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Decision

Matter of: Peraton, Inc.--Costs

File: B-417358.3

Date: April 30, 2020

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DIGEST

Request for recommendation that agency reimburse a greater share of protester's costs than the agency has offered to pay is denied where the agency's offer, based on severability of the unsuccessful protest issues from the single sustained protest ground and application of a "page count" method, was reasonable.

DECISION

Peraton, Inc., of Herndon, Virginia, requests that we recommend reimbursement in the amount of \$96,475.38 for its protest costs incurred in its challenge to the award of a contract to Engility Corporation of Herndon, Virginia, under request for proposals (RFP) No. FA8818-18-R-0021, issued by the Department of the Air Force for engineering, development, integration, and sustainment services in support of satellite systems for the Air Force Space Command, Space Warfighting Construct. Following our Office's earlier decision sustaining the protest and recommending payment of the costs of filing and pursuing the protest, Peraton submitted a certified claim for such costs to the agency.

As discussed below, we deny Peraton's request to the extent it seeks our recommendation for reimbursement in excess of the amount the agency has offered.

BACKGROUND

On March 5, 2019, Peraton filed a protest with our Office challenging various aspects of the agency's award of a contract to Engility. On April 15, Peraton filed a supplemental

protest, in which it asserted that Engility did not meet the RFP's material requirement for small business participation under the program management technical subfactor and, therefore, was ineligible for award. After the parties filed briefings on the protest and supplemental protest, our Office held a conference call on May 15 to discuss certain substantive matters, including concerns about the record and the agency's evaluation of Engility's proposal under the small business participation requirement. The parties then filed second supplemental briefings focusing on Peraton's challenge to the agency's evaluation under the solicitation's small business participation requirement.

On June 11, we sustained Peraton's protest on a single issue--that is, its challenge to the agency's evaluation of Engility's proposal under the small business participation requirement. *Peraton, Inc.*, B-417358, B-417358.2, June 11, 2019, 2019 CPD ¶ 216. Specifically, we found that the agency's evaluation of Engility's proposal under this requirement was unreasonable, inconsistent with the terms of the solicitation, and undocumented. We also found that the agency's award was improper because Engility's proposal failed to meet the minimum percentage of the small business participation requirement and, therefore, was technically unacceptable and ineligible for award. In our decision, we specifically rejected all of Peraton's other challenges, including but not limited to: the agency's evaluation of Peraton's proposal under both technical subfactors; the agency's alleged unequal evaluation of Peraton's and Engility's proposals; the agency's evaluation of Peraton's final proposal revisions, and documentation thereof; the agency's best-value tradeoff and award decision; and the agency's decision not to evaluate past performance. *Id.* at 10 n.15.

Our decision included a recommendation that Peraton be reimbursed the reasonable costs of filing and pursuing its protest, including reasonable attorneys' fees. *Peraton, Inc.*, *supra* at 11. On August 8, Peraton submitted its claim for costs to the agency, requesting that the agency reimburse it the amount of \$105,818.85. Request for Costs, exh. 1, Certified Claim for Protest Costs, Aug. 8, 2019.

On October 4, the agency responded to Peraton's costs claim, offering to reimburse Peraton for the portion of its protest costs that reflected Peraton's pursuit of the single protest issue on which it prevailed. The agency's calculations in its response were divided into three parts, based on the time periods for which the attorneys' fees were claimed. First, the agency agreed that Peraton was entitled to reimbursement of all of its attorneys' fees claimed for the period from May 13 to May 31 (\$14,648.35), as these fees were "all related to the one protest issue on which Peraton prevailed." Request for Costs, exh. 2, Agency's Response to Certified Claim for Protest Costs, Oct. 4, 2019, at 1. Second, the agency found that Peraton was entitled to reimbursement of a portion of its attorneys' fees claimed for the period from April 4 to May 1 (\$11,167.62),¹ based

¹ The record shows that neither the agency's calculations nor the protester's responses to those calculations discussed the period between May 1 and May 13, during which one of the protester's attorneys recorded 0.20 hours spent on updating the client. See Request for Costs, exh. 1, Certified Claim for Protest Costs, Aug. 8, 2019. We note that
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on a “page count” method. *Id.* That is, the agency offered to reimburse Peraton for a percentage of Peraton’s total protest costs, calculating the reimbursable percentage by dividing the number of pages in Peraton’s protest submissions for this time period that addressed the basis on which the protest was sustained by the total number of pages in Peraton’s protest submissions for this time period.² Third, the agency found that Peraton was not entitled to reimbursement of any of its attorneys’ fees claimed for work performed before April 4. The agency explained that these fees were for “work related to Peraton’s other protest issues, for which GAO stated in its decision that it had considered and found no merit [internal citation omitted], and which are clearly severable from the one issue on which Peraton prevailed.” *Id.* at 2. Based on its calculations, and after including the \$350.00 GAO bid protest filing fee, the agency offered to reimburse Peraton a total of \$26,165.97. *Id.*

On October 17, Peraton rejected the agency’s October 4 offer, asserting that it “believes it is entitled to the payment of its attorney[s]’ fees regardless of whether or not it was successful on every issue protested.” Request for Costs, exh. 3, Protester’s Response and Offer of Settlement, Oct. 17, 2019, at 1. Nonetheless, Peraton stated that it was “willing to forgo those costs incurred in connection with its protest of the Air Force’s failure to evaluate offeror past performance” and, “[u]sing the Air Force’s proposed page count methodology,” Peraton adjusted its claim and requested that the agency reimburse it the amount of \$96,475.38. *Id.* at 2-3.

On January 2, 2020, the agency responded to Peraton’s revised claim, stating that its offer of \$26,165.97 was its “best and final offer[.]” Request for Costs, exh. 4, Agency’s Final Offer, Jan. 2, 2020. Peraton then filed this request for a recommendation for reimbursement of its protest costs with our Office.

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this period represents the time between when the parties filed briefings on the supplemental protest and when GAO notified the parties of its intent to hold the May 15 conference call discussed above.

² In this regard, the agency explained: “The supporting documentation which accompanied Peraton’s claim, however, is not sufficient to determine how much of the attorney time claimed by Peraton for that period was spent working on the successful protest issue. In cases where the information submitted to support a claim for protest costs is not detailed enough to establish how much of the claimed amount was incurred in pursuit of the successful protest issues, using a ‘page count’ method--that is, an estimate based on the number of pages in the protester’s submissions to GAO that were devoted to a particular issue--is a reasonable means of determining this amount.” *Id.* at 1-2.

DISCUSSION

Peraton asks our Office to recommend that the agency reimburse it \$96,475.38, including attorneys' fees and the \$350.00 filing fee.³ Peraton also requests that our Office recommend that it be reimbursed for the costs of pursuing this request for costs. Request for Costs at 1-2. The agency offered to settle Peraton's claim for the amount of \$26,165.97, calculated as discussed above. Agency's Response, Jan. 24, 2020, at 7; see also Request for Costs, exh. 2, Agency's Response to Certified Claim for Protest Costs, Oct. 4, 2019, at 2.

Our Bid Protest Regulations require a protester to file its claim for costs, detailing and certifying the time expended and costs incurred, with the agency within 60 days after receipt of GAO's recommendation that the agency pay the protester its costs. 4 C.F.R. § 21.8(f)(1). If the agency and the protester cannot reach agreement on such costs within a reasonable time, GAO may, upon request of the protester, recommend the amount of costs the agency should pay in accordance with 31 U.S.C. § 3554(c). *Id.* A protester seeking to recover its protest costs must submit evidence sufficient to support its claim that those costs were incurred, and are properly attributable to, filing and pursuing the protest. *BAE Tech. Servs., Inc.--Costs*, B-296699.3, Aug. 11, 2006, 2006 CPD ¶ 122 at 3.

Attorneys' Fees

The parties primarily disagree on whether Peraton's single successful protest ground is clearly severable from its unsuccessful protest grounds. Peraton argues that its "protest of the Air Force's technical evaluation of proposals is clearly intertwined with the small business participation rate issue" and that "[t]he small business participation rate was merely one of the aspects [of] the technical evaluation factor that went into an offeror's overall technical score." Request for Costs at 9. In this regard, Peraton asserts that its successful and unsuccessful protest grounds are "precisely the type of protest where the award of all costs is warranted." Protester's Response to Agency's Response to Request for Costs at 2, *citing Fluor Energy Tech. Servs., LLC--Costs*, B-411466.3, June 7, 2016, 2016 CPD ¶ 160 at 2.

³ Peraton asks our Office to recommend the agency "pay Peraton the full amount requested[,]" and references the initial certified claim amount of \$105,818.85. Request for Costs, Jan. 13, 2020, at 1. Yet, Peraton conceded to the agency on October 17 that it was "willing to forgo" certain costs and revised its claim "[u]sing the Air Force's proposed page count methodology" to the amount of \$96,475.38. Request for Costs, exh. 3, Protester's Response and Offer of Settlement, Oct. 17, 2019, at 2-3. Moreover, Peraton specifically asks our Office to consider its revised claim of \$96,475.38. Request for Costs at 5-6; Protester's Response to Agency's Response to Request for Costs, Feb. 3, 2020, at 7. Under these circumstances, we need not consider Peraton's initial certified claim amount nor address the agency's page count methodology.

In response, the agency argues that Peraton's single successful protest issue was clearly severable based on the following:

The evaluation of small business subcontracting under the solicitation involved different criteria, different portions of the proposals, and a different evaluation schema than any of the other areas of the evaluation challenged by Peraton. Even though the Small Business criterion under which offerors' compliance with the 25 percent subcontracting requirements was included among the Solicitation's Technical Subfactor 2 Program Management Criteria [internal citation omitted], this is the only nexus between the Small Business criterion and the technical evaluation.

Agency's Response at 5.

We have considered all of the parties' arguments, and we agree with the agency.

As a general rule, we recommend that a successful protester be reimbursed its incurred costs with respect to all issues pursued, 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, 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. See, e.g., *BAE Tech. Servs., Inc.--Costs*, *supra* 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 *Sodexo Mgmt., Inc.--Costs*, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 29.

Here, as discussed above, our Office sustained Peraton's protest on a single issue--that is, its challenge to the agency's evaluation of Engility's proposal under the small business participation requirement. *Peraton, Inc.*, *supra*. Our decision specifically noted that we had considered all of Peraton's other challenges and found no merit to them. *Id.* at 10 n.15.

The record shows that the small business participation requirement was one of several requirements listed under one of the technical evaluation subfactors; in this regard, we agree with the agency's view that "this is the only nexus between the Small Business criterion and the technical evaluation." Agency's Response at 5. The RFP included several stipulations unique to the small business participation requirement, including but not limited to: requiring offerors to prepare and reference a small business participation commitment document separate from the technical volume for the purposes of evaluating this requirement; dictating a mathematical formula for calculating the small

business subcontracting percentage; and providing for an objective evaluation of this requirement on a pass/fail basis. *See, e.g., Peraton, Inc., supra* at 3, 3 n.5.

In addition, we note that a small business participation requirement inherently involves certain considerations that distinguish it from a technical evaluation. *See, e.g., Peraton, Inc., supra* at 7 (“it is readily apparent that the purpose of a small business subcontracting requirement is to assess the extent to which an offeror proposes small businesses to actually perform, and be paid for, the work required under a solicitation”).

As a final matter, we note that Peraton’s reliance on our Office’s decision in *Fluor Energy Tech. Servs., LLC--Costs, supra*, is misplaced. *See* Protester’s Response to Agency’s Response to Request for Costs at 2. The agency in that case “presented no argument or evidence to support its contention” that the protester’s other challenges should be severed from its clearly meritorious challenges, and our Office concluded that “[a]bsent such support, we are unwilling to deviate from the general premise that a protester is entitled to all costs associated with both successful and unsuccessful allegations.” *Fluor Energy Tech. Servs., LLC--Costs, supra* at 3. Here, we think that the agency has provided sufficient explanation to support its review of Peraton’s costs claim. Moreover, consistent with our Office’s approach noted above, limiting our recommendation for the award of protest costs is appropriate where the issues are readily severable. *See, e.g., Sodexo Mgmt., Inc.--Costs, supra*.

In sum, we find nothing unreasonable in the agency’s offer. We note that the agency does not dispute the underlying hours or rates billed by the protester. We also note that Peraton has not meaningfully disputed the agency’s page count method--indeed, Peraton used the agency’s methodology to revise its claim. Under these circumstances, to the extent Peraton seeks our recommendation for reimbursement in an amount exceeding what the agency has offered, Peraton’s request is denied.

Costs of the Claim

As a final matter, Peraton asks to be reimbursed the costs of filing and pursuing its cost 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). We will recommend payment of such costs only if it is shown that the agency unreasonably delayed consideration of the protester’s claim or otherwise failed to give the claim reasonable consideration. *Blue Rock Structures, Inc.--Costs, B-293134.2, Oct. 26, 2005, 2005 CPD ¶ 190* at 7. Here, the record establishes that the agency acted reasonably and promptly in negotiating Peraton’s claim before the matter was submitted to our Office. Under the circumstances, the agency’s handling of Peraton’s claim does not provide a basis for us to recommend the reimbursement of the costs of filing and pursuing this claim at our Office.

CONCLUSION

We conclude that the agency's offer of \$26,165.97 reasonably complied with our decision and recommendation in this matter. The protester's request that GAO recommend reimbursement of the requested amount of protest costs, in excess of the amount the agency has offered, is denied.

Thomas H. Armstrong
General Counsel