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Decision

Matter of: Protection Strategies, Inc.--Costs

File: B-419302.3

Date: May 6, 2021

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Andrew J. Baker, Esq., Department of Justice, for the agency.

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DIGEST

1. GAO recommends reimbursement of the reasonable costs of filing and pursuing protest grounds challenging the best-value tradeoff decision, where this argument is not severable from the meritorious issues.
 2. GAO does not recommend reimbursement of abandoned protest grounds alleging that the agency overlooked meritorious aspects of the protester's staffing plan and technical approach.
 3. GAO does not recommend reimbursement of a challenge that the agency's evaluation of corporate experience and past performance was flawed, as this ground was not clearly meritorious and is severable from the clearly meritorious protest grounds.
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DECISION

Protection Strategies, Inc., a service-disabled veteran-owned small business of Knoxville, Tennessee, requests that we recommend the firm be reimbursed its reasonable costs of pursuing its protest. Protection Strategies challenged the issuance of a task order to Armada Ltd., by the Department of Justice (DOJ) under request for quotations (RFQ) No. 15JPSS20Q0000014, which was issued for various security services. The protester alleged that the agency engaged in unequal discussions, improperly evaluated the awardee's quotation, relied on a flawed independent government cost estimate (IGCE), failed to perform a required price realism analysis, and made award based on an erroneous best-value tradeoff decision. After our Office advised the parties that GAO would likely sustain the protest during an outcome

prediction alternate dispute resolution (ADR) conference, DOJ indicated that it would take corrective action and we dismissed the protest as academic.

We grant the request in part and deny the request in part.

BACKGROUND

On January 14, 2020, DOJ issued the RFQ to obtain security program support services for the Executive Office for the United States Attorney under General Services Administration Federal Supply Schedule 84, Total Solutions for Law Enforcement, Security, Facility Management Systems, Fire, Rescue, Special Purpose Clothing, Marine Craft and Emergency/Disaster Response. Agency Report (AR), Tab 2.1, RFQ.¹ The RFQ was set aside for service-disabled veteran-owned small businesses and contemplated a single task order award on a best-value tradeoff basis, considering the factors of technical merit and price. *Id.* at 65-66. The technical merit factor consisted of three evaluation areas in decreasing order of importance: technical approach, staffing plan, and corporate experience and past performance. *Id.* at 67. Protection Strategies and Armada submitted timely proposals by the March 3 deadline.

On June 10, the technical evaluation panel (TEP) concluded its initial evaluation of the quotations. AR, Tab C.1, Technical Evaluation Report. It determined that Armada and Protection Strategies were in the competitive range, but that each quotation required clarifications and revisions. *See generally id.* On June 12, DOJ opened discussions with Protection Strategies and sought a revised quotation.

On June 24, Armada and Protection Strategies submitted revised quotations. Memorandum of Law (MOL) at 5; *see also* AR, Tab D.1, Protection Strategies Final Technical Quotation, June 24, 2020.

On September 14, the TEP determined that “Armada mistakenly had not been asked to address two deficiencies.” MOL at 5; AR, Tab F.1, Revised Technical Evaluation Report, Sept. 18, 2020, at 1-2. The agency reopened discussions with Armada in order to allow it to revise its quotation and address the deficiencies. Supp. MOL at 11. At the same time, the TEP concluded that there was no need for additional communication with Protection Strategies. AR, Tab F.1, Revised Technical Evaluation Report at 2. Accordingly, Protection Strategies was neither invited nor permitted to submit a revised quotation.²

On September 16, Armada submitted a second revised quotation. AR, Tab E.1, Armada Revised Technical Quotation, Sept. 16, 2020. In addition to being permitted to

¹ Citations to the agency report are to the report produced in the underlying protest, docketed as B-419302 and B-419302.2.

² Protection Strategies asserted that, had it been permitted to participate in this new round of discussions, it would have attempted to further reduce its price or add beneficial elements to its quotation. Comments & Supp. Protest at 33.

address deficiencies, Armada was also permitted to extend the expiration date of its quotation and update or change its rates. AR, Tab E2, Armada Best and Final Price Volume, Sept. 16, 2020, at 3, 9-10. The agency completed its evaluation, assigning Armada and Protection Strategies's quotations the same adjectival ratings under the technical merit evaluation. AR, Tab G, Best-Value Tradeoff Decision at 4. As part of this evaluation, each aspect of the technical merit factor, including the corporate experience and past performance element, was separately evaluated. *Id.*

On September 28, DOJ selected Armada for award and notified Protection Strategies of the decision. AR, Tab H, Award Decision Memorandum; Tab J, Protection Strategies Notification of Award.

On October 9, Protection Strategies filed a protest with our Office, and on November 16, the protester filed its comments on the agency report and a supplemental protest. Protest at 1; Comments & Supp. Protest at 1. Collectively, the protester argued that the agency failed to perform a required price realism analysis and failed to identify associated risks in Armada's staffing plan and technical approach. Protest §§ VII.A, VII.B.1, VII.C.1. Protection Strategies raised a related protest ground that the IGCE was unreasonable. Supp. Protest § III.A.2.i. In addition, the protester asserted that DOJ failed to recognize meritorious aspects of Protection Strategies's quotation as compared to Armada's quotation. Protest §§ VII.B.2, VII.C.2. Protection Strategies also challenged the agency's evaluation under the corporate experience and past performance element. *Id.* § VII.D. Furthermore, the protester alleged that the agency engaged in unequal discussions (Supp. Protest § III.F) and that, based on the alleged errors, the best-value tradeoff decision was flawed (Protest § VII.E; see *also* Comments & Supp. Protest).

On January 7, 2021, after development of the protest record, the Government Accountability Office (GAO) attorney assigned to the protest conducted an "outcome prediction" alternative dispute resolution (ADR) conference.³ In the course of that ADR conference, the GAO attorney advised the parties that GAO would likely sustain Protection Strategies's challenge that the agency failed to perform a required price realism evaluation. Additionally, the GAO attorney indicated that the IGCE was not reasonably supported. The GAO attorney also indicated that GAO was likely to find that the DOJ had engaged in unequal discussions by opening discussions with Armada but not Protection Strategies, and by permitting Armada, but not Protection Strategies, to update its quotation. Because of these errors, the GAO attorney stated that she could not conclude that the agency's best-value tradeoff decision was reasonable.

³ In an outcome prediction ADR conference, the GAO attorney informs the parties what the GAO attorney believes the likely outcome will be and the reasons for that belief. A GAO attorney will engage in this form of ADR only if she or he has a high degree of confidence regarding the outcome. The outcome prediction reflects the view of the GAO attorney, but it is not an opinion of our Office and does not bind our Office should issuance of a written decision remain appropriate. *Inter-Con Sec. Sys., Inc.; CASS, a Joint Venture--Costs*, B-284534.7, B-284534.8, Mar. 14, 2001, 2001 CPD ¶ 54 at 2 n.1.

On January 11, DOJ advised our Office that it intended to take corrective action. Notice of Corrective Action & Req. for Dismissal, Jan. 11, 2021, at 1. Specifically, the agency stated that it would open another round of communications with Protection Strategies and Armada only; request final quotation revisions; review and, as appropriate, revise the IGCE; reevaluate final quotations; and make a new best-value tradeoff determination and award. *Id.* at 1-2. On the basis of the proposed corrective action, our Office dismissed the protest as academic. *Protection Strategies, Inc.*, B-419302, B-419302.2, Jan. 13, 2021 (unpublished decision).

On January 27, Protection Strategies filed this request. See *generally* Req. for Reimbursement of Costs.

DISCUSSION

Protection Strategies asks our Office to recommend that DOJ reimburse it for the costs associated with all of the issues pursued. See *generally* Req. for Reimbursement of Costs. In response, DOJ concedes that the protester should be reimbursed its costs of pursuing its claims “associated with Supplemental Protest Ground III.F [unequal discussions] and Initial Protest Grounds VII.A [failing to perform a price realism evaluation], VII.B.1 [allegation of performance risks in staffing plan related to underpricing], and VII.C.1. [allegation of performance risks in technical approach related to underpricing].”⁴ Opp’n to Req. for Reimbursement of Costs at 8-9.

The agency also does not contest reimbursement of a portion of the costs related to the challenge to the best-value tradeoff decision, to the extent that the argument relates to the allegation that the agency failed to perform a price realism evaluation. *Id.* at 9. However, the agency maintains that Protection Strategies’s reimbursement for any other costs associated with its challenge to the best-value decision not related to the price realism issue should be severed from the meritorious grounds and not reimbursed. *Id.* Accordingly, the only issue remaining for resolution by our Office is whether the protester should be reimbursed for the challenges raised in its protest beyond those DOJ agrees to reimburse.

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

⁴ The agency considers the challenge to the IGCE to be part of the allegation that the agency failed to perform a required price realism evaluation. Opp’n to Req. for Reimbursement of Costs at 3. We agree with DOJ’s conclusion on this issue.

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 Op. Res. 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 quotations 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. 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. However, 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.

As discussed below, we largely agree with the agency's position as to which issues were meritorious and reimbursable, and which issues were severable and not independently clearly meritorious, or were otherwise abandoned by the protester. We do not, agree however, that severance of costs within the meritorious challenge to the best-value decision is appropriate. Accordingly, we grant that portion of the protester's request.

First, DOJ argues that Protection Strategies's remaining challenges to the agency's evaluation of quotations are clearly severable from the concerns identified in the outcome prediction ADR conference and not independently clearly meritorious. DOJ argues that the protester should not be reimbursed for protest grounds that it alleges were abandoned, namely its initial protest grounds alleging that DOJ failed to credit Protection Strategies for meritorious aspects of its staffing plan and technical approach. Opp'n to Req. for Reimbursement of Costs at 4 (citing Protest, sections VII.B.2 and VII.C.2). Protection Strategies asserts that the protest grounds are interrelated, and thus not readily severable. Resp. to Opp'n to Req. for Reimbursement of Costs at 2.

In reviewing Protection Strategies's comments filed in response to the agency report, we find that the protester failed to respond to the agency's arguments in relation to the

protest grounds raised in sections VII.B.2 and VII.C.2 of its protest, where the protester originally argued that the agency unreasonably failed to identify beneficial aspects of the protester's quotation under the staffing plan and technical factors. See *generally* Comments & Supp. Protest. Where an agency provides a detailed response to a protester's assertion and the protester fails to respond to the agency's arguments in its comments, the protester abandons its argument because it fails to provide us with a basis to conclude that the agency's position with respect to the issue in question is unreasonable. *IntegriGuard, LLC d/b/a HMS Fed.--Protest & Recon.*, B-407691.3, B-407691.4, Sept. 30, 2013, 2013 CPD ¶ 241 at 5; *Atmospheric Res. Sys., Inc.*, B-240187, Oct. 26, 1990, 90-2 CPD ¶ 338 at 4. Accordingly, those protest grounds are considered abandoned and therefore do not warrant consideration of a recommendation of reimbursement of protest costs.

Next, DOJ argues that Protection Strategies should not be reimbursed for the costs associated with its challenges to the evaluation of Protection Strategies's quotation under the corporate experience and past performance element of the technical evaluation. Opp'n to Req. for Reimbursement of Costs at 4-5; see *also* Protest § VII.D. In response, the protester argues that its challenges are reimbursable on the basis that they share a common core set of facts and are based on related theories as the meritorious challenges. Resp. to Opp'n to Req. for Reimbursement of Costs at 3.

We again agree with the agency that the costs incurred in challenging the evaluation under the corporate experience and past performance element should not be reimbursed, and are properly severed here. In this regard, the protester argued that in evaluating the awardee the agency failed to consider allegedly adverse past performance information, while considering positive past performance information that, the protester contends, was not allowable. Comments & Supp. Protest at 18. This issue was not identified in the ADR conference as an area where the protester would prevail. With respect to whether these issues were intertwined with the issues identified as likely to be sustained, we conclude they are not. The protester's challenge to this evaluation did not involve the same core nucleus of operative facts as the clearly meritorious grounds, nor did the issues raised turn on related legal theories or principles. As a result, we will not recommend that the protester be reimbursed the costs of raising these issues.⁵

⁵ In addition, the challenge to the evaluation of the corporate experience and past performance element was not independently clearly meritorious. For example, Protection Strategies argued that the agency's evaluation was simultaneously overbroad and underbroad in the scope of the historical experience considered by the agency. In our view, the agency independently and reasonably evaluated the corporate experience and past performance element. The protester's allegations reflected only disagreement with the agency's evaluation and thus were not independently clearly meritorious. Accordingly, we do not recommend that the agency reimburse Protection Strategies for the costs associated with this protest ground. *Chags Health Info. Tech., LLC, et al.--Costs*, B-413116.38, *et al.*, Apr. 19, 2017, 2017 CPD ¶ 126 at 4 (severing

Finally, DOJ asserts that Protection Strategies's challenges to the agency's best-value tradeoff decision, to the extent they do not encompass the "line of argument" for the price realism protest ground, are not related to the successful issues, without merit, and thus not reimbursable. Opp'n to Req. for Reimbursement of Costs at 4-5. The protester maintains that it should be reimbursed for all of its protest costs related to its challenge to the best-value tradeoff. Resp. to Opp'n to Req. for Reimbursement of Costs at 3. We agree with the protester.

The agency's tradeoff analysis rested on Armada's amended quotation, received after the agency engaged in unequal discussions, as well as the price evaluation that did not include a price realism analysis and used a flawed IGCE. We thus consider all of the protester's arguments in connection with the tradeoff decision to be necessarily intertwined with the protester's meritorious challenges. Accordingly, we reject the agency's arguments that our Office should conclude that some parts of the challenge to the best-value tradeoff should be reimbursed, and others should not be reimbursed. We will not recommend that the agency attempt to sever costs within the best-value tradeoff decision. See *Deque Sys., Inc.--Costs, supra* at 5. We conclude that the agency should reimburse these costs.

CONCLUSION

As described above, the agency does not contest reimbursement for protest grounds related to the price realism challenge, including the allegations that the IGCE was unreasonable, and the allegations that the agency engaged in unequal discussions (protest sections VII.A, VII.B.1, VII.C.1, and supplemental protest grounds III.F and III.A.2.i). As also described above, we agree with the agency's conclusion that certain other protest costs--i.e., those related to the evaluation of corporate experience and past performance--do not involve issues that are intertwined with the issues upon which Protection Strategies was successful. Our conclusion differs with the agency only to the extent that we agree with the protester that it should be reimbursed all of the costs associated with its challenge to the best-value tradeoff.

RECOMMENDATION

We recommend that the protester be reimbursed its costs, including reasonable attorneys' fees, associated with pursuing its challenge to the agency's best-value tradeoff decision. We do not recommend reimbursement of costs associated with the other protest grounds. 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 DOJ within 60 days of receipt of this decision.

The request is granted in part and denied in part.

the costs associated with challenges to a past performance evaluation that were not intertwined with clearly meritorious challenges to the technical factor evaluation and the resulting tradeoff, nor independently clearly meritorious).

Thomas H. Armstrong
General Counsel