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Decision

Matter of: Dynaxys LLC--Costs

File: B-414459.3

Date: September 25, 2017

Jonathan J. Frankel, Esq., Karla J. Letsche, Esq., and Craig LaChance, Esq., Frankel PLLC, and Patricia H. Wittie, Esq., Wittie Law PLLC, for the protester. Blythe I. Rodgers, Esq., and Julie K. Cannatti, Esq., Department of Housing and Urban Development, for the agency. Heather Weiner, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

GAO recommends reimbursement of the costs of filing and pursuing challenges against the agency's evaluation of proposals, price reasonableness determination, and source selection decision, where the evaluation challenges were clearly meritorious, or intertwined with clearly meritorious issues.

DECISION

Dynaxys LLC, of Silver Spring, Maryland, requests that we recommend that it be reimbursed the costs associated with filing and pursuing its protest against the award of a contract to KeyBank National Association, of Overland Park, Kansas, under request for proposals (RFP) No. DUR100R-15-R-0001, which was issued by the Department of Housing and Urban Development (HUD), for multi-family mortgage loan servicing.

We grant the request.

BACKGROUND

On March 13, 2017, Dynaxys protested HUD's award to KeyBank, challenging the agency's evaluation of technical proposals and price reasonableness determination. The protester also asserted that the agency improperly failed to conduct a proper best-value tradeoff, and challenged the agency's source selection determination. Specifically, the protester argued that HUD failed to evaluate proposals in accordance with the rating scheme established in the RFP, and also asserted that the agency improperly converted the procurement from one conducted on the basis of best value, into a lowest-price, technically acceptable competition. On April 24, Dynaxys filed a

supplemental protest expanding its challenges to the agency's evaluation, price reasonableness determination, and source selection decision.

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 parties that GAO would likely sustain Dynaxys' protest challenging the agency's determination that Dynaxys' proposed price was unreasonably high on the basis that the record failed to support the agency's determination. In addition, the GAO attorney advised that GAO would likely sustain Dynaxys' protest of the agency's source selection decision on the basis that the agency failed to reasonably consider the relative merits of the proposals based on the evaluation scheme set forth in the RFP. In this regard, the GAO attorney pointed out that the source selection authority (SSA) concluded that both the awardee's and protester's proposals were rated overall as "technically acceptable," even though "technically acceptable" was not one of the adjectival ratings provided in the solicitation. Further, the GAO attorney advised that the SSA's determination in this regard was problematic because the SSA's conclusion was inconsistent with the underlying technical evaluation, which reflected that Dynaxys' proposal received a higher technical rating. The GAO attorney recommended that the agency conduct a new price reasonableness determination, conduct a best-value tradeoff assessment, and make a new award decision. Additionally, the GAO attorney advised that a written decision on the protest was unlikely to sustain the protester's organizational conflict of interest (OCI) protest ground.

In response to the ADR, the agency informed our Office that it intended to take corrective action consisting of, at a minimum, reevaluating proposals, making a new price reasonableness determination, best-value tradeoff recommendation, and source selection decision. Based on the agency's proposed corrective action, GAO dismissed Dynaxys' protest as academic. Dynaxys LLC, B-414459, B-414459.2, May 30, 2017, (unpublished decision). Following the dismissal of the protest, Dynaxys filed this request that GAO recommend the reimbursement of its costs of filing and pursuing its protest.

DISCUSSION

Dynaxys asks our Office to recommend that HUD reimburse it for the costs associated with all of the issues pursued, with the exception of its OCI allegations.¹ In response, HUD does not dispute that the protester should be reimbursed its costs of pursuing its challenge to the agency's price reasonableness determination, but maintains that Dynaxys' reimbursement should be limited to this issue.

¹ The protester does not seek reimbursement for costs for its OCI allegations. Protester's Response (July 6, 2017), at 2 ("Protester is excluding [Dynaxys' OCI allegations] from its request for costs.").

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, HUD does not contest the protester’s request that we recommend reimbursement of its protest costs associated with challenging the agency’s price reasonableness determination, which as noted previously, was one of the topics of the ADR. With regard to the second issue discussed during the ADR conference, which concerned the agency’s determination that the protester’s and awardee’s proposals were “technically equal,” as previously stated, the GAO attorney advised during the ADR conference that a written decision on the protest was likely to sustain Dynaxys’ protest of the agency’s source selection decision on the basis that the agency failed to reasonably consider the relative merits of the proposals based on the evaluation scheme set forth in the RFP. As such, we find that this protest ground satisfies the “clearly meritorious” requirement for the purpose of recommending reimbursement of protest costs. National Opinion Research Ctr.--Costs, supra.

Accordingly, the only remaining question for resolution by our Office is whether the protester should be reimbursed for its remaining challenges to the agency’s evaluation of proposals.

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--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 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; 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.

HUD argues that the remaining challenges to the agency's evaluation of proposals are clearly severable because the concerns identified in the outcome prediction ADR focused on the price evaluation, and not the evaluation conducted by the lower-level technical evaluators. We disagree. As noted above, in addition to the price evaluation, the ADR addressed the agency's determination that the protester's and awardee's proposals were "technically equal." In our view, the other protest 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, Dynaxys argued, among other grounds, that the agency's evaluation of its proposal under task 3 was inconsistent with the solicitation's evaluation criteria and disparate with regard to the awardee. The protester further contended that this error, 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 failure to conduct a 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 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 determination.

RECOMMENDATION

We recommend that Dynaxys be reimbursed the costs associated with filing and pursuing its protest, including reasonable attorneys' fees. Dynaxys should submit its certified claim, detailing the time 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).

The request is granted.

Susan A. Poling
General Counsel