



Decision

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Matter of: Ace Info Solutions, Inc.--Costs

File: B-414650.27

Date: May 14, 2019

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DIGEST

1. Request for recommendation that agency reimburse a greater portion of protester's costs than the agency has agreed to pay is granted in part where protester seeks costs relating to unsuccessful protest issues that were clearly intertwined with the protester's successful protest grounds.
 2. Request for recommendation that agency reimburse a greater portion of protester's costs than the agency has agreed to pay is denied in part where protester seeks costs relating to unsuccessful protest issues that were severable from the protester's successful protest grounds and seeks costs relating to an earlier protest that did not raise clearly meritorious protest issues.
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DECISION

Ace Info Solutions, Inc., a small business located in Reston, Virginia, requests that we recommend reimbursement, in the amount of \$155,235.07, for its protest costs incurred in its challenge to the issuance of a task order to Insero Corporation, a small business located in Vienna, Virginia, under request for quotations (RFQ) No. HSCETC-17-Q-00010, issued by the Department of Homeland Security (DHS) for information technology operations support services (ITOSS). Following our Office's earlier decision sustaining the protest and recommending payment of the costs of pursuing the protest, Ace Info submitted a certified claim for such costs to the agency. The agency has agreed to pay \$57,125.05 of this claim, and our decision here addresses only the disputed portion of the claim.

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

BACKGROUND

On March 31, 2017, DHS issued the RFQ, which consolidated seven separate ITOSS task orders into one task order under DHS's Enterprise Acquisition Gateway for Leading Edge Solutions (EAGLE) II indefinite-delivery, indefinite-quantity multiple-award contract vehicle. The solicitation called for the evaluation of four factors: management approach, technical approach, past performance, and price. RFQ at 10.

On May 8, the agency received a total of 11 quotations from interested vendors, including quotations from Inerso and Ace Info. On September 29, following discussions and the submission of revised quotations, DHS issued a task order for the ITOSS requirement to Inerso. Following the issuance of the task order, our Office received protests from several vendors, including Ace Info, which submitted a protest on October 16 that was docketed as B-414650.3. The protest challenged (1) the agency's evaluation of Ace Info's quotation under the technical approach factor, (2) the agency's discussions with Ace Info with respect to the management approach and technical approach factors, (3) the agency's evaluation of Inerso's past performance and management approach, and (4) the agency's best-value tradeoff analysis. See B-414650.3 Protest, Oct. 16, 2017. Prior to filing its report in response to the protest, DHS elected to take corrective action stating that, "[a]lthough [it] is still determining the nature and extent of the corrective action, [DHS] will review its evaluation, conduct a new tradeoff analysis, and make a new award determination." Notice of Corrective Action, Oct. 24, 2017, at 1.

On January 31, 2018, following a further round of discussions and quotation submissions, the agency reaffirmed its decision to issue the subject task order to Inerso, finding that Inerso's quotation conformed to all solicitation requirements and provided the best value to the agency. Our Office then received five protests of the award, including a protest filed by Ace Info that was docketed as B-414650.10. Ace Info's protest asserted that the agency (1) failed to document its determination that Inerso offered substantial benefits over Ace Info in the management approach factor, (2) unreasonably assigned Ace Info a good rating for the technical approach factor, (3) unreasonably evaluated Inerso under the past performance and management approach factors, and (4) conducted an unreasonable best-value tradeoff analysis. See B-414650.10 Protest, Feb. 13, 2018.

Following the agency's early submission of relevant documents in response to the protest, Ace Info filed a supplemental protest asserting that the agency: (1) improperly credited Inerso's past performance of two contracts with attributes that were not in the vendor's quotation or past performance questionnaires, (2) failed to follow the stated evaluation criteria by assigning a substantial confidence rating to Inerso's past performance despite the failure of its past performance efforts to meet the size, scope and complexity requirements of the solicitation, (3) made significant errors in its evaluation of Ace Info's quotation under the management approach factor,

(4) conducted a flawed evaluation of Inerso under the technical approach factor and engaged in disparate treatment, and (5) unreasonably assigned a good rating to Ace Info's quotation under the technical approach factor. See B-414650.14 Supp. Protest, Mar. 12, 2018. Our Office docketed this supplemental protest as B-414650.14 and requested that the agency provide a response to both protests in its agency report.¹

On May 21, our Office sustained Ace Info's protest, concluding that the agency's evaluation of Inerso's past performance contained material errors and was inadequately documented. Ace Info Solutions, Inc., B-414650.10, B-414650.14, May 21, 2018, 2018 CPD ¶ 189. We found that these errors were prejudicial to Ace Info because there was a reasonable possibility that, but for the agency's actions, the protester would have had a substantial chance of receiving the award. Our Office recommended that the agency reevaluate Inerso's quotation and make a new source selection decision based on that reevaluation. We also recommended that the agency reimburse Ace Info its reasonable costs of filing and pursuing its protest, including reasonable attorneys' fees, in accordance with 4 C.F.R. § 21.8(d)(1).

On June 22, Ace Info submitted a certified claim to the contracting officer for the protester's attorneys' fees and costs, seeking reimbursement in the amount of \$140,467. The claim sought reimbursement for the attorneys' fees incurred in connection with the B-414650.3, B-414650.10, and B-414650.14 protests. On July 20, after the contracting officer pointed out a calculation error in the claim, the protester submitted a revised certified claim for \$155,235.07.

On August 15, the agency responded to the claim by stating that DHS would not reimburse the protester its fees incurred in connection with the B-414650.3 protest. The agency also stated that it would only pay the costs associated with the protester's "successful" protest issues, i.e., "its challenge to the evaluation of Inerso's past performance." Agency Resp. to Protester's Claim, at 3. To determine such costs, the agency calculated attorneys' fees using a page count method. That is, the agency counted the pages in each of these protest filings that were devoted to background sections and past performance arguments, and then applied the resulting percentage of the filing pages to the legal fees incurred by the protester for the totality of the applicable filing. Id. at 3-5.² The agency also agreed to pay \$2,560.40 in attorneys'

¹ Because of DHS's early document production, the supplemental protest was filed prior to the agency's legal memorandum responding to Ace Info's initial (B-414650.10) protest grounds.

² The agency additionally did not count a "duplicative" background section in one of the filings in the page count for that filing. Id. at 4 n.3. We note that the protester has not specifically objected to the page count methodology employed by the agency here, and instead generally challenged the agency's severance of the unsuccessful protest issues from the successful protest issues. Accordingly, we do not address the reasonableness of the agency's specific page count methodology in this decision.

fees associated with work related to the issuance of a public GAO decision. Id. at 5. In total, the agency agreed to pay \$57,125.05 of the claim.

This request for a recommendation on the amount of costs followed.

DISCUSSION

The protester asks our Office to recommend that the agency reimburse Ace Info \$155,235.07, to include both the \$57,125.05 that the agency has already agreed to pay and an additional \$98,110.02, representing the protest costs associated with the B-414650.3 protest and the unsuccessful protest issues in the B-414650.10/ B-414650.14 proceeding. With respect to the B-414650.10 and B-414650.14 protests, the protester argues that it should be reimbursed for the entirety of its protest, because its unsuccessful protest grounds were intertwined with its successful protest grounds. The protester additionally asserts that it should be reimbursed the protest costs associated with the B-414650.3 proceeding because the corrective action taken by the agency after that protest did not address a meritorious protest issue, and this failure “put [Ace Info] to the expense of protesting a second time on the same ground.” Request for Recommendation on Costs at 7. Finally, the protester requests that our Office recommend that it be reimbursed for the costs of pursuing its request for costs.

Severability of Protest Costs

As noted above, the protester requests that our Office recommend that DHS reimburse Ace Info for all of the attorneys’ fees that it incurred in pursuing its unsuccessful protest grounds in the B-414650.10/B-414650.14 protest proceeding. The protester argues that since these protest arguments all relate to the evaluation of quotations, they are clearly intertwined with the protester’s successful protest grounds, which challenged the evaluation of Inserso’s quotation under the past performance factor.

As a general rule, our Office will recommend that a successful protester be reimbursed the costs incurred with respect to all the issues pursued, not merely those upon which it has prevailed. TRESP Assocs., Inc.--Costs, B-258322.8, Nov. 3, 1998, 98-2 CPD ¶ 108 at 2. 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. Id. at 2-3. 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. Chags Health Info. Tech., LLC et al.--Costs, B-413116.38 et al., Apr. 19, 2017, 2017 CPD ¶ 126 at 4. In applying these principles, we have, on occasion, severed costs arising from allegations of misvaluation under separate evaluation factors on the basis that they are not clearly intertwined. Id.; see also Genesis Bus. Sys.--Costs, B-411264.11, Dec. 10, 2015, 2015 CPD ¶ 389 at 3-4 (concluding that challenges to a

past performance evaluation were not clearly intertwined with clearly meritorious challenges to the technical factor evaluation and the resulting tradeoff).

Here, we find that the protester's unsuccessful challenge to DHS's best-value tradeoff was intertwined with, and thus not readily severable from, the protester's successful challenge to the evaluation of Inerso's past performance. In this regard, the two protest grounds share related legal theories. For example, the argument challenging the tradeoff analysis asserted that the agency's best-value tradeoff analysis was flawed and inadequate, while the past performance challenge also took issue with the best-value determination, asserting that it was prejudicially affected by DHS's flawed past performance evaluation. See B-414650.10 Protest, Feb. 13, 2018, at 25-27; B-414650.10/B-414650.14 Comments, Apr. 5, 2018, at 18. In this respect, the protester asserted that, but for the agency's flawed evaluation of past performance, "there is a reasonable chance that the best value decision would have been made in favor of [Ace Info], making [Ace Info] the awardee." B-414650.10/B-414650.14 Comments, Apr. 5, 2018, at 18. Our decision ultimately agreed with this argument, concluding that there was a reasonable possibility of prejudice as a result of the agency's flawed past performance evaluation. See Ace Info Solutions, Inc., supra, at 9. Because of the intertwined nature of the protester's challenges to the agency's past performance evaluation and best-value tradeoff, we see no basis to accept the agency's arguments to sever the recovery of costs related to these two issues.

Accordingly, we recommend that the agency reimburse the protester for the costs incurred in connection with its challenge to the agency's best-value tradeoff determination. This challenge comprises two pages in the protester's 27-page, initial protest filing. See B-414650.10 Protest, Feb. 13, 2018, at 25-27. The agency calculated the total cost of the B-414650.10 protest filing to be \$21,211.50 in attorneys' fees. See Agency Resp. to Protester's Claim at 3. Using the agency's page count methodology, to which the protester has not objected, further reimbursement for the portion of costs attributable to the tradeoff challenge would result in an additional \$1,571.22 in recoverable protest costs.

We find the remainder of the protester's unsuccessful protest arguments from the B-414650.10 and B-414650.14 protests to be severable from Ace Info's successful challenge to the agency's past performance evaluation. In this regard, the record demonstrates that the arguments asserted by the protester in its remaining challenges were not intertwined with the arguments asserted in the protester's challenge to the past performance evaluation. For example, the protester challenged the evaluation of quotations under the technical approach and management approach factors, focusing on the specific approaches proposed by Ace Info and Inerso. The protester argued that these approaches warranted the assignment (or lack thereof) of strengths and weaknesses, and also argued that the agency unreasonably assigned adjectival ratings under both evaluation factors. These challenges were not intertwined and had little to do with the protester's challenges to the agency's evaluation of Inerso's past performance efforts. They were instead based on separate proposal sections and different evaluation factors, which, in turn, had separate evaluation criteria and a

separate rating scheme. We therefore find the agency's decision to sever these costs to be reasonable.

Costs of the Earlier Protest

The protester additionally seeks a recommendation from our Office that the agency reimburse Ace Info \$37,434.57 for the costs incurred in pursuing its earlier protest, the B-414650.3 protest. The agency took corrective action in response to that protest prior to the agency report deadline. Despite this, the protester relies on our decision in Louisiana Clearwater, Inc.--Recon. & Costs, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209, to argue that Ace Info should be reimbursed the costs of its earlier protest. In Louisiana Clearwater, we recommended that an agency pay the protester its costs from an earlier protest, where the agency failed to address a meritorious issue raised in that protest, such that the protester was put to the expense of protesting a second time on the same ground. The protester argues that similar to Louisiana Clearwater, the agency here failed to address a clearly meritorious argument raised in Ace Info's earlier B-414650.3 protest, which caused the protester to undergo the expense of protesting the same protest ground a second time. The protester notes that its B-414650.3 protest raised a nearly identical past performance challenge to the argument raised in Ace Info's initial filing in the B-414650.10 protest. Both filings challenged the agency's assignment of a substantial confidence rating to Insero under the past performance evaluation factor, on the basis that the awardee did not possess sufficiently relevant past performance experience to merit such a rating. Compare B-414650.3 Protest, Oct. 16, 2017, at 25-27 with B-414650.10 Protest, Feb. 13, 2018, at 22-25.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of 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. AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. While, as a general rule, we will not find undue delay when an agency takes corrective action prior to the deadline for the agency report, this is not the case where an agency implements corrective action that fails to address a meritorious issue raised in the protest that prompted the corrective action, such that the protester is put to the expense of subsequently protesting the very same procurement deficiency. Louisiana Clearwater, Inc.--Recon. & Costs, supra, at 6. Our Office has explained in several decisions, however, that the principles set forth in Louisiana Clearwater address a narrow range of circumstances, namely, those where an agency fails to implement corrective action in good faith in response to a clearly meritorious protest. Bluehorse Corp.--Recon., B-414383.3, Aug. 28, 2017, 2017 CPD ¶ 267 at 3.

Here, we find that Ace Info's earlier protest ground, set forth in the B-414650.3 proceeding, was not clearly meritorious. A protest is clearly meritorious where the argument provides sufficient facts such that a reasonable agency inquiry into the protester's allegations would reveal facts showing the absence of a defensible legal position. See First Fed. Corp.--Costs, B-293373.2, Apr. 21, 2004, 2004 CPD ¶ 94 at 2.

The B-414650.3 protest, while challenging the awardee's overall level of past performance, did not specifically allege any of the material errors that were later found in the agency's past performance evaluation.³ Ultimately, it was these errors that led our Office to sustain Ace Info's protest. See Ace Info Solutions, Inc., supra, at 1.⁴ In our view, the initial protest arguments raised by Ace Info were not sufficiently specific to put the agency on notice of the errors in its evaluation of specific past performance efforts submitted by the awardee. Without such notice, the record does not demonstrate that the agency failed to implement prompt corrective action with respect to the protest arguments raised in the B-414650.3 proceeding.

Costs of the Claim

As a final matter, Ace Info asks to be reimbursed the costs of filing and pursuing its claim. Our Bid Protest Regulations, 4 C.F.R. § 21.8(f)(5), provide that we may recommend a protester be reimbursed for the costs of pursuing its claim at our Office. This provision is designed to encourage the agency's expeditious and reasonable consideration of a protester's claim for costs. E&R, Inc.--Claim for Costs, B-255868.2, May 30, 1996, 96-1 CPD ¶ 264 at 6 (citing predecessor regulation). Here, the record establishes that DHS acted reasonably and promptly in negotiating Ace Info's claim before the matter was submitted to our Office, even pointing out a calculation error in Ace Info's favor. Under the circumstances, DHS's handling of Ace Info's claim was reasonable and expeditious and does not provide a basis for us to recommend the reimbursement of the costs of pursuing this claim at our Office.

³ While the B-414650.3 protest challenged the evaluation of Inerso's past performance, this protest ground was different from the argument on which Ace Info ultimately prevailed. In the B-414650.3 protest, Ace Info primarily asserted, based on publicly available information, that the protester should not have received a substantial confidence rating in light of the fact that it "cannot demonstrate that it has performed contracts of a similar size and scope . . . as the instant procurement." B-414650.3 Protest, Oct. 16, 2017, at 25. Ace Info later reraised this same argument in its initial protest filing in the B-414650.10 protest. See B-414650.10 Protest, Feb. 13, 2018, at 24. In contrast to these arguments, the protester's successful protest grounds were first asserted in a supplemental protest filing in the B-414650.10/B.414650.14 proceeding, where the protester asserted that the agency's evaluation of the specific past performance efforts submitted by Inerso contained material errors and was inadequately documented. See B-414650.14 Supp. Protest, Mar. 12, 2018, at 16-27.

⁴ Notably, our decision did not address the protester's initial argument that Inerso's overall lack of relevant experience meant that the agency's assignment of a rating of substantial confidence for Inerso's past performance was unreasonable.

RECOMMENDATION

In sum, we recommend that the agency reimburse Ace Info a total of \$1,571.22 in attorneys' fees, in addition to the costs DHS has previously agreed to pay. This sum represents the costs represented by the protester's challenge to the agency's best-value tradeoff analysis, which we find to be clearly intertwined with the protester's meritorious protest arguments. We do not recommend reimbursement of the remainder of the disputed amount.

The protester's request that GAO recommend reimbursement of the amount of protest costs is granted in part and denied in part.

Thomas H. Armstrong
General Counsel