



Decision

Matter of: Ruchman and Associates, Inc.--Costs

File: B-419968.3

Date: March 10, 2022

Neil H. Ruchman for the protester.
Michael H. Noyes, Esq., Department of Homeland Security, for the agency.
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DIGEST

Request that GAO recommend reimbursement of protest costs is granted where the agency unduly delayed taking corrective action in response to clearly meritorious protest arguments and where the other protest grounds were intertwined with the clearly meritorious issues.

DECISION

Ruchman and Associates, Inc. (RAI), a small business located in Nottingham, Maryland, requests that our Office recommend the agency reimburse it for the reasonable costs of filing and pursuing its protest. RAI challenged the establishment of a blanket purchase agreement (BPA) with Firebird Analytical Solutions and Technologies, under request for quotations (RFQ) No. 70US0920Q70090079, issued by the Department of Homeland Security, United States Secret Service, for contract financial investigative support. The protester challenged the agency's price realism evaluation. The protester also argued that the agency unreasonably evaluated RAI's technical quotation regarding its proposed key personnel, and failed to perform a proper best-value tradeoff. After our Office advised the parties at an alternative dispute resolution (ADR) conference that GAO would likely sustain the protest, the agency stated that it would take corrective action, and we dismissed the protest as academic.

We grant the request.

BACKGROUND

On July 7, 2020, the agency issued the RFQ to vendors holding General Services Administration (GSA), federal supply schedule (FSS) contracts under the Professional Services Schedule using the procedures of Federal Acquisition Regulation (FAR)

subpart 8.4. Agency Report (AR), exh. 3, RFQ at 1; AR, exh. 2, Contracting Officer's Statement (COS) at 1.¹ The RFQ was set aside for small businesses and anticipated establishment of a BPA contemplating the issuance of fixed-price and labor-hour call orders, for a base year and four 1-year option periods. RFQ at 2-4. Award was to be made on a best-value tradeoff basis, considering corporate experience, past performance, technical capability, and price.² *Id.* at 18-19. The technical capability factor included two subfactors of equal importance: program management and staffing, and key personnel. *Id.* at 19.

The evaluation was conducted in two phases using an "advisory down-select" process.³ *Id.* at 18. The agency received phase I quotations from six vendors. COS at 2; AR, exh. 13, Source Selection Decision/Price Analysis Memorandum (SSD/PAM) at 6. After evaluating quotations, the agency notified RAI and Firebird that they were among the most highly rated vendors and invited both vendors to participate in phase II of the procurement. *Id.* at 5-6; Protest, exh. 1, RAI Notice at 1. Both RAI and Firebird submitted phase II quotations. COS at 6.

After evaluating phase II quotations, the agency assigned the following overall ratings to RAI and Firebird:

	RAI	FIREBIRD
Corporate Experience	High Confidence	High Confidence
Past Performance	High Confidence	High Confidence
Technical Capability	Low Confidence	High Confidence
Price	\$9,015,345	\$12,966,441

COS at 9, 11; AR, exh. 13, SSD/PAM at 6-7, 10, 13. RAI received the low confidence rating for the technical capability factor based on the agency's concerns regarding RAI's proposed approach for key personnel.

The agency selected Firebird for the establishment of the BPA, concluding that its quotation represented the best value. The agency notified RAI on June 28, 2021, of the award decision. In accordance with the guidance at FAR section 8.405-2(d), the agency provided RAI with a brief explanation of the award. COS at 16, 18; Protest,

¹ Citations to the agency report are to the report produced in the underlying protest and supplemental protest, docketed as B-419968 and B-419968.2.

² The solicitation also provided for an optional evaluation factor--written scenarios--which the agency opted not to use during the procurement. COS at 10.

³ In the first phase, vendors were evaluated under the first two technical factors--corporate experience and past performance; following the phase one evaluation, the agency issued "advisory notifications." RFQ at 18. The most highly rated vendors were invited to proceed to the second phase during which quotations were evaluated for technical capability and price, and vendors not among the most highly rated were advised that they were unlikely to be viable competitors. *Id.*; COS at 5-6.

exh. 2, Notification of Award; *id.*, exh. 3, Explanation of Award. The brief explanation did not provide any information other than listing the evaluation factors provided in the RFQ and stated that “[c]onsidering the non-price factors and price, [Firebird] was deemed to be the best value to the Government.” Protest, exh. 2, Notification of Award; *id.*, exh. 3, Explanation of Award. Specifically, the brief explanation did not provide any information about how the quotation was rated under the non-price factors, or how pricing factored into the decision.

On July 8, 2021, RAI filed a protest with our Office, challenging generally the agency’s evaluation and best-value tradeoff as unreasonable. In essence, RAI argued that the agency offered no meaningful justification for why RAI’s highly rated quotation was not selected when compared to another quotation priced twice as high as the protester’s quotation. Protest at 5.

After receiving a heavily redacted agency report, the protester filed comments on the report.⁴ Redacted Memorandum of Law (MOL). Upon review of the filings, our Office found that the redacted record contained insufficient detail to adequately inform either the protester, the intervenor, or our Office of the basis for the selection decision or for the agency’s arguments. GAO Notice, Aug. 19, 2021. GAO requested that the agency provide “less redacted” documents to the protester and intervenor.⁵ *Id.* at 2; GAO Notice, Sept. 3, 2021 at 1.

Upon receipt of the additional information from the agency, the protester filed a supplemental protest.⁶ Specifically, the protester challenged the agency’s price realism analysis, arguing that the agency unreasonably concluded that its proposed fully-burdened labor rates were unrealistic and presented an unacceptable risk of performance. The protester also argued that the agency unreasonably concluded that RAI’s pay rates were unrealistically low, noting that “the Agency did not request a cost buildup, so the Agency would not have any pay rate information to determine if rates are too low.” Supp. Protest at 1. In addition, the protester challenged the agency’s assignment of a rating of “low confidence” to RAI’s quotation under the technical factor

⁴ Of relevance here, RAI’s comments filing disputed the position taken in the agency’s report that the solicitation provided for a price realism analysis. Comments at 1. Alternatively, the protester argued that the price realism analysis was flawed and wrongly concluded that RAI’s price presented risk to the government and was unrealistically low. *Id.* at 3. Instead, RAI argued that it “has continued to perform exceptionally on this work for the past four years at prices similar to that proposed for this RFQ.” *Id.* at 3. In addition, the protester contended that, to the extent the agency’s technical evaluation was based on the agency’s conclusion from the price realism analysis that “RAI’s price was so low as to indicate a lack of understanding and/or pose a performance risk,” the agency’s evaluation was unreasonable. *Id.* at 2.

⁵ RAI elected to proceed with its protest without the assistance of counsel, and therefore our Office was unable to issue a protective order in this protest.

⁶ GAO also asked for additional briefing from the agency regarding whether the solicitation provided for a price realism analysis. GAO Notice, Aug. 19, 2021, at 1.

based on concerns that RAI would not be able to hire qualified personnel or retain incumbent personnel at its quoted labor rates. *Id.* at 1, 6. The protester further argued that the agency's technical evaluation was unreasonable because the agency did not have a basis for concluding that RAI's discounted labor rates represented a "35% to 45% pay cut." *Id.* at 6 (quoting MOL at 5, n.2). RAI asserted that its proposed discounts were to fully loaded labor rates, and that the agency's conclusion was unreasonable because the agency did not have the information necessary to ascertain RAI's pay rates or whether they were too low. As a result of these evaluation errors, RAI alleged that the agency's award decision was unreasonable. *Id.* at 6.

After receipt of the supplemental protest described above, the agency provided a supplemental report, and the protester prepared supplemental comments. On September 28, 2021, after development of the supplemental protest record, our Office conducted a "litigation risk" ADR conference. During the conference, the GAO attorney assigned to the protest advised the parties that GAO would likely sustain two aspects of the supplemental protest--the protester's challenge to the reasonableness of the agency's price realism analysis and the agency's evaluation of the protester's quotation under the key personnel factor. On September 29, 2021, the agency advised our Office that it intended to take corrective action, and we dismissed the protest as academic. *Ruchman & Assocs., Inc.*, B-419968, B-419968.2, Oct. 1, 2021 (unpublished decision). On October 7, RAI filed this request.

DISCUSSION

RAI requests that our Office recommend reimbursement of the costs of pursuing all of its protest grounds. RAI contends that its supplemental protest grounds challenging the agency's price realism analysis and technical evaluation were clearly meritorious, that the agency unduly delayed taking corrective action, and that the other protest grounds, to include those from its initial protest, are not severable from the successful grounds.

While the agency generally opposes RAI's request, it does not dispute that RAI's supplemental protest allegations were clearly meritorious as to the agency's price realism analysis and evaluation of RAI's quotation under the technical capability factor. *Resp. to Req. for Costs* at 3. Instead, the agency argues primarily that it did not unduly delay taking corrective action in response to the supplemental protest. *Id.* Accordingly, the agency asks that we decline to recommend reimbursement for all of the requested costs.

Based upon our review of the record, and as discussed below, we recommend that RAI be reimbursed its costs related to its supplemental protest allegations concerning the agency's price realism analysis and evaluation of RAI's key personnel. We recommend that RAI be reimbursed its costs because the agency unduly delayed taking corrective action in response to clearly meritorious protest grounds. We further conclude, with one exception, that RAI's other grounds of protest are intertwined with the clearly meritorious protest grounds and should also be reimbursed.

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. 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. *CDIC, Inc.-Costs*, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 2. Where a new protest allegation is raised after the filing of the agency report, corrective action is prompt if taken prior to the deadline set by our Office for the agency's response to the new protest grounds. *See Alliant SB CTA, LLC-Costs*, B-411842.5, Nov. 4, 2016, 2016 CPD ¶ 323 at 2-3.

As noted above, we find RAI's supplemental protest challenges to the agency's price realism analysis and evaluation of RAI's key personnel to be clearly meritorious because a reasonable agency inquiry into the protest allegations would have disclosed the absence of a defensible legal position.

With regard to the first allegation, the protester challenged the adequacy of the agency's price realism analysis, arguing that the record failed to support the agency's conclusion that RAI's discounted labor rates presented an unacceptable performance risk. Supp. Protest at 6-7. The agency argued that, because RAI's proposed labor rates were lower than the other vendors' rates, the contracting officer reasonably "considered RAI's rate(s) to present a higher risk than the awardee's rate(s)." Supp. AR at 5.

Where, as here, a solicitation provides for establishment of a BPA contemplating fixed-price or fixed-rate call orders to be issued against a vendor's FSS contract, and identifies the number of hours involved, the "realism" of a vendor's proposed pricing is not ordinarily considered because the fixed-price or fixed-rate contracting vehicle places the risk and responsibility for contract costs and resulting profit or loss on the contractor. *See MindPoint Grp., LLC*, B-418875.2, B-418875.4, Oct. 8, 2020, 2020 CPD ¶ 309 at 9; *Systems, Studies, and Simulation, Inc.*, B-295579, Mar. 28, 2005, 2005 CPD ¶ 78 at 6. An agency may, however, as here, provide for a price realism analysis for the limited purpose of assessing whether a vendor's low price reflects on its understanding of the contract requirements or the risk inherent in its approach. *Grove Resource Solutions, Inc.*, B-296228, B-296228.2, July 1, 2005, 2005 CPD ¶ 133 at 4-5. We will review an agency's price realism analysis to determine whether it was reasonable and consistent with the terms of the solicitation. *SKE Italy Srl*, B-414884.3, Jan. 24, 2018, 2018 CPD ¶ 37 at 6.

The solicitation advised that price would be evaluated using a weighted computation, and a price realism review to determine risk.⁷ RFQ at 19; AR, exh. 4, RFQ amend. 0001, Questions and Answers (Q&A) Nos. 10-11 at 4. The program management contract line item numbers (CLINs) for the base and option years were fixed price. *Id.* Vendors were to provide fully burdened labor rates for the other CLINs. The solicitation did not require that vendors provide information separating their proposed fully burdened labor rates into their constituent elements--*i.e.*, vendors were not required to provide the cost build-up for their fully-burdened rates, including for example: direct labor rates (or salary), fringe benefits rates, general and administrative (G&A) expenses, or profit. *Id.* at 16. The RFQ did, however, request that vendors "provide discounted pricing from their General Services Administration schedule contract." RFQ at 16.

In conducting the price realism analysis, the record reflects that the agency relied on FAR section 8.404(d), which provides that GSA has already determined that the rates for services offered at hourly rates under FSS contracts are fair and reasonable. FAR 8.404(d); AR, exh. 13, SSD/PAM at 10. The contracting officer found that the discounted labor rates quoted by a third vendor were not realistic and posed an "unacceptable risk [the vendor will be unable to] successfully perform the requirement at its proposed labor rates" because the vendor had proposed discounts of up to 45 percent from its schedule rates, which "GSA ha[d] determined . . . to be fair and reasonable." *Id.* at 10. The contracting officer then compared RAI's quoted rates to the third vendor's rates and concluded that because RAI's rates were lower than the third vendor's rates, they posed unacceptable risk. *Id.* at 17.

We find the agency's price realism analysis was unreasonable. Although FAR section 8.404(d) provides that GSA determines that schedule rates are fair and reasonable at the time it creates the schedule, this FAR section says nothing about the realism of GSA schedule rates. FAR 8.404(d). An agency's evaluation of fair and reasonable pricing, *i.e.*, a price reasonableness determination, focuses on whether the offered prices are too high, rather than too low, *i.e.*, a price realism assessment. See *Science Applications Int'l Corp.*, B-408690.2, B-408690.3, Dec. 17, 2014, 2015 CPD ¶ 12 at 8.

Here, however, the contracting officer essentially found that the GSA schedule rates were realistic (*i.e.*, not too low) based solely on GSA's determination that the GSA

⁷ Although the RFQ as initially issued did not indicate that the agency would conduct a price realism analysis, the agency subsequently advised potential vendors of its intent to conduct such an analysis in a series of questions and answers that were incorporated into the solicitation by amendment. AR, exh. 4, RFQ Amendments, amend. 0001 at 4. As mentioned above, after receipt of the agency's initial report, the protester argued that the solicitation did not indicate that the agency would perform a price realism analysis. We agree with the agency on this issue; the incorporation of the Q&As into the solicitation placed potential vendors on notice that the agency would review prices for realism. See *Nu-Way Security & Investigative Servs., Inc.*, B-414988.2, Oct 20, 2017, 2017 CPD ¶ 339 at 3 (furnishing amendment to solicitation places vendors on notice of the revised terms).

schedule labor rates were fair and reasonable (*i.e.*, not too high). This conclusion was based on the amount of the discount without taking into account that there was wide variation in the rates GSA found to be fair and reasonable. The contracting officer then concluded that labor rates discounted more than a minimal amount from the GSA Schedule rates posed a risk to performance and were unrealistic. The price evaluation did not include any other analysis or explanation as to why the discounts created risk. Given that the solicitation here invited discounts from the GSA schedule, the agency cannot reasonably conclude that a vendor's proposed labor rates were unrealistic based solely on a vendor's decision to quote a discount from the rates on its schedule.

In addition, the agency's reliance on a comparison of RAI's quoted rates to the rates of a third vendor for the conclusion that RAI's rates were unrealistic is not supported by the record. As an initial matter, based on a comparison of the two vendors' quoted rates and the discounts proposed by the third vendor, the agency made an assumption about the discounts proposed by RAI. Such an assumption regarding the amount that RAI's quoted rates were discounted from RAI's GSA Schedule rates, however, without any consideration of RAI's GSA Schedule rates, is not reasonable. Further, while the agency relied on a comparison of RAI's quoted rates to the rates of a third vendor, the record provides no explanation as to why the discounts or the quoted rates created risk. The evaluation here fails to provide reasonable support for the conclusion that the rates created an unacceptable risk that the vendor would be unable to "successfully perform the requirement at its proposed prices." AR. exh. 13, SSD/PAM at 17.

Further, in response to the protest, the agency provided examples of the "unacceptable risk" posed by RAI's proposed fully burdened labor rates--such as concerns that RAI would "not be[] able to retain incumbent personnel" who "would accept a 35% to 45% pay cut" or be "able to hire other qualified personnel for the quoted unrealistically low pay rate." MOL at 5, n.2. The solicitation, however, did not require, nor did vendors provide, information in their quotations that separated the proposed fully-burdened hourly rates into their constituent elements. As such, to the extent the agency concluded that RAI's proposed labor rates were unrealistic because they reflected risk regarding low pay rates or risk as to whether RAI would be able to hire qualified staff (or retain incumbent personnel), the evaluation was not supported by the record and was unreasonable.

In sum, we find the allegation challenging the reasonableness of the price realism analysis to be clearly meritorious.

With regard to RAI's challenge to the agency's technical evaluation, the protester argued that the agency unreasonably assigned its quotation a rating of a low confidence under the technical capability factor based on concerns regarding RAI's plans for key personnel. While the agency acknowledged the adequacy of RAI's technical approach related to key personnel, it also argued that it reasonably downgraded the protester's proposed approach for key personnel due to concerns about the adequacy of the proposed labor rates, and concerns that the low rates created an unacceptable risk to performance. MOL at 5. As discussed previously, this included a concern that RAI would be unable to retain incumbent personnel given the proposed 35 to 45 percent pay

cut. *Id.* at 5 n.2. The evaluators were also concerned that RAI would be unable “to hire other qualified personnel for the quoted unrealistically low pay rate.” *Id.*

As also discussed above, we find that the agency’s determination in its price realism analysis of unacceptable risk based on RAI’s proposed fully burdened labor rates was not reasonably based. To the extent the agency’s rating of low confidence under the technical capability factor regarding concerns with RAI’s key personnel was based on conclusions stemming from the agency’s unreasonable price realism analysis, the agency’s assessment of low confidence in the technical evaluation was also not supported by the record and was unreasonable. The agency’s argument is not legally defensible, and we find the allegation that the agency unreasonably assessed a “low confidence” rating to RAI’s quotation under the technical capability factor to be clearly meritorious.

We also find that the agency unduly delayed taking corrective action in the face of RAI’s clearly meritorious protest grounds, which the protester filed as a supplemental protest after receiving the agency report and the additional evaluation documents. As referenced previously, where a new protest allegation is raised after the filing of the agency report, corrective action is prompt if taken prior to the deadline set by our Office for the agency’s response to the new protest grounds. *See Alliant SB CTA, LLC-Costs, supra.* The agency elected to take corrective action in response to the GAO attorney’s ADR conference call advising the parties of their litigation risk, which occurred after the agency submitted its report in response to the supplemental protest and after the protester submitted its supplemental comments. As a result, we find that the agency’s corrective action was unduly delayed. *See The Jones/Hill JV-Costs, B-286194.3, Mar. 27, 2001, 2001 CPD ¶ 62 at 13 (undue delay found where agency took corrective action after litigation risk alternative dispute resolution).*

Finally, we turn to RAI’s assertion that its unsuccessful protest grounds are not severable from the clearly meritorious protest grounds. Again, we agree with one exception--*i.e.*, we view RAI’s assertion that the solicitation did not indicate the agency’s intent to conduct a price realism evaluation to be severable from its challenge to the evaluation as it was conducted.

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 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 noted above, with one exception, we find that all of RAI's arguments concerning the price evaluation are intertwined with its clearly meritorious protest ground challenging the reasonableness of the agency's price realism analysis. The one exception in this area is RAI's contention that the solicitation did not anticipate a price realism evaluation. In responding to whether the RFQ anticipated price realism, the agency would not necessarily be led to review the adequacy of the realism evaluation. Rather, in reviewing an allegation that the solicitation did not contain a price realism requirement, the agency's review would likely focus entirely on the sufficiency of the terms of the solicitation instead of the sufficiency of the agency's price realism analysis. Thus, a different legal theory is involved since the agency would be defending the existence of a price realism requirement in the first instance instead of defending the sufficiency of any such analysis in the second. As a result, the issues are not intertwined. We therefore recommend reimbursement of RAI's costs of pursuing all arguments challenging the reasonableness of the price realism analysis, but not RAI's arguments that the solicitation did not provide for a price realism analysis.

We also find that all of RAI's arguments concerning the technical evaluation are intertwined with its successful protest ground challenging the evaluation of RAI's quotation as "low confidence" under the technical capability factor. For example, the initial protest challenged any technical rating lower than "high confidence" for RAI's quotation. We consider the issues to share common factual and legal bases; thus, we find that they also are also not readily severable from the clearly meritorious challenge. We therefore recommend that the protester be reimbursed for the costs of filing and pursuing these challenges.

Similarly, we decline to sever RAI's protest relating to the agency's tradeoff and award decision. Protest at 5; Supp. Protest at 6-7. This protest ground is derivative of the supplemental protest grounds of the agency's technical and price evaluations. *Apex Transit Sols., LLC-Costs*, B-418631.8, Aug. 13, 2021, 2021 CPD ¶¶ 282 at 9. Since we find the supplemental protest allegations clearly meritorious, we conclude that this derivative challenge to the best-value tradeoff and award decision also provides a basis upon which to recommend costs. *Id.*

RECOMMENDATION

For the reasons discussed above, we conclude that RAI's protest allegations challenging the reasonableness of the agency's price realism analysis and evaluation of key personnel under the technical capability factor were clearly meritorious and that the agency failed to take timely corrective action in response to these arguments. With the exception of RAI's argument that the solicitation did not provide for a price realism analysis, we also conclude that RAI's other, unsuccessful protest grounds were

inextricably intertwined with the clearly meritorious allegations. We recommend that the agency reimburse RAI's costs for filing and pursuing all protest grounds, with the exception of the costs related to pursuing the argument that there was price realism provision included in this solicitation. RAI 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.

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General Counsel