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Decision

Matter of: Octo Consulting Group, Inc.--Costs

File: B-414801.4

Date: December 14, 2017

Damien C. Specht, Esq., Ethan E. Marsh, Esq., James A. Tucker, Esq., and Lauren J. Horneffer, Esq., Morrison & Foerster LLP, for the protester. Nicole Beeler, Esq., and Andrew Sinn, Esq., General Services Administration, for the agency. Heather Weiner, Esq., and Jennifer D. Westfall-McGrail, 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 quotations and source selection 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 argument that agency engaged in impermissible bait and switch, which was severable from the protester's clearly meritorious complaints, and not itself clearly meritorious.
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DECISION

Octo Consulting Group, Inc., a small business located in Reston, Virginia, requests that we recommend that it be reimbursed the costs associated with filing and pursuing its protest against the issuance of a task order to Agile Defense, Inc., also of Reston, Virginia, under request for quotations (RFQ) No. ID04160076, issued by the General Services Administration (GSA), Federal Acquisition Service, on behalf of the Department of the Army, Program Executive Office for Simulation, Training, and Instrumentation. The task order, which was issued under the GSA's Alliant Small Business Government-Wide Acquisition Contract (GWAC), was for information technology management services.

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

BACKGROUND

On June 12, 2017, Octo protested with our Office GSA's award to Agile, challenging the agency's evaluation of technical quotations and past performance, as well as the agency's award determination. Specifically, Octo argued that the agency failed to credit its quotation with various strengths, and improperly assessed weaknesses, under the solicitation's three technical subfactors, as well as asserted that the agency failed to recognize the superior past performance of Octo's teammate. The protester also challenged the award to Agile, arguing that it resulted from an impermissible "bait and switch." On June 15, 2017, and July 21, 2017, Octo filed supplemental protests expanding its challenges to the agency's technical evaluation and source selection decision.

After development of the protest record, 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 parties that GAO would likely sustain Octo's protest on the basis that the agency applied an unstated evaluation criterion in assessing weaknesses to Octo's quotation under the organizational structure subfactor. Specifically, the GAO attorney explained that, although the solicitation asked offerors to describe their organizational structure, and provided that the agency would evaluate their hierarchical arrangement, including internal and external communications strategies, RFQ at 89, the record reflected that the agency's assessment of the weaknesses was based on the fact that the evaluators were seeking a program manager with a "high level" of autonomy and authority, which the agency interpreted to mean a program manager that could make decisions without corporate office approval. AR, Tab 23, Memo for File, May 23, 2017, at 1.

The GAO attorney pointed out that, while a program manager's authority to make decisions is related to the hierarchical structure, such that it has some relationship to the evaluation criteria in the RFQ, the agency's stated concerns (articulated in the assessed weaknesses) were so far removed from the expressly stated criteria in the solicitation that offerors could not have known they were required to address the specific concerns in their quotations. In the view of the GAO attorney, this error led to a flawed award determination. In this regard, the GAO attorney also identified some concerns with the agency's source selection decision. For example, the GAO attorney noted that, although the technical evaluation identified differences between Octo's quotation and the awardee's quotation, those differences did not appear to be adequately reflected or otherwise documented in the source selection decision.

In response to the ADR, the agency informed our Office that it intended to take corrective action consisting of, at a minimum, reevaluating quotations and making a new source selection decision. Based on the agency's proposed corrective action, GAO dismissed Octo's protest as academic. Octo Consulting Group, Inc., B-414801, B-414801.2, Sept. 14, 2017 (unpublished decision). Following the dismissal of the protest, Octo filed this request that GAO recommend the reimbursement of its costs of filing and pursuing its protest.

DISCUSSION

Octo asks our Office to recommend that GSA reimburse it for the costs associated with all of the issues pursued. In response, GSA does not dispute that the protester should be reimbursed its costs of pursuing its challenge to the agency's technical evaluation under the organizational subfactor, but maintains that Octo's reimbursement should be limited to this issue. Accordingly, the remaining question for resolution by our Office is whether the protester should be reimbursed for all of the remaining challenges to the agency's evaluation of quotations raised in the 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 reasonable 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 the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Pemco Aeroplex, Inc.--Recon. & 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 the purpose of recommending reimbursement of protest costs. National Opinion Research Ctr.--Costs, B-289044.3, Mar. 6, 2002, 2002 CPD ¶ 55 at 3.

In considering whether to recommend the reimbursement of protest costs, we generally consider all issues concerning the evaluation of proposals to be intertwined--and thus not severable--and therefore, generally will recommend reimbursement of the costs associated with both successful and unsuccessful challenges to an evaluation. Coulson Aviation (USA) Inc.; 10 Tanker Air Carrier, LLC--Costs, B-406920.6, B-406920.7, Aug. 22, 2013, 2013 CPD ¶ 197 at 5. While we have, in appropriate cases, limited our recommendation where a part of a successful protester's costs is allocable to a protest issue that is so clearly severable as to essentially constitute a separate protest, see, e.g., 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, limiting recovery of protest costs in all cases to only those issues on which the protester prevailed would be inconsistent with the broad, remedial Congressional purpose behind the cost reimbursement provisions of the Competition in Contracting Act, 31 U.S.C. § 3554(c)(1)(A). Fluor Energy Tech. Servs., LLC--Costs, B-411466.3, June 7, 2016, 2016 CPD ¶ 160 at 3.

GSA argues that Octo's remaining challenges to the agency's evaluation of quotations are clearly severable from the concerns identified in the outcome prediction ADR, which

focused on the agency's application of an undisclosed evaluation criterion during the technical evaluation under the organizational structure subfactor. We disagree.

Regarding the costs for the source selection protest allegations, it is readily apparent that the agency's analysis required an assessment of the evaluation factors, to include the organizational subfactor evaluation findings, which, as noted above, were raised as an issue during ADR by the GAO attorney. Since the source selection decision was necessarily based on flawed technical evaluation findings, we consider all of the protester's arguments in connection with the source selection decision to be necessarily intertwined with the protester's meritorious challenges. Accordingly, we reject the agency's arguments to sever costs in this regard.

With regard to Octo's other challenges to the evaluation of quotations--i.e., that the agency failed to credit Octo's quotation with various strengths under the solicitation's other technical subfactors, and that the agency failed to adequately credit Octo for the past performance of its teammate--we consider these issues to share common factual and legal bases; both the meritorious and non-meritorious issues are intertwined and interrelated with the agency's flawed consideration of the relative merits of quotations. See Sevatec, Inc.--Costs, B-407880.3, June 27, 2013, 2013 CPD ¶ 163 at 3-4. As such, we decline to sever the costs of these protest grounds.

We agree with the agency, however, that the protest allegation asserting an impermissible bait and switch on the part of the awardee should be severed in this case. We conclude that this issue is not intertwined with the protester's successful challenges, which related to the agency's application of an unstated evaluation criterion in assigning weaknesses to Octo's quotation under the organizational structure subfactor. Octo's bait and switch argument, on the other hand, concerned allegations of misrepresentation, and challenged the agency's evaluation of the awardee's quotation. The protester's bait and switch argument did not involve the same core nucleus of operative facts as the unstated evaluation criterion argument, nor did the issues raised turn on related legal theories or principles. In addition, the bait and switch issues were not independently clearly meritorious, and thus provide no basis on which to recommend reimbursement of protest costs.

RECOMMENDATION

We recommend that the protester be reimbursed the costs associated with filing and pursuing its protest, including reasonable attorneys' fees, to the extent those costs were incurred in connection with challenges to the agency's evaluation of quotations under the technical evaluation factor, challenges to the agency's evaluation of past performance, or challenges to the source selection decision. We do not recommend

reimbursement for Octo's bait and switch allegations. The protester should submit its claim for costs associated with the protest grounds recommended for reimbursement, detailing and certifying the time expended and costs incurred, directly to GSA within 60 days of receipt of this decision.

The request is granted in part and denied in part.

Thomas H. Armstrong
General Counsel