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Decision

Matter of: Technatomy Corporation; Octo Consulting Group, Inc.--Costs

File: B-413116.49; B-413116.50

Date: December 14, 2016

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Anthony E. Marrone, Esq., Department of Health and Human Services, for the agency.

Evan D. Wesser, Esq., and Eric Ransom, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

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

DECISION

Technatomy Corporation, of Fairfax, Virginia, and Octo Consulting Group, Inc., of McLean, Virginia, request that we recommend that they be reimbursed the costs associated with filing and pursuing their respective protests against the award of multiple contracts under request for proposals (RFP) No. RFP-CMS-2016-SPARC, which was issued by the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), for the Strategic Partners Acquisition Readiness Contract (SPARC) program.

We grant the requests.

BACKGROUND

On June 17 and 24, 2016, respectively, Technatomy and Octo protested multiple contract awards made by CMS for the SPARC program, challenging the agency's

evaluation of proposals under the non-price evaluation factors and resulting best value determinations.¹ The protesters filed supplemental protests expanding their challenges to the agency's evaluation and best value determinations on June 24 and July 28, respectively.

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 Technatomy's and Octo's protests of the agency's best value determinations on the basis that the agency had failed to reasonably consider the relative merits of the proposals across all of the applicable evaluation criteria. Additionally, the GAO attorney advised that GAO would likely sustain Octo's challenge to the agency's evaluation of its proposal under the small business participation evaluation factor. The GAO attorney recommended that the agency reevaluate Octo's proposal under the small business participation factor, and make and document a new award decision. Additionally, the GAO attorney advised that a written decision in the protest was unlikely to sustain the protesters' remaining evaluation challenges.

In response to the ADR, the agency informed our Office that it intended to take corrective action consisting of, at a minimum, reviewing the evaluation record (to include specifically reevaluating Octo's proposal under the small business participation factor) and conducting and documenting a new source selection decision. Based on the agency's proposed corrective action, GAO dismissed Technatomy's and Octo's protests as academic. Technatomy Corp. et. al, B-413116.4 et al., Sept. 7, 2016 (unpublished decision). Following the dismissal of the protests, Technatomy and Octo filed these requests that GAO recommend the reimbursement of their costs of filing and pursuing their protests.

DISCUSSION

In their requests for costs, Technatomy and Octo ask our Office to recommend that CMS reimburse them for the costs associated with all of the issues they pursued. In response, the agency does not dispute that the protesters should be reimbursed their costs of pursuing their challenges to the agency's best value determinations

¹ The SPARC program RFP provided for the evaluation of proposals for awards for an unrestricted pool and a small business set-aside pool. The protests at issue here relate to the awards made for the unrestricted pool. In addition to consolidating the protests of Technatomy and Octo, our Office also consolidated two additional protests filed by protesters challenging the agency's contract awards in the SPARC unrestricted pool. Those protesters elected not to submit requests for a recommendation that they be reimbursed the costs of filing and pursuing their respective protests.

and the evaluation of Octo's proposal under the small business participation factor, but maintains that the protesters' reimbursement should be limited to these issues.

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 protesters to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Pemco Aeroplex, Inc.--Recon. & 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 the purpose of recommending reimbursement of protest costs. National Opinion Research Ctr.--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, CMS does not contest the protesters' requests that we recommend reimbursement of their protest costs associated with challenging the agency's best value determinations, and, in the case of Octo, its challenge to the agency's evaluation of its proposal under the small business participation factor, which were the topics of the ADR. Accordingly, the remaining question for resolution by our Office is whether the protesters should be reimbursed for all of the remaining challenges to the agency's evaluation of proposals raised in the protests.

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., 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 the Competition in Contracting Act.

Fluor Energy Tech. Servs., LLC--Costs, B-411466.3, June 7, 2016, 2016 CPD ¶ 160 at 3; JV Derichebourg-BMAR & Assocs., LLC--Costs, B-407562.3, May 3, 2013, 2013 CPD ¶ 108 at 3.

CMS argues that the remaining challenges to the agency's evaluation of proposals are clearly severable because, with the exception of Octo's challenge to the evaluation of its proposal under the small business participation evaluation factor, the concerns identified in the outcome prediction ADR focused on the source selection decision, and not the evaluation conducted by the lower-level technical evaluators. We disagree. In our view, these other issues share common factual and legal bases; both the meritorious and non-meritorious issues are intertwined and interrelated with the agency's flawed consideration of the relative merits of proposals. See Sevatec, Inc.--Costs, B-407880.3, June 27, 2013, 2013 CPD ¶ 163 at 3-4.

For example, both Technatomy and Octo argued, among other grounds, that the agency's evaluation of their proposals under the process maturity factor was inconsistent with the solicitation's evaluation criteria and disparate with regard to certain of the awardees. The protesters further contended that these errors, and related evaluation errors under the other non-price factors, impacted the reasonableness of the SSA's best-value determination by limiting a reasonable comparative assessment of the proposals. Essentially, the challenges to the underlying evaluation and to the SSA's subsequent comparative assessment of proposals both relied on the same factual and legal premises--that the agency had failed to reasonably consider the merits of the protesters' proposals. Here the record demonstrates that the challenges shared a common factual and legal basis, and therefore we conclude that the underlying technical challenges were inextricably intertwined with the meritorious protest grounds challenging the agency's best-value determinations.

RECOMMENDATION

We recommend that Technatomy and Octo be reimbursed the costs associated with filing and pursuing their respective protests, including reasonable attorneys' fees. Technatomy and Octo should submit their respective certified claims, detailing the time and costs incurred, directly to the agency within 60 days of their receipt of this decision. Bid Protest Regulations, 4 C.F.R. § 21.8(f)(1).

The requests are granted.

Susan A. Poling
General Counsel