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Decision

Matter of: WorldWide Language Resources, Inc.--Costs

File: B-417015.16

Date: January 28, 2020

Paul F. Khoury, Esq., Kara M. Sacilotto, Esq., George E. Petel, Esq., and Lindy C. Bathurst, Esq., Wiley Rein LLP, for the protester.
Robert B. Neill, Esq., Department of the Army, 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

Protester's request that GAO recommend the reimbursement of protest costs is granted where the record shows that the agency unduly delayed taking corrective action in response to clearly meritorious protest grounds.

DECISION

WorldWide Language Resources, Inc. (WWLR), of Fayetteville, North Carolina, requests that we recommend the Department of the Army reimburse it for the reasonable costs of filing and pursuing its protest of the agency's decision to issue a task order to Valiant Government Services, LLC, of Hopkinsville, Kentucky, under request for task order proposals (RTOP) No. W911W4-17-R-ARCENT, issued by the Army for linguist support services for the Army's Central Command area of responsibility. The protester contends that the agency failed to take prompt corrective action in response to clearly meritorious protest grounds.

We grant the request.

BACKGROUND

On September 21, 2017, the Army issued the RTOP under the Department of Defense's Language Interpretation and Translation Enterprise II (DLITE II) contract vehicle, to acquire linguist support capability in support of the Combined Joint Task Force-Operation Inherent Resolve, the Department of State Office of Special Cooperation-Iraq, and the U.S. Army Central. The RTOP contemplated that the resulting cost-plus fixed-fee task order would have a 1-year base period and four 1-year option periods.

On July 31, 2019, the Army notified WWLR that the task order had been issued to Valiant. Following a debriefing, WWLR filed a timely protest, which our Office docketed as B-417015.6, challenging the agency's evaluation of Valiant's cost and technical proposals, its failure to credit WWLR's proposal with additional strengths, its discussions with WWLR, and its best-value tradeoff determination. On August 23, the protester filed a supplemental protest (docketed as B-417015.10) challenging the agency's cost realism evaluation in light of a reduction in Valiant's proposed cost from an earlier-submitted proposal. On September 18, the Army provided an agency report responding to these protest grounds.

On September 23, WWLR filed comments on the agency report and submitted a second supplemental protest (docketed as B-417015.11) that challenged additional aspects of the Army's cost realism evaluation, asserted that the agency unreasonably and disparately evaluated Valiant's technical and cost proposals, and contended that the Army's best-value tradeoff was flawed as a result of these errors. Then, on September 30, WWLR filed a third supplemental protest (docketed as B-417015.15) challenging (1) additional elements of the agency's cost realism evaluation, (2) its discussions with offerors, and (3) the technical "cross walk" process used by the Army to assess the impact of Valiant's cost elements on its technical approach. Supp. Protest & Comments, Sept. 30, 2019, at 9.

On October 4, the Army announced it would take corrective action in response to WWLR's protests. The agency stated it would reevaluate proposals and make a new source selection decision. The agency additionally reserved the right to reopen discussions, if necessary, and solicit revised proposals.

Based on the corrective action, we dismissed the protests as academic. This request for a recommendation on reimbursement follows.

DISCUSSION

The protester argues that the agency unduly delayed taking corrective action in response to WWLR's clearly meritorious protest grounds and instead waited until after the protester had submitted two sets of comments on the agency report before taking corrective action. The Army does not dispute that several of the initial protest's arguments were clearly meritorious. These arguments include contentions that: (1) the agency failed to conduct an adequate cost realism evaluation and ignored the potential risk and lack of understanding reflected in the awardee's unrealistically low proposed compensation, (2) the agency conducted misleading discussions with the protester, (3) the agency unreasonably and unequally evaluated the awardee's proposal under the staffing plan subfactor, and (4) the agency's best-value determination was flawed. The agency argues that, with the exception of these arguments, WWLR's protest grounds were not clearly meritorious and are readily severable from the above clearly meritorious grounds. Army Resp. to Cost Request at 15.

Our Office may recommend the 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.

Here, the agency does not dispute that three of the protest grounds were clearly meritorious.¹ In fact, the agency took corrective action based on errors identified in the same portions of the evaluation that were the subject of these protest grounds: i.e., the cost evaluation, the staffing plan evaluation, and the agency's best-value determination. Based on our review of the record, we see no reason to question the agency's concession as to the merit of these protest grounds.

In addition, we find that the agency did not take prompt corrective action in response to these protest grounds. In this regard, our Office generally considers 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. In this case, the due date for the agency report was September 18, yet the agency did not take corrective action until October 4. Accordingly, we conclude that the agency unduly delayed taking corrective action in response to clearly meritorious protest grounds.

As a general rule, a successful protester should 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 making this determination, we consider, among other things, the extent to which the claims are interrelated or intertwined, e.g., whether the successful and unsuccessful claims 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.

¹ The agency argued that the remaining protest grounds were not clearly meritorious, however, and the protester failed to take issue with the agency's position. We therefore consider this point to be conceded.

The agency contends that the remaining protest issues are severable because they are based on different facts and legal theories than WWLR's successful protest grounds. Based on our review of the record, we disagree. In this regard, we find that the protester's arguments (both successful and unsuccessful) share a common set of facts and a common legal theory and therefore are not severable from each other.

As an initial matter, many of these protest grounds allege errors stemming from the Army's failure to identify and account for Valiant's unrealistically low costs within its evaluation. For example, in WWLR's second supplemental protest, it alleged that the Army conducted an unreasonable technical evaluation because "it failed to consider the technical risk associated with Valiant's proposed compensation," including Valiant's allegedly "[l]ow and stagnant compensation with meaningless incentives." Supp. Protest & Comments, Sept. 23, 2019, at 25. The protester contended that these errors impacted the evaluation of Valiant's management plan and staffing plan, and that the agency should have, but did not, take Valiant's low compensation rates into account when assigning strengths to Valiant's proposal. See id. at 25-38.

As another example, WWLR's third supplemental protest alleged that the Army conducted a perfunctory "cross walk" analysis of the "impact of Valiant's pricing machinations on its technical approach." Supp. Protest & Comments, Sept. 30, 2019, at 9. The protester asserted that this inadequate evaluation let Valiant "have it both ways" by "reap[ing] the reward of an '[o]utstanding' technical rating and multiple strengths without any consideration [of] whether its cost approach would allow it to achieve those lofty promises." Id. at 11.

Even where the protester's challenges do not directly reference the agency's cost-realism evaluation, we note that they nonetheless are intertwined with WWLR's successful protest grounds. In this respect, the agency has conceded that WWLR's challenge to the evaluation of Valiant's staffing plan was clearly meritorious. In our view, this successful challenge shares a common factual basis with the protester's other technical evaluation challenges; both the meritorious and non-meritorious issues are intertwined and interrelated with the agency's flawed evaluation of Valiant's technical proposal. See Sevatec, Inc.--Costs, B-407880.3, June 27, 2013, 2013 CPD ¶ 163 at 3-4. Under the circumstances presented here, these technical evaluation issues are not severable.

RECOMMENDATION

For the protest grounds noted above, we recommend that the Army reimburse WWLR the reasonable costs of filing and pursuing its protest challenging the agency's decision to issue a task order to Valiant. WWLR 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.

Thomas H. Armstrong
General Counsel