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Decision

Matter of: Odyssey Systems Consulting Group, Ltd.--Costs

File: B-419730.5

Date: September 30, 2021

David Cohen, Esq., John J. O'Brien, Esq., and Laurel A. Hockey, Esq., Cordatis LLP, for the protester.

Torrie Harris, Esq., and Charles McCarthy, Esq., General Services Administration, for the agency.

David A. Edelstein, Esq., and Evan C. Williams, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

GAO recommends reimbursement of the reasonable costs of filing and pursuing protest challenging the agency's technical evaluation and tradeoff decision where protest of the agency's assessment of a weakness was clearly meritorious and the agency unduly delayed taking corrective action. Reimbursement is also recommended as to other protest grounds relating to evaluation of the same technical evaluation factor that are intertwined with, and thus not severable from, the clearly meritorious protest ground.

DECISION

Odyssey Systems Consulting Group, Ltd., a small business of Wakefield, Massachusetts, requests that we recommend the firm be reimbursed its reasonable costs of pursuing its protest. Odyssey challenged the issuance of a task order to Millennium Engineering and Integration, LLC, by the General Services Administration (GSA), Federal Acquisition Service, under task order request for proposals (RFP) No. 47QFPA21R0009, which was issued for advisory and assistance services. The protester alleged that Millennium improperly certified its small business status and that the agency improperly awarded the task order to Millennium knowing that it was not an eligible small business. The protester further argued that the agency unreasonably evaluated Odyssey's proposal, unequally evaluated offerors, improperly waived page limitations for the awardee, and failed to perform a proper best-value tradeoff. After our Office advised the parties at an outcome prediction alternative dispute resolution (ADR) conference that GAO would likely sustain the protest, GSA stated that it would take corrective action, and we dismissed the protest as academic.

The request is granted in part and denied in part.

BACKGROUND

On December 18, 2020, GSA issued the RFP to firms holding contracts under GSA's One Acquisition Solution for Integrated Services Small Business Pool 5B indefinite-delivery, indefinite-quantity contract, pursuant to the procedures of Federal Acquisition Regulation (FAR) subpart 16.5. RFP at 2.¹ GSA conducted the procurement on behalf of the Space and Missile Systems Center Portfolio Architect at Los Angeles Air Force Base (AFB) in Los Angeles, California; Peterson AFB in Colorado Springs, Colorado; and Buckley AFB in Aurora, Colorado. *Id.* The contractor would provide support necessary to perform a broad range of advisory and assistance services, in areas such as acquisition strategy and execution, systems engineering, and quality control. *Id.* The solicitation contemplated the issuance of a fixed-price task order for a 1-year base period, four 1-year options, and a 6-month option to extend services under FAR clause 52.217-8, Option to Extend Services. *Id.* at 10.

The RFP provided that award would be made on a best-value tradeoff basis, considering technical capability, past performance, and price. *Id.* at 90. Technical capability was the most important evaluation factor, and was significantly more important than price. *Id.* at 91-97.

The RFP provided that the agency's evaluation of technical capability would be based on three equally-weighted elements: (1) technical approach; (2) staffing plan; and (3) start-up plan. *Id.* at 91-95. Relevant to this request, the RFP advised that these elements would not be rated separately, and that offerors would be assigned one overall adjectival rating for the technical capability factor. *Id.* at 91, 94.

By the January 19, 2021 closing date, GSA received three proposals, including proposals from Odyssey and Millennium. After evaluating proposals, the agency assigned the following final ratings to Odyssey and Millennium:

	Odyssey	Millennium
Technical Capability	Satisfactory	Exceptional
Past Performance	Acceptable	Acceptable
Price	\$86,203,123	\$94,585,708

AR, exh. 8, Award Decision at 33-34. As anticipated by the RFP, the agency did not assign separate ratings for any of the elements. *Id.* at 14-19.

¹ Citations to the agency report are to the report produced in the underlying protest and supplemental protests, docketed as B-419730, B-419730.2, B-419730.3, and B-419730.4. Citations to the RFP are to the conformed copy through amendment 3. Agency Report (AR), exh. 9, Tab 4.1.

The agency made award to Millennium, concluding that its proposal represented the best value. *Id.* at 39. On April 1, GSA notified Odyssey of the award decision, and provided a written debriefing. AR, exh. 6, Notification of Decision Statement.

On April 6, 2021, Odyssey filed a protest with our Office.² After receipt of the agency report, Odyssey filed its comments and a supplemental protest on May 17, 2021. Odyssey argued that Millennium was a large business ineligible for award, that Millennium improperly failed to recertify itself as a large business, and that the agency awarded a contract to Millennium knowing that it was a large business. Protest at 5-13. Odyssey further argued that the source selection decision inconsistently described Odyssey's technical rating as "Very Good" in some places and "Satisfactory" in others. Protest at 14-15.³ Odyssey also argued that the agency unreasonably evaluated proposals by failing to recognize and properly value all of the strengths in Odyssey's proposal, unreasonably assigning weaknesses to Odyssey's proposal, improperly waiving page limitations in evaluating Millennium's technical proposal, and unequally assigning strengths and weaknesses to Odyssey and Millennium. Protest at 15-22; Comments and Supp. Protest at 1-9. As a result of these evaluation errors, Odyssey alleged that the agency's tradeoff decision was unreasonable. Protest at 22-24.

On July 2, 2021, after development of the protest record, our Office conducted an outcome prediction ADR conference. During the ADR conference, our Office stated that we were likely to sustain the protester's challenge to the agency's assessment of a weakness to Odyssey's proposal under the staffing plan element of the technical capability factor. In this regard, the GAO attorney indicated that the record showed that Odyssey's proposed staffing was consistent with the minimum staffing number and mix identified in the RFP, and that as a result, we did not view as reasonable the agency's conclusion that Odyssey's proposed staffing deviated from the agency's "anticipated minimum number."

Subsequent to the ADR conference, the agency informed our Office that it intended to take corrective action by conducting a "revised technical evaluation and any resulting revised technical decision," which we understood to include a new source selection decision. Agency Resp. to ADR at 1; Clarification to Agency Resp. to ADR at 1. On July 12, 2021, we dismissed the protest as academic.

On July 26, 2021, Odyssey filed this request.
DISCUSSION

² Prior to receipt of the agency report, Odyssey filed a supplemental protest on April 12, 2021, and a second supplemental protest on May 4, 2021. Odyssey's first and second supplemental protests restated and consolidated all prior protest arguments. Accordingly, citations to Odyssey's "Protest" are to its second supplemental protest, filed on May 4, 2021. Supp. Protest, B-419730.3.

³ In its comments on the agency report, Odyssey withdrew this protest ground. Comments and Supp. Protest at 25.

Odyssey requests that our Office recommend reimbursement of its attorneys' fees and costs in pursuing all of its protest grounds, except for one allegation. Req. for Costs. In particular, Odyssey concedes that the issue relating to Millennium's size status is severable, and expressly states that it is not requesting costs relating to that issue. *Id.* at 2. Odyssey requests reimbursement with respect to all other protest issues. In support of its request, Odyssey contends that its protest was clearly meritorious, that the agency unduly delayed taking corrective action, and that the protest grounds are not severable. *Id.* at 2-3.

While GSA generally opposes Odyssey's request, GSA's opposition appears not to specifically contest that Odyssey's protest was clearly meritorious as to the assessment of a weakness under the staffing plan element of the technical capability factor. Resp. to Req. for Costs at 1-7. Instead, GSA argues primarily that our Office should view Odyssey's remaining protest arguments as severable and therefore limit Odyssey's recovery to the one clearly meritorious ground of protest only. *Id.* at 2-7.

Based upon our review of the record, and as discussed below, we conclude that Odyssey's protest of the assessment of weaknesses to its proposal was clearly meritorious, and that the agency unduly delayed taking corrective action in response to this clearly meritorious protest ground. Further, with the exception of the one ground of protest that Odyssey withdrew prior to the ADR conference, we conclude that Odyssey's grounds of protest are based on a common core set of facts and related legal theories, and are not readily severable from the clearly meritorious challenge. Accordingly, we grant Odyssey's request except with respect to the withdrawn ground of protest.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs under 4 C.F.R. § 21.8(e) if we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. *East Coast Nuclear Pharmacy--Costs*, B-412053.5, Aug. 31, 2016, 2016 CPD ¶ 249 at 5. 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. *Id.* 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. *Octo Consulting Grp., Inc.--Costs*, B-414801.4, Dec. 14, 2017, 2018 CPD ¶ 52 at 3. 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.

Our Office finds Odyssey's protest of the assessment of a weakness to its staffing plan to be clearly meritorious because a reasonable agency inquiry into the protest allegations would have disclosed the absence of a defensible legal position.

Here, the RFP required offerors to submit a staffing plan identifying, among other things, their proposed labor-hours by full-time equivalents (FTEs) for all required positions. RFP at 85. The RFP advised offerors to “keep the Government’s estimated staffing hours from the PWS [performance work statement] in mind” when preparing their own staffing plans, and stated that “[a]ny deviations from the PWS should be explained in detail with rationale.” *Id.* The PWS clearly established a minimum requirement for 49 FTEs. PWS at 17.⁴ A staffing matrix separate from the PWS identified both 49 FTEs under the heading “minimum staffing levels” and a total of 55 FTEs under the heading “FTE Qty. & Loc.” AR, exh. 9, Tab 3.3, Staffing Matrix. But, in multiple question and answer (Q&A) responses provided prior to submission of offers, the agency confirmed that it was concerned only with the whether offerors’ staffing plans diverged from the 49 FTE minimum staffing level identified in the PWS and staffing matrix. AR, exh. 9, Tab 2.6, amend. 1 Q&A at 13-14, Response Nos. 37 and 38 (“Offerors to submit a staffing plan/matrix above or below the FTE listed in columns N-P⁵ with justification of the proposed FTE compared to PWS requirements.”); AR, exh. 9, Tab 3.4, amend. 2 Q&A at 20, Response No. 66 (“Offerors are free to propose to columns N-P. Determination of need for justification is the Offerors discretion.”).

The record shows that Odyssey’s proposal identified 49 FTEs as required by the RFP, PWS, and staffing matrix. AR, exh. 10, Tab 2, Odyssey’s Technical Capability Proposal at 45-53. Nevertheless, the agency assigned Odyssey’s proposal a weakness for deviating from the minimum staffing levels without justification. AR, exh. 8, Award Decision at 35. This was unreasonable. Odyssey’s proposed staffing was consistent with the minimum number and mix identified in the PWS and staffing matrix, and we do not view as reasonable the agency’s conclusion that Odyssey’s proposed staffing deviated from the agency’s “anticipated minimum number” or that Odyssey was required to justify its staffing level in these circumstances. Because a reasonable inquiry into Odyssey’s protest allegation would have disclosed the absence of a defensible legal position, we find this ground of Odyssey’s protest clearly meritorious.

Further, our Office finds that the agency unduly delayed taking corrective action in the face of Odyssey’s protest. While we consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest, we generally do not consider it to be prompt where it is taken after that date. *AGFA HealthCare Corp.--Costs*, B-400733.6, Apr. 22, 2009, 2009 CPD ¶ 90 at 3-4. Here, although Odyssey made its clearly meritorious protest argument in its initial protest, the agency did not take corrective action until after it filed an agency report, the protester filed

⁴ Citations to the RFP’s PWS are to the conformed copy through amendment 2. AR, exh. 9, Tab 3.2.

⁵ Microsoft Excel column labels were not visible in the Adobe PDF version of the staffing matrix included in the agency report. However, the staffing matrix was originally provided to offerors in Excel format, and the protester provided the native Excel file to our Office as an exhibit to its comments and third supplemental protest. Review of this Excel file confirms that the 49 FTE “minimum staffing levels” were contained in columns N-P of the staffing matrix; the 55 FTEs were identified in columns K-M.

comments and a supplemental protest, the agency filed a supplemental agency report, the protester filed supplemental comments, and our office conducted an ADR conference. As a result, the agency's corrective action was unduly delayed.

Accordingly, we recommend that Odyssey be reimbursed its protest costs related to its clearly meritorious challenge to the agency's evaluation of its staffing plan under the technical capability factor. The agency only generally contests this conclusion. Instead, it focuses its opposition on the contention that we should find the majority of Odyssey's protest arguments severable from this clearly meritorious argument, and limit our recommendation to reimbursement of Odyssey's costs of pursuing this aspect of its protest only. Resp. to Req. for Costs at 2-7. We disagree.

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. 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.

We find that all of Odyssey's arguments related to the agency's evaluation of technical capability are intertwined with its clearly meritorious protest ground, and we recommend reimbursement of the costs of pursuing those challenges. While Odyssey's clearly meritorious protest ground related to evaluation of the staffing plan "element" of the technical capability factor, the RFP provided--and the record of the agency's evaluation confirmed--that these "elements" were not separately rated and that the agency's evaluation of proposed staffing plans informed the overall rating that the agency assigned to offerors for the technical capability factor. We view Odyssey's clearly meritorious protest ground, therefore, as a challenge to the agency's evaluation of offerors under the technical capability factor.

Odyssey's other grounds of protest also challenge the agency's evaluation of offerors under the technical capability evaluation factor. Specifically, Odyssey argued that GSA

failed to recognize and appropriately reward Odyssey's strengths on this factor, Protest at 15-17; that GSA improperly assessed Odyssey's proposal weaknesses under this factor (including, but not limited to, the challenge to the staffing plan weakness that we found clearly meritorious), Protest at 17-22; that GSA improperly evaluated the awardee under the technical capability factor by considering material in excess of the page limitation set by the RFP, Comments and Supp. Protest at 1-6; and that GSA unequally evaluated Odyssey and Millennium on the technical capability factor by assigning strengths to only Millennium for features also found in Odyssey's proposal, Comments and Supp. Protest at 6-9. Given that these grounds of protest all relate to the evaluation of proposals under the same evaluation factor, we find that they share a common core set of facts and are based on related legal theories. Therefore, we find that these protest grounds are not readily severable from the clearly meritorious protest ground.

Similarly, we decline to sever Odyssey's protest relating to the agency's tradeoff decision. Protest at 22-24. The agency's tradeoff analysis rested on its evaluation of offerors' technical capability, which was identified as the most important of all evaluation factors. We thus consider all of the protester's arguments in connection with the tradeoff decision to be necessarily intertwined with the protester's meritorious challenge to that evaluation. See *Deque Sys., Inc.--Costs, supra* at 5 (protest of a tradeoff decision is intertwined with meritorious protest of evaluation that informed the tradeoff). As a result, we conclude that the agency should reimburse the costs related to Odyssey's challenge to the agency's tradeoff decision.

However, we do not recommend reimbursement of Odyssey's costs related to its argument that the agency's award decision was tainted by contradictory ratings assigned to Odyssey in different sections of the agency's award documentation. This ground of protest was expressly withdrawn by Odyssey after the record demonstrated it to be without merit. Comments and Supp. Protest at 25. Withdrawn or abandoned protest grounds do not warrant consideration of a recommendation of reimbursement of protest costs. *Protection Strategies, Inc.--Costs*, B-419302.3, May 6, 2021, 2021 CPD ¶ 198 at 6.

As described above, we find that Odyssey's protest is clearly meritorious, that the agency unduly delayed corrective action, and that Odyssey's other protest grounds are intertwined with its clearly meritorious protest ground. The exceptions to this are Odyssey's protest related to Millennium's size (for which it does not seek reimbursement) and its protest related to the contradictory description of its technical rating (which it withdrew). We therefore recommend reimbursement, with these exceptions.

RECOMMENDATION

We recommend that the protester be reimbursed its reasonable protest costs, including attorneys' fees, related to the assessment of a weakness to its proposal. We also recommend reimbursement of Odyssey's reasonable protest costs, including attorneys'

fees, related to its other challenges to GSA's evaluation of proposals and to GSA's best-value tradeoff decision. Odyssey does not seek, and we do not do not recommend, reimbursement of costs related to its small business argument (Protest at 5-13). We also do not recommend reimbursement of costs related to the ground of protest that Odyssey withdrew prior to the ADR conference (Protest at 14-15). 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 GSA within 60 days of receipt of this decision.

The request is granted in part and denied in part.

Edda Emmanuelli Perez
General Counsel