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Decision

Matter of: JV Derichebourg-BMAR & Associates, LLC--Costs

File: B-407562.3

Date: May 3, 2013

Joseph P. Hornyak, Esq., Alexander B. Ginsberg, Esq., and David I. Schneider, Esq., Holland & Knight LLP, for the protester.

David L. Koman, Esq., Department of the Navy, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. GAO recommends reimbursement of the costs of filing and pursuing challenges to reasonableness of agency's evaluation of proposals where evaluation challenges were intertwined with clearly meritorious protest issue.
 2. GAO does not recommend reimbursement of the costs of filing and pursuing complaint that contracting officer failed to adequately investigate an alleged violation of Procurement Integrity Act where the argument was severable from protester's other complaints and was not clearly meritorious.
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DECISION

JV Derichebourg-BMAR & Associates, LLC (JVDB), of Naples, Italy, requests that we recommend that it be reimbursed the costs associated with filing and pursuing its protest against the Department of the Navy's award of a contract to NewStar S.r.L. under request for proposals (RFP) No. N33191-12-R-1600, for custodial and maintenance services at the U.S. Navy's Support Activity in Gricignano, Italy.

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

BACKGROUND

In its initial protest, JVDB challenged the agency's evaluation of both NewStar's proposal and its own. The protester also argued that the contracting officer had violated Federal Acquisition Regulation (FAR) § 3.104-7 by awarding to NewStar without conducting an adequate investigation of an alleged violation of the

Procurement Integrity Act. In connection with the procurement integrity issue, the protester complained that the agency had failed to investigate and consider possible violations of the Procurement Integrity Act raised by a letter the agency received from an unidentified "Worker's Committee." In a supplemental protest filed after its receipt of the agency report, the protester raised additional objections to the agency's evaluation, arguing, among other things, that in evaluating NewStar's proposed staffing, the Navy evaluators had overlooked the fact that NewStar had proposed its labor [deleted], without indicating [deleted], which had made an assessment of the sufficiency of NewStar's staffing impossible.

After receipt of a supplemental agency report and the protester's comments, our Office conducted an outcome prediction alternative dispute resolution (ADR) conference call. In the course of the call, the cognizant GAO attorney advised the parties that GAO would likely sustain the protest on the basis that, as argued by the protester, it was unreasonable for the evaluators to have determined NewStar's proposed level of staffing sufficient based on the information furnished in its proposal. The GAO attorney recommended that the agency make a competitive range determination and conduct discussions with the offerors included in it, and that it then make another source selection determination.¹ The GAO attorney further recommended that in the event the agency determined that the solicitation, as currently written, did not accurately reflect its needs or its intended basis for evaluation, it should amend the solicitation and allow offerors to respond. Because the GAO attorney's recommendation involved the agency reopening the acquisition, she did not reach the merits of JVDB's other issues.

The agency subsequently notified our Office that it intended to take corrective action in response to the protest. While the agency did not advise us of the precise nature of the steps to be taken, it did represent that the corrective action would include a new source selection decision. Because the agency decision to make a new source selection determination rendered JVDB's protest of the initial source selection determination academic, we dismissed the protest. JV Derichebourg-BMAR & Assocs., LLC Joint, B-407562, B-407562.2, Jan. 10, 2013.

DISCUSSION

In its request for costs, JVDB asks our Office to recommend that the Navy reimburse it for the costs associated with all of the issues it pursued. In response, the Navy concedes that the protester should be reimbursed its costs of pursuing the challenge to the evaluation of NewStar's staffing, but maintains that the protester's reimbursement should be limited to that issue.

¹ The GAO attorney recommended that a competitive range be established because NewStar's proposal was the only one that the evaluators had initially determined to be eligible for award without discussions.

Where a procuring agency takes corrective action in response to a protest, our Office may recommend under 4 C.F.R. § 21.8(e) (2013) that the agency reimburse the protester its 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 protesters to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Pemco Aeroplex, Inc.--Recon. and Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 5. 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. The Real Estate Ctr.--Costs, B-274081.7, Mar. 30, 1998, 98-1 CPD ¶ 105 at 3. A GAO attorney will inform the parties through outcome prediction 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, and satisfies the “clearly meritorious” requirement for purposes of recommending reimbursement of protest costs. National Opinion Research Center--Costs, B-289044.3, Mar. 6, 2002, 2002 CPD ¶ 55 at 3; Inter-Con Sec. Sys., Inc.; CASS, a Joint Venture--Costs, B-284534.7, B-284534.8, Mar. 14, 2001, 2001 CPD ¶ 54 at 3.

As noted above, the Navy does not contest the protester’s request that we recommend reimbursement of its protest costs associated with the staffing issue, which was the topic of ADR. Accordingly, the remaining question for resolution by our Office is whether the protester should be reimbursed for all issues raised in its protest.

Generally, we consider a successful protester entitled to costs incurred with respect to all issues pursued, not merely those upon which it prevails. In our view, 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. AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 9. Nevertheless, failing to limit the recovery of protest costs in all instances of partial or limited success by a protester may result in an unjustified windfall to the protester and cost to the government. As a consequence, in appropriate cases 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 constitute an essentially separate protest. Focused Mgmt., Inc., B-404029.6, Oct. 3, 2011, 2011 CPD ¶ 204 at 4; KAES Enters., LLC--Protest and Costs, B-402050.4, Feb. 12, 2010, 2010 CPD ¶ 49 at 4. In determining whether protest issues are so clearly severable as to constitute essentially separate protests, we consider, among other things, the extent to which the issues are interrelated or intertwined--*i.e.*, the extent to which successful and unsuccessful arguments share a common core set of facts, are based on related legal theories, or

are otherwise not readily severable. See Sodexho Mgmt., Inc.--Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 29.

Here, we regard the protester's objections to the evaluation of proposals as interrelated and not readily severable. In this connection, we generally consider issues concerning the evaluation of proposals to be intertwined. The Salvation Army Community Corrections Program--Costs, B-298866.3, Aug. 29, 2007, 2007 CPD ¶ 165 at 7; see also CNA Indus. Eng'g, Inc.--Costs, B-271034.2. Nov. 20, 1997, 97-2 CPD ¶ 149 at 3. Accordingly, we recommend that the Navy reimburse the protester for the costs of pursuing these issues.

We reach the opposite conclusion regarding the procurement integrity issue. This issue does not share a common core of relevant facts with--and thus is severable from--the protester's other complaints. Moreover, we did not consider the argument raised by the protester pertaining to an alleged violation of FAR § 3.104-7 to be clearly meritorious. In our view, the argument raised involved a close question where the record indicated that the agency had reviewed the "Workers Committee" letter, which provided the basis for the Procurement Integrity Act issues, but the agency did not deem a further investigation warranted where the author was anonymous and where the allegations in the letter were unsubstantiated. See Honeywell Technology Solutions, Inc.--Costs, B-296860.3, Dec. 27, 2005, 2005 CPD ¶ 226 at 4 n.3. Thus, we do not recommend that the agency reimburse the protester the costs of pursuing the procurement integrity issue.

RECOMMENDATION

We recommend that JVDB be reimbursed the costs associated with filing and pursuing its protest of the evaluation of proposals, including reasonable attorneys' fees. JVDB 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. Bid Protest Regulations, 4 C.F.R. § 21.8(f)(1) (2013).

The request is granted in part and denied in part.

Susan A. Poling
General Counsel