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**Comptroller General
of the United States**

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

Decision

Matter of: Genesis Business Systems--Costs

File: B-411264.11

Date: December 10, 2015

John C. Dulske, Esq., The Law Offices of Dulske & Gluys, PC, for the protester.
Ryan A. Black, Esq., Department of the Army, Corps of Engineers, for the agency.
Eric M. Ransom, Esq., and Edward Goldstein, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

1. GAO recommends reimbursement of the costs of filing and pursuing challenges against the agency's evaluation of the protester's technical proposal and best-value tradeoff decision, where the evaluation challenges were clearly meritorious, or intertwined with clearly meritorious issues.
2. GAO does not recommend reimbursement of the costs of pursuing issues that were independent and therefore severable from the protester's clearly meritorious complaints, and not themselves clearly meritorious.

DECISION

Genesis Business Systems of San Antonio, Texas, requests that we recommend that it be reimbursed the costs associated with filing and pursuing its protests against the Army Corps of Engineers' issuance of an order to The Informatics Applications Group (TIAG) of Reston, Virginia, under solicitation No. W912DY-14-R-0053, for information management/information technology services.

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

BACKGROUND

On March 20, 2015, Genesis protested the award of a contract to TIAG, arguing that the agency applied unstated evaluation criteria, unreasonably evaluated its technical proposal, and failed to conduct a proper best-value tradeoff decision. Genesis also asserted that the agency engaged in disparate treatment by failing to

include Genesis in discussions. Subsequent to the filing of its initial protest, Genesis filed five supplemental protests. One supplemental protest provided additional support for its initial protest grounds whereas the four others introduced new grounds of protest alleging that the agency conducted a flawed evaluation of its own and TIAG's past performance, abused its discretion in electing not to engage in discussions, unreasonably evaluated TIAG's technical proposal, and failed to address an organizational conflict of interest.

After development of the protest record, including the filing of an agency report, the above-referenced supplemental protests, a supplemental agency report, and the protester's and intervenor's comments, the cognizant Government Accountability Office (GAO) attorney conducted an "outcome prediction" alternative dispute resolution (ADR) conference. In the course of that ADR, the GAO attorney advised the agency that GAO would likely sustain Genesis' protest on the basis that the agency had applied unstated evaluation criteria and unreasonably evaluated Genesis' technical proposal by applying task areas set forth in the performance work statement as mandatory corporate technical experience requirements, and by applying certification requirements applicable during performance as de facto definitive responsibility criteria. The GAO attorney recommended that the agency reevaluate the proposals in accordance with the terms of the solicitation or, if the solicitation as written did not accurately reflect its needs or intended basis for evaluation, revise the solicitation and solicit new proposals.

In response to the ADR, the agency informed our Office that it intended to take corrective action consisting of reviewing the solicitation, and thereafter either reevaluating the proposals, or soliciting and evaluating revised proposals, and making a new source selection decision. Based on the agency's proposed corrective action, GAO dismissed Genesis' protests as academic. Genesis Bus. Sys., B-411264 et al., June 11, 2015. Following the dismissal of its protest, Genesis filed this request for entitlement to reimbursement of its costs of filing and pursuing its protest.

When a procuring agency takes corrective action in response to a protest, our Office may recommend under 4 C.F.R. § 21.8(e) that the agency reimburse the protester its protest costs where, 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 protesters to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Pemco Aeroplex, Inc.--Recon. and Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 5. A protest is clearly meritorious when a reasonable agency inquiry into the protest allegations would show facts disclosing the absence of a defensible legal position. The Real Estate Ctr.--Costs, B-274081.7, Mar. 30, 1998, 98-1 CPD ¶ 105 at 3. 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 purposes of recommending reimbursement of protest costs. National Opinion Research Center--Costs, B-289044.3, Mar. 6, 2002, 2002 CPD ¶ 55 at 3; Inter-Con Sec. Sys., Inc.; CASS, a Joint Venture--Costs, B-284534.7, B-284534.8, Mar. 14, 2001, 2001 CPD ¶ 54 at 3.

In response to Genesis’ request, the agency concedes that the protester is entitled to its reasonable protest costs as they relate to clearly meritorious allegations. The agency argues, however, that Genesis’ recovery should be limited to those protest allegations discussed as likely to be sustained during the ADR--specifically, certain Genesis challenges to the evaluation of its own technical proposal. According to the agency, GAO did not find Genesis’ other allegations clearly meritorious, and Genesis’ challenges to the evaluation of its own technical proposal are distinct from the facts and legal theories underpinning its other allegations, such that the costs incurred in connection with the latter allegations are clearly severable.

We agree with the agency that reimbursement of Genesis’ protest costs should be limited. Although as a general rule, we may recommend that a successful protester be reimbursed its incurred costs with respect to all issues pursued and not merely those upon which it prevails, AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 9, in appropriate cases 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. BAE Tech. Servs., Inc.--Costs, B-296699.3, Aug. 11, 2006, 2006 CPD ¶ 122 at 3; Interface Flooring Sys., Inc.--Claim for Attorneys’ Fees, B-225439.5, July 29, 1987, 87-2 CPD ¶ 106 at 2-3. In determining whether protest issues are so clearly severable as to essentially constitute 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. See Sodexho Mgmt., Inc.--Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 29.

As noted above, the agency does not contest Genesis’ entitlement to reimbursement of its costs associated with the errors in the technical evaluation which were the topic of the ADR. Although the agency requests that we sever a number of Genesis’ challenges to the technical evaluation that were not directly discussed during the ADR, we regard Genesis’ allegations concerning the technical evaluation of its own proposal as not readily severable. Additionally, we conclude that Genesis should be reimbursed for its allegation that the agency failed to conduct a proper best-value tradeoff decision, as errors in the technical evaluation rendered the agency’s best-value decision unreasonable.

We also note that Genesis does not seek reimbursement of protest costs on several issues, to include its claim that the agency had conducted improper unequal

discussions with firms other than Genesis--the record reflected that no discussions were conducted with any offeror during the procurement--or the allegations set forth in its fifth supplemental protest. See Genesis Request for Entitlement, at 2 n.2. The fifth supplemental protest raised an alleged organizational conflict of interest with respect to the awardee, challenged the agency's failure to properly evaluate the awardee's past performance, and argued that the agency should have evaluated the awardee's technical proposal as unacceptable.¹

Regarding the remaining issues raised in Genesis' supplemental protests, we conclude that they were not clearly intertwined with its clearly meritorious challenges concerning the technical evaluation of Genesis' own proposal and the best-value decision. In addition, these issues were not independently clearly meritorious, and thus provide no basis on which to recommend reimbursement of protest costs. Specifically, the severable allegations include the arguments raised in the first supplemental protest concerning the evaluation of past performance, in the third supplemental protest concerning the agency's abuse of discretion in deciding not to conduct discussions, and in the fourth supplemental protest concerning the evaluation of TIAG's technical proposal.

RECOMMENDATION

In sum, we recommend that Genesis be reimbursed the costs of filing and pursuing its protest grounds concerning the evaluation of its own proposal, as set forth in its initial protest and second supplemental protest, and concerning the agency's best-value tradeoff decision. Genesis should submit its claim for costs, detailing and certifying the time expended and costs incurred, directly to the Army within 60 days of receipt of this decision.

The request is granted in part and denied in part.

Susan A. Poling
General Counsel

¹ Genesis was advised during the development of the protest that the remaining allegations contained in the fifth supplemental protest were dismissed by our Office for failure to state a valid basis of protest, a fact which would have been reflected in any written decision issued by our Office in the protest. GAO Dismissal Email, May 29, 2015.