



GAO

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: URS Federal Services, Inc.--Costs

File: B-406140.4

Date: July 17, 2012

Kevin P. Connelly, Esq., and Kelly E. Buroker, Esq., Vedder Price P.C., and Joseph J. Dyer, Esq., Joshua C. Drewitz, Esq., and Caroline A. Keller, Esq., Seyfarth Shaw LLP, for the protester.

Holly H. Styles, Esq., Lori R. Larson, Esq., Marianna Lvovsky, Esq., and Jonathan D. Tepper, Esq., Internal Revenue Service, for the agency.

Louis A. Chiarella, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

GAO will recommend that agency reimburse protester for the costs of filing and pursuing its protest, where the agency did not take corrective action in response to the protest until after the submission of the agency report and the protester's comments, and the protest was clearly meritorious.

DECISION

URS Federal Services, Inc., of Manassas, Virginia, requests that we recommend that it be reimbursed the costs of filing and pursuing its protest challenging the award of a contract to VSE Corporation, of Alexandria, Virginia, under request for proposals (RFP) No. A-09-036, issued by the Department of the Treasury, Internal Revenue Service (IRS), for seized and forfeited personal property management and disposition services. We dismissed the protest after the agency advised our Office that it would take corrective action by canceling the awarded contract. URS argues that its protest was clearly meritorious and the agency's corrective action unduly delayed.

We grant URS's request in part and deny it in part.

BACKGROUND

The solicitation sought to obtain property management and disposition services in support of both the Department of the Treasury's Executive Officer for Asset

Forfeiture and Office of Foreign Assets Control. In general terms, the contractor would be responsible for providing transportation, custody, security, maintenance, storage management, records management, and disposition of seized, forfeited or blocked personal property and conveyances.

The RFP, issued on January 19, 2010, contemplated the award of a single indefinite-delivery, indefinite-quantity (ID/IQ)-type contract, with fixed-price, fixed-rate, and cost-plus-fixed-fee-type contract line items, for a 12-month base period with nine 1-year options. The RFP established, in addition to price/cost, five technical evaluation factors (in descending order of importance): technical solution; management solution; past performance; transition/phase-in; and small business participation. The technical factors, when combined, were significantly more important than price/cost, and award was to be made to the responsible offeror whose proposal represented the best value to the government.

Four offerors, including URS and VSE, submitted proposals by the April 5 closing date. Based on its initial evaluation, the IRS established a competitive range determination which included the URS and VSE proposals. The agency held three rounds of discussions, culminating in the submission of final proposal revisions (FPR). On October 31, based on the final evaluation results, the agency source selection authority determined that VSE's proposal represented the best value to the government all factors considered.

URS filed its protest with our Office on November 14 and raised four main arguments: (1) the IRS's evaluation of URS's technical proposal was improper; (2) the agency's cost realism analysis of VSE was unreasonable; (3) the IRS failed to engage in meaningful discussions with URS; and (4) the agency performed a flawed best value analysis.

The IRS filed its report responding to the protest allegations on December 15. Together with its December 27 comments on the agency report, URS also filed a supplemental protest with our Office alleging that: (1) the agency had unreasonably failed to recognize that VSE was technically unacceptable and/or not a responsible offeror because of its proposed use of a debarred subcontractor, the Flynn Jensen Company (FJC); (2) VSE's proposal failed to comply with the RFP's small business subcontracting goals; (3) VSE's proposal contained misrepresentations regarding the capabilities of its proposed subcontractors; and (4) the agency had engaged in unequal treatment of offerors.

With regard to the first supplemental issue, one of VSE's primary subcontractors for both its incumbent contract with the IRS and its initial proposal in this procurement was Manheim Auctions Government Services, LLC (MAGS), a subsidiary of Manheim, Inc. In 2010, the U.S. Department of Labor (DOL) began a compliance action against Manheim and MAGS for various nondiscrimination and equal

opportunity law violations. URS Protest, Dec. 27, 2011, attach. 1, DOL Office of Administrative Law Judges (OALJ), Office of Federal Compliance Programs vs. Manheim Auctions, Inc. et al., Case No. 2011-OFC-00005, June 14, 2011 (DOL OALJ Decision). On September 27, 2011, Manheim and MAGS were debarred from further government contracts. 76 Fed. Reg. 59738-39 (Sept. 27, 2011). Prior to the debarment and at Manheim's urging, however, MAGS' director of operations Peter Flynn created a new corporate entity, "FJC," to service the federal contracts then held by MAGS. URS Protest, Dec. 27, 2011, attach. 1, DOL OALJ Decision, at 26. As part of its October 12 FPR submission, VSE amended its initial proposal and replaced the debarred subcontractor, MAGS, with FJC.

The agency filed its report responding to the supplemental protest allegations on January 10, 2012. With respect to the FJC allegations, the IRS argued that FJC was a separate and different company from Manheim/MAGS, and not covered by the debarment order. In its comments on the supplemental agency report, however, URS pointed out that the IRS's evaluation had failed to consider that VSE's own proposal had repeatedly characterized FJC as simply the new name for MAGS, and had attributed all of the debarred company's experience, past performance, and facilities to the new corporate entity. For example, when identifying its major subcontractors, VSE included "Flynn Jensen Company LLC (FJC), formerly known as Manheim Auctions Government Services (MAGS), a unit of Manheim Auctions, Inc., the largest vehicle remarketing organization in the world. It was organized specifically to serve the unique vehicle services requirements of public sector entities." AR, Tab 17, VSE Cost/Price Proposal, at 27.

After receiving the protester's comments on the supplemental agency report, our Office convened a conference call with counsel for all parties to discuss the various protest grounds and to schedule a hearing regarding specific protest issues, including the IRS's evaluation of VSE's proposal with regard to its proposed subcontractor FJC.

On January 30, on the eve of the scheduled hearing, the agency notified our Office that it would take corrective action by terminating the contract previously awarded to VSE. Our Office thereupon dismissed URS's protest as academic based on the corrective action. URS Federal Servs., Inc., B-406140 et al., Jan. 31, 2012.

DISCUSSION

URS requests that our Office recommend that the agency reimburse the protester's costs of filing and pursuing its protest. URS argues that the IRS unduly delayed taking corrective action--as evidenced by its failure to do so until after filing of the agency report and submission of comments by the protester--and that its protest was clearly meritorious. The agency opposes URS's request, arguing that the protest here was not clearly meritorious.

When a procuring agency takes corrective action in response to a protest, our Office may recommend 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 make further use of the protest process in order to obtain relief.¹ Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3554(c)(1)(A) (2006); Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2012). 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. Basic Commerce and Indus., Inc.--Costs, B-401702.3, Feb. 22, 2010, 2010 CPD ¶ 258 at 4; Information Ventures, Inc.--Costs, B-294567.2, Nov. 16, 2004, 2004 CPD ¶ 234 at 2.

Ordinarily, we do not regard a protest as clearly meritorious where resolution of the protest required further record development, such as a hearing, to complete and clarify the record. See Boston Harbor Dev. Partners, LLC--Costs, B-404614.5, Feb. 17, 2012, 2012 CPD ¶ 74 at 2-3. However, when corrective action is taken by an agency after a hearing has been scheduled, we may still conclude that the protest is clearly meritorious, where, as here, that conclusion is otherwise established by the record. See Basic Commerce and Indus., Inc.--Costs, *supra*; Eagle Home Med. Corp.--Costs, B-299821.3, Feb. 4, 2008, 2008 CPD ¶ 41 at 5 n.4.

In our view, URS's protest challenging the adequacy of the IRS's evaluation of VSE's proposal with regard to the use of subcontractor FJC was clearly meritorious on the record provided to our Office with the agency report. In this regard, the agency's evaluation of VSE's proposed use of subcontractor FJC was entirely without support. IRS has not explained, nor is it otherwise evident from the record, how VSE could be considered eligible for award when VSE proposed to rely on a subcontractor (FJC) which VSE itself repeatedly characterized as simply the new name of a debarred company.

As a general rule, we recommend that a successful protester be reimbursed protest costs with respect to all issues pursued, not merely those upon which it prevails. Nevertheless, in appropriate cases, we have limited our recommendation for the award of protest costs where a part of those costs is allocable to one or more unsuccessful protest issues that are so clearly severable from the successful issues that it essentially constitutes a separate protest. In determining whether protest issues are so clearly severable as to essentially constitute separate protests, we

¹ As a general rule, so long as an agency takes corrective action in response to a protest by the due date of its protest report, we regard such action as prompt and decline to consider favorably a request to recommend reimbursement of protest costs. Alsalam Aircraft Co.--Costs, B-401298.3, Nov. 5, 2009, 2009 CPD ¶ 208 at 3.

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 set of facts, are based on related legal theories, or are otherwise not readily severable. Core Tech Int'l Corp.--Costs, B-400047.2, Mar. 11, 2009, 2009 CPD ¶ 59 at 8. We view URS's other evaluation challenges--which we find were not clearly meritorious--as plainly severable from the challenges to the debarred subcontractor issue because the questions involved distinct aspects of the record, and were not intertwined factually or legally.

RECOMMENDATION

We recommend that the IRS reimburse URS's costs of filing and pursuing its protest with respect to its subcontractor challenges, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester's certified claim for costs, detailing the time spent and the cost incurred, must be submitted to the agency within 60 days after receiving this decision.

The request is granted in part and denied in part.

Lynn H. Gibson
General Counsel