CPD ¶ 262; *Intermarkets Global--Costs*, B-400660.14, July 2, 2014, 2014 CPD ¶ 205.