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Decision

Matter of: Tridentis LLC--Costs

File: B-418690.3

Date: October 14, 2020

Robert C. Starling, Esq., Meghan D. Doherty, Esq., Alexander B. Ginsberg, Esq., and Dinesh Dharmadasa, Esq., Pillsbury Winthrop Shaw Pittman LLP, for the protester. Matthew Hawkins, Esq., Diana Murphy, Esq., Audra L. Medeiros, Esq., and Emilia Thompson, Esq., Department of the Navy, for the agency. Katherine I. Riback, Esq., and Evan C. Williams, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

GAO does not recommend reimbursement of the costs of pursuing arguments challenging agency's evaluation under the technical and costs factors, which were not clearly meritorious themselves, and are severable from the protest grounds for which the agency has agreed to reimburse the protester.

DECISION

Tridentis, LLC, a small business of Alexandria, Virginia, requests that our Office recommend that the Department of the Navy, Naval Surface Warfare Center, reimburse the firm the costs of filing and pursuing its protest, including reasonable attorney's fees. The protester previously protested with our Office the award of a contract to Marine Systems Corporation (MSC), pursuant to request for proposals (RFP) No. N00178-19-R-3500, issued by the Navy for ship integration services that address the physical design, installation, test and maintenance of warfare systems and to ensure systems are installed correctly aboard ships and in accordance with ship building specifications.

In response to the protester's request for reimbursement, the Navy agrees to reimburse the protester its costs of pursuing its challenges to the agency's evaluation of past performance and its best-value determination. We deny the protester's request to recommend that the agency reimburse costs related to pursuing protest issues beyond those the agency has agreed to pay.

BACKGROUND

The agency issued the solicitation on May 23, 2019, as a small business set-aside, under the Navy's Seaport-Next Generation (SeaPort-NXG) multiple award contract (MAC).¹ AR,² Tab 1, RFP at 2-3.³ The agency issued four amendments to the solicitation. AR, Tab 2, Contracting Officer Statement (COS) at 1.

The solicitation contemplated the award of a cost-plus-fixed-fee, level of effort task order with a base year and four 1-year options to small businesses identified in the MAC contract. RFP at 50, 68. Award was to be made to the responsible offeror whose proposal represented the best value, considering the following factors, listed in descending order of importance: technical understanding/capability/approach, workforce, management, past performance, and cost. *Id.* at 71.

The technical factor was divided into two subfactors, statement of work (SOW) and scenario. As relevant here, under the SOW subfactor, the agency would evaluate the degree to which an offeror's proposal demonstrated the knowledge, capability, and experience to perform the tasks outlined in the SOW. *Id.* at 73. In addition, the workforce factor was also divided into two subfactors, resumes of key personnel and staffing plan/matrix. The subfactors of both factors were listed in descending order of importance. The solicitation provided that each subfactor would receive an adjectival rating and that these ratings would be rolled up into one adjectival rating for each factor.⁴ *Id.* at 68-69. Regarding cost, the solicitation provided that cost would be evaluated for realism and completeness, and that the importance of cost as an evaluation factor would increase with the degree of equality in overall technical merit of competing proposals. *Id.* at 71, 75.

¹ The estimated value of this task order for ship integration services is \$44,690,712. Agency Report (AR), Tab 5, Government Independent Cost Estimate at 2. Since the value of the task order at issue exceeds \$25 million, the protest was within our Office's jurisdiction to hear protests of task orders that are issued under multiple-award contracts established by Department of Defense agencies. 10 U.S.C. § 2304c(e)(1)(B).

² Citations are to the agency report, contracting officer's statement, memorandum of law, and comments filed in the underlying protest (B-418690; B-418690.2).

³ The references to the solicitation are to a conformed copy provided by the agency.

⁴ The solicitation provided that the agency would assign adjectival ratings of outstanding, good, acceptable, marginal, or unacceptable. The RFP provided that the combined technical/risk rating included consideration of risk in conjunction with the strengths, weaknesses, and deficiencies in determining technical ratings. RFP at 72. The RFP provided that while cost would not be assigned an adjectival rating it would not be ignored. *Id.* at 70-71.

The agency received three proposals in response to the solicitation including those from Tridentis and MSC. COS at 1. The agency held oral presentations, evaluated the technical proposals, and conducted a cost analysis of each proposal. The agency concluded that MSC offered the best value to the government. On April 27, 2020, Tridentis filed a protest.⁵ Protest (B-418690). In its protest, Tridentis challenged various aspects of the agency's evaluation of its proposal under the technical, past performance, and cost factors, in addition to contesting the best-value determination concerning its proposal.

After receipt of the agency report and additional documents, the protester filed its comments on the agency report and filed a supplemental protest in which it raised supplemental protest grounds, largely concerning the agency's evaluation of MSC's proposal. Comments and Supp. Protest (B-418690.2) at 2-4. For instance, Tridentis raised supplemental arguments that the agency's evaluation was disparate in certain instances. *Id.* As relevant here, the protester alleged that the agency unreasonably assigned its proposal a significant weakness, and MSC's proposal a strength, under the statement of work subfactor of the technical factor. *Id.* at 9. Our Office established June 18 as the deadline for the agency to submit its supplemental agency report. Dkt. No. 32.

On June 15, the agency notified our Office of its intent to take corrective action. On June 16, the agency filed an amended notice of corrective action, stating that it intended to re-evaluate the offerors' past performance and conduct a new best-value determination. Agency Amended Corrective Action Notice, June 16, 2020. Our Office dismissed Tridentis's protest as academic. *Tridentis LLC*, B-418690, B-418690.2, June 19, 2020 (unpublished decision).

Following the dismissal of its protest, Tridentis filed this request with our Office.

DISCUSSION

Tridentis requests that GAO recommend reimbursement of the reasonable costs of filing and pursuing all of the grounds raised in its protest, to include its supplemental protest grounds. Req. for Reimbursement at 2. In this regard, the protester contends that each of the grounds in its initial protest were clearly meritorious, and that the agency unduly delayed in taking corrective action in the face of clearly meritorious protest grounds. *Id.* Additionally, Tridentis asserts that it is entitled to a recommendation for reimbursement for the costs of all of its initially raised and supplemental protest grounds because all of the contentions are intertwined, as they all concern the agency's evaluation of proposals. *Id.* at 3.

⁵ On May 4, Tridentis filed an amended protest, which the parties referred to throughout the proceedings. Electronic Protest Docketing System (Dkt.) No. 12.

In response, the agency agrees to reimburse Tridentis's costs of pursuing its protest with regard to Tridentis's challenge to the agency's evaluation of past performance and best-value determination. Agency Resp. to Req. for Costs at 1. In this regard, the agency concedes that Tridentis's challenge to the agency's evaluation of the firm's past performance was clearly meritorious and explains that the best-value determination was based, in part, on the agency's past performance evaluation. *Id.* The agency argues that the remaining issues, however, were not independently clearly meritorious. Further, the agency contends that the remaining protest grounds are not intertwined with the past performance and best-value issues because they were based on a different core set of facts. *Id.* at 2-5. Thus, the agency asserts that the protester should not be reimbursed its reasonable costs for pursuing these other protest grounds. *Id.*

Under the Competition in Contracting Act of 1984 (CICA), our Office is authorized to recommend reimbursement of protest costs only where we find that an agency's actions violated a procurement statute or regulation. 31 U.S.C. § 3554(c)(1). Our Bid Protest Regulations provide that where an agency takes corrective action in response to a protest, our Office may recommend that the agency pay the protester its reasonable costs of filing and pursuing the protest. 4 C.F.R. § 21.8(e). However, our regulations do not contemplate a recommendation for the reimbursement of protest costs in every case where an agency takes corrective action, but rather only where an agency unduly delays taking corrective action in the face of a clearly meritorious protest. *Information Ventures, Inc.--Costs*, B-294580.2 *et al.*, Dec. 6, 2004, 2004 CPD ¶ 244 at 2.

Thus, as a prerequisite to our recommending the reimbursement of costs where a protest has been resolved by corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious, *i.e.*, not a close question. *Overlook Sys. Techs., Inc.--Costs*, B-298099.3, Oct. 5, 2006, 2006 CPD ¶ 184 at 6. A protest is clearly meritorious where a reasonable agency inquiry into the protester's allegations would reveal facts showing the absence of a defensible legal position. *First Fed. Corp.--Costs*, B-293373.2, Apr. 21, 2004, 2004 CPD ¶ 94 at 2. The existence of any defensible legal position or close question is sufficient to show that a protest allegation was not clearly meritorious so as to warrant reimbursement of protest costs. See *Triple Canopy, Inc.--Costs*, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 3.

As a general rule, our Office recommends that a successful protester be reimbursed the costs incurred with respect to all the issues pursued, not merely those upon which it has prevailed. *The Salvation Army Cmty. Corrs. Programs--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 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. *Id.*

In applying these principles, we have, in some instances, severed costs arising from allegations of misvaluation under separate evaluation factors on the basis that they are not clearly intertwined. For example, challenges to a past performance evaluation were not clearly intertwined with clearly meritorious challenges to the technical factor evaluation and the resulting tradeoff. *Chags Health Information Technology, LLC et al.--Costs*, B-413116.38, *et al.*, Apr. 19, 2017, 2017 CPD ¶ 126 at 4; *see also Carney, Inc.--Costs*, B-408176.13, Feb. 14, 2014, 2014 CPD ¶ 82 at 5 (severing costs for alleged misvaluation of price from clearly meritorious challenge to technical capability factor evaluation).

Based on our review of the record, we find that none of Tridentis's protest allegations concerning the agency's technical and cost evaluations were clearly meritorious or clearly intertwined with the protest issues (*i.e.*, past performance and best-value determination) for which the agency has agreed to reimburse the protester. Although we discuss only representative examples below, we have reviewed each of the protester's arguments, and find no basis to grant the request.

Technical Evaluation

In its protest, Tridentis raised a number of allegations concerning the agency's technical evaluation of its proposal. For instance, Tridentis argued that the agency unreasonably assigned its proposal a significant weakness under the statement of work subfactor of the technical factor. Protest at 13. The protester contends the agency unreasonably assessed a significant weakness to its proposal for failing to demonstrate understanding of the informational tools referenced under section C.4.2 of the solicitation's SOW. Specifically, the protester asserts the agency lacked a basis to downgrade its proposal for allegedly failing to address ship integration drawing (SID). In this regard, Tridentis claims that this significant weakness was unreasonable because the solicitation did not contain a SID development requirement under SOW task C.4.2. Tridentis also notes that the agency's debriefing mentioned Tridentis's discussion of SID development on slide 38 of its oral presentation, but in fact, its slide 38 did not contain an express discussion of SID. *Id.*

In response, the agency asserts that Tridentis's significant weakness related to the way Tridentis addressed SOW task C.4.2, Drawing Products, which was assessed under the SOW subfactor of the technical factor. AR, Tab 8, Technical Evaluation at 26. The agency notes that SOW task C.4.2 required that contractors "provide development and modification of drawing products," and included a list of drawing product examples. RFP at 17. The agency explains that in contrast to SOW task C.4.4, which is titled SIDs, the requirement in SOW C.4.2 is not about developing SIDs. Memorandum of Law (MOL) at 18. Rather, the agency contends that SOW task C.4.2 involves the extensive process by which underlying government furnished information items are created, that are later developed into SIDs (*i.e.*, the step before SID development). *Id.*

The agency further explains that by discussing [DELETED] at slide 38 of its proposal, Tridentis referenced a matter that relates to SID development, and not the tasking under C.4.2., which, as explained above, involved the step before SID development.⁶ *Id.* at 19. Therefore, according to the agency, the protester's proposal warranted a significant weakness for failing to demonstrate its understanding of SOW task C.4.2., Drawing Products. *Id.*

In reviewing a protest challenging an agency's evaluation of proposals, our Office does not reevaluate proposals or substitute our judgment for that of the agency, but rather examines the record to determine whether the agency's judgment was reasonable and in accord with the stated evaluation criteria and applicable procurement laws and regulations. *MicroTechnologies, LLC*, B-413091, B-413091.2, Aug. 11, 2016, 2016 CPD ¶ 219 at 4-5. A protester's disagreement with an agency's judgment, without more, is not sufficient to establish that an agency acted unreasonably. *STG, Inc.*, B-405101.3 *et al.*, Jan. 12, 2012, 2012 CPD ¶ 48 at 7.

Here, based on the record presented, we cannot conclude that Tridentis's protest ground contesting the agency's assignment of a significant weakness to its proposal under the statement of work subfactor of the technical factor was clearly meritorious. After reviewing the record and the parties' filings, we find that this protest ground presents a close question. In this regard, based upon the existing record, we conclude that resolution of this technical issue about the scope of the SOW task in question would have required further development in the form of a supplemental agency report and comments. In such cases, we do not consider the protest grounds to be clearly meritorious. *InfraMap Corp.--Costs*, B-405167.3, Mar. 26, 2012, 2012 CPD ¶ 123 at 4; *East Penn Mfg. Co., Inc.--Costs*, B-291503.4, Apr. 10, 2003, 2003 CPD ¶ 83 at 2-3 (protest not clearly meritorious where decision would have required further steps to complete and clarify the record). Thus, we conclude that this protest ground does not meet the high bar set by the clearly meritorious standard. See, e.g., *Oready, LLC--Costs*, B-418297.2, Mar. 30, 2020, 2020 CPD ¶ 131 at 5 (citing *Northrop Grumman Sys. Corp.--Costs*, B-412278.6, Feb. 7, 2017, 2017 CPD ¶ 68 at 5).

We also agree with the agency that Tridentis's various challenges regarding the agency's technical evaluation are severable from the contentions for which the agency has agreed to reimburse costs--i.e., the past performance evaluation and best-value determination. In reaching this conclusion, we first find that the allegations did not share a common set of core facts as the technical factor was evaluated independently from the past performance factor. See *Chags Health Information Technology, LLC et al.--Costs*, *supra* at 5. We also find that the issues raised by Tridentis with respect to the technical evaluation did not turn on legal theories or principles related to its

⁶ The agency notes as well that Tridentis failed to challenge the second significant weakness that it received under the SOW subfactor of the technical factor. MOL at 15 n.7.

challenge to its challenges to the agency's past performance evaluation.⁷ *Id.* Thus, we have no basis to recommend reimbursement of costs associated with the agency's technical evaluation.

Cost Evaluation

Tridentis's protest also asserted that the agency's cost realism evaluation was flawed. In this area, Tridentis argues that the agency ignored the company's explanations regarding its proposed indirect rates, which resulted in an upward adjustment of [DELETED] to Tridentis's proposed costs. Protest at 11.

In response, the agency first argues that under the solicitation, offerors bore the responsibility to ensure that their proposals sufficiently supported their proposed cost information. RFP at 67; MOL at 13. As support, the agency cites the following RFP provision:

Further, indirect rates significantly lower than recent actuals, or declining indirect rates may not be evaluated as realistic unless fully explained or maximums/caps offered.

RFP at 65. The agency goes on to assert that Tridentis proposed [DELETED], and that the proposed rates were not supported with sufficient data to allow for the agency's evaluation. AR, Tab 6, Tridentis Cost Proposal at 12-19; Tab 9, Cost Evaluation of Tridentis Proposal at 7-8; MOL at 13-14. In this regard, the agency states that Tridentis purported to support its indirect rates by citing a "Forward Pricing Model [FPM] for 2020" for its expected [DELETED], but did not provide that FPM. AR, Tab 6, Tridentis Cost Proposal at 13; Tab 9, Cost Evaluation of Tridentis Proposal at 7-8. As an example, the agency points out that Tridentis's proposal stated only that its expected "[DELETED]" amount for overhead was [DELETED] and that this number was obtained from the forward pricing model. AR, Tab 6, Tridentis Cost Proposal at 17. The agency notes, however, that Tridentis failed to provide any information as to how it calculated this figure, or the information behind it. Thus, without such supporting information, the agency contends that it was unable to assess the realism or evaluate the accuracy of Tridentis's proposed indirect costs. AR, Tab 9, Cost Evaluation of Tridentis Proposal at 7.

In response to the agency's argument that Tridentis did not provide adequately detailed information to support its proposed rates, the protester contends that the solicitation did

⁷ For example, Tridentis argued that the agency's evaluation of its past performance was unreasonable because the agency did not attempt to use any of the contact information provided in its proposal in researching its past performance, but rather relied exclusively on contractor performance assessment reports. Comments and Supp. Protest at 5.

not require mathematical calculations to justify an offeror's proposed indirect rates. AR, Tab 9, Tridentis Cost Evaluation at 8; Comments and Supp. Protest at 34.

Here, we cannot conclude that Tridentis's challenge to the agency's evaluation of the firm's cost proposal was clearly meritorious, *i.e.*, that it was not a close question or that the agency lacked a legally defensible position. In this regard, it appears that the agency and the protester simply disagree on what constitutes sufficient documentation to support Tridentis's proposed indirect rates. As stated above, a simple disagreement regarding the agency's judgment, without more, does not provide our Office with a sufficient basis to question the agency's evaluation. See *STG, Inc.*, *supra*. Thus, we are not convinced that Tridentis's challenge to the agency's cost evaluation was meritorious, let alone clearly meritorious. Consequently, this protest ground provides no basis on which to recommend reimbursement of protest costs.

We also find that Tridentis's allegations concerning the agency's cost evaluation are not intertwined with the protester's allegations concerning past performance and the agency's best-value determination. As compared to the past performance factor, the cost factor was independently evaluated and did not involve the same core nucleus of operative facts, nor did the issues raised turn on related legal theories or principles. Accordingly, we do not recommend reimbursement of these protest costs.

CONCLUSION

Here, the agency does not oppose the protester's request for reimbursement to the extent it relates to the costs of filing and pursuing its challenge to the agency's past performance evaluation and best-value determination. We decline, however, to recommend reimbursement for Tridentis's pursuit of any additional protest grounds. As discussed above, we conclude that Tridentis's other protest grounds were not otherwise independently clearly meritorious and are severable from the uncontested protest issues. Therefore, we deny the request that GAO recommend reimbursement of protest costs for issues beyond those which the agency has already agreed to reimburse the protester.

The request is denied.

Thomas H. Armstrong
General Counsel