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Decision

Matter of: Synchron, LLC--Costs

File: B-412622.4

Date: August 31, 2016

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DIGEST

Reimbursement of costs of filing and pursuing a protest challenging the agency's technical evaluation after agency took corrective action is not recommended where protest was not clearly meritorious; the agency does not dispute protester's entitlement to protest costs regarding the agency's cost realism evaluation.

DECISION

Synchron, LLC, of Fairfax Station, Virginia, requests that we recommend that it be reimbursed the costs of filing and pursuing its protest challenging the award of a contract to the Patrona Corporation, of Arlington, Virginia, under request for proposals (RFP) No. N00024-15-R-3088, issued by the Department of the Navy, Naval Sea Systems Command (NAVSEA), for program support services for the NAVSEA Submarine Safety and Quality Assurance Program Office. We dismissed the protest after the agency advised our Office that it would take corrective action by reevaluating offerors' proposals and making a new source selection determination. Synchron argues that its protest was clearly meritorious and the agency's corrective action unduly delayed.

We deny Synchron's request.

BACKGROUND

The RFP, issued on February 6, 2015, contemplated the award of a cost-plus-fixed-fee/cost-plus-award-fee task order under the Navy's Seaport-e indefinite-delivery,

indefinite-quantity, multiple-award contract for a base year with four 1-year options. In general terms, the contractor would be responsible for providing professional support services to the aforementioned Navy program office, including in the areas of life cycle support, logistics, and quality assurance engineering. The RFP established four evaluation factors in descending order of importance: technical capability; management approach; past performance; and cost. The technical capability factor in turn consisted of three equal subfactors: technical capabilities; staffing plan; and key personnel resumes. The noncost factors, when combined, were significantly more important than cost, and award was to be made to the offeror whose proposal represented the best value to the government.

Three offerors, including Patrona and Synchron, submitted proposals by the March 23 closing date. A Navy technical evaluation team (TET) evaluated offerors' proposals using various adjectival rating schemes that were set forth in the RFP (e.g., outstanding, good, satisfactory, marginal, or unsatisfactory for the technical capability and management approach criteria). On December 18, based on the evaluation results, the Navy source selection authority (SSA) determined that Patrona's lower technically rated, lower-cost proposal represented the best value to the government all factors considered.

Synchron, after receiving notice of award and a debriefing, filed its protest with our Office on January 8, 2016,¹ and raised four primary arguments: (1) the agency's evaluation of Patrona's proposal, under all evaluation factors, was improper; (2) the Navy's evaluation of Synchron under the key personnel resumes and management approach criteria was unreasonable; (3) the agency's cost realism analysis of Synchron was unreasonable; and (4) the Navy conducted an improper award decision.² Protest, Jan. 8, 2016, at 1-7.

On January 27, our Office dismissed Synchron's challenges to the agency's evaluation of Patrona's proposal, and challenge to the Navy's award decision, as factually and legally insufficient. GAO Email to Parties, Jan. 27, 2016; see 4 C.F.R. § 21.5(f).

The Navy thereafter filed its report on February 4, responding to all remaining protest allegations. The agency argued that the evaluation of Synchron's proposal and resulting source selection decision had been reasonable and consistent with

¹ As the value of the awarded task order was greater than \$10 million, the procurement was within our jurisdiction to hear protests related to the issuance of task orders under multiple-award contracts. 10 U.S.C. § 2304c(e)(1)(B).

² Synchron's allegation here was that the Navy's failure to select the higher technically rated, higher-cost proposal (i.e., Synchron's) improperly converted the basis of award from best value to low-price, technically acceptable.

the stated evaluation criteria. Agency Report (AR), Feb. 18, 2016, at 10-18. With respect to the key personnel resumes subfactor, the TET had found Synchron's key personnel were highly qualified, with strengths in education, experience, and training levels, which resulted in the assignment of a "good" rating. Id. at 8, 13. The agency report noted that, contrary to Synchron's assertion, the evaluators had considered the protester's incumbent personnel. Id. at 13-14. The agency report also stated, in response to the protester's assertion regarding the past performance ratings of its incumbent staff, that the TET did not consider Synchron's past performance when evaluating the offeror's key personnel, because past performance was not part of the key personnel factor. Id.

Further, with respect to the management approach factor, the agency evaluators had found that Synchron's management approach met all requirements, and demonstrated an understanding of program goals, methods, resources, and schedules, thereby resulting in a "satisfactory" rating. Id. at 8. The agency report noted that, contrary to Synchron's assertions, the strengths which the evaluators found under the technical capability factor were not automatically advantages to be recognized again under the management approach criteria. Id. at 17-18. The agency report also noted that as Synchron's proposal was determined to have met but not exceeded RFP requirements, a satisfactory rating was appropriate. Id. at 16.

Synchron filed a supplemental protest on February 11 in which it raised a new challenge to the Navy's award decision,³ and comments on the agency report on February 18.

On March 1, the Navy filed its supplemental agency report with our Office, which among other things stated:

On or about February 18, 2016, the Navy discovered some errors in the Cost Report (AR, Tab 6). . . . After correcting the errors, Synchron's Total Evaluated Cost is now \$27,653,686.60, and Patrona's Total Evaluated Cost is \$24,106,100. Thus, the probable cost of Synchron's proposed approach is approximately \$3,547,586.60 more than the proposal cost of Patrona's proposed approach, resulting in the cost premium changing from 18.5% to 14.7%. However, the Source Selection Authority (SSA), after reviewing the corrected numbers, reaffirmed his selection of Patrona's proposal as the best value to the Government. The SSA concluded

³ Synchron's supplemental protest raised two arguments: (1) the Navy conducted a flawed source selection based on significantly flawed cost evaluation; and (2) Synchron's proposal received unequal treatment. Protest, Feb. 11, 2016, at 4-6.

that Synchron's technical advantage did not justify the payment of an additional \$3.5 million or 14.7% premium.

Supplemental Agency Report, Mar. 1, 2016, at 1.

On March 7, Synchron filed a second supplemental protest, alleging the agency had, in effect, improperly taken corrective action during a pending protest and that the new award decision amounted to a post-hoc rationalization that should be afforded little if any weight. Protest, Mar. 7, 2016, at 1-6, citing Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91.

In response, on March 10, the Navy notified our Office that it would take corrective action by reevaluating offerors' proposals and making a new source selection determination. Our Office thereupon dismissed Synchron's protest as academic based on the announced corrective action. Synchron, LLC, B-412622 et al., Mar. 11, 2016 (unpublished decision).

DISCUSSION

Synchron requests that our Office recommend that the agency reimburse the protester's costs of filing and pursuing its underlying protest.⁴ Synchron argues that the Navy unduly delayed taking corrective action--as evidenced by its failure to do so until after filing of the agency report and submission of comments by the protester--and that its protest was clearly meritorious in all regards.

The Navy does not dispute that Synchron should be reimbursed its protest costs associated with its challenge to the cost realism evaluation.⁵ AR, Apr. 5, 2016, at 1. The agency, however, argues that the remaining aspects of Synchron's protest, i.e., the evaluation of Synchron's proposal under the key personnel resumes subfactor and management approach factor, were not clearly meritorious.

When a contracting agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs, including reasonable attorneys' fees, if 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 the protester to expend unnecessary time and resources to

⁴ Synchron does not, however, seek protest costs related to those issues raised in its initial protest that our Office previously dismissed on January 27. Synchron Email to GAO, May 19, 2016.

⁵ Accordingly, in light thereof, we need not review this aspect of the protester's request for a recommendation that it be reimbursed its protest costs.

make further use of the protest process in order to obtain relief.⁶ Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3554(c)(1)(A); Bid Protest Regulations, 4 C.F.R. § 21.8(e); Wisconsin Physicians Serv. Ins. Corp.--Costs, B-401068.12, Mar. 22, 2013, 2013 CPD ¶ 81 at 4. A protest is considered clearly meritorious where a reasonable agency inquiry into the protester's allegations would reveal facts showing the absence of a defensible legal position. Genesis Bus. Sys.--Costs, B-411264.11, Dec. 10, 2015, 2015 CPD ¶ 389 at 2; Basic Commerce & Indus., Inc.--Costs, B-401702.3, Feb. 22, 2010, 2010 CPD ¶ 258 at 4.

In our view, Synchron raised a clearly meritorious challenge to the agency's cost realism evaluation--which the Navy does not dispute. As to Synchron's other protest challenges, however, the Navy presented a defensible legal position based on the factual record, so we cannot regard those issues as clearly meritorious.

As a preliminary matter, we note that our Office never issued a decision nor otherwise expressed an opinion (e.g., in the form of an "outcome prediction" ADR) on the merits on Synchron's noncost evaluation challenges.⁷ Further, we find that record provided to our Office with the agency report supports the Navy's technical evaluation of Synchron and resulting source selection decision. As detailed above, the Navy explained how the agency evaluators determined the findings and ratings for Synchron's proposal under the key personnel resumes subfactor and management approach factor. The agency also explained that the evaluators already took into account those aspects of its proposal which the protester alleged were ignored, or why certain things were not in fact considered (e.g., Synchron's past performance under the key personnel resumes subfactor). While the protester alleges that it should have received higher ratings under the key personnel resumes and management approach criteria, its arguments regarding the agency's evaluation in these areas are not clearly meritorious. In sum, the Navy presented a

⁶ As a general rule, so long as an agency takes corrective action in response to a protest by the due date of its protest report, we regard such action as prompt and decline to consider favorably a request to recommend reimbursement of protest costs. Alsalam Aircraft Co.--Costs, B-401298.3, Nov. 5, 2009, 2009 CPD ¶ 208 at 3.

⁷ In outcome prediction ADR, the GAO attorney handling a protest convenes the parties, at their request or at GAO's initiative, and explains what she or he believes the likely outcome will be, and the reasons for that belief. 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. Genesis Bus. Sys.--Costs, supra, at 2.

defensible legal position that the evaluation of Synchron's proposal under the key personnel resumes subfactor and management approach factor was reasonable, and that the evaluators fully considered those aspects of Synchron's proposal which the protester alleges should have resulted in higher assigned ratings.

Additionally, while the Navy does not dispute that Synchron should be reimbursed the protest costs associated with its cost realism evaluation challenge, we find this does not provide a basis for our recommending the reimbursement of costs for the other aspects of its protest. A successful protester should generally be reimbursed the costs incurred with respect to all the issues pursued. The Salvation Army Cmty. Corr. Program--Costs, B-298866.3, Aug. 29, 2007, 2007 CPD ¶ 165 at 7. However, in appropriate cases, we have properly limited our recommendation for the award of protest costs where a part of those costs is allocable to unsuccessful protest issues that are so clearly severable from the successful issue 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. In determining whether protest issues are so clearly severable as to essentially constitute 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.⁸ Debcon, Inc.--Costs, B-412298.3, Apr. 26, 2016, 2016 CPD ¶ 122 at 6; Core Tech Int'l Corp.--Costs, B-400047.2, Mar. 11, 2009, 2009 CPD ¶ 59 at 8.

On the record here, we find no basis on which to recommend reimbursement of protest costs regarding the protester's challenges to the evaluation under the key personnel resumes subfactor and management approach factor. First, as noted

⁸ In applying these principles, we have severed costs arising from allegations of misevaluation under separate evaluation factors on the basis that they are not clearly intertwined. For example, challenges to a past performance evaluation were not clearly intertwined with clearly meritorious challenges to the technical factor evaluation and the resulting tradeoff. Genesis Bus. Sys.--Costs, supra, at 4; see also Carney, Inc.--Costs, B-408176.13, Feb. 14, 2014, 2014 CPD ¶ 82 at 5 (severing costs for alleged misevaluation of price from clearly meritorious challenge to technical capability factor evaluation); Loyal Source Gov't Servs., LLC--Costs, B-407791.4, Feb. 14, 2014, 2014 CPD ¶ 139 at 4 (severing costs for evaluation challenges from clearly meritorious challenge to adequacy of best-value tradeoff rationale). In a similar fashion, we severed the costs for challenges to the evaluation of the awardee's proposal and to the agency's alleged failure to amend a solicitation because those issues were not clearly intertwined with a clearly meritorious allegation of unequal discussions. VSE Corp.; The Univ. of Hawaii--Costs, B-407164.11, B-407164.12, June 23, 2014, 2014 CPD ¶ 202 at 8.

above, these issues were not independently clearly meritorious. Further, these issues were not clearly intertwined with Synchron's clearly meritorious challenge to the agency's cost realism evaluation. The questions involved distinct aspects of the record, the issues were not intertwined factually or legally, and the reasons why the Navy made adjustments to Synchron's cost proposal were unrelated to the protester's technical proposal, including the key personnel resumes and management approach sections. Lastly, while the Navy has presented argument and evidence to support its contention that Synchron's other challenges should be severed from the cost realism evaluation challenge, the protester has presented nothing other than its assertion that a "deeply flawed" agency evaluation was the "common thread" of its protest. Synchron Comments, Apr. 13, 2016, at 3.

The request is denied.

Susan A. Poling
General Counsel