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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: DynCorp International LLC--Costs

File: B-409874.4

Date: December 15, 2016

Richard J. Vacura, Esq., Morrison & Foerster LLP, for the protester.
Morgan L. Cosby, Esq., Department of State, for the agency.
Glenn G. Wolcott, Esq., and Christina Sklarew, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation that an agency reimburse a greater share of protester's costs than the agency has offered to pay is denied where the agency's offer, based on applying the "percent of pages" method, reasonably complied with GAO's prior decision and recommendation regarding reimbursement of protest costs.

DECISION

DynCorp International LLC, of Falls Church, Virginia, requests that we recommend reimbursement of certain costs it incurred in pursuing a protest that challenged the Department of State's award of a task order to PAE Government Services, Inc. under task order request (TOR) No. SAQMMA13R0132 to provide life and mission support services at designated facilities in Afghanistan. The agency does not dispute DynCorp's entitlement to a portion of its protest costs, but maintains that DynCorp's request is contrary to, and significantly exceeds, the amount contemplated by GAO's prior decision and recommendation in this matter.

As discussed below, we deny DynCorp's request to the extent it seeks our recommendation of reimbursement in excess of the amount the agency has offered.

BACKGROUND

On February 2, 2015, DynCorp filed a protest with our Office challenging the agency's award of a task order to PAE. On March 16, DynCorp submitted a supplemental protest. In challenging the award, DynCorp raised multiple arguments, including assertions that the agency failed to conduct meaningful

discussions, failed to properly evaluate the offerors' technical proposals, and failed to properly evaluate the offerors' cost/price proposals.

On May 13, 2015, we sustained DynCorp's protest on the limited basis that the agency failed to provide DynCorp an opportunity to address certain adverse past performance information during discussions, an issue that was first raised in DynCorp's supplemental protest. In our decision, we specifically rejected all of DynCorp's assertions challenging various aspects of the agency's technical evaluation. For example, the agency assigned "marginal" ratings to DynCorp's proposal under two of the four technical evaluation subfactors, and our decision noted that "the agency's final evaluation record provides considerable explanation and support for its substantive assessments--most of which DynCorp's protest fails to address in any way." DynCorp Int'l LLC, B-409874.2, B-409874.3, May 13, 2015, 2016 CPD ¶ __ at 10. Additionally, DynCorp withdrew or abandoned its assertions regarding the agency's evaluation of cost/price proposals. Finally, in our decision, we recommended that DynCorp be reimbursed a portion of its protest costs, expressly stating that such reimbursement should be "limited to the costs relating to the basis on which we have sustained the protest." Id.

On June 2, 2015, DynCorp submitted its claim for costs to the agency, which it amended on June 22. DynCorp Request for Costs, exh. 2, Cost Claim. DynCorp's claim was based on the premise that it was entitled to recover protest costs for all protest activities except those activities that were specifically related to "segregable unsuccessful protest grounds." Id. at 4.

On June 29, the agency responded to DynCorp's cost claim, offering to reimburse DynCorp for the portion of its protest costs that reflected DynCorp's pursuit of the single protest issue on which it prevailed, and calculating that portion using the "percentage of pages" method. DynCorp Request for Costs, exh. 3, Agency's June 29 Response to Cost Claim, at 3. That is, the agency offered to reimburse DynCorp for a percentage of DynCorp's total protest costs, calculating the reimbursable percentage by dividing the number of pages in DynCorp's protest submissions that addressed the basis on which the protest was sustained by the total number of pages in all of DynCorp's protest submissions. Id. In its response, the agency noted that GAO's decision had expressly stated that reimbursement should be "limited to the costs related to the basis on which we have sustained the protest." DynCorp Int'l LLC, supra.

On August 10, DynCorp rejected the agency's June 29 offer, contending generally that reimbursement should be greater,¹ and complaining that the agency's June 29

¹ Among other things, DynCorp has complained that it was statutorily required to limit its claim to the reimbursable rate for attorneys' fees set by statute. See, e.g., Core Tech Int'l Corp.--Costs, B-400047.3, June 2, 2009, 2009 CPD ¶ 121 at 1-3; (continued...)

response “sought to reduce the costs reimbursed to reflect the small percentage of successful protest grounds.” DynCorp Request for Costs, exh. 4, DynCorp Aug. 10 Reply, at 3.

On September 22, the agency again responded to DynCorp’s claim, reminding DynCorp that GAO’s recommendation for cost reimbursement had expressly limited reimbursement of costs to those associated with the single issue on which DynCorp had prevailed. DynCorp Request for Costs, exh. 5, Agency’s Sept. 22 Response, at 1-3. In this response, the agency specifically noted that 10 of the 180 pages in DynCorp’s protest submissions (5.5%) were “devoted to or discuss[ed]” DynCorp’s assertion that the agency had failed to address certain adverse past performance information during discussions--that is, the single issue on which DynCorp had prevailed. Id. at 6.

On October 30, DynCorp submitted this request to our Office, asking that we recommend reimbursement in the amount of \$74,309.41. DynCorp Request for Costs at 12, 16. DynCorp agrees that reliance on the “percent of pages” method is appropriate, but maintains that, in calculating the number of pages that address the single issue on which it prevailed, the agency should include all pages except those devoted to “clearly severable unsuccessful protest grounds.” DynCorp Request for Costs at 2-4. We reject DynCorp’s approach.

While it is true that our Office frequently recommends that a successful protester be reimbursed its protest costs with respect to all issues pursued, we have also concluded that, in certain instances, such approach results in an unjustified windfall to the protester. See, e.g., JV Derichebourg-BMAR & Assocs., LLC--Costs, B-407562.3, May 3, 2013, 2013 CPD ¶ 108 at 3-4; VSE Corp.; The University of Hawaii--Costs, B-407164.11, B-407164.12, June 23, 2014, 2014 CPD ¶ 202 at 8-9. In limiting costs to avoid such unjustified windfall, we have endorsed the “percent of pages” method as a reasonable approach to calculating reimbursable costs. See, e.g., JRS Staffing Services--Costs, B-410098.6 et al., Aug. 21, 2015, 2015 CPD ¶ 262 at 7 n.1; Intermarkets Global--Costs, B-400660.14, July 2, 2014, 2014 CPD ¶ 205 at 4.

(...continued)

Sodexho Mgmt., Inc.--Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 37-43. Based on application of the Department of Labor’s Consumer Price Index, DynCorp calculated the permissible ceiling rate to be \$229.62 per hour, noting that the hourly rates for all of its attorneys exceeded this amount. DynCorp Request for Costs, exh. 2, Cost Claim, at 4-5. The existence of a statutory ceiling on the hourly rate at which attorneys’ fees may be reimbursed does not provide a basis for augmenting DynCorp’s recommended reimbursement in this matter.

Based on the record here, we agree that application of the “percent of pages” method is a reasonable and appropriate approach to calculating the portion of reimbursable costs. However, we disagree with DynCorp’s assertion that its cost recovery should be calculated by excluding from consideration only those pages that address “clearly severable unsuccessful protest grounds.” To the contrary, our decision and recommendation contemplated reimbursement of costs to the extent they were associated with the single issue on which DynCorp prevailed, specifically stating that cost reimbursement should be “limited to the costs relating to the basis on which we have sustained the protest.” DynCorp Int’l LLC, supra. Indeed, application of the appropriate percentage to total allowable protest costs effectively results in DynCorp’s recovery of costs for some portion of its protest activities that cannot be directly connected with its pursuit of the single issue on which it prevailed.

Accordingly, we find nothing unreasonable in the agency’s offers, first made on June 29 and again made on September 22, that were based on the “percent of pages” approach. Further, DynCorp has not meaningfully disputed the agency’s conclusion that only 10 pages, out of the 180 pages DynCorp submitted in pursuing its protest, were devoted to or discussed the agency’s failure to address certain adverse past performance information during discussions. Accordingly, we conclude that the offers the agency made shortly after DynCorp submitted its claim reasonably complied with our decision and recommendation in this matter. To the extent DynCorp seeks our recommendation of reimbursement in an amount exceeding what the agency has offered, DynCorp’s request is denied.

Susan A. Poling
General Counsel