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Decision

Matter of: Shertech Pharmacy Piedmont, LLC--Costs

File: B-412297.3

Date: October 28, 2016

Tenley A. Carp, Esq., Sara M. Lord, Esq., and Eric D. Olson, Esq., Arnall Golden Gregory LLP, for the protester.

Tyler W. Brown, Esq., Department of Veterans Affairs, for the agency.

Alexander O. Levine, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's request that GAO recommend reimbursement of protest costs is granted in part, where the agency unduly delayed taking corrective action in response to several clearly meritorious challenges to the evaluation of the awardee's quotation, and denied in part, where several of the protest challenges were not clearly meritorious.
 2. Protester's challenges to the agency's evaluation of the awardee's price, technical, and past performance were clearly meritorious where the awardee's quotation did not meet the stated evaluation factors and where documentation in the evaluation record fails to establish that the agency conducted a reasonable evaluation.
 3. Protester's challenge to awardee's status as a small business nonmanufacturer was not clearly meritorious where such status was not a matter within the GAO's jurisdiction.
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DECISION

Shertech Pharmacy Piedmont, LLC, a woman-owned small business, located in Kernersville, North Carolina, requests that we recommend that the Department of Veterans Affairs (VA) reimburse it for the reasonable costs of filing and pursuing its protests of the selection for award of Caring Hands Health Equipment & Supplies, LLC, located in Ridgeland, South Carolina, under request for quotations (RFQ) No. VA246-15-Q-0483, for radiopharmaceuticals for the Durham VA Medical Center (VAMC). We dismissed the underlying protests as academic based on the agency's

decision to take corrective action. Shertech argues that the VA failed to take prompt corrective action in response to clearly meritorious protest grounds.

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

BACKGROUND

On September 24, 2015,¹ the VA issued the RFQ, which contemplated award of a requirements-type, fixed-price contract for radiopharmaceutical products for the Durham VAMC. Id. at 34. The solicitation was issued as a set-aside for small businesses under North American Industry Classification System code 325412, which is a supply code for pharmaceutical preparation manufacturing. The RFQ advised offerors that the “Non-Manufacturer Rule ha[s] been waived for this solicitation.”² RFQ at 1.

The solicitation provided that it would use simplified acquisition procedures under Federal Acquisition Regulation (FAR) subpart 13.5. Id. at 30. Award was to be made to the lowest-priced, technically-acceptable quotation, considering the following factors: technical, past performance, and price. Id. The technical factor consisted of four subfactors: licensing, location, required software mechanism, and quality assurance plan. Id. at 30-31. With regard to pricing, the RFQ price/cost schedule sought unit pricing from vendors for estimated quantities of various radiopharmaceuticals and for the use of a radiopharmaceutical management system to facilitate quality assurance, isotope receipt and administration. Id. at 5-12.

Quotations were due on September 29. On September 30, the contracting officer, who was also the VA’s source selection authority, recommended an award to Caring Hands as the lowest-priced, technically-acceptable vendor. Agency Report (AR), Exhibit 6, Source Selection Decision. The source selection decision explained the agency’s technical evaluation by stating that the technical evaluation panel (TEP) “reviewed all offers and determined that Shertech Pharmacy Piedmont

¹ The contracting officer stated that the solicitation was issued on September 21, Contracting Officer Statement (COS) at 1; however, the solicitation is dated September 24. For purposes of our decision, it does not matter which date is correct.

² The nonmanufacturer rule generally provides that the offer of a nonmanufacturer small business concern can be considered under a small business set-aside, provided, among other things, that the small business concern represents that it will supply the product of a domestic small business manufacturer or processor, or that a waiver of this requirement is granted by the U.S. Small Business Administration (SBA). 15 U.S.C. § 637(a)(17); see also 13 C.F.R. § 121.406.

and Caring Hands Equipment & Supplies LLC quoted the technically acceptable specifications required.” Id.³ That same day, the VA provided Shertech with notice that Caring Hands’ quotation, which was priced at \$1,948,436.17, had been selected for award.

On October 8, Shertech timely filed a protest with our Office challenging the agency’s evaluation of Caring Hands’ quotation and the VA’s decision to waive the nonmanufacturer rule. On November 9, the VA provided an agency report responding to the protest allegations. On November 19, Shertech filed comments on the agency report and included four supplemental protest arguments challenging the agency’s evaluation of Caring Hands’ quotation. On December 2, the VA provided a supplemental agency report, which responded to Shertech’s supplemental protest arguments and provided additional portions of Caring Hands’ quotation.⁴

On December 3, the protester objected to the scope of documents provided in the supplemental agency report and requested additional documents. In response, our Office requested that the agency provide, by December 4th, a rationale for its withholding of the requested documents. On December 4, the VA notified our Office of its intent to take corrective action.

On December 9, we dismissed the protest as academic in light of the agency’s proposed corrective action, which included cancellation of the solicitation. On December 22, Shertech timely filed the instant request that we recommend the reimbursement of the protester’s fees and costs.

DISCUSSION

Shertech requests that our Office recommend that the VA reimburse the company the costs associated with filing its protests because its initial and supplemental protest grounds were clearly meritorious and the VA unduly delayed taking corrective action. In response to the request for costs, the agency asserts that none of the protest grounds was clearly meritorious and therefore no costs should be paid.

³ The source selection decision document did not state that the TEP prepared a report or any documentation of its review or the basis of its conclusions. Additionally, no such documentation was provided to our Office.

⁴ The agency had previously represented that it would provide the awardee’s quotation in the November 9 agency report. When it became clear that the VA had not provided the entire quotation, our Office requested that the agency provide the missing quotation portions.

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. Competition in Contracting Act of 1984, 31 U.S.C. § 3554(c)(1)(A); Bid Protest Regulations, 4 C.F.R. § 21.8(e). 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. Triple Canopy, Inc.--Costs, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 3. As discussed below, we grant the protester's request in part because we find that several (but not all) of the protest allegations were clearly meritorious and that the agency unduly delayed taking corrective action in response to the meritorious protest grounds.

Meritorious Arguments

During the course of its initial and supplemental protests Shertech raised a number of challenges to the agency's evaluation of Caring Hands' quotation under the price, technical, and past performance factors.⁵ For example, Shertech protested the agency's price evaluation of Caring Hands' quotation, asserting that Caring Hands had failed to provide pricing for the contract line items (CLINs) for "[u]se of radiopharmaceutical management system to facilitate [sic] quality assurance, isotope receipt and administration (hardware and software)."⁶ RFQ at 6. In this regard, Caring Hands' quotation did not provide a price for these CLINs and instead stated "[i]tem must be purchased directly from [our supply partner]." AR, Exhibit 5, Caring Hands Quotation, at 3.⁷ Further, the contemporaneous evaluation record

⁵ While we do not address every argument raised by Shertech in this decision, we have considered them all and, with the exception of those arguments addressed below, do not find the arguments to be clearly meritorious. For instance, Shertech challenged the VA's price evaluation, asserting that Caring Hands' quoted price for one of the pharmaceuticals, Amyvid, did not reflect the amount the agency would pay for it. We do not find this argument to be adequately supported in the record, and thus do not consider it clearly meritorious. Nevertheless, as discussed below, we find this argument to be intertwined with Shertech's meritorious challenge to the agency's unreasonable price evaluation.

⁶ The RFQ's price schedule contained one CLIN for the use of a radiopharmaceutical management system for each year of contract performance. These were CLINs A027, B027, C027, and D027.

⁷ Certain documents provided in this protest (the COS, the supplemental COS, Caring Hands' quotation, and Shertech's quotation) did not contain page numbers. Our Office separately assigned consecutively numbered pages to the unnumbered pages in these documents. The citations to these documents in this decision are to (continued...)

contains no indication that the agency considered the fact that the awardee's quotation was missing these prices. In response to this point, the contracting officer explained that "Caring Hands is offering the [DELETED] at no cost to the Agency, which is why sub-CLIN A027, B027, C027 and D027 has no price." Supplemental COS at 3.

When using simplified acquisition procedures, an agency must conduct the procurement consistent with a concern for fair and equitable competition and must evaluate quotations in accordance with the terms of the solicitation. Emergency Vehicle Installations Corp., B-408682, Nov. 27, 2013, 2013 CPD ¶ 273 at 4. In reviewing a protest of an allegedly improper simplified acquisition evaluation, we examine the record to determine whether the agency met this standard and exercised its discretion reasonably. DOER Marine, B-295087, Dec. 21, 2004, 2004 CPD ¶ 252 at 3. Further, in reviewing an agency's evaluation, we do not limit our consideration to contemporaneously-documented evidence, but instead consider all the information provided, including the parties' arguments, explanations, and any hearing testimony. Remington Arms Co., Inc., B-297374, B-297374.2, Jan. 12, 2006, 2006 CPD ¶ 32 at 10. While we accord greater weight to contemporaneous source selection materials as opposed to judgments made in response to protest contentions, post-protest explanations that provide a detailed rationale for contemporaneous conclusions, and simply fill in previously unrecorded details, will generally be considered in our review of the rationality of selection decisions--so long as those explanations are credible and consistent with the contemporaneous record. NWT, Inc.; PharmChem Labs., Inc., B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158 at 16 (citing Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15).

The contracting officer did not explain his basis for asserting that Caring Hands agreed to provide the management system at no cost to the agency, and we find no support in the contemporaneous evaluation record for this contention. In fact, the contemporaneous record is inconsistent with this statement. Caring Hands' quotation did not state that it would be providing the management system (at no cost or otherwise), and instead stated that the item must be purchased directly from its supply partner. AR, Exhibit 5, Caring Hands Quotation, at 3.⁸ The RFQ,

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the page numbers assigned by our Office. Additionally, Caring Hands' quotation was provided twice, once being identified as Exhibit 1 and once being identified as Exhibit 5. Because another agency report document was already identified as Exhibit 1, we refer to the awardee's quotation as Exhibit 5 to avoid confusion.

⁸ Further, Caring Hands' quotation indicated that it would not provide hardware for the management system, despite the fact that the CLINs at issue appear to envision that the vendor will provide such hardware. In this regard, the CLINs at issue stated that they were for "[u]se of radiopharmaceutical management system to facilitate

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however, required vendors to submit complete quotations and warned that incomplete quotations would not move forward for further evaluation. Id. at 30. We find that the awardee's quotation did not meet this requirement.⁹ In light of this fact, we find that this protest ground is clearly meritorious.¹⁰

Sheritech also asserted that Caring Hands did not provide a license from the Nuclear Regulatory Commission (NRC) for either itself or its supply partner, and that the agency did not consider this fact in its technical evaluation. On this issue, the RFQ stated that:

Licensing - Contractor shall provide evidence that it has been licensed or mutually partnered to receive orders and purchase from a contractor and all sub-contractors that is licensed by the Nuclear Regulatory Commission and be regularly established in the business of providing radiopharmaceuticals. **The Contractor shall provide copies of licenses, certifications, and applicable supply partnering agreements in order to be considered technically acceptable.**

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[sic] quality assurance, isotope receipt and administration (hardware and software).” RFQ at 6-12 (emphasis added). As part of Caring Hands’ quotation, however, its supply partner submitted an attachment detailing the hardware requirements for the system, which stated that “[i]t is our understanding that Customer will be providing the hardware for the . . . software program.” AR, Attachment C, Hardware Requirements Printout.

⁹ We note, in addition, that there was a less than two percent price difference between the protester and awardee’s quotations, such that Sheritech’s price may have been the lowest price had the awardee’s quotation priced the missing CLINs. Our Office will resolve doubts regarding prejudice in favor of a protester; a reasonable possibility of prejudice is sufficient to sustain a protest. Crowley Logistics, Inc., B-412628.2 et al., Apr. 19, 2016, 2016 CPD ¶ 120 at 8.

¹⁰ Additionally, another problem with respect to Caring Hands’ price submission was that Caring Hands’ quotation did not comply with the RFQ’s requirement to propose technetium-99m (Tc99m) products generated from non-highly enriched uranium (HEU) sources, where available. See RFQ at 15. Significantly, based on this requirement, Sheritech asked the agency if it could assume that prices being requested in the RFQ schedule were for non-HEU pharmaceutical items and was told to “[a]ssume that all the bid prices are non-HEU.” Protest at 13. In its quotation, Sheritech therefore submitted prices for non-HEU Tc99m products. AR, Exhibit 4, Sheritech Quotation, at 2. In contrast, however, Caring Hands included at least one HEU Tc99m product in its price submission. AR, Exhibit 5, Caring Hands Quotation, at 2.

RFQ at 30 (emphasis in original). The RFQ further provided that “[p]roposals that do not contain above requested instructions, requested licenses, certifications and applicable supply partnering agreements as detailed in Section E, Addendum to FAR Part 52.212-1, Instructions to Offerors, will be considered not technically acceptable and non-responsive for a contract award for this requirement.” Id. at 13 (emphasis in original).

The agency responded to this argument by pointing to a radioactive materials license submitted by Caring Hands’ supply partner. Supplemental Memorandum of Law at 2.¹¹ That license, however, was issued by the North Carolina Department of Health and Human Services and not the NRC. See AR, Exhibit B, Radioactive Materials License. The VA did not argue that this state license is equivalent to an NRC license, nor has it asserted that the issuance of the state license is evidence of an NRC license. In the absence of any such contention, we find that the awardee did not submit the NRC license required under the solicitation in order for a vendor to be considered technically acceptable. We therefore find this argument clearly meritorious.

In addition to challenging the VA’s technical evaluation, the protester asserted that the agency’s evaluation of Caring Hands’ past performance was inconsistent with the terms of the solicitation. In support of this argument, the protester pointed out that Caring Hands’ quotation was missing contract award dates and points of contact information, both of which were required by the RFQ in order to be considered technically acceptable. RFQ at 31. In response, the VA asserted that Caring Hands, in concert with its supply partner, is “currently providing radiopharmaceuticals throughout the VA, which supports the Agency rationale of being satisfied with Caring Hands past performance.” Supplemental COS at 3. While the agency thus asserted that it was currently satisfied with the awardee’s past performance, we do not find any evidence in the contemporaneous record that the agency conducted a past performance evaluation prior to award. In this regard, the agency report did not contain any documentation of the agency’s past performance evaluation, and the source selection decision is devoid of any mention of the agency’s past performance evaluation. See AR, Exhibit 6. Nor does the VA explain in its protest filings whether it conducted a contemporaneous past performance evaluation. The RFQ, however, listed past performance as a stated evaluation factor, thereby requiring the agency to conduct an evaluation of the past performance information submitted by each vendor. Cf. Tantus Techs., Inc., B-411608, B-411608.3, Sept. 14, 2015, 2015 CPD ¶ 299 at 8-9 (sustaining protest where agency failed to evaluate past performance in accordance with the stated

¹¹ The contracting officer also stated that Caring Hands’ supply partner “is licensed by the NRC,” Supplemental COS at 2, but it is not clear what the basis for this statement is since no NRC license was submitted with Caring Hands’ quotation.

evaluation criteria). There is no evidence that the agency did so. We therefore find this protest ground to be clearly meritorious.

Shertech also contended that Caring Hands took exception to the RFQ's statement of work (SOW) and that its quotation should therefore have been "deemed non-responsive." Comments at 32. In this regard, paragraph 14 of the SOW required that the "[c]ontractor shall be responsible for all costs for any radiopharmaceuticals and nonradioactive items contracted for if the Durham VA Medical Center must find an alternate supplier for contracted items." RFQ at 15. In response to this requirement, Caring Hands' quotation stated:

We cannot commit to covering the cost if they order from another supplier during a shortage. We cannot control the pricing of a competitor and it creates too much risk as they could charge an outrageous price. If they have to order due to a supply failure on our part, then we will reimburse them the difference in price up to \$100 per dose with invoice proof source.

AR, Exh. 5, Caring Hands Quotation, at 12. Responding to this protest ground, the contracting officer stated that "[t]he Agency determines that Caring Hands statement in regarding to paragraph 14 of the Statement of Work is responsive and found that Caring Hands, in concert with [its supply partner] is technically acceptable." Supplemental COS at 3.

A quotation that takes exception to a solicitation's material terms and conditions should be considered unacceptable and may not form the basis for an award. IBM U.S. Fed., a division of IBM Corp.; Presidio Networked Solutions, Inc., B-409806 et al., Aug. 15, 2014, 2014 CPD ¶ 241 at 10. Material terms of a solicitation are those which affect the price, quantity, quality, or delivery of the goods or services being provided. Id. Additionally, solicitations frequently require offerors to bear pricing risks, and where a solicitation requires a vendor to bear such risks and it takes exception, its quotation as submitted cannot be considered for award. See Optical Sys. Tech., Inc., B-292743.2, Nov. 12, 2004, 2004 CPD ¶ 231 at 6; W. Gohman Constr. Co., B-401877, Dec. 2, 2009, 2010 CPD ¶ 11 at 3-4.

In the instant case, we find that it was a material requirement for vendors to agree to cover the costs arising if the agency must use an alternate supplier. This provision effectively required vendors to bear the pricing risk of such contingent costs, and to factor that risk in when setting their fixed pricing. By taking exception to the requirement, Caring Hands was able to shift the pricing risk to the agency, and thus provide itself with a price advantage not enjoyed by the other vendors on this lowest-priced, technically acceptable procurement. Since its quotation took exception to a material requirement, it should have been considered unacceptable. We therefore find this protest ground to be clearly meritorious.

Non-Meritorious Arguments

In addition to the protest challenges discussed above, Shertech raised several arguments that we find are not clearly meritorious. For example, Shertech challenged the agency's waiver of the nonmanufacturer rule. Shertech asserted that because it is a small business that has the ability to provide all of the radiopharmaceuticals sought in the solicitation, the agency improperly waived the nonmanufacturer rule. In this regard, 15 U.S.C. § 657s(a)(4) permits the waiver of the nonmanufacturer rule where the SBA has determined that no small business manufacturer or processor can reasonably be expected to offer a product meeting the specifications or where no small business manufacturer or processor is available to participate in the procurement.

We find Shertech's challenge to the waiver of the nonmanufacturer rule untimely and therefore not clearly meritorious. Our Bid Protest Regulations contain strict rules for the timely submission of protests. These rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Verizon Wireless, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4. Under these rules, a protest based on alleged improprieties in a solicitation must be filed prior to the time established for receipt of quotations. 4 C.F.R. § 21.2(a)(1). Here, the solicitation advised vendors that the nonmanufacturer rule had been waived for this procurement. RFQ at 1. Since Shertech did not file a protest prior to the time established for the receipt of quotations, its challenge to the waiver of the rule was untimely.

Shertech also challenged the VA's technical evaluation, alleging that Caring Hands' quotation did not comply with the limitation on subcontracting clause incorporated by the RFQ, FAR clause 52.219-14. That clause requires that a small business concern agree that for any procurement for supplies, "other than [a] procurement from a nonmanufacturer of such supplies," the concern "shall perform work for at least 50 percent of the cost of manufacturing the supplies, not including the cost of materials." Shertech asserted that because Caring Hands did not meet the definition of a nonmanufacturer, as found in the SBA's regulations at 13 C.F.R. § 121.406(b),¹² it would be required, under the applicable limitation on

¹² In this regard, 13 C.F.R. § 121.406(b) provides:

- (b) Nonmanufacturers. (1) A firm may qualify as a small business concern for a requirement to provide manufactured products or other supply items as a nonmanufacturer if it:
 - (i) Does not exceed 500 employees;
 - (ii) Is primarily engaged in the retail or wholesale trade and normally sells the type of item being supplied;

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subcontracting clause, to perform work for at least 50 percent of the cost of manufacturing the supplies being procured. Shertech asserted that Caring Hands could not meet this requirement because it did not have a license to manufacture radiopharmaceutical products.

Resolving this issue, however, would require us to first make a determination regarding whether Caring Hands qualifies as a small business nonmanufacturer under the standard set forth in 13 C.F.R. § 121.406(b). However, the SBA, not our Office, has conclusive authority to determine the size status of an offeror for federal procurement purposes, including whether the offeror satisfies the requirements of 13 C.F.R. § 121.406(b). DynaLantic Corp., B-402326, Mar. 15, 2010, 2010 CPD ¶ 103 at 5; Hatco Corp., B-270545, Mar. 21, 1996, 96-1 CPD ¶ 161 at 3-4. Accordingly, we find that this protest ground raises a matter outside of our bid protest jurisdiction, and is therefore not clearly meritorious.

Undue Delay

As set forth above, our Office may recommend reimbursement of protest costs if we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. This principle is intended to prevent inordinate delay in investigating the merits of a protest and taking corrective action once an error is evident, so that a protester will not incur unnecessary effort and expense in pursuing its remedies before our Office. Professional Landscape Mgmt. Servs., Inc.--Costs, B-287728.2, Nov. 2, 2001, 2001 CPD ¶ 180 at 5. We generally consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest but not prompt where it is taken after that date. Alsalam Aircraft Co.--Costs, B-401298.3, Nov. 5, 2009, 2009 CPD ¶ 208 at 3.

With regard to Shertech's clearly meritorious protest grounds, *i.e.*, its challenge to the evaluation of the awardee's quotation, we find that the agency unduly delayed taking corrective action. Specifically, Shertech raised these allegations beginning in its initial protest filed on October 8, and then in its supplemental protest filed on November 19. The VA, however, delayed taking corrective action, filing an agency report on November 9 and then filing a supplemental agency report on December 2. The VA did not take corrective action until December 4, doing so only after our

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(iii) Takes ownership or possession of the item(s) with its personnel, equipment or facilities in a manner consistent with industry practice; and

(iv) Will supply the end item of a small business manufacturer, processor or producer made in the United States, or obtains a waiver of such requirement pursuant to paragraph (b)(5) of this section.

Office requested the agency provide justification for its withholding of requested documents. As a result, we find that the agency's corrective action was unduly delayed.

Severance of Costs

As explained above, we find that the agency unduly delayed taking corrective action in response to several clearly meritorious protest arguments. We also find, however, that not all of the arguments raised by the protester were clearly meritorious. As a general rule, our Office recommends that a successful protester 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 determining whether protest issues are so clearly severable as to essentially constitute separate protests, our Office considers, among other things, whether the successful and unsuccessful arguments share a common core set of facts, are based on related legal theories, or are otherwise not readily severable. Id.

In applying these principles, we have severed costs arising from allegations of misevaluation under separate evaluation factors on the basis that they are not clearly intertwined. For example, challenges to a past performance evaluation were not clearly intertwined with clearly meritorious challenges to the technical factor evaluation and the resulting tradeoff. Genesis Bus. Sys.--Costs, B-411264.11, Dec. 10, 2015, 2015 CPD ¶ 389 at 4; see also Carney, Inc.--Costs, B-408176.13, Feb. 14, 2014, 2014 CPD ¶ 82 at 5 (severing costs for alleged misevaluation of price from clearly meritorious challenge to technical capability factor evaluation); Loyal Source Gov't Servs., LLC--Costs, B-407791.4, Feb. 14, 2014, 2014 CPD ¶ 139 at 4 (severing costs for evaluation challenges from clearly meritorious challenge to adequacy of best value tradeoff rationale). In a similar fashion, we severed the costs for challenges to the evaluation of the awardee and to the agency's alleged failure to amend a solicitation because those issues were not clearly intertwined with a clearly meritorious allegation of unequal discussions. VSE Corp.; The Univ. of Hawaii--Costs, B-407164.11, B-407164.12, June 23, 2014, 2014 CPD ¶ 202 at 8.

Here, we recommend that Shertech be reimbursed for its costs of pursuing all of its challenges relating to its initial and supplemental protests with the exception of its challenge to the agency's waiver of the nonmanufacturer rule and its challenge to the nonmanufacturer status of the awardee. The challenge to the agency's waiver of the nonmanufacturer rule relates to a term in the solicitation and is thus clearly severable from the protest grounds arising from the evaluation of the awardee's

proposal. Similarly, Shertech's challenge to the awardee's status as a small business nonmanufacturer, while ostensibly stylized as a challenge to the agency's technical evaluation, involves a size status issue that is legally distinct from the protester's other challenges to the adequacy of the agency's evaluation.

The remaining non-clearly meritorious protest grounds relate to the agency's technical and price evaluations of the awardee's quotation, sharing a common core set of facts with, or related legal theories to, Shertech's meritorious protest challenges. We therefore find these protest grounds to be intertwined with Shertech's clearly meritorious protest grounds.

RECOMMENDATION

We recommend that the VA reimburse Shertech the reasonable costs of filing and pursuing its initial and supplemental protests challenging the agency's evaluation of the awardee's proposal with the exception of those costs arising from Shertech's two arguments relating to the nonmanufacturer rule. Shertech should file its claim for costs, detailing and certifying the time expended and costs incurred, with the agency within 60 days of receipt of this recommendation. 4 C.F.R. § 21.8(f)(1).

The request is granted in part and denied in part.

Susan A. Poling
General Counsel