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Decision

Matter of: Meridian Knowledge Solutions, LLC

File: B-420808.3

Date: December 5, 2022

Lucas T. Hanback, Esq., Rogers Joseph O'Donnell, PC, for the requester.
James Muetzel, Esq., Office of Personnel Management, for the agency.
Uri R. Yoo, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Request that GAO recommend reimbursement of protest costs is denied where the agency did not unduly delay taking corrective action in the face of a clearly meritorious protest.
 2. Request that GAO recommend reimbursement of protest costs is denied where the protest issue was untimely raised; a prerequisite to the recovery of protest costs related to agency corrective action is a timely filed protest allegation.
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DECISION

Meridian Knowledge Solutions, LLC, of Arlington, Virginia, requests that our Office recommend that it be reimbursed the reasonable costs of filing and pursuing its protest challenging the terms of request for proposals (RFP) No. 24322622R0003, issued by the Office of Personnel Management (OPM) for learning system licenses or software subscriptions to support OPM's USALearning program. The requester contends that the agency failed to take prompt corrective action in response to clearly meritorious protest grounds. Although OPM agrees to reimburse the requester for the costs related to several of Meridian's initial and supplemental protest grounds, it does not agree to reimburse Meridian for the cost of pursuing an issue on which the agency took prompt corrective action and an issue that was not timely raised.

We deny the request.

BACKGROUND

On May 16, 2022, OPM issued the RFP as a small business set-aside for value-added resellers to provide learning-system licenses or software subscriptions to support customer agencies using services offered under OPM's USALearning program. B-420808, Agency Report (AR), Exh. 22, RFP at 1, 2. The RFP contemplated the award of "approximately ten" indefinite-delivery, indefinite-quantity (IDIQ) contracts to offerors with the lowest-price, technically acceptable proposals, using the streamlined procedures for commercial items in accordance with Federal Acquisition Regulation (FAR) subpart 12.6 in conjunction with FAR part 15. *Id.* at 2.

The RFP required offerors to provide learning system licenses or software subscriptions to support various training and education requirements within USALearning customer agencies. *Id.* A technically acceptable offeror was required to "demonstrate its ability to provide the required Learning System Licenses as a small business reseller of the manufacturer." *Id.* at 6. Specifically, the RFP required the offeror to be a value-added reseller under the North American Industrial Classification System (NAICS) code 541519, Information Technology (IT) Value Added Reseller¹, and be authorized to represent and sell two or more of the specific licenses listed in the RFP's table of 17 "Applicable Software Brands." *Id.* at 2-3, 8-9. The RFP described the listed software licenses as follows:

These licenses . . . are commercial vendor hosted annual subscription services, provide virtual licenses for live and virtual instructor-led events, content learning portals and platforms, talent & learning management systems, commercial-off-the-shelf (COTS) eLearning content libraries, assessment and survey software, collaboration, asynchronous instructor led platforms and other as required.

Id. at 2. The agency included as part of the RFP a class justification and approval (J&A) for other than full and open competition to support limiting the required licenses to the 17 brand-name products listed in the solicitation. See AR, Exh. 22i, RFP attach. 9, J&A. The RFP provided that technical proposals would be evaluated based on the offeror's

¹ Regulations describing NAICS code 541519 defines an IT value-added reseller as follows:

An Information Technology Value Added Reseller (ITVAR) provides a total solution to information technology acquisitions by providing multi-vendor hardware and software along with significant value added services. Significant value added services consist of, but are not limited to, configuration consulting and design, systems integration, installation of multi-vendor computer equipment, customization of hardware or software, training, product technical support, maintenance, and end user support.

13 C.F.R. § 121.201, fn.18.

“proposal to provide all product(s)/service(s) identified within the [Federal Risk and Authorization Management Program² (FedRAMP)] authorized software licenses and current status as an authorized [v]alue-[a]dded reseller.” *Id.* at 8.

On June 7, 2022, Meridian filed a pre-award protest with our Office, docketed as B-420808, challenging various solicitation terms as being unduly restrictive of competition. Specifically, Meridian asserted as follows: (1) the requirement for offerors to be certified at FedRAMP moderate or above at the time of proposal submission is unduly restrictive and constitutes an unjustified qualification requirement; (2) the requirement for offerors to provide at least two licenses does not reflect legitimate agency needs; (3) the agency’s justification does not support the decision to limit competition to the brand name software listed in the solicitation; (4) the agency engaged in disparate treatment by including the KUDO platform as one of the 17 approved brand name products, a product that is not currently certified as FedRAMP moderate, while excluding Meridian’s product for not being FedRAMP certified; and (5) the solicitation was otherwise defective because the J&A showed a lack of advance planning, no evidence of considering competing offerors’ capabilities, incorporates non-standard commercial terms, and does not indicate how the agency will increase competition. Protest at 5-16.

On July 7, the agency submitted its report responding to each of the protester’s allegations. With respect to the protester’s disparate treatment allegation (protest ground No. 4), however, the agency stated that it had already taken immediate corrective action by amending the solicitation to remove KUDO from the list of approved brand name licenses. Contracting Officer’s Statement (COS) at 18; see AR, Exh. 18, RFP, Amend. 0003 at 3.

On July 18, Meridian filed its comments on the agency report, as well as a supplemental protest alleging four new protest grounds. In the supplemental protest, Meridian alleged that the agency: (1) improperly requested a waiver of the small business nonmanufacturer rule at 15 U.S.C. § 637(a)(17) and 13 C.F.R. § 121.406(b); (2) created and failed to mitigate an unequal access to information organizational conflict of interest (OCI) with respect to the incumbent, PowerTrain; and (3) improperly procured Acadis learning management system (LMS) licenses on behalf of the Department of Homeland Security (DHS) in advance of making a competitive award. Meridian also argued, for the first time, that the agency applied the FedRAMP requirement in a disparate manner by permitting Adobe Captivate Prime, currently certified only as FedRAMP low impact, to be included on the list of approved brand name licenses. Comments and Supp. Protest at 3-8. The protester also argued in its comments that amending the solicitation in response to the disparate treatment allegation in the initial protest did not render that issue academic because removing KUDO did not resolve the inequity of requiring

² FedRAMP is a governmentwide program that promotes the adoption of secure cloud services across the federal government by providing a standardized approach to security and risk assessment for cloud technologies and federal agencies. See www.fedramp.gov (last visited Dec. 1, 2022).

FedRAMP certifications in the first place, which deprived Meridian of its opportunity to compete. *Id.* at 16.

Prior to the date set by our Office for the agency to submit a supplemental agency report, OPM notified our Office that it would take corrective action in response to the supplemental protest. Notice of Corrective Action at 1. Specifically, the agency stated that it would suspend the RFP, conduct additional market research, and amend the solicitation, as necessary, based on the market research. *Id.* At the request of the protester, the agency clarified that “OPM intends to use the FedRAMP Marketplace website to identify licenses that are FedRAMP ‘in process’ and include them in the Solicitation.” Reply to Protester’s Response to Proposed Corrective Action at 1.

Based on the agency’s proposed corrective action, we dismissed the protests as academic. *Meridian Knowledge Solutions, LLC*, B-420808, B-420808.2, July 28, 2022 (unpublished decision). This timely request followed.

DISCUSSION

Meridian asks our Office to recommend that OPM reimburse the requester for the costs associated with all of the issues raised in its protests. Req. for Reimbursement at 1-2. In response, the agency agrees to reimburse Meridian for costs related to certain protest issues, but not for others. Partial Objection to Req. for Reimbursement at 2-5.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs 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. 4 C.F.R. § 21.8(e); *East Coast Nuclear Pharmacy--Costs*, B-412053.5, Aug. 31, 2016, 2016 CPD ¶ 249 at 5. As a prerequisite to our recommending the reimbursement of costs where a protest has been resolved by corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious, *i.e.*, not a close question. *Harley Marine Servs., Inc.--Costs*, B-416033.4, Mar. 15, 2019, 2019 CPD ¶ 121 at 4. 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.

Here, Meridian argues that the agency unduly delayed taking corrective action in the face of its clearly meritorious protest grounds. OPM responds that it agrees to reimburse Meridian for costs related to most of the protest grounds alleged in its initial protest and the first supplemental protest grounds. Partial Objection to Req. for Reimbursement at 2. However, the agency opposes reimbursement for costs related to Meridian’s initial protest ground (alleging disparate treatment with respect to KUDO being on the list of approved licenses), as well as the supplemental protest allegation of disparate treatment with respect to Adobe Captivate Prime being on that list. *Id.* at 2-4. The agency also opposes reimbursement for costs related to Meridian’s supplemental

protest grounds asserting that the agency created an unmitigated OCI, and that the agency is improperly procuring Acadis LMS for DHS outside of competition.³ *Id.* at 3.

As a general rule, we consider a successful protester entitled to costs incurred with respect to all issues pursued, not merely those upon which it prevails. *JRS Staffing Servs.--Costs, supra*. In our view, 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. *AAR Aircraft Servs.--Costs*, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 9. On the other hand, failing to limit the recovery of protest costs in all instances of partial or limited success by a protester may result in an unjustified windfall to the protester and cost to the government. *JRS Staffing Servs.--Costs, supra*.

Accordingly, in appropriate cases we have limited the recommended reimbursement of protest costs where a part of the costs is allocable to a losing protest issue that is so clearly severable as to essentially constitute a separate protest. See, e.g., *VSE Corp.; The Univ. of Hawaii--Costs*, B-407164.11, B-407164.12, June 23, 2014, 2014 CPD ¶ 202 at 8; *Honeywell Tech. Solutions, Inc.--Costs*, B-296860.3, Dec. 27, 2005, 2005 CPD ¶ 226 at 3-4. In determining whether protest issues are so clearly severable as to constitute essentially 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. *JV Derichebourg-BMAR & Assocs., LLC--Costs*, B-407562.3, May 3, 2013, 2013 CPD ¶ 108 at 3-4.

On this record, we find that reimbursement of costs related to pursuing protest issues beyond those to which the agency has agreed to pay is not appropriate here. We discuss each contested issue in turn.

First, we decline to recommend reimbursement of costs where the agency took prompt corrective action in response to the initial protest allegation. Here, Meridian initially

³ The agency also objects to reimbursement of costs that Meridian incurred in pursuing certain document requests, including a request to produce documents cited in another protest, which requests were denied on the basis that the documents were not relevant. *Id.* at 4-5. The agency's arguments in this regard are misplaced. When determining whether our Office will recommend that an agency reimburse a protester its costs for pursuing a protest, the issue is not whether specific categories of costs should be reimbursed, but rather, whether the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, and whether such recovery of costs should be limited to those allocable to protest issues that were not clearly meritorious and severable from the meritorious protest issues. See, e.g., *East Coast Nuclear Pharmacy--Costs, supra*; *JRS Staffing Servs.--Costs*, B-410098.6 *et al.*, Aug. 21, 2015, 2015 CPD ¶ 262 at 5. In short, our conclusions here are based on applying this standard to the arguments made, and not on the activities for which costs were incurred.

alleged that the agency treated Meridian disparately by excluding Meridian's LMS from the solicitation's list of approved licenses for not being FedRAMP certified, while allowing the KUDO platform--a product that is also not FedRAMP certified--to be included. Protest at 11-12. However, OPM promptly took corrective action on this protest issue by amending the solicitation to remove KUDO from the list of approved licenses after "re-check[ing] the status of the learning system license for KUDO Platform in the FedRAMP Marketplace website" and confirming that it was not FedRAMP authorized. COS at 18; Memorandum of Law at 6.

As noted, our Office may recommend reimbursement of protest costs if we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. See *East Coast Nuclear Pharmacy--Costs, supra*. When an agency takes corrective action before the due date set for receipt of an agency report, our Office views such action as prompt and will not recommend the reimbursement of costs. *Career Sys. Dev. Corp.--Costs*, B-411346.10, July 18, 2018, 2018 CPD ¶ 249 at 5. Here, the record shows that the agency amended the solicitation to remove KUDO from the list of approved licenses on June 9, just three days after Meridian filed its initial protest on June 6 and before the agency report was due on July 7. COS at 18; see AR, Exh. 18, RFP, Amend. 0003 at 3.

Meridian argues that this issue is not severable from its other meritorious challenges to the solicitation's FedRAMP requirement. Response to Agency's Partial Objection at 3-4. In this regard, Meridian had argued in its comments to the agency report that the agency's solicitation amendment did not correct the disparate treatment issue because it did not resolve the problematic requirement for the listed licenses to be certified FedRAMP-moderate. Comments and Supp. Protest at 16. We reject Meridian's contention that the issues should not be severed. The legal issues and facts supporting Meridian's allegation that the agency unequally applied the FedRAMP requirement *vis-a-vis* other licenses listed in the solicitation are fundamentally different from those presented by Meridian's more generalized challenge to the solicitation's FedRAMP requirement as being unduly restrictive. The severability of the disparate treatment issue is further made apparent by the fact that the agency promptly addressed that specific issue--inclusion of KUDO in the solicitation--by amending the solicitation within three days of protest filing, before substantively addressing the remaining protest grounds, including the justification for the FedRAMP requirement, in the agency report. We therefore decline to recommend reimbursement of costs for the disparate treatment arguments with respect to KUDO because the agency did not unduly delay taking corrective action in response to that protest ground.

Meridian also contends that the solicitation amendment removing KUDO did not remedy the disparate treatment of the protester's product because the RFP continued to include another product, Adobe Captivate Prime--also not FedRAMP-moderate certified--on the list. Response to Agency's Partial Objection at 3-4. Based on this assertion, Meridian alleged for the first time in its supplemental protest an additional disparate-treatment issue with respect to Adobe Captivate Prime. Comments and Supp. Protest at 6-8. In this regard, Meridian argues that it should be reimbursed not only for the cost of

pursuing the disparate treatment arguments with respect to KUDO, but also for the cost of pursuing the supplemental protest ground of disparate treatment with respect to Adobe Captivate Prime. Response to Agency's Partial Objection at 3-4.

However, Meridian's supplemental protest ground with respect to Adobe Captivate Prime was an untimely argument that Meridian could have raised, but did not raise, in its initial protest. To be clear, the agency did not add Adobe Captivate Prime when it amended the solicitation to remove KUDO; Adobe Captivate Prime was one of the solicitation's approved licenses when Meridian filed its initial protest. See AR, Exh. 22a, RFP attach. 1, Learning System Licenses at 2. Therefore, the issue with Adobe Captivate Prime was known, or should have been known, to Meridian when it filed its initial protest and thus should have been raised at that time. See *Synergy Solutions, Inc.*, B-413974.3, June 15, 2017, 2017 CPD ¶ 332 at 7. Our regulations do not permit the piecemeal presentation of protest issues, where, as here, there is no reason Meridian could not have earlier raised this contention. *Vertex Aerospace, LLC*, B-418828.8, July 23, 2021, 2021 CPD ¶ 272 at 9.

A protester is not entitled to recover protest costs where the record shows that the protest ground was in fact untimely. *Agile-Bot II, LLC--Costs*, B-418264.4, July 30, 2020, 2020 CPD ¶ 258 at 9; see *Allied Materials & Equip. Co.--Costs*, B-243631.3, Oct. 31, 1991, 91-2 CPD ¶ 412 at 3. Here, because the supplemental protest issue alleging disparate treatment with respect to Adobe Captivate Prime was untimely raised, we decline to recommend that Meridian be reimbursed for those costs.

Finally, we also decline to recommend reimbursement with respect to the costs incurred in pursuing Meridian's two remaining supplemental protest grounds, for which the agency took prompt corrective action. Partial Objection to Req. for Reimbursement at 3. As noted, when an agency takes corrective action before the due date set for receipt of an agency report, our Office views such action as prompt and will not recommend the reimbursement of costs. *Career Sys. Dev. Corp.--Costs, surpa*.

The record shows that Meridian alleged, for the first time in its supplemental protest, that the agency: (1) created and failed to mitigate an OCI with respect to the incumbent PowerTrain; and (2) procured Acadis LMS for DHS in advance of competitive awards under this RFP. Comments and Supp. Protest at 5-6. Our Office requested that OPM submit its supplemental report by close of business on July 22, and the agency notified our Office of its intent to take corrective action on the established deadline. See Electronic Protest Docketing System (Dkt.) No. 27, B-420808 (establishing a deadline of close of business, July 22, for supplemental agency report); Dkt. No. 28 (agency's notice of corrective action filed at 8:52 a.m. Eastern Time on July 22).

We decline to accept Meridian's argument that these supplemental protest grounds are not readily severable from other protest grounds because they were based on the documents provided by the agency in response to Meridian's meritorious initial protest grounds. See Response to Agency's Partial Objection at 2-3. In this regard, Meridian contends that the "core of Meridian's protest was the allegation that DHS was moving a

competitive procurement to the USA Learning vehicle, and that the terms of the new competition unfairly prohibited Meridian from competing for this business it had long held.” *Id.* at 2. Meridian argues that its supplemental protest grounds alleging PowerTrain’s OCI as the incumbent and OPM’s procurement of Acadis LMS for DHS without proper competition are inextricably intertwined with the merits of that “core” protest. *Id.* We disagree.

Our review of the record shows that neither the OCI allegation with respect to PowerTrain nor the allegation of improper acquisition of Acadis LMS for DHS were raised in, or related to, Meridian’s initial protest, such that the agency’s investigation of the initial protest should have revealed the asserted evaluation errors. Under these circumstances, we consider the agency’s corrective action, taken before the deadline set for the submission of a supplemental agency report, to have been prompt. See *Metalcraft, Inc.--Costs*, B-402181.3, May 17, 2010, 2010 CPD ¶ 116 at 3 (finding that corrective action was not unduly delayed when taken prior to the submission of a supplemental agency report and where supplemental protest allegations were not related to the initial protest such that the agency’s investigation of the initial protest should have revealed the asserted evaluation errors). Accordingly, we decline to recommend reimbursement of the costs Meridian incurred in pursuing these supplemental protest grounds.

The request that GAO recommend reimbursement of protest costs for issues beyond those which the agency has already agreed to pay is denied.

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