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Decision

Matter of: NOVAD Management Consulting, LLC

File: B-419194.9

Date: September 30, 2022

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Julie Holvik, Esq., Justin D. Haselden, Esq., and Julie K. Cannatti, Esq., Department of Housing and Urban Development, for the agency.

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DIGEST

Request that GAO recommend reimbursement of protest costs is granted in part where the agency unduly delayed taking corrective action in response to clearly meritorious protest arguments, and denied in part where other protest grounds were not clearly meritorious and are readily severable.

DECISION

NOVAD Management Consulting, LLC (NOVAD), a small business of Landover, Maryland, requests that our Office recommend the agency reimburse it for the reasonable costs of filing and pursuing a protest of the award of a contract by the Department of Housing and Urban Development to Compu-Link Corporation, doing business as Celinx, of Lansing, Michigan, under request for proposals (RFP) No. 86614920R00007 for reverse mortgage loan services. The protester challenged the agency's evaluation of proposals, conduct of discussions, and best-value tradeoff. The protester also argued that the agency insufficiently addressed an organizational conflict of interest (OCI) on the part of Celinx. After our Office advised the parties during an alternative dispute resolution (ADR) conference that GAO likely would sustain the protest, the agency stated that it would take corrective action, and we dismissed the protest as academic.

The request is granted in part and denied in part.

BACKGROUND

The agency issued the RFP on August 27, 2020, on an unrestricted basis. Agency Report, Tab 2, RFP at 1d.¹ The RFP anticipated the award of a single fixed-price contract, with reimbursable contract line items, for a base year and four 1-year option periods. RFP at 14. The solicitation contemplated that award would be made on a best-value tradeoff basis, considering the following evaluation factors: technical approach; quality control plan; management plan; past performance; socioeconomic participation; and price. *Id.* at 155-61. The non-price factors were of equal importance and, when combined, were significantly more important than price. *Id.* at 161.

Relevant here, the RFP required offerors to submit a technical approach demonstrating, among other things, logical and feasible methods for meeting the requirements of the performance work statement (PWS), and a labor mix and level of effort with labor categories and number of hours for each labor category. *Id.* at 145. The agency would evaluate how well each proposal demonstrated logical and feasible methods for meeting the PWS requirements, as well as how well the proposed labor mix was based upon reasonable assumptions and was consistent with PWS requirements and the proposed technical approach. *Id.* at 156. With respect to the socioeconomic participation factor, the RFP required offerors to include letters of commitment from all subcontractors proposed to perform more than 10 percent of the total cost of labor. *Id.* at 147-48. Among the information required to be included in each letter was an identification of the work or professional service disciplines to be provided, as well as any key personnel who would provide support under the subcontract. *Id.* at 148.

During the course of proposal evaluations, the agency requested clarification from Celink regarding an OCI identified in Celink's proposal. Contracting Officer's Statement ¶ 10. After receiving additional information from Celink, the agency requested, and Celink provided, a formal mitigation plan. *Id.* Additionally, the agency executed an OCI waiver with respect to any OCI that might remain. *Id.* The agency completed evaluations and awarded the contract to Celink, which the agency found had submitted the only technically acceptable, and thus awardable, proposal. *Id.* ¶¶ 13, 62.

Following receipt of an unsuccessful offeror letter and a debriefing, NOVAD filed a protest with our Office on April 4, 2022. The protester challenged the agency's evaluation of NOVAD's proposal under each of the non-price factors. Protest at 19-44. The protester also challenged the agency's evaluation of Celink's past performance, the agency's consideration of Celink's OCI, and the absence of a tradeoff analysis, which NOVAD alleged would have been required but for the evaluation errors. *Id.* at 44-48. NOVAD further alleged that Celink was ineligible for award because it failed to register in the system for award management (SAM) database prior to proposal submission. *Id.* at 48-51.

¹ References to page numbers for the RFP are to the page numbers added by the agency to that document.

The agency filed a request for dismissal of NOVAD's protest on April 14, 2022, and attached the waiver of Celink's OCI as an exhibit, in response to which NOVAD filed a supplemental protest on April 20. In the supplemental protest, the protester further challenged the evaluation of NOVAD's proposal under the technical approach factor, and alleged that the agency's waiver of Celink's OCI was unreasonable. Supp. Protest at 10-16.

On April 21, the agency filed a request for dismissal of NOVAD's supplemental protest. Following briefing by the parties, we dismissed the protest allegation regarding Celink's SAM registration, but declined to dismiss the other grounds raised in the initial and supplemental protests. See Notice of Resolution of Reqs. to Dismiss.

After the agency produced its report, NOVAD filed a second supplemental protest on May 16, 2022, which raised numerous additional challenges. Specifically, the protester challenged several aspects of the agency's evaluation of Celink's proposal and alleged disparate treatment of proposals under the technical approach factor. Comments & 2nd Supp. Protest at 8-11, 14-15, 19-48, 58-65, 68-69. Of particular relevance here, the protester alleged that the agency had failed to assign deficiencies to Celink's proposal where it was silent with respect to certain PWS requirements, while it had assigned deficiencies to NOVAD's proposal for similar omissions. *Id.* at 19-48, 58-65. The protester further alleged that Celink's proposal failed to include required labor mix and level of effort information with respect to one of Celink's proposed subcontractors. Additionally, NOVAD alleged that the agency had relaxed the RFP's requirements with respect to font size and page limits for Celink's proposal. *Id.* at 65-68.

As to the quality control plan factor, the protester alleged that the agency had unreasonably evaluated the proposals of both NOVAD and Celink, particularly as related to the [DELETED]. *Id.* at 51-52, 69-70. NOVAD also raised several arguments under the management plan factor, including that Celink's proposed [DELETED] failed to meet the RFP's minimum key personnel requirements. *Id.* at 54-55, 68, 71-73. As to the socioeconomic participation factor, the protester alleged that the agency unreasonably failed to find a deficiency in Celink's proposal because Celink's proposal included a letter of commitment from a subcontractor that was missing required information. *Id.* at 82-84.

Finally, NOVAD raised several additional arguments related to the evaluation of past performance and Celink's OCI. *Id.* 73-75, 77-81, 85-94. NOVAD's second supplemental protest also argued that the agency improperly did not conduct a tradeoff analysis, on the ground that it would have been required if the agency had corrected the alleged evaluation errors. *Id.* at 94-95.

After additional development of the protest record, our Office conducted an "outcome prediction" ADR conference on June 23, 2022. During the conference, the GAO attorney assigned to the protest advised the parties that the protest likely would be sustained in part. To that end, the GAO attorney advised that the record suggested that the agency had disparately evaluated proposals under the technical approach factor.

The GAO attorney cited examples where the record demonstrated that the agency had assigned deficiencies to NOVAD's proposal for failing to address certain PWS requirements, while not assigning similar deficiencies to Celink's proposal where it failed to address similar requirements. Similarly, the GAO attorney also advised that GAO likely would sustain NOVAD's argument that the agency had unreasonably evaluated Celink's labor mix and level of effort under the technical approach factor. The GAO attorney advised that the record did not reflect any agency consideration of Celink's omission of one subcontractor from the labor mix, despite the RFP's requirement that proposals include a labor mix and level of effort with labor categories and number of hours for each labor category. Finally, the GAO attorney advised that GAO likely would sustain NOVAD's argument that a subcontractor letter of commitment in Celink's proposal lacked material information required by the RFP under the socioeconomic participation factor. The GAO attorney advised that GAO likely would recommend that the agency open discussions with offerors to remedy these issues.

By contrast, the GAO attorney advised that the remaining protest grounds likely would be denied, and specifically addressed the challenges to the evaluation of NOVAD's past performance and the sufficiency of the agency's OCI waiver.

On June 24, 2022, the agency advised our Office that it intended to take corrective action by reevaluating proposals, establishing a competitive range, conducting discussions, evaluating revised proposals, and making a new award decision. Based on the agency's proposed corrective action, we dismissed the protest as academic. *NOVAD Mgmt. Consulting, LLC*, B-419194.6 *et al.*, June 27, 2022 (unpublished decision). On July 11, NOVAD filed this request.

DISCUSSION

The protester asks our Office to recommend that the agency reimburse NOVAD for the costs associated with all of the issues raised in its protests. In response, the agency does not dispute that NOVAD should be reimbursed the costs of pursuing the challenges identified by the GAO attorney as likely to be sustained, *i.e.*, both disparate treatment with respect to addressing PWS requirements and the unreasonable evaluation of Celink's labor mix under the technical approach factor, and the sufficiency of a Celink subcontractor's letter of commitment under the socioeconomic participation factor. Agency Resp. at 2. The agency maintains, however, that the protester's reimbursement should be limited to these issues. *Id.*

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs under 4 C.F.R. § 21.8(e) if 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. *East Coast Nuclear Pharmacy--Costs*, B-412053.5, Aug. 31, 2016, 2016 CPD ¶ 249 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. *Octo*

Consulting Group, Inc.--Costs, B-414801.4, Dec. 14, 2017, 2018 CPD ¶ 52 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. *Auxilio FPM JV, LLC--Costs*, B-415215.4, Apr. 27, 2018, 2018 CPD ¶ 162 at 3.

As noted above, the agency does not contest the protester's request that we recommend reimbursement of protest costs associated with disparate treatment and unreasonable evaluation under the technical approach factor and the sufficiency of the letter of commitment provided by one of Celink's proposed subcontractors, which were the protest grounds the GAO attorney advised were likely to be sustained. Agency Resp. at 2. Accordingly, the remaining question for resolution is whether the protester should be reimbursed for all--or any--of the remaining protest grounds.

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; therefore, we will generally 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. 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. *BAE Tech. Servs., Inc.--Costs*, B-296699.3, Aug. 11, 2006, 2006 CPD ¶ 122 at 3. However, 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. 31 U.S.C. § 3554(c)(1)(A); *Fluor Energy Tech. Servs., LLC--Costs*, B-411466.3, June 7, 2016, 2016 CPD ¶ 160 at 3. In determining whether protest issues are so clearly severable as to constitute separate protests, our Office considers, among other things, whether the successful and unsuccessful arguments share a common core set of facts, are based on related legal theories, or are otherwise not readily severable. *Deque Sys., Inc.--Costs*, B-415965.5, Aug. 23, 2018, 2018 CPD ¶ 304 at 5.

For the reasons that follow, we recommend reimbursement of the costs incurred in challenging the agency's evaluation under the technical approach, management approach, quality control, and socioeconomic participation factors, as well as with respect to the protester's tradeoff challenge. We decline, however, to recommend reimbursement of the costs related to the protester's other challenges.

With respect to the evaluation under the technical approach factor, the agency urges us to limit our recommendation to only those costs associated with the disparate treatment of proposals and the unreasonable evaluation of Celink's proposal, and not to include those associated with the challenges to the evaluation of the protester's own proposal. We previously have found, however, that the misevaluation of proposals and unequal treatment of offerors under the same evaluation factor involve the same core facts, and

that such challenges therefore are intertwined for purposes of considering whether protests costs should be reimbursed. See, e.g., *Burns and Roe Servs. Corp.--Costs*, B-310828.2, Apr. 28, 2008, 2008 CPD ¶ 81 at 3. The agency has presented no argument or evidence that persuades us that we should depart from that view under the facts here. The protester here alleged that the agency's evaluation of its proposal under the technical approach factor was unreasonable, inconsistent with the solicitation's evaluation criteria, and disparate with regard to Celink. We consider these issues to share common factual and legal bases, and therefore conclude that the challenges to the evaluation of NOVAD's proposal under the technical approach factor are not readily severable from the clearly meritorious challenges under that same factor.²

Moreover, the challenges to the evaluation under the quality control factor also share common factual and legal bases with the clearly meritorious challenges to the technical approach evaluation. The gravamen of several of NOVAD's technical approach evaluation challenges--which the GAO attorney advised would likely be sustained--was that where Celink's proposal failed to address certain requirements, the agency read Celink's proposal expansively, giving Celink the benefit of the doubt, but where NOVAD's proposal failed to address certain requirements, the agency assigned a deficiency. In other words, the protester alleged that when proposals were silent concerning solicitation requirements, the agency treated the proposals unequally. In this regard, NOVAD's challenges to the evaluation under the quality control factor involve a similar disparate treatment argument with respect to missing information concerning the independence of the [DELETED]. See Comments & 2nd Supp. Protest at 51-52, 69-70. Therefore, the challenges to the quality control plan evaluation are not readily severable from the clearly meritorious challenges to the technical approach evaluation because they rely on a shared legal theory.

Similarly, we note that NOVAD's challenge to the evaluation under the management plan factor involves the same core facts as, and therefore is intertwined with, the protester's successful socioeconomic participation challenge. As discussed above, the GAO attorney advised the parties that our Office likely would sustain NOVAD's challenge to the evaluation of Celink's proposal under the socioeconomic participation factor because Celink's subcontractor's letter of commitment was missing information required by the RFP. Of particular relevance here, the principal information missing from the letter of commitment was an acknowledgement that the subcontractor would be providing key personnel. Specifically, Celink proposed that a subcontractor would

² Similarly, although NOVAD's allegation of waiver of the RFP's font size and page limit requirements is targeted to the form, rather than the substance, of Celink's proposed technical approach, we conclude that it is not readily severable from the clearly meritorious protest grounds relating to the evaluation of proposals under the technical approach factor. See *Odyssey Sys. Consulting Group, Ltd.--Costs*, B-419730.5, Sept. 30, 2021, 2021 CPD ¶ 335 at 6-7 (allegations of evaluation errors, exceedance of page limits, and disparate treatment not readily severable from clearly meritorious ground alleging evaluation errors under the same evaluation factor).

provide a [DELETED], but the subcontractor's letter of commitment did not commit to providing a [DELETED] as required by the RFP. In addition to challenging the letter of commitment under the socioeconomic participation factor, NOVAD also alleged that the qualifications of the proposed [DELETED] did not meet the RFP's minimum requirements under the management plan factor. See *id.* at 68. Thus, these protest grounds involve intertwined issues with respect to whether the awardee complied with the RFP's requirements with respect to the same key position. Accordingly, these grounds of protest are also not readily severable.³

Similarly, we find no basis to sever NOVAD's protest relating to the absence of a tradeoff analysis. As we conclude that there were clearly meritorious grounds of protest with respect to the agency's underlying evaluation, we conclude that NOVAD's challenges to the resulting award decision are not reasonably severable. *Ruchman and Assocs., Inc.--Costs*, B-419968.3, Mar. 10, 2022, 2022 CPD ¶ 76 at 9; *Apex Transit Sols., LLC--Costs*, B-418631.8, Aug. 13, 2021, 2021 CPD ¶ 282 at 9.

However, the protester's other challenges are readily severable from the clearly meritorious protest grounds. In this regard, absent compelling circumstances, our Office has generally treated past performance evaluation-related allegations as severable from other technical, management, or cost evaluation-related challenges. See, e.g., *Protection Strategies, Inc.--Costs*, B-419302.3, May 6, 2021, 2021 CPD ¶ 198 at 6 n.5; *Genesis Bus. Sys.--Costs*, B-411264.11, Dec. 10, 2015, 2015 CPD ¶ 389 at 4.

Here, we deny the request for a recommendation for reimbursement of costs as it relates to NOVAD's protest allegations regarding the evaluation of past performance. As the GAO attorney advised the parties in the ADR conference, our Office likely would deny all NOVAD's challenges to the agency's evaluation of past performance. For example, the GAO attorney explained that there was no basis to conclude that the agency erred in its assessment of the relevance of the protester's past performance, and the record further demonstrated that the performance ratings for the protester's relevant efforts were overwhelmingly poor. Furthermore, we discern no common factual or legal basis as between the challenges to the past performance evaluation and the clearly meritorious grounds of protest. Consistent with the RFP, past performance was independently evaluated under a separate factor from the technical approach and socioeconomic participation factors, and contemplated a distinct analysis from the

³ In contrast, we find no basis to recommend reimbursement of the costs related to NOVAD's challenge based on Celink's registration status in the SAM database. As discussed above, we dismissed this challenge, which the protester concedes is a "narrow, discrete ground." Req. for Costs at 3 n.2. Our dismissal of that challenge indicates that it is materially distinct--both in terms of factual and legal bases--from the remaining protest grounds. *Arrow Security & Training, LLC--Costs*, B-418720.11, Oct. 29, 2020, 2020 CPD ¶ 355 at 7. We therefore conclude that this argument is severable from the clearly meritorious grounds.

evaluation under those factors. See RFP at 157-58. Accordingly, we decline to recommend reimbursement of protest costs related to the past performance challenges.

We also deny the request for reimbursement of costs as it relates to the protester's allegations regarding Celink's OCI. The GAO attorney advised the parties that there was no basis to sustain the arguments that the agency's OCI waiver was improper or deficient. The allegations also do not share common factual bases or legal theories with the clearly meritorious evaluation challenges.⁴ See *PB&A, Inc.; Env'tl. Synectics, Inc.--Costs*, B-410074.3, B-410074.4, Sept. 15, 2015, 2015 CPD ¶ 285 (severing unsuccessful OCI arguments based on distinct factual and legal bases from clearly meritorious challenges to proposed consolidation of requirements); cf. *Honeywell Tech. Solutions, Inc.--Costs*, B-296860.3, Dec. 27, 2005, 2005 CPD ¶ 226 (severing unsuccessful evaluation challenges from clearly meritorious OCI ground). We therefore deny the request for reimbursement of costs with respect to the OCI challenges.

RECOMMENDATION

For the foregoing reasons, we recommend that the protester be reimbursed its reasonable protest costs, including attorneys' fees, related to challenging only the agency's evaluation under the technical approach, management approach, quality

⁴ In addition to challenging the reasonableness of the agency's consideration of the alleged OCI and the subsequent waiver, NOVAD also argued that the agency's communications with Celink regarding the OCI constituted unequal discussions. As a general matter, a contracting officer's consideration of whether a contractor is eligible for award despite an OCI is analogous to a responsibility determination, and exchanges relating to an offeror's responsibility, rather than proposal evaluation, do not generally constitute discussions. See *Overlook Sys. Techs., Inc.*, B-298099.4, B-298099.5, Nov. 28, 2006, 2006 CPD ¶ 185.

Accordingly, we do not recommend reimbursement for the costs of pursuing this argument because (1) they do not share a common set of factual and legal bases with the clearly meritorious protest grounds, and (2) as the GAO attorney advised during the ADR conference, resolution of the allegation would have required further development, but the allegation was effectively mooted by our likely recommendation to open discussions to address the clearly meritorious protest grounds. We have consistently concluded that protest grounds that would have required additional record development to resolve are not clearly meritorious. See, e.g., *Threat Mgmt. Group*, B-407766.5, Mar. 28, 2013, 2013 CPD ¶ 84 at 6 (arguments not clearly meritorious where our Office required agency to provide additional explanation); *Apptis Inc.--Costs*, B-402146.3, Mar. 31, 2010, 2010 CPD ¶ 123 at 5 (need for additional development demonstrates protest arguments not clearly meritorious).

control, and socioeconomic participation factors, as well as the agency's tradeoff. NOVAD 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. 4 C.F.R. § 21.8(f)(1).

The request is granted in part and denied in part.

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