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Decision

Matter of: Elemental Innovation d/b/a Halo Maritime Defense System

File: B-419019.4

Date: March 11, 2021

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DIGEST

GAO recommends reimbursement of all of the costs of filing and pursuing its protest, where the agency agrees that reimbursement is appropriate where it did not investigate allegations of an organizational conflict of interest, and the remaining protest grounds are not clearly severable from the meritorious issue.

DECISION

Elemental Innovation Inc., a small business of Newton, New Hampshire, doing business as Halo Maritime Defense Systems (Halo), requests that our Office recommend that it be reimbursed the costs associated with filing and pursuing its protest. Halo filed its protest against the award of a contract to Oceanetics, Inc., a small business of Annapolis, Maryland, doing business as Truston Technologies (Truston), under request for proposals (RFP) N00024-20-R-6303, which was issued by the Department of the Navy, Naval Sea Systems Command, for port security barriers (PSBs). The protester contended that the agency failed to investigate apparent organizational conflicts of interest (OCIs); conducted a flawed technical evaluation, including the failure to consider prohibitions on the procurement of certain PSB designs; used an unsound internal price estimate; and did not engage in meaningful discussions with Halo, insofar as the discussions relied on the flawed price estimate. After our Office advised the parties at the conclusion of an outcome prediction alternate dispute resolution (ADR) conference that GAO would likely sustain the protest, the Navy indicated that it would take corrective action and we dismissed the protest as academic.

We grant the request.

BACKGROUND

On August 17, 2020, Halo protested with our Office the Navy's award to Truston. Halo alleged that the agency had failed to investigate OCIs in its selection of Truston and that Truston had an unfair competitive advantage that merited disqualification from the competition. See, e.g., Protest at 27.¹ In particular, Halo noted that one of Truston's current employees had previously worked in the Navy's Facility Engineering Service Center (NFESC), later the Naval Facilities Engineering and Expeditionary Warfare Center (EXWC),² and during that time had, along with two other Navy employees, designed a particular PSB. Halo Comments at 7. The Navy had patented these employees' PSB designs over several years, including the patent issued on July 22, 2008. Agency Report (AR), Tab 14(a), U.S. Patent No. 7,401,565 B2 at 1. In 2009, the Navy licensed this PSB patent (and another) to Truston for commercial use. See Halo Comments, exh. 2, RTI Report at I-13. One of the Navy employees who designed the PSB then joined Truston, where he continued to be involved in PSB work as Truston's chief designer. AR, Tab 6, Truston Proposal at 32.

Halo also alleged that an OCI arose from the fact that two of the evaluators on the source selection evaluation board (SSEB) for this procurement were from the EXWC, such that those Navy employees evaluated a proposal of a technology developed by their own Navy office. Protest at 60; see also MOL at 9 (confirming that two EXWC members were on the SSEB). Halo further asserted that the presence of the EXWC personnel on the SSEB resulted in an evaluation that was not neutral. In this regard, the protester contended that procurement of the Truston PSBs was specifically prohibited by Congress in the fiscal year (FY) 2019 National Defense Authorization Act (NDAA) and the FY 2020 NDAA under a provision prohibiting the use of funds to procure legacy waterborne security barriers for Navy ports.³ Protest at 25. The protester argued that the NDAA provisions should have led the Navy to disqualify Truston's proposal, which was based on a "legacy" design. *Id.* at 28. Halo asserted that the Navy's willingness to overlook the NDAA provisions was further evidence of an OCI and also resulted in a flawed technical evaluation. *Id.* The protester also argued

¹ Citations in this decision to the broader record are to those documents produced in the underlying protest, B-419019, B-419019.2, and B-419019.3.

² According to Halo, the EXWC was established by combining the NFESC with the Naval Facilities Engineering Systems Command (NAVFAC) Expeditionary Logistics Center, the Specialty Center Acquisitions NAVFAC, and the NAVFAC Information Technology Center. Halo Comments at 3. The Navy does not dispute this history. See, e.g., Memorandum of Law (MOL) at 9.

³ In particular, Halo claimed that section 130 of the FY 2019 NDAA specifically prohibited the use of funds to purchase "legacy waterborne security barriers for Navy ports." Protest at 11; see NDAA, FY 2019, Pub. L. No. 115-232, § 130, 132 Stat. 1665-66 (2018). Section 126 of the FY 2020 NDAA revised the restriction to prohibit the use of appropriated funds for "legacy waterborne security barriers for Navy ports, including as replacements for legacy barriers." See NDAA, FY 2020, Pub. L. No. 116-92, § 126, 133 Stat. 1198 (2019).

that as a result of these factors, the Navy erred in its best-value determination. *Id.* at 24-25, 27.

On September 8, Halo filed a supplemental protest arguing that the agency had performed an improper price evaluation. Supp. Protest at 5-7. On September 28, Halo filed a second supplemental protest, asserting that the agency had used a flawed basis for its independent price estimate. Second Supp. Protest at 4-5. In this regard, the protester asserted that the agency had in fact developed two separate price estimates: one based on the Navy's own PSB technology (now licensed to Truston), and another price estimate not based on the licensed technology. *Id.* The protester argued that the agency improperly decided to use the price estimate based on the licensed PSB design as the basis for the price evaluation, despite the fact that the use of this technology was, according to Halo, prohibited by provisions in the FY 2019 and FY 2020 NDAs. See *generally* Halo Supp. Comments. The protester further alleged that in selecting the PSB-based price estimate, the Navy was improperly preferring both Truston and the Navy-developed technology. *Id.* Halo also raised a protest ground claiming that the agency's discussions with the protester were marred, in part, by the Navy's improper reliance on the flawed price estimate during those discussions. Second Supp. Protest at 4.

On November 6, after development of the protest record, the Government Accountability Office (GAO) attorney assigned to the protest conducted an "outcome prediction" ADR conference. In the course of that ADR conference, the GAO attorney advised the parties that GAO would likely sustain Halo's protest on the basis that the agency failed to investigate Halo's OCI allegations.⁴

In the outcome prediction ADR conference, the GAO attorney explained that the record contained no evidence that the agency ever identified or evaluated Halo's allegations of a potential OCI. In this regard, there was no contracting officer's investigation available for GAO to review. The GAO attorney explained that, without such a record, GAO was

⁴ The Federal Acquisition Regulation (FAR) requires contracting agencies to "avoid strictly any conflict of interest or even the appearance of a conflict of interest in [g]overnment-contractor relationships." FAR 3.101-1; see also *VSE Corp.*, B-404833.4, Nov. 21, 2011, 2011 CPD ¶ 268 at 7. Where a firm may have gained an unfair advantage through its hiring of a former government official, the firm can be disqualified from a competition based upon the appearance of impropriety which is created by this situation--even if no actual impropriety can be shown--so long as the determination of an unfair competitive advantage is based on hard facts and not on mere innuendo or suspicion. *Health Net Fed. Servs., LLC*, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 28; see also *NKF Eng'g, Inc. v. U.S.*, 805 F.2d 372 (Fed. Cir. 1986). We review the reasonableness of the contracting officer's investigation and, where an agency has given meaningful consideration to whether an unfair competitive advantage exists, will not substitute our judgment for the agency's, absent clear evidence that the agency's conclusion is unreasonable. *Northrop Grumman Sys. Corp.*, *supra* at 7.

likely to issue a decision sustaining the protest because there was no basis to conclude that the contracting officer's investigation was reasonable when the contracting officer had not performed an investigation.⁵ *Threat Mgmt. Grp., LLC*, B-413729, Dec. 21, 2016, 2017 CPD ¶ 9 at 8-9 (sustaining protest where the lack of information in the record prevented our Office from concluding that the agency's action was reasonable).

On November 9, 2020, the Navy advised our Office that it intended to take corrective action in response to the outcome prediction ADR. In particular, the Navy committed to investigating the protester's conflict of interest allegations. Notice of Corrective Action & Req. for Dismissal, Nov. 9, 2020. The Navy also advised that if its review showed that there was an OCI and that OCI had impacted the awarded decision, it would take additional action as appropriate. *Id.* While Halo made certain requests about the Navy's approach to the OCI investigation, the protester did not object to dismissal of the protest on the basis of the agency's corrective action. Halo Response to Navy's Notice of Corrective Action & Req. for Dismissal, Nov. 13, 2020.

On November 16, our Office dismissed the protest as academic on the basis of the Navy's proposed corrective action. *Elemental Innovation Inc. d/b/a Halo Maritime Def. Sys.*, B-419019 *et al.*, Nov. 16, 2020 (unpublished decision).

DISCUSSION

Halo asks our Office to recommend that the Navy reimburse it for the costs associated with all of the issues pursued. See *generally* Request for Recommendation of Reimbursement of Protest Costs. In response, the Navy concedes that the protester should be reimbursed its costs of pursuing its claims that the agency failed to investigate allegations of OCIs, but maintains that Halo's reimbursement should be limited to this issue. Navy Response to Request for Recommendation of Reimbursement of Protest Costs at 4. The agency contends that the other protest grounds are severable from the OCI grounds and are not independently clearly meritorious. *Id.* Accordingly, the only remaining question for resolution by our Office is whether the protester should be reimbursed for the challenges raised in the protest beyond those the Navy agrees to reimburse.⁶

⁵ In reaching this conclusion, we find that the facts alleged by the protester were sufficiently detailed and supported, such that the agency was obligated to investigate the alleged OCI. This differentiates the current situation from that in protests where the protester's allegations were not sufficiently detailed and supported. See, e.g., *Trailboss Enters., Inc.*, B-415970, B-415812.2, B-415970.2, May 7, 2018, 2018 CPD ¶ 171 at 10 (dismissing protest where the protester failed to identify hard facts that indicated the existence or potential existence of an OCI).

⁶ Our discussion below does not address all aspects of each protest ground. In this regard, we viewed those arguments as related to a larger protest ground, such as the OCI challenge or the allegation that discussions were not meaningful.

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. *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 defensible legal position. *Id.* 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. *Id.*; *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; therefore, we will generally 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, 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. 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.

The Navy argues that Halo's remaining challenges to the agency's evaluation of quotations are clearly severable from the concerns identified in the outcome prediction ADR conference, which focused on the agency's failure to investigate the protester's allegations regarding OCIs. We disagree.

Here, Halo alleged that Truston had an unfair competitive advantage from Truston's employment of the former Navy EXWC employee, and that the Navy's evaluation itself was not neutral due to the presence of current EXWC employees on the SSEB. Halo Comments at 4-5. The protester also argued that the agency improperly overlooked that procurement of the Truston design was proscribed by the relevant NDAA provisions. Protest at 28. In addition, Halo maintained that the agency's evaluation errors resulted in a flawed best-value tradeoff decision. *Id.* Given that the allegations rest on the same core set of facts, and without an agency investigation into the OCI

allegations to offer additional information, we consider all of the protester's arguments in connection with the agency's evaluation of proposals, including the NDAA and best-value arguments, to be intertwined with the protester's meritorious challenge. Accordingly, we reject the agency's arguments to sever these costs. *Octo Consulting Grp., Inc.--Costs, supra* at 4 (declining to sever costs that were intertwined with costs related to agency's flawed evaluation); *cf. Honeywell Tech. Sols., Inc.--Costs*, B-296860.3, Dec. 27, 2005, 2005 CPD ¶ 226 at 4 (severing reimbursement for an OCI protest ground that did not share core facts with--and was thus distinguishable from--the challenges to the technical and price evaluation and allegations of unequal discussions).

With regard to Halo's other challenges, *i.e.*, that the agency used a flawed price estimate and engaged in misleading discussions, we find that these protest grounds are intertwined with the OCI allegations. As to the first, the agency failed to adequately explain why it had created two price estimates--one apparently based on the Navy/Truston PSB design, and another that anticipated a different design. The Navy also did not sufficiently explain why, given the creation of parallel price estimates, it selected the one based on the product it had licensed to Truston. We find that these allegations are intertwined with the factual and legal grounds that underpin the OCI allegations, namely, the close relationship between the EXWC office and Truston. We thus decline to sever these arguments

We also decline to sever the arguments related to Halo's allegation that the agency's discussions were not meaningful, insofar as they related to price. The record shows that agency used the price estimate based on the Navy/Truston PSB design to advise Halo that Halo's proposed price was "unaffordable." MOL at 11. The agency's discussions with Halo with regard to price relied on the price estimate, whose use the agency has not adequately explained; thus, both the clearly meritorious and discussion grounds are intertwined and interrelated with the OCI allegations that the agency failed to investigate. 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.

RECOMMENDATION

We recommend that the protester be reimbursed the costs associated with filing and pursuing its protest, including reasonable attorneys' fees. 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 the Navy within 60 days of receipt of this decision.

The request is granted.

Thomas H. Armstrong
General Counsel