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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Fluor Energy Technology Services, LLC--Costs

File: B-411466.3

Date: June 7, 2016

Kevin P. Connelly, Esq., Kelly E. Buroker, Esq., Marques O. Peterson, Esq., and Caroline A. Keller, Esq., Vedder Price, P.C., for the protester. James J. Jurich, Esq., Gabriel D. Soll, Esq., and H. Jack Shearer, Esq., Department of Energy, for the agency. Eric M. Ransom, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Reimbursement of costs of filing and pursuing protest is recommended where we conclude that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest because a reasonable agency inquiry into initial protest allegations would have revealed prejudicial errors in the agency's cost realism evaluation.

DECISION

Fluor Energy Technology Services, LLC, of Greenville, South Carolina, requests that we recommend that it be reimbursed the costs associated with filing and pursuing its protests against the Department of Energy's award of a contract to Lockheed Martin Corporation, of Bethesda, Maryland, under solicitation No. DE-SOL-005395, for research and development services.

We grant the request.

On April 27, 2015, Fluor protested the award of a contract to Lockheed, arguing that the agency's cost realism analysis double-counted various costs, resulting in an improper upward cost adjustment of approximately \$83.8 million. Fluor also argued that the agency unreasonably evaluated its technical proposal with regard to key personnel and past performance, and conducted an unreasonable best value decision. Subsequent to the agency's report, Fluor filed a supplemental protest expanding its arguments concerning the agency's cost realism analysis.

After development of the protest record, the cognizant Government Accountability Office (GAO) attorney conducted an “outcome prediction” alternative dispute resolution (ADR) conference. In the course of that ADR, the GAO attorney advised the agency that GAO would likely sustain Fluor’s protests of the cost realism analysis on the basis that the agency had double counted certain costs and unreasonably upwardly adjusted Fluor’s cost proposal by approximately \$83.8 million. The GAO attorney recommended that the agency conduct a reasonable reevaluation of the proposals and make a new award decision. Additionally, in order to aid the agency in a reevaluation effort, the GAO attorney advised that a written decision in the protest was unlikely to object to the agency’s technical evaluation.

In response to the ADR, the agency informed our Office that it intended to take corrective action consisting of, at minimum, conducting a reevaluation of proposals and making a new source selection decision. Based on the agency’s proposed corrective action, GAO dismissed Fluor’s protest as academic. Fluor Energy Tech. Servs., LLC, B-411466, B-411466.2, July 27, 2015. Following the dismissal of the protest, Fluor filed this request that GAO recommend the reimbursement of its costs of filing and pursuing its protest.

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 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 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, 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.

In response to Fluor’s request, the agency concedes that the protester should be reimbursed its reasonable protest costs as they relate to challenges against the agency’s cost realism evaluation, but asserts that Fluor’s recovery should be limited to those protest grounds only. In this regard, the agency states in its response that “DOE believes the other grounds are discrete and severable and that it would have prevailed on the other protest grounds, and therefore protester would not be entitled

to recovery on those allegations.” Agency Response, Aug. 20, 2015, at 1. However, DOE’s response provides no further explanation or argument in support of its belief that the other arguments raised in Fluor’s protest are discrete and severable.

For purposes of determining entitlement to protest costs, we generally consider all issues concerning the evaluation of proposals to be intertwined--and thus not severable--and therefore generally will 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 the award of protest costs to successful protesters where a part of their 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; Interface Flooring Sys., Inc.--Claim for Attorneys’ Fees, B-225439.5, July 29, 1987, 87-2 CPD ¶ 106 at 2-3, 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 CICA. TRESP Assocs., Inc.--Costs, B-258322.8, Nov. 3, 1998, 98-2 CPD ¶ 108 at 2.

In this case, as noted above, the agency has presented no argument or evidence to support its contention that Fluor’s other challenges should be severed from its clearly meritorious challenges to the agency’s cost realism evaluation. See Burns and Roe Servs. Corp.--Costs, B-310828.2, Apr. 28, 2008, 2008 CPD ¶ 81 at 3. Absent such support, we are unwilling to deviate from the general premise that a protester is entitled to all costs associated with both successful and unsuccessful allegations. Since a reasonable inquiry into Fluor’s initial protest would have revealed that the protest was clearly meritorious--where the record showed that the agency’s cost realism analysis did double-count various proposed costs--we conclude 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, including the filing of a supplemental protest expanding upon its clearly meritorious protest grounds, and comments on the agency report concerning its initial protest allegations. In this context, we recommend that Fluor be reimbursed its reasonable costs incurred with respect to all issues pursued in its initial protest and supplemental protest.

The request that GAO recommend reimbursement of protest costs is granted.

Susan A. Poling
General Counsel