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Decision

Matter of: Unico Mechanical Corporation--Costs

File: B-420355.5

Date: March 24, 2023

Jacob W. Scott, Esq., and Alexander Gorelik, Esq., Smith, Currie & Hancock LLP, for the protester.
Elisabeth A. Dixon, Esq., and Judith E. Almerico, Esq., Department of the Army, for the agency.
David A. Edelstein, Esq., and Alexander O. Levine, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Request that GAO recommend reimbursement of protest costs is granted where challenge to the agency's waiver of Buy American Act requirements was clearly meritorious and the agency unduly delayed taking corrective action.
 2. Request that GAO recommend reimbursement of protest costs is denied where the requester's arguments regarding the evaluation of proposals were not clearly meritorious and are severable from the clearly meritorious protest argument.
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DECISION

Unico Mechanical Corporation, a small business of Benicia, California, requests that we recommend the firm be reimbursed the reasonable costs of pursuing its protest. Unico challenged the award of a contract to McMillen, LLC, of Boise, Idaho, by the Department of the Army, United States Army Corps of Engineers, under request for proposals (RFP) No. W9127N-21-R-0005, which was issued for construction at Cougar Dam power plant in Lane County, Oregon.

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

BACKGROUND

The procurement at issue here relates to the powerhouse at Cougar Dam, which relies on two 90 inch butterfly valves to shut off the flow of water to the generator turbines.

Contracting Officer's Statement (COS) at 1.¹ These valves, which were placed into service in the 1960s, have developed defects affecting their safety and reliability. *Id.* at 1-2. On August 27, 2021, the agency issued the RFP, seeking to award a fixed-price construction contract for the replacement of these valves and associated control systems. *Id.*; see Agency Report (AR), Tab 5a, RFP.²

The RFP provided that award would be made on a best-value tradeoff basis considering the following factors: price, past performance, work plan, and small business participation commitment. AR, Tab 8, RFP amend. 3 at 5, 9-16.

The RFP incorporated Federal Acquisition Regulation (FAR) clause 52.225-9 and FAR provision 52.225-10, which implement the Buy American Act, 41 U.S.C. § 8301-8305. AR, Tab 14, RFP amend. 7 at 1-6. Clause 52.225-9(b)(1) generally requires the contractor to use only domestic construction material in performing the contract. If the agency determines that certain specified criteria are met, the agency can list specific material excepted from this requirement. FAR clause 52.225-9(b)(2), (b)(3). Provision 52.225-10(d)(3) provides that an agency may only award a contract based on a proposal that is compliant with the domestic material requirement, unless the agency determines that an exception applies and grants a waiver. The RFP here listed no exceptions. AR, Tab 14, RFP amend. 7 at 4.

The agency received seven proposals, including proposals from McMillen and Unico. COS at 9.

Of relevance to this request, McMillen's proposal relied on the use of foreign materials for the project's two 90 inch butterfly valves and one hydraulic power unit (HPU). McMillen requested that the agency waive the Buy American Act for these items. AR, Tab 16, McMillen Buy American Waiver Request at 2. The agency denied McMillen's request and documented its rationale for doing so. AR, Tab 24, McMillen Buy American Waiver Denial at 2. During discussions, and at the agency's request, McMillen submitted additional information in support of its request. See Supp. AR, Tab 1, McMillen Revised Pricing Proposal at 14-15. The record does not contain any documentation of the agency's analysis of this revised submission, or any indication that the agency affirmatively granted McMillen's waiver request prior to contract award.

The agency convened a source selection evaluation board (SSEB) to evaluate proposals. See AR, Tab 35, SSEB Final Report. The source selection authority (SSA) reviewed the SSEB's conclusions and concurred with the ratings assigned to Unico and

¹ Unless otherwise specified, citations to protest filings are to the underlying protest, B-420355.3, B-420355.4.

² The RFP was amended twelve times. COS at 2-3. The final text of the RFP's instructions to offerors and evaluation factors for award was set forth in amendment 3 to the solicitation. *Id.*; AR, Tab 8, RFP amend. 3 at 5-16. The final text of the RFP's Buy American Act provisions, also of relevance to this request, was contained in amendment 7. COS at 2-3; AR, Tab 14, RFP amend. 7 at 2-6.

McMillen. Supp. AR, Tab 2, Source Selection Decision Document (SSDD) at 13. The final ratings and total evaluated prices for McMillen and Unico were as follows:

	McMillen	Unico
Past Performance	Substantial Confidence	Limited Confidence
Work Plan	Outstanding	Good
Small Business	Acceptable	Outstanding
Price	\$4,121,583	\$5,095,420

Id. at 19. The SSA determined that McMillen’s proposal was both the highest-rated overall and the lowest-priced, and that it therefore represented the best value to the agency. *Id.*

On August 24, 2022, the agency awarded a contract to McMillen. Supp. AR, Tab 8, Award Notice at 1. Shortly after award, the agency issued contract modification P00001, adding the butterfly valves and HPU to the list of material exempted from the Buy American Act’s domestic material requirement. Supp. AR, Tab 6, Contract Modification P00001 at 3. The record does not contain any documentation of the agency’s rationale for issuing this modification.

Unico timely protested the award to McMillen with our Office.³ In its protest, Unico alleged that the agency improperly waived the solicitation’s Buy American Act requirements. Unico also argued that the agency unreasonably evaluated Unico’s proposal on the work plan and past performance factors, incorrectly evaluated whether McMillen could comply with the project’s specifications, and made an unreasonable best-value determination.⁴

The agency filed its report on Unico’s protest on October 13. Unico timely filed comments and a supplemental protest. Our Office directed the agency to file a report on the supplemental protest by November 1. On that day, the agency informed our Office that it intended to take corrective action by reevaluating the proposals of Unico and McMillen, and requested that we dismiss the protest. Notice of Corrective Action, Nov. 1, 2022 at 1-2. After our Office requested clarification, the agency confirmed that it would make a new award decision. Revised Notice of Corrective Action, Nov. 4, 2022,

³ Unico filed two prior protests of this procurement, both of which our Office dismissed as academic after the agency indicated it would take corrective action. *Unico Mechanical Corp.*, B-420355, Nov. 23, 2021 (unpublished decision); *Unico Mechanical Corp.*, B-420355.2, Jul. 6, 2022 (unpublished decision). Neither of these prior protests is relevant to this request for reimbursement.

⁴ Unico also argued that the agency unreasonably ignored an organizational conflict of interest related to McMillen’s employment of a former agency employee, but withdrew this argument in its comments on the agency report. Comments & Supp. Protest at 2 n.2. Unico does not seek reimbursement of its costs related to this argument. Unico Brief Regarding Severability, Feb. 2, 2023 at 4 n.1.

Attachment A at 5. Accordingly, we dismissed the protest as academic. *Unico Mechanical Corp.*, B-420355.3, B-420355.4, Nov. 7, 2022 (unpublished decision). This request timely followed.

DISCUSSION

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. 4 C.F.R. § 21.8(e); *AAR Aircraft Servs.--Costs*, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 5.

As a prerequisite to our recommending that costs be reimbursed where an agency takes corrective action in response to a protest, not only must the protest have been meritorious, but it also must have been clearly meritorious, *i.e.*, not a close question. *InfraMap Corp.--Costs*, B-405167.3, Mar. 26, 2012, 2012 CPD ¶ 123 at 3. 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. *Procinctu Grp. Inc.--Costs*, B-416247.4, Sept. 21, 2018, 2019 CPD ¶ 36 at 4. Once our Office determines that a protest is clearly meritorious, 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.⁵ *Alsalam Aircraft Co.--Costs*, B-401298.3, Nov. 5, 2009, 2009 CPD ¶ 208 at 3.

As explained below, we find that Unico raised a clearly meritorious protest argument relating to the agency's waiver of the Buy American Act, and that the agency unduly delayed taking corrective action. We therefore recommend that Unico be reimbursed its costs with respect to this argument. However, we find that the remainder of Unico's protest is not clearly meritorious, and is severable from the clearly meritorious argument. We therefore do not recommend that Unico be reimbursed its costs associated with any other protest arguments.

Buy American Act

Unico alleged that the agency improperly granted McMillen a Buy American Act waiver. Protest at 23-27. Unico contends that this protest argument is clearly meritorious because the protest record contains no support for the agency's grant of a Buy American Act waiver. Req. for Reimbursement at 7-11. Unico also notes that it is capable of manufacturing Buy American Act-compliant butterfly valves, and that McMillen's market survey, submitted to support its Buy American Act waiver request, did not include Unico. Protest at 26-27.

⁵ Here, the agency took corrective action after filing the agency report on Unico's initial protest, but prior to the due date for the agency report on the supplemental protest. Unico does not seek reimbursement of those costs pertaining to its supplemental protest. Req. for Reimbursement at 2 n.1.

The agency argues that it had a defensible legal position because McMillen submitted sufficient documentation in support of its waiver request. Resp. to Req. for Reimbursement at 4-6. Our Office has reviewed the protest record, and for the reasons stated below, we find this aspect of Unico's protest to be clearly meritorious.

The RFP here incorporated FAR clause 52.225-9, which generally requires the use of domestic construction material. If the contracting officer determines that any of several specified exceptions applies, however, the contracting officer may identify items that are not subject to this domestic material requirement. FAR clause 52.225-9(b)(2), (b)(3). One basis for such an exception is a determination that the cost of domestic material would be unreasonable; that is, that it would exceed the cost of foreign material by more than 20 percent.⁶ FAR clause 52.225-9(b)(3)(i).

If the contracting officer does not identify a particular item as excepted from the Buy American Act's domestic material requirement, FAR clause 52.225-9 allows a contractor to request a waiver (referred to as a "determination of inapplicability") by providing specified information necessary for the government to evaluate the request. FAR clause 52.225-9(c)(1)(i). If the waiver request is based on the alleged unreasonable cost of domestic materials, the contractor's request must include a "reasonable survey of the market." FAR clause 52.225-9(c)(1)(ii).

In addition, FAR provision 52.225-10 provides that, prior to award, offerors may request a Buy American Act waiver. The provision states that offerors should submit any necessary waiver requests in time to allow a determination prior to the submission of offers. FAR provision 52.225-10(b). If an offeror does not request, or does not receive, a waiver prior to the submission of offers, it must submit its request and supporting information with its offer. *Id.* Under the provision, offerors must provide the same information in support of their requests that FAR clause 52.225-9 requires of contractors. *Id.* Unless the contracting officer grants a pre-award waiver, the agency may evaluate only those offerors based on the use of domestic material, and may only accept an offer based on the use of foreign material if it is revised during negotiations to become compliant with the domestic material restrictions. FAR provision 52.225-10(d)(3).

Importantly, while the FAR prescribes the information that offerors and contractors must submit in support of a waiver request, it is the contracting officer that makes the final determination regarding the grant of a waiver. That is, even if an offeror or contractor submits the required information, the contracting officer must still determine that this information supports the grant of a waiver. FAR clause 52.225-9(c)(3) ("Unless the [g]overnment determines that an exception to the Buy American statute applies, use of foreign construction material is noncompliant with the Buy American statute.").

⁶ The other exceptions are where application of the domestic material restriction would be impracticable or inconsistent with the public interest, or where the material is not produced in the United States in sufficient quantities or of satisfactory quality. FAR clause 52.225-9(b)(3)(ii) and (iii).

Prior to the submission of offers on this solicitation, at least one offeror requested a Buy American Act waiver for the project's two 90 inch butterfly valves, on the grounds that these valves were not available from domestic manufacturers at a reasonable cost. Supp. AR, Tab 7a, Draft Buy American Memorandum at 1.⁷ In evaluating this offeror's request, the agency conducted market research by contacting manufacturers, including Unico. The contracting officer wrote:

Unico Mechanical Corp . . . refuted the claims asserted by [the offeror requesting a waiver]. The President/CEO [chief executive officer] of Unico Mechanical . . . identified that Unico has the ability and capacity to manufacture the [b]utterfly [v]alves required by the solicitation in compliance with the Buy American [Act]. Additionally, [Unico] identified that given the right circumstances, if approached by another contractor [it] would be willing to operate as a subcontractor.

Id. at 2. Unico provided a rough order of magnitude price of \$[DELETED] for both of the butterfly valves. The agency identified at least two other domestic manufacturers that indicated an ability to provide Buy American Act-compliant valves; one provided a rough pricing estimate of \$[DELETED] for both valves, and one did not provide a pricing estimate. *Id.* Accordingly, on October 21, 2021, the contracting officer indicated a belief that "there are sufficient resources existing to allow contractors to comply with Buy American [Act] requirements for the 90 [inch] butterfly valves." *Id.*

Ultimately, the solicitation did not list any items as exceptions to the Buy American Act's domestic material requirement. AR, Tab 14, RFP amend. 7 at 4. On December 8, 2021, McMillen requested a Buy American Act waiver with respect to the project's two 90 inch butterfly valves and one HPU. AR, Tab 16, McMillen Waiver Request at 2. McMillen's request was based on its assertion that the price delta between domestic and foreign material would exceed 20 percent. *Id.* at 1-2. The only support McMillen provided for this was a table indicating a lump sum price of \$[DELETED] for the domestic material and \$[DELETED] for the foreign material, without breaking down that lump sum into the cost of the butterfly valves and HPU. *Id.* at 2. This table indicated that McMillen had obtained pricing from one domestic supplier and one foreign supplier. *Id.*

⁷ This document is a draft memorandum that was not signed by the contracting officer. Supp. AR, Tab 7a, Draft Buy American Memorandum at 3. The agency states that it "includes the [a]gency's analysis in response to [Buy American Act] waiver requests but was not used" because it was rendered unnecessary by a solicitation amendment. Agency Resp. to Unico's Req. for Add'l. Documents, Oct. 20, 2022, at 2-3. Accordingly, our Office does not cite this document for its discretionary conclusions but rather for what it indicates about the state of the agency's knowledge and understanding at the time it was drafted.

On May 18, 2022, the contracting officer denied McMillen's waiver request. AR, Tab 24, McMillen Buy America Waiver Denial. The contracting officer wrote:

[W]hile McMillen has identified the suppliers for both foreign and domestic materials, its supporting information consists of pricing provided by a single supplier of each construction material, with no indication that these sources are the only ones available. I find that this limited information is insufficient to constitute a reasonable survey of the market.

Id. Upon making this determination, the contracting officer sent McMillen a negotiation memorandum which, apparently, asked McMillen to provide additional information in support of its request for a Buy American Act waiver. Supp. AR, Tab 1, McMillen Response to Negotiation Memorandum at 1.⁸ McMillen responded on May 31 by providing a table indicating that it had surveyed four additional foreign manufacturers of the butterfly valves and HPU, but no additional domestic manufacturers. *Id.* at 15.

The agency does not identify, and our Office could not locate, any document in the record that post-dates this submission by McMillen in which the agency documented its evaluation of McMillen's revised Buy American Act waiver request. In fact, no document in the record indicates that the agency actually granted McMillen's waiver request prior to contract award.⁹ In short, the record demonstrates that the agency awarded a contract to McMillen knowing that McMillen's proposal relied on foreign construction material, but without granting a Buy American Act waiver, and without documenting a determination that a Buy American Act exception applied. Accordingly, the agency's award of a contract to McMillen was a violation of the Buy American Act and the FAR clauses implementing the Act. See FAR clause 52.225-9(b)(3), (c)(3) (requiring determination by the government that an exception applies to grant a waiver); FAR provision 52.225-10(d)(3) (prohibiting award to offeror whose proposal is based on foreign material unless a waiver is granted). Given the absence of any explanation or supporting documentation in the record, a reasonable agency inquiry into the protest allegations would have disclosed the absence of a defensible legal position. See *Procinctu Grp. Inc.--Costs, supra* at 4.

The agency argues that it acted reasonably because, after the agency rejected McMillen's initial waiver request, McMillen submitted a revised request indicating that it had surveyed other firms. Resp. to Req. for Reimbursement at 5. We find that this argument does not present a defensible legal position. As discussed above, the agency did not document its review of McMillen's revised submission or its affirmative determination that an exception to the Buy American Act applied. In any event, the

⁸ The negotiation memorandum itself is not in the agency report.

⁹ To the contrary, contract modification P00001 (which added the butterfly valves and the HPU to the items excepted from the Buy American Act) suggests that the waiver was not granted prior to award. See Supp. AR, Tab 6, Modification P00001 at 3. Notably, the record contains no documentation of the agency's rationale for this modification.

record demonstrates that the agency had actual knowledge of additional domestic suppliers capable of producing Buy American Act-compliant 90 inch butterfly valves. Supp. AR, Tab 7a, Draft Buy American Memorandum at 1-2. Further, the agency had previously determined that McMillen's survey of one foreign and one domestic supplier was insufficient to support a Buy American Act waiver specifically because McMillen had not indicated that these sources were the only ones available. AR, Tab 24, McMillen Buy America Waiver Denial at 2. McMillen's revised request surveyed several additional foreign suppliers but ignored additional domestic suppliers that the agency actually knew could produce Buy American Act-compliant valves. In these circumstances, we find it unreasonable for the agency to have waived the Buy American Act based on this revised request.

The agency also argues that its own "market research" supports its grant of a Buy American Act waiver. COS at 14 (*citing* AR, Tab 4, Market Research Report). However, the market research the agency cites is not its prior research into the Buy American Act issue, *i.e.*, Supp. AR, Tab 7a, Draft Buy American Memorandum. Instead, the agency cites market research on whether it expected at least two offers from responsible small businesses and should therefore issue the solicitation as a small business set-aside pursuant to FAR section 19.502-2. AR, Tab 4, Market Research Report at 1-6. This market research document is wholly silent on the Buy American Act. *Id.*

Similarly, in response to a document production request by Unico, the agency stated that the SSDD constituted its "[e]valuation of McMillen's revised [Buy American Act] waiver request." Agency Resp. to Req. for Add'l. Documents, Oct. 20, 2022 at 1. However, our Office's review confirms that the SSDD discussed the Buy American Act only in the context of the price adjustment to McMillen's proposal¹⁰ and did not discuss or support, in any way, the agency's rationale for granting the waiver request. See Supp. AR, Tab 2, SSDD at 18-20. Thus, neither the agency's "market research" nor the SSDD provides a defensible legal position regarding Unico's Buy American Act arguments.

Accordingly, we find that a reasonable agency inquiry into Unico's Buy American Act argument would have disclosed the lack of a defensible legal position, and that this aspect of Unico's protest is clearly meritorious. Unico first raised this argument in its initial protest. Protest at 23-27. Because the agency took corrective action after the due date for the agency report, we find that the agency unduly delayed taking corrective action. See *Alsalam Aircraft Co.--Costs, supra* at 3. The agency does not dispute this undue delay analysis. See Agency Resp. to Req. for Entitlement at 10. We therefore grant Unico's request with respect to this protest argument.

¹⁰ If an offer is based on the use of foreign construction material, the contracting officer must add 20 percent of the cost of that foreign material to the offer's evaluated price. FAR provision 25.204(b)(1)(ii). McMillen's proposal included \$[DELETED] of foreign material; the agency therefore upwardly adjusted the firm's evaluated price by \$[DELETED]. Supp. AR, Tab 2, SSDD at 18.

Other Protest Arguments

The remainder of Unico's protest relates to the agency's evaluation of proposals. Unico alleged that the agency incorrectly determined that McMillen could comply with contract technical specifications, improperly evaluated Unico's proposal on the work plan and past performance factors, and made an unreasonable best-value tradeoff decision. The agency argues that these protest arguments are not clearly meritorious because Unico misinterpreted the solicitation and because Unico's arguments represent mere disagreement with the agency's discretionary decisions. Resp. to Req. for Reimbursement at 7-10. Here, we agree with the agency.

With respect to the evaluation of McMillen, Unico argued that, because McMillen proposed to procure valves produced in foreign countries, it "could not procure a valve that meets the numerous technical specifications that ensure the valve's reliability and material conformance, ensure that the required testing is properly performed, and provide a suitable warranty." Protest at 28. Relatedly, Unico noted that the RFP's specifications gave the agency the right to witness shop testing of the valves during fabrication, and argued that agency personnel "would not be able to attend any such testing performed in a foreign country." *Id.* at 29.

The agency responded that nothing in McMillen's proposal suggested that its valves would not meet contract specifications, and that, in any event, this presented an issue of contract administration. Memorandum of Law (MOL) at 19. We agree. See *Roco Rescue, Inc.*, B-416382, Aug. 9, 2018, 2018 CPD ¶ 277 at 3-4 n.3 ("Whether [an offeror] will actually be able to deliver a compliant product involves a matter of contract administration, which is the responsibility of the contracting agency, not our Office."). The agency also stated that its personnel routinely attend the testing of construction components outside the United States. MOL at 19. We find the agency's explanation reasonable, and accordingly conclude that Unico's protest of the evaluation of McMillen's proposal is not clearly meritorious.

Unico also protested the evaluation of its own proposal under the past performance factor. Here, the RFP instructed offerors to submit information for between two and four recent and relevant projects. AR, Tab 8, RFP amend. 3 at 9. To be considered recent, a project must have been completed, or substantially completed, within the preceding ten years. *Id.* "Substantially complete" was defined as "having completed more than 75 [percent] of the project work at the time of proposal submission." *Id.* The solicitation specifically informed offerors that they "must reasonably explain why [a] project is considered at least 75 [percent] complete," and that the agency reserved the right to reject projects where the offeror did not provide a reasonable explanation. *Id.*

With respect to one of Unico's submitted projects, for the manufacture and supply of three turbine shutoff valves on a Naval Facilities Engineering Systems Command (NAVFAC) project, NAVFAC indicated that the work was 95 percent complete, but both Unico and NAVFAC stated that only one of the three units had been delivered. AR, Tab 33a, Unico Proposal at 9 ("Unit 1 delivered; [i]n progress for Units 2 & 3"), at 11 (Unit 1 [d]elivered, [u]nit 2, 3 in production"). Unico's proposal did not explain this

discrepancy. *Id.* The agency concluded that it could not determine that the project was substantially complete. AR, Tab 35, SSEB Final Report at 44.

Unico initially argued--counterfactually--that “[n]othing in Unico’s proposal states that only one of three units were delivered on that project.” Protest at 30. In its comments on the agency report, Unico added the argument that the agency “ignored the explanatory note in Unico’s proposal.” Comments & Supp. Protest at 22. This appears to refer to a note in Unico’s proposal stating: “Construction or site installation was performed under another contract and under the contract [Unico’s major subcontractor] provided [o]n-site construction installation support to the district and the site construction contractor.” AR, Tab 33a, Unico Proposal at 9. This note does not clearly address the agency’s concern: the conflict between the statements that the contract was 95 percent complete and that only one of three units had been delivered. It is an offeror’s responsibility to submit a well-written proposal, with adequately detailed information which clearly demonstrates its compliance with the solicitation requirements and allows a meaningful review by the procuring agency. See, e.g., *Innovative Pathways, LLC*, B-416100.2, June 13, 2018, 2018 CPD ¶ 212 at 5. With this standard in mind, as well as the RFP’s specific instruction to offerors that they were responsible for explaining the completion percentage of their past performance projects, we find that the agency had a defensible legal position regarding its evaluation of Unico’s past performance.

Unico also protested the evaluation of its proposal under the work plan factor. Unico did not challenge any specific finding of the agency’s evaluators. Instead, Unico argued that since the agency found that Unico’s proposal had four strengths and no weaknesses, and posed a low technical risk, the solicitation required the agency to assign the proposal a rating of outstanding rather than good under the work plan factor. Protest at 16-19.

In this regard, the solicitation defined a rating of good under the work plan factor as: “Proposal indicates a thorough approach and understanding of the requirements and contains at least one strength, and risk of unsuccessful performance is low to moderate.” AR, Tab 8, RFP amend. 3 at 13. A rating of outstanding was defined as: “Proposal indicates an exceptional approach and understanding of the requirements and contains multiple strengths, and risk of unsuccessful performance is low.” *Id.* It is clear from this language that a proposal with four strengths (which is both “multiple” and “at least one”) and a low technical risk could be rated either good or outstanding. Unico’s argument that the solicitation language required a rating of outstanding is incorrect. See *Smiths Detection, Inc.; American Science & Engineering, Inc.*, B-402168.4 *et al.*, Feb. 9, 2011, 2011 CPD ¶ 39 at 7 (“there is no legal requirement that an agency award the highest possible rating . . . under an evaluation factor simply because the proposal contains strengths and/or is not evaluated as having any weaknesses”).

Agency evaluators have wide discretion when assigning adjectival ratings, given that the ratings reflect both objective and subjective judgments about the relative merits of different proposals and their ability to meet the agency’s needs. *Yulista Tactical Servs., LLC*, B-417317.3 *et al.*, Jan. 15, 2020, 2020 CPD ¶ 29 at 3. Moreover, it is well

established that adjectival descriptions and ratings serve only as a guide to, and not a substitute for, intelligent decision-making. *INDUS Tech., Inc.*, B-411702 *et al.*, Sept. 29, 2015, 2015 CPD ¶ 304 at 4. Where an agency reasonably considers the underlying bases for the ratings—including advantages and disadvantages associated with the specific content of competing proposals—in a manner that is fair and consistent with the terms of the solicitation, a protester’s disagreement over the actual adjectival ratings, without more, does not render the agency’s judgment unreasonable. See *id.*

Here, the agency determined and contemporaneously documented its conclusion that Unico demonstrated a “thorough approach and understanding of solicitation requirements,” and therefore merited a rating of good. AR, Tab 35, SSEB Final Report at 50; Supp. AR, Tab 2, SSDD at 17. Both the SSEB report and the SSDD discussed and analyzed the specific strengths of Unico’s proposal in reaching this conclusion. *Id.* Thus, Unico has not demonstrated that its adjectival rating under the work plan factor was unreasonable or inconsistent with the solicitation. Unico’s protest on this basis is not clearly meritorious.¹¹

Severability

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 *Sodexo Mgmt., Inc.--Costs*, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 29. Our Office may find that issues are severable where they do not share a common core set of facts and are not based on related legal theories. *BAE Tech. Servs., Inc.--Costs*, B-296699.3, Aug. 11, 2006, 2006 CPD ¶ 122 at 3.

We find Unico’s non-meritorious arguments regarding the evaluation of proposals to be severable from its meritorious challenge to the agency’s grant of a Buy American Act waiver because the non-meritorious arguments do not share a common core set of facts or a related legal theory with the meritorious argument.

¹¹ Unico’s challenge to the agency’s best-value determination was based entirely on its protest of the agency’s underlying evaluation conclusions. Our Office considers such derivative allegations not to establish independent bases of protest. *Advanced Alliant Solutions Team, LLC*, B-417334, Apr. 10, 2019, 2019 CPD ¶ 144 at 6. Accordingly, this argument is also not clearly meritorious.

In this regard, Unico's challenge to the agency's compliance with the Buy American Act relies on the Buy American Act, and on FAR clause 52.225-9 and FAR provision 52.225-10, which implement the Act. Factually, this protest argument relies on McMillen's waiver requests, the agency's memorandum for the record initially denying McMillen's request, the agency's prior market research regarding the availability of Buy American Act-complaint materials, and the lack of any explanation or support in the record for the agency's ultimate grant of a waiver.¹²

By contrast, the remaining arguments of Unico's protest relate to the agency's evaluation of proposals. The facts on which they rely are the technical proposals of Unico and McMillen, and the evaluation and tradeoff conclusions of the SSEB report and the SSDD. As discussed above, these documents are wholly silent on the issue of the Buy American Act waiver. Unico's evaluation challenges rely on the strictures of FAR part 15, such as its instruction that "[a]n agency shall evaluate competitive proposals and then assess their relative qualities solely on the factors and subfactors specified in the solicitation." FAR provision 15.305(a).

In short, Unico's challenges to the agency's evaluation of proposals and to the agency's handling of McMillen's Buy American Act waiver request rely on an entirely separate core set of facts and on wholly unrelated legal theories. See *BAE Tech. Servs., supra* at 3. They are so clearly severable as to essentially constitute separate protests. *Burns & Roe, supra* at 3. We therefore find the non-meritorious aspects of Unico's protest to be severable from the clearly meritorious argument, and we do not recommend that Unico be reimbursed its costs related to any protest argument other than its Buy American Act arguments.

RECOMMENDATION

We recommend that Unico be reimbursed its reasonable protest costs, including attorneys' fees, related to filing and pursuing its protest of the agency's grant of a Buy American Act waiver. We do not recommend reimbursement of costs related to any other protest arguments. Unico should submit its certified claim, detailing the time spent and costs incurred, directly to the agency within 60 days of its receipt of this decision. 4 C.F.R. § 21.8(f)(1).

Edda Emmanuelli Perez
General Counsel

¹² These facts and legal theories are the basis both of Unico's argument that the agency improperly granted a Buy American Act waiver (Protest at 25-27) and of its related contention that the agency failed to amend the solicitation to reflect its grant of the waiver (Protest at 23-25). Therefore, we find these two arguments to be intertwined and not severable, and recommend reimbursement of costs with respect to all of Unico's Buy American Act protest arguments.