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Decision

Matter of: Apex Transit Solutions, LLC--Costs

File: B-418631.8

Date: August 13, 2021

Manju Gupta, Esq., and Halden R. Schwallie, Esq., Ulmer & Berne LLP, for the protester.

Kimberly Kegowicz, Esq., Department of Veterans Affairs, for the agency.

Kasia Dourney, Esq., and Evan C. Williams, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Request that GAO recommend reimbursement of costs of filing and pursuing protests challenging the agency's evaluation of past performance is granted in part, where the primary issue presented was clearly meritorious, yet the agency unduly delayed taking corrective action; reimbursement is also recommended with regard to other allegations that were intertwined with clearly meritorious protest ground.

2. Request that GAO recommend reimbursement of protest costs related to challenge to the price evaluation is denied where the allegation was not clearly meritorious and not intertwined with clearly meritorious protest ground.

3. Request for a recommendation of reimbursement of costs of filing and pursuing multiple prior protests is dismissed as untimely where the request effectively seeks reconsideration of a decision denying a prior request that the same protest costs be reimbursed.

DECISION

Apex Transit Solutions, LLC, a small business of Cleveland, Ohio, requests that our Office recommend that the firm be reimbursed the reasonable costs of filing and pursuing its protests of the contract awards to GC Logistics, LLC, a service-disabled veteran-owned small business, of Ridgeland, Mississippi. The contract awards were made under requests for quotations (RFQ) Nos. 36C25019Q0494 and 36C25020Q0093, issued by the Department of Veterans Affairs (VA) for ambulette transportation services for the VA Cleveland Healthcare System located in Cleveland, Ohio. Apex contends that the VA failed to properly implement multiple corrective actions taken in response to protests related to this procurement. In its most recent

protests, Apex challenged the agency's evaluation of past performance and price, the agency's best-value tradeoff determination, and alleged disparate treatment.

We grant the request in part and dismiss it in part.¹

BACKGROUND

The initial RFQ No. 36C25019Q0494 was issued on June 13, 2019, and subsequently reissued on February 14, 2020, as RFQ No. 36C25020Q0093, under the simplified acquisition procedures of Federal Acquisition Regulation (FAR) subpart 13.5. *Apex Transit Solutions, LLC--Costs*, B-418631.4, Feb. 8, 2021, 2021 CPD ¶ 102 at 1.

The RFQ advised that the agency would evaluate quotations considering past performance, socioeconomic factors, and price, with past performance being the most important factor. *Id.* Past performance was to be evaluated based on vendors' experience in providing transportation services similar in size, scope, and complexity to those described in the performance work statement. The solicitation advised that the agency would consider the past performance narrative, past performance questionnaires, and other sources, including information in CPARS [contractor performance assessment reporting system], FAPIIS [federal awardee performance and integrity information system], as well as the agency's "personal knowledge" of vendors. Protest (B-418631.5), Agency Report (AR), exh. 3, RFQ at 72. As relevant to this request, vendors were also instructed that the agency would only consider the identified past contracts performed within the preceding three years. *Id.*

As discussed in detail in our prior decision on reimbursement of costs, in the course of this protracted procurement, the VA made four awards to GC Logistics, each of which Apex protested to our Office. *Apex Transit Solutions, LLC--Costs, supra* at 2-4. Then, on each occasion, the VA informed our Office that it would take corrective action, and we dismissed each of the four protests as academic. *Id.*

Subsequently, pursuant to 4 C.F.R. § 21.8(e), Apex filed a request that we recommend that it be reimbursed for the costs of filing and pursuing the prior four protests B-418114, B-418631, B-418631.2, and B-418631.3. *Id.* at 4. On February 8, 2021, our Office denied Apex's request, concluding that Apex failed to establish that any of its prior protests were clearly meritorious and that the agency unduly delayed taking corrective action. *Id.* at 11.

¹ This procurement has been the subject of multiple protests before our Office, and an earlier request for recommendation of reimbursement of costs. See *Apex Transit Solutions, LLC--Costs*, B-418631.4, Feb. 8, 2021, 2021 CPD ¶ 102. Our February 2021 decision denying the request for a recommendation of reimbursement of costs provides relevant background regarding the procurement and the prior protests thereto, and hence, our discussion herein is limited to the issues relevant to the resolution of the specific allegations of this request.

On January 6, 2021, after concluding its corrective action in response to protest B-418631.3, the VA again selected GC Logistics's quotation for award. Protest (B-418631.5), AR, exh. 1, Award Letter at 1. On January 19, 2021, Apex protested the award to our Office. See *generally* Protest (B-418631.5). The protester alleged that the VA failed to: properly evaluate past performance; properly evaluate price quotations; evaluate vendors equally and according to the solicitation criteria; and conduct a meaningful best-value tradeoff analysis. *Id.*

Subsequent to the receipt of the agency report, Apex filed a supplemental protest expanding its initial arguments relating to the evaluation of past performance. Comments and Supp. Protest at 4-7. The protester asserted that it was improper for the agency to credit GC Logistics with the past performance of its affiliates where GC Logistics's quotation failed to explain how they would be involved in performing the contract. *Id.* at 6-7. In support, Apex submitted records showing that there are five affiliated entities related to GC Logistics incorporated in Mississippi. *Id.* at 5-6. Based on those records, Apex pointed out that while the awardee GC Logistics was not incorporated until October 2017, three out of five past contracts considered by the VA were performed before that date. *Id.*

Notably, in the intervenor's comments on the agency report, filed on the same day as Apex's comments and supplemental protest, GC Logistics acknowledged that some of the contracts at issue were in fact performed by affiliates of GC Logistics. Intervenor's Comments at 15 (representing that "GCL-Miss[issippi] is performing the GCRTA [Greater Cleveland Regional Transit Authority] contract and the Tucson VA contract was performed by Quality Transport Services of Arizona . . ."). The intervenor argued that GC Logistics could draw upon the advice and experience of its affiliates, and that the evaluation should be left to the agency's discretion. *Id.* at 15-16.

Our Office requested additional information on the issue. Electronic Protest Docket System No. 40, Req. for Add'l Briefing. Specifically, we asked the VA to brief in the supplemental agency report whether it considered any contracts performed by GC Logistics before 2017, *i.e.*, the date GC was incorporated, because there was no explanation in the record concerning specific entities that performed the contracts and their relationship to the awardee. *Id.*

On April 8, notwithstanding the intervenor's admission that some of its identified past contracts were performed by affiliates of GC Logistics, the VA filed a supplemental agency report defending its evaluation of the awardee's past performance. Supp. Memorandum of Law at 4-8. As relevant here, the agency argued in its supplemental memorandum that the GCRTA contract at issue was properly considered by the VA because it was "similar or greater" in scope, size, and complexity to the current requirement. *Id.* at 6. Importantly, the agency did not address the intervenor's admission regarding the identity of the vendor performing the GCRTA contract, discussed above. Instead, the VA represented that its evaluation of GC Logistics's past performance was unobjectionable because the contracting officer reviewed CPARS, the

past performance information retrieval system, consulted FAPIIS, and found no adverse past performance information. *Id.*; Supp. Contracting Officer's Statement at 2.

Subsequently, on April 13, only a few hours before the comments on the supplemental agency report were due, the VA advised our Office that it intended to take corrective action. Notice of Corrective Action & Req. for Dismissal at 1. Specifically, the agency explained that on April 12, it received a phone call from the intervenor's counsel, advising that the GCRTA contract, which the VA considered as one of the past performance references, was in fact performed by an affiliate of GC Logistics. *Id.* at 2. The VA further stated that it "would not have known this information" if not provided by the intervenor since GC Logistics failed to disclose it in its quotation, and since the period of performance on the GCRTA contract commenced after GC Logistics was incorporated. *Id.* Moreover, while the VA maintained that it properly relied on the information provided by the awardee, in light of the new specific facts regarding the identity of the firm performing the GCRTA contract, the agency elected to reevaluate all vendors' past performance quotations and make a new award. *Id.* at 2-3.

On the basis of the proposed corrective action, our Office dismissed the protests as academic. *Apex Transit Solutions, LLC*, B-418631.5, B-418631.6, Apr. 21, 2021 (unpublished decision). On May 6, Apex filed this request. See *generally* Req. for Reimbursement of Costs.

DISCUSSION

Apex seeks a recommendation from our Office that the firm be reimbursed its reasonable costs of filing and pursuing all of its alleged protest grounds raised in both its most recent protests, B-418631.5, B-418631.6, and its previous protests B-418631, B-418631.2, and B-418631.3. For the reasons that follow, we recommend that Apex be reimbursed only its costs related to its allegations regarding the agency's evaluation of the awardee's past performance, and related grounds, discussed below, raised in B-418631.5 and B-418631.6, because the VA unduly delayed taking corrective action in response to a clearly meritorious protest ground. We also conclude that certain other protest grounds raised in the B-418631.5, B-418631.6 protests are intertwined with the meritorious protest ground and should also be reimbursed. We dismiss, however, Apex's request relating to costs incurred in filing and pursuing its protests in B-418631, B-418631.2, and B-418631.3, because it is, in essence, an untimely request for reconsideration of our prior decision denying Apex's request for the same costs in *Apex Transit Solutions, LLC--Costs, supra*.

Costs Relating to Protests B-418631.5, B-418631.6

Apex seeks a recommendation regarding recovery of its costs for all of the grounds raised in the B-418631.5 and B-418631.6 protests, arguing that all of the issues raised are intertwined, and reflect Apex's contention that the VA failed to conduct a fair evaluation of quotations. Comments on Response to Req. for Costs at 12. As noted above, the protester alleged that the VA failed to: properly evaluate past performance;

properly evaluate price quotations; evaluate vendors equally and according to the solicitation criteria by, among other things, unreasonably crediting GC Logistics with the past performance of its affiliates; and conduct a meaningful best-value tradeoff analysis. See *generally* Protests (B-418631.5, B-418631.6).

The agency counters that it took “appropriate and timely” corrective action with respect to protests B-418631.5, B-418631.6, and that Apex failed to establish that its allegations were clearly meritorious. Response to Req. for Reimbursement of Costs at 5-14. Accordingly, the VA asks that we decline to recommend reimbursement of all the requested costs and fees. *Id.* In the alternative, the VA asks that if our Office recommends reimbursement of costs for Apex’s allegations regarding the awardee’s past performance, we should limit our recommendation to only those costs related to pursuing that single protest ground. *Id.* at 14-15.

For the reasons that follow, we recommend reimbursement of the costs incurred in challenging the awardee’s past performance that were raised in the supplemental protest. We also recommend reimbursement of the costs incurred in arguing disparate treatment in evaluating past performance, and an improper best-value tradeoff determination. We decline, however, to recommend reimbursement of the costs related to the price evaluation challenge.

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. We make these recommendations 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. *Octo Consulting Grp., Inc.--Costs*, B-414801.4, Dec. 14, 2017, 2018 CPD ¶ 52 at 3. A protest is clearly meritorious when a reasonable agency inquiry into the protest allegations would show facts disclosing the absence of a legally defensible position. *Id.*

Here, we find that Apex’s supplemental challenge of the agency’s past performance evaluation was clearly meritorious because the record establishes that a reasonable inquiry into this allegation would have disclosed the absence of a legally defensible position.

Apex’s supplemental protest centered on the issue of the corporate identity of the entities for which GC Logistics received credit for past performance. Specifically, the protester alleged that GC Logistics could not have possibly performed certain pre-2017 contracts identified in the awardee’s quotation because the company was not incorporated until October of that year. Comments and Supp. Protest at 4-7. In this regard, Apex contended that three out of five identified past contracts, which were described in the awardee’s quotation as performed by the “GC Logistics Management Team,” were in fact performed by the awardee’s affiliates. *Id.* at 5-7; see also Comments on Response to Req. for Reimbursement of Costs at 7 (citing AR, exh. 9,

GC Logistics's Quotation at 493). Accordingly, Apex alleged that because the awardee's quotation failed to describe the nexus between the company and its affiliates, the VA improperly credited the awardee with their past performance.

In response, the agency claims that the protest ground is not clearly meritorious, arguing that it reasonably relied on the representations included in the awardee's quotation. Response to Req. for Reimbursement of Costs at 9-10. The VA also contends that it was not required to "research the submissions" provided by vendors nor investigate details with respect to specific contract references in vendors' quotations, absent possession of contrary information, personally known to the evaluators. *Id.* at 9-10 (citing *Torres-Advanced Enter. Solutions, Inc.*, B-412755.2, June 7, 2016, 2016 CPD ¶ 167).

While the evaluation of past performance is generally a matter within the discretion of a contracting agency, and we will not substitute our judgment for reasonably based past performance ratings, we will question an agency's evaluation conclusions where they are unreasonable or undocumented. *Computer Scis. Corp. et al.*, B-408694.7 *et al.*, Nov. 3, 2014, 2014 CPD ¶ 331 at 12; *OSI Collection Servs., Inc.*, B-286597, B-286597.2, Jan. 17, 2001, 2001 CPD ¶ 18 at 6. The critical questions are whether the evaluation was conducted fairly, reasonably, and whether it was based on relevant information sufficient to make a reasonable determination regarding vendors' past performance. See *OSI Collection Servs., Inc.*, *supra*.

Here, we cannot conclude that the VA considered "relevant information" sufficient to make a reasonable determination on past performance in light of Apex's supplemental protest allegations. *Id.* At the minimum, when Apex filed its supplemental protest, alleging that the agency improperly credited the awardee with the past performance of its affiliates, the VA was presented with specific information which should have prompted additional inquiry on the issue. Given that information, the agency should have taken steps to ascertain whether GC Logistics was properly credited for the past performance of its "team." See, e.g., *Alutiiq Pac., LLC*, B-409584, B-409584.2, June 18, 2014, 2014 CPD ¶ 196 at 7-8 (sustaining a protest for improperly crediting the awardee with the past performance by its affiliates where the record failed to demonstrate that the resources of affiliates would have meaningful involvement in performing the contract). Because the agency failed to do so, and continued to defend its evaluation, we cannot conclude that the agency's evaluation of GC Logistics's past performance was reasonable. We also find that a reasonable inquiry into Apex's supplemental protest allegation would have disclosed the absence of a legally defensible position. Accordingly, we conclude that the contentions regarding the VA's evaluation of the awardee's past performance were clearly meritorious.²

² We need not discuss in detail here the requester's allegations that the agency submitted contradictory statements from its two contracting officers, with differing accounts as to which contracts the agency considered while evaluating the awardee's past performance. Comments on Response to Req. for Costs at 8-9. In our view, the

Further, with respect to the promptness of the corrective action, the VA did not take corrective action until after it filed its supplemental agency report, causing the protester to expend the time and costs to review the report and prepare comments.³ Then, 5 days after submitting its supplemental agency report, 46 days after GC Logistics admitted in its comments that the GCRTA contract was performed by one of its affiliates, and only after being specifically alerted by the intervenor's counsel that Apex's assertions about the GCRTA contract had merit, the agency elected to take corrective action.

The agency argues that at the time the intervenor filed its comments, the issue of whether the GCRTA contract was performed by a GC Logistics's affiliate was not in dispute; according to the VA, it only became a protest ground after our Office requested additional briefing on the issue on April 6. Response to Req. for Costs at 14 n.3.

We reject the agency's position here. The protester, in its supplemental protest, specifically alleged that "GC Logistics, LLC, is not itself the company that performed the contracts identified under past performance in its [q]uot[ation]." Comments and Supp. Protest at 4. While Apex did not specifically single out the GCRTA contract at issue, it nevertheless sufficiently articulated its protest ground related to the agency's evaluation of all of the awardee's past contract references.

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. *AAR Aircraft Servs.--Costs*, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 5-6. 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. *East Coast Nuclear Pharmacy--Costs*, B-412053.5, Aug. 31, 2016, 2016 CPD ¶ 249 at 5. With respect to the promptness of the agency's corrective action, we review the record to determine whether the agency took appropriate and timely steps to investigate and resolve the impropriety. *Columbia Ancillary Servs., Inc.*, B-416800.4, Jan. 21, 2020, 2020 CPD ¶ 36 at 3. 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. Under the circumstances presented here, we find that the agency's corrective action was unduly delayed.

inconsistencies in the VA's record highlight the clearly meritorious nature of the supplemental protest contentions.

³ As noted above, the agency filed its notice of corrective action merely hours before the protester's supplemental comments were due, *i.e.*, at 12:16 p.m. EDT, on April 13, 2021. The protester and the intervenor timely filed their comments later that afternoon.

Here, had the agency conducted a reasonable inquiry regarding the identity of firms which performed the past contracts identified in the awardee's quotation, the agency would have discerned that it improperly assigned past performance credit to the awardee for an affiliate the record does not establish would perform aspects of the agency's requirement. Instead, the VA submitted its supplemental agency report, defending its evaluation of the awardee's past performance, and thus requiring the protester to prepare and file comments in order to preserve its protest. 4 C.F.R. § 21.3(i).

Even were we to agree with the agency that the specific issue related to the GCRTA contract did not become a protest ground until after we requested additional briefing on April 6, we would still find that the agency failed to take proper timely actions here. Specifically, not only did the VA submit its supplemental agency report on April 8, but it waited five days, until the day the comments were due, to announce it would take corrective action. On the facts here, the agency's corrective action was unduly delayed.

In addition to recommending reimbursement related to the agency's failure to properly evaluate the awardee's past performance, we also conclude that the requester should be reimbursed for the protest costs associated with its other challenges related to disparate treatment in the evaluation of past performance, and to the best-value tradeoff determination.

Generally, we consider a successful protester entitled to costs incurred with respect to all issues pursued, not merely those upon which it prevails; therefore, we will consider all issues concerning the evaluation of quotations to be intertwined and thus not severable. *Coulson Aviation (USA) Inc.; 10 Tanker Air Carrier, LLC--Costs*, B-406920.6, B-406920.7, Aug. 22, 2013, 2013 CPD ¶ 197 at 5. 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.

Limiting recovery of protest costs in all cases to only those issues on which the protester prevailed, however, 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. 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. See *Deque Sys., Inc.--Costs*, B-415965.5, Aug. 23, 2018, 2018 CPD ¶ 304 at 5. Thus, absent an agency request with supporting evidence, 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*.

Here, the VA's failure to properly evaluate the awardee's past performance permeated both the disparate treatment allegations and the agency's best-value tradeoff determination. As the protester alleged and we agree, the agency evaluated past performance quotations unequally, crediting the awardee with the past performance of its affiliates but not crediting the protester's quotations similarly. In this regard, we find that the protester's allegations of disparate treatment involve the same core nucleus of operative facts, and turn on related legal theories and principles, as the clearly meritorious ground--*i.e.*, whether the agency's past performance evaluation was reasonable.

With respect to the agency's best-value tradeoff determination, this protest ground is derivative of the protester's challenge to the agency's evaluation of the awardee's and its own quotations. Since we find the supplemental protest allegation clearly meritorious, we conclude that this derivative challenge to the best-value tradeoff determination also provides a basis upon which to recommend costs.

DirectVizSolutions, LLC, B-417565.3, B-417565.4, Oct. 25, 2019, 2019 CPD ¶ 372 at 9. On this record, we conclude that the agency's best-value tradeoff determination and disparate treatment challenge are inextricably intertwined with the clearly meritorious past performance evaluation issue, and thus recommend that the protester be reimbursed for the costs of filing and pursuing these protest grounds.

On the other hand, we conclude that the costs incurred in challenging the evaluation of price quotations should not be reimbursed, and should be severed here. In this regard, while the protester argued that the agency failed to reasonably evaluate price quotations, we do not consider this issue as one where the protester would have prevailed. Comments and Supp. Protest at 19-23. With respect to whether this issue was intertwined with the evaluation of past performance, we conclude it is not. The protester's challenge to the agency's price evaluation did not involve the same core nucleus of operative facts as the clearly meritorious ground, nor did the issue turn on related legal theories or principles. As a result, we do not recommend that the protester be reimbursed the costs of raising the pricing issue.

Therefore, we recommend that the requester be reimbursed its reasonable costs for filing and pursuing its past performance evaluation, unequal treatment, and best-value tradeoff determination challenges raised in protests B-418631.5 and B-418631.6.

Costs Relating to Prior Protests: B-418631, B-418631.2, and B-418631.3

As noted above, Apex also requests that we recommend that it be reimbursed for the costs of filing and pursuing its prior protests B-418631, B-418631.2, and B-418631.3, alleging, in sum, that the VA failed to conduct a fair evaluation of quotations, and failed to timely implement corrective actions taken in attempt to rectify the agency's evaluation errors. Req. for Reimbursement of Costs at 1-2; 8-10. We dismiss the request because, in essence, it is an untimely request for reconsideration of our prior decision in *Apex Transit Solutions, LLC--Costs, supra*.

Our Bid Protest Regulations require that any request for reconsideration must be filed not later than 10 days after the basis for reconsideration is known or should have been known. 4 C.F.R. § 21.14(b). Here, as noted above, Apex previously filed a request that our Office recommend the reimbursement of protest costs following the VA's decision to take corrective action in response to protests B-418114, B-418631, B-418631.2, and B-418631.3.⁴ On February 8, 2021, our Office denied the request. *Apex Transit Solutions, LLC--Costs, supra*. To the extent that Apex contends that subsequent, repeated failures to evaluate proposals using a common baseline for evaluation justifies a different result, it was incumbent on the protester to have timely sought reconsideration within 10 days of when it knew or should have known the basis for reconsideration. Apex's renewed request for costs, which was filed nearly three months after our denial of its previous request for reimbursement of costs, is therefore dismissed as untimely.⁵

RECOMMENDATION

We recommend that Apex be reimbursed the costs associated with filing and pursuing its protests B-418631.5, B-418631.6, challenging the agency's failure to properly evaluate the awardee's past performance and to evaluate proposals on a common basis, as well as its challenge to the agency's best-value tradeoff determination. We also recommend that Apex be reimbursed reasonable attorneys' fees. Apex should submit its certified claim, detailing the time spent and costs incurred, directly to the agency within 60 days of its receipt of this decision. 4 C.F.R. 21.8(f)(1).

The request is granted in part and dismissed in part.

Edda Emmanuelli Perez
General Counsel

⁴ In contrast to its prior request, Apex is no longer seeking our recommendation on reimbursement of its costs incurred while pursuing its very first protest, B-418114. *Cf. Apex Transit Solutions, LLC--Costs, supra*.

⁵ To the extent that the protester raises collateral arguments regarding its request for recommendation of reimbursement of protest costs, we have considered those and conclude that they also were not clearly meritorious. Therefore, any related request for recommendation of reimbursement of costs is denied. *Procinctu Grp., Inc.--Costs, B-416247.4, Sept. 21, 2018, 2019 CPD ¶ 36 at 8.*