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Decision

Matter of: Open SAN Consulting, LLC d/b/a OSC Edge--Costs

File: B-421507.2

Date: December 18, 2023

Stuart W. Turner, Esq., and Michael McGill, Esq., Arnold & Porter Kaye Scholer, LLP, for the protester.

George E. Wise, Esq., Defense Information Systems Agency, for the agency.

Charmaine A. Stevenson, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request that GAO recommend reimbursement of protest costs is granted where challenge to a proposed sole-source task order was clearly meritorious, and the agency unduly delayed taking corrective action.

DECISION

Open SAN Consulting, LLC, doing business as OSC Edge (OSC), an 8(a) small business of Atlanta, Georgia, requests that our Office recommend that it be reimbursed the costs of filing and pursuing its protest challenging the planned issuance of a sole-source task order to Leidos, Inc. under that firm's Defense Enclave Services (DES) contract with the Defense Information Systems Agency (DISA).

We grant the request.

BACKGROUND

The procurement actions challenged in the protest that led to this request arose under an unusual set of circumstances. The National Defense University (NDU) is a component of the Department of Defense and operates under the control of the Chairman of the Joint Chiefs of Staff.¹ NDU does not have its own procurement

¹ NDU is an institution of higher learning whose mission is to educate joint warfighters and other national security leaders in critical thinking and the creative application of military power to inform national strategy and globally integrated operations, under

(continued...)

authority or contracting staff and thus relies on other defense agencies to conduct its procurements. As relevant to the protest and this request, in January 2018, the Department of the Navy, Naval Supply Systems Command (NAVSUP), acting as the procurement agency for NDU, awarded a contract to OSC following a competition set aside for small businesses to fulfill NDU's enterprise information technology (IT) support services requirements. NAVSUP Contracting Officer's Statement (COS) at 1. Under this contract, OSC has performed enterprise network support, full spectrum help desk support, enterprise cyber security, network modernization, software development, experimentation, training environment development, lessons learned, and training. See Protest, exh. A, Contract No. N0018918DZ010, Performance Work Statement at 5. The ordering period began on January 8, 2018, and as stated in the duration of contract period clause, "shall continue in effect during the period ending 60 months after date of contract unless terminated in accordance with other provisions herein. Performance under any task order may continue in effect during the period ending twelve months after the last day of the ordering period." *Id.* at 3, 50.

Separately, on February 28, 2022, DISA awarded the DES contract to Leidos pursuant to a request for proposals published by DISA using Federal Acquisition Regulation (FAR) part 15 procedures for full and open competition to award a single indefinite-delivery, indefinite-quantity contract. Req. for Dismissal at 3; Agency Report (AR), Tab 8, DES Contract Award Notice.² The DES solicitation description explained:

In 2019, the Deputy Secretary of Defense designated DISA as the single service provider to optimize network capabilities for Fourth Estate^[3] Defense Agencies and Department of Defense Field Activities (DAFAs). The DES contract will unify the Fourth Estate's common use Information Technology (IT) systems, personnel, functions and program elements under DISA; DISA will leverage the DES contract to manage, operate and support the network architecture. DES will provide integrated, standardized and cost-effective IT services; while improving security, network availability and reliability for 22 DAFAs within the Fourth Estate. The DES effort will establish the modern infrastructure foundation and united frame of thought needed to deliver cohesive combat support capabilities to the warfighter.

AR, Tab 3, DES Solicitation Description at 2. NDU was not included among the 22 DAFAs identified in the DES solicitation. AR, Tab 4, DES Solicitation at 12.

conditions of disruptive change, in order to prevail in war, peace, and competition. See <https://www.ndu.edu/About/Vision-Mission/> (last visited October 10, 2023).

² All record citations are to the record from B-421507.

³ The fourth estate refers to defense agencies and Department of Defense field activities; these are organizational entities in the Department of Defense that are not in the military departments, intelligence community agencies, or combatant commands. See https://4edacm.dau.edu/4e_agencies.html (last visited November 21, 2023).

On March 6, 2023, OSC filed a protest with our Office challenging DISA's planned issuance of a task order to Leidos under its DES contract. In its protest, OSC stated that it was the current contractor providing enterprise IT services to NDU. OSC further stated that on February 23, during a conference call with the NDU contracting officer's representative,⁴ OSC was informed that a decision had been made that NDU's enterprise IT support requirements would be procured under Leidos's DES contract upon expiration of OSC's contract on May 31, and that independent verification & validation (IV&V) work performed by another small business would also be moved to Leidos under its DES contract. Protest at 7-8, 17. The protester asserted that the conference call thus made clear that NDU's enterprise IT support requirements, including the work that OSC was already performing, would be moved to Leidos under its DES contract managed by DISA. *Id.* The protest also identified DISA as the procuring agency.

In its protest, OSC specifically raised the following four allegations:

1. The proposed award of NDU's enterprise IT support services requirements to Leidos using its DES contract is unlawful because the requirements are outside the scope of the DES contract. *Id.* at 8-10.
2. The planned transfer of NDU's enterprise IT support services requirements to Leidos constitutes an illegal and unjustified sole-source award that does not satisfy the exceptions to competition requirements provided in the Competition in Contracting Act (CICA), 10 U.S.C. § 3204, or FAR part 6. *Id.* at 10-12.
3. Award to Leidos violates protections afforded to small businesses under the so-called "rule of two" in FAR 19.502-2(b), and DISA failed to properly withdraw the requirements from the small business program in accordance with FAR 19.502-9. *Id.* at 13-17.
4. Award to Leidos would create an unlawful impaired objectivity organizational conflict of interest because performance by Leidos of both the NDU enterprise IT support services and IV&V work scope would place Leidos in a position to evaluate its own performance of the requirements. *Id.* at 17-18.

On March 22, DISA filed a request for dismissal and made three arguments as follows: (1) the protest was untimely because it was filed more than 45 days after the expiration of the 30-day posting period of a "Justification [and Approval] for Other Than Full and Open Competition" notifying the public of DISA's intent to modify Leidos's DES contract to provide support to the common use IT enterprise of NDU (NDU J&A); (2) the protest was premature because DISA had not yet issued a task order or request for proposal for Leidos to provide services to NDU under the DES contract; and (3) OSC did not furnish a copy of its protest to the designated contracting officer as required by 4 C.F.R.

⁴ Although NDU does not have its own procurement authority, the designated contracting officer's representative for OSC's contract is an NDU employee. Protest, exh. A, Contract No. N0018918DZ010 at 48; AR, Tab 14, Decl. of NDU Contracting Officer's Representative.

§ 21.1(e) and FAR 33.104(a)(1). Req. for Dismissal at 2. The request for dismissal included as an exhibit the NDU J&A posted to the sam.gov website on December 21, 2022. *Id.*, exh. 3; see also AR, Tab 9, NDU J&A.

With respect to the first argument, the agency argued that the NDU J&A constituted constructive notice to OSC of the agency's intention to move to Leidos the services OSC was currently performing for NDU. Based on our review of the NDU J&A, we disagreed. In particular, the NDU J&A inaccurately stated that the requirements were new and that there was no prior procurement history. See AR, Tab 9, NDU J&A at 4 (stating "this requirement has never been previously acquired") and 6 (indicating that DISA's head of contracting activity waived the requirement to post a sources sought notice or request for information, there were no interested sources, and there was no applicable procurement history). The NDU J&A also did not identify OSC as a contractor currently performing the requirements, and thus failed to provide any notice to OSC that its requirements would be moved to the DES contract such that its failure to file a protest within ten days of the expiration of the publication of the NDU J&A would render its protest untimely.

With respect to the remaining arguments, we concluded that the record did not yet demonstrate that the protest was premature, and that failure to furnish a copy of the protest to the DES contracting officer did not provide a basis for dismissal. After denying the request to dismiss the protest, we instructed the agency to file its report responding to the protest by the original due date. Electronic Protest Docketing System (Dkt.) No. 9. We informed the agency that the agency report must address all protest grounds raised and include all relevant documents. *Id.*

In its report, filed on April 5, despite GAO denying the request for dismissal, the agency continued to argue that the protest was both untimely because OSC filed its protest over 45 days after the NDU J&A had been published, and premature because no task order had yet been issued to Leidos. Memorandum of Law (MOL) at 22-32. In addition, the agency made various other arguments for dismissal or denial of the protest as follows:

- The published NDU J&A makes any dispute involving DES a matter of contract administration over which GAO should not exercise jurisdiction. On the merits, the agency additionally argued that NDU's IT requirements were within the scope of the DES contract. *Id.* at 32-46.
- DISA is not the proper agency to defend against the protest as it relates to OSC's challenges to NDU's selection of the DES contract vehicle to fulfill its requirements and NDU's alleged violation of small business protections. *Id.* at 46-51.
- NDU's contracting officer representative lacks the authority to contract on behalf of DISA. *Id.* at 51-52.
- Even if OSC was unaware of the NDU J&A, it should have furnished a copy of the protest to someone in DISA's contracting office. *Id.* at 52-55.
- OSC is not an interested party to challenge task orders issued under the DES contract because it is not a DES contract awardee, and it can no longer timely protest the DES solicitation. *Id.* at 55-57.

The report included the NDU J&A and documents related to the DES solicitation and contract award. OSC filed an objection to the agency's document production, arguing in general that the agency failed to produce any documents that addressed the merits of OSC's protest arguments. The protester argued as follows:

DISA has admitted that it plans to award OSC's NDU IT Support Work to Leidos, a large business. This was the central allegation in this case and now it is a confirmed admission. Yet DISA is refusing to provide any documents related to its plan to award two scopes of work to Leidos previously performed by small businesses (including OSC's legacy scope) without any competition and without any attempt to justify abandoning the small business set-aside. DISA offers that this is a "planned" award to Leidos, and "information on nonfinal future government requirements [is] protected from disclosure to ensure procurement and competition integrity." (Dkt. 10 at 2-3.) There is no authority to support DISA's position, especially after DISA pointed to a public filing and attempted to rely on that public filing as putting OSC on notice of DISA's plan to award all of this work to Leidos without competition.

Dkt. No. 15, Objection to Document Production at 1. The protester further argued that the agency had failed to produce documents to address its allegation that the award to Leidos created an organizational conflict of interest, or documents related to its market research to justify removal of the requirements from a small business set-aside. *Id.* at 2.

In response to the protester's objection to the agency's document production, as well as the arguments raised by DISA regarding the propriety of DISA's role as the agency to defend against the protest, on April 13, the GAO attorney assigned to the protest conducted a status conference with the parties and suspended the due date for the protester to file its comments. See Dkt. No. 16. During the conference, DISA continued to argue that it was not the proper agency to respond to the protest. In addition, the DES contracting officer was not aware of what documents, if any, were in NDU's or NAVSUP's possession that were relevant to the protest allegations, *i.e.*, the decision to move the requirements to Leidos's DES contract. As a result of the conference, NAVSUP was invited to participate in the protest as a secondary agency; we requested that NAVSUP file a contracting officer's statement to explain its current role as a procuring agency for NDU's enterprise IT services requirements, and to respond to the protest allegations as applicable.

On April 21, NAVSUP filed a contracting officer's statement and advised, as noted, that NDU does not have its own procurement authority or contracting staff, and that NAVSUP conducted the competition resulting in the award of OSC's current contract to provide NDU's enterprise IT support services. NAVSUP COS at 1. NAVSUP's contracting officer further advised that when he contacted NDU to inquire whether NDU wanted NAVSUP to recompet the requirements when OSC's contract expired, "NDU

responded that these services would be acquired via a separate contracting vehicle through DISA.” *Id.* He further stated that NAVSUP “did not provide any assistance, guidance or procurement related strategy associated with the DISA contract action, including whether the services sought under the DISA contract mirror the services currently performed by OSC,” and that NAVSUP’s only role related solely to the administration of OSC’s current contract. *Id.* at 1-2.

Based on these representations, the GAO attorney concluded that DISA was the proper agency to defend against the protest since it would be the agency issuing the task order to Leidos on behalf of NDU. On May 2, the GAO attorney conducted another status conference to discuss further development of the record. Dkt. No. 21, Record Development Scheduling Order. With assistance from NAVSUP, the GAO attorney also contacted cognizant personnel at NDU to participate in the status conference. The GAO attorney again advised that our Office would not dismiss the protest on the basis that it was untimely due to publication of the NDU J&A. The GAO attorney informed DISA that the record to date was inadequate to resolve the protest, requested that the agency file a supplemental report, and specifically requested that the agency work with NDU personnel to clarify the status of the challenged acquisition. *Id.*

On May 9, the agency filed its supplemental report, and on May 15, the protester filed its comments. Following review of the record, on May 25, the GAO attorney conducted an outcome prediction alternative dispute resolution (ADR) conference with the parties. The GAO attorney indicated that GAO likely would sustain the protest on the basis that the agency failed to demonstrate that DISA had a proper and justifiable basis to except NDU’s enterprise IT support requirements from competition and issue a sole-source task order to Leidos under its DES contract. The GAO attorney also indicated that the remaining allegations did not provide additional bases for sustaining the protest because the supplemented record now showed that the allegations were premature. Based on DISA’s decision to take corrective action, we dismissed the protest as academic. *Open SAN Consulting, LLC d/b/a OSC Edge, B-421507, June 2, 2023* (unpublished decision). OSC then filed this request for reimbursement of its protest costs.

DISCUSSION

The protester requests that we recommend that it be reimbursed its costs of filing and pursuing the protest. The protester argues that it should be reimbursed all of its costs because all four allegations arose from the same planned sole-source award to Leidos, and because “a significant portion of OSC’s costs in this matter were spent not responding to DISA’s positions on the merits, but responding (and re-responding) to various baseless objections over documents, jurisdiction, timeliness, and other roadblocks that DISA sought to drag into the path of the protests.” *Req. for Costs at 2.* The agency argues that the request should be denied because the protest allegations were not clearly meritorious, and it took prompt corrective action as soon as it was advised that GAO would sustain the protest. *Resp. to Req. for Costs at 4-5.*

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 the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. *CloudFirstJV, LLC--Costs*, B-416872.4, May 10, 2019, 2019 CPD ¶ 177 at 3. A protest is clearly meritorious where a reasonable agency inquiry into the protest allegations would have shown facts disclosing the absence of a defensible legal position. *Id.*; *Deque Sys., Inc.--Costs*, B-415965.5, Aug. 23, 2018, 2018 CPD ¶ 304 at 4. 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. *Chags Health Info. Tech., LLC, et al.--Costs*, B-413116.38 *et al.*, Apr. 19, 2017, 2017 CPD ¶ 126 at 4.

With respect to the promptness of the agency's corrective action under the circumstances, we review the record to determine whether the agency took appropriate and timely steps to investigate and resolve the impropriety. *Apex Transit Sols., LLC--Costs*, B-418631.8, Aug. 13, 2021, 2021 CPD ¶ 282 at 7. While we consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest, we generally do not consider it to be prompt where it is taken after that date. *Alsalam Aircraft Co.--Costs*, B-401298.3, Nov. 5, 2009, 2009 CPD ¶ 208 at 3.

During outcome prediction, the GAO attorney informed the parties that based on our review of the NDU J&A, we found that it was insufficient to justify a sole-source task order to Leidos and would sustain the protest on that basis. In this regard, the NDU J&A did not demonstrate that Leidos was the only responsible source and no other contractor could satisfy the agency's requirements, in accordance with the cited exception to competition, 10 U.S.C. § 3204(a)(1) and FAR 6.302-1.⁵ The GAO attorney identified numerous inaccuracies and ambiguities in the document to explain why it

⁵ The agency incorrectly states that during outcome prediction "the GAO identified some language in the NDU J&A that might justify an award to Leidos under the unusual and compelling urgency exception, 10 U.S.C. § 3204(a)(2), to CICA's full and open competition standard. In light of the NDU J&A, the Protestor's illegal unjustified sole-source allegation was not a clearly meritorious protest ground." Resp. to Request at 5. To the contrary, the GAO attorney explained that one of the many defects in the NDU J&A was its claim that "NDU's identification of their requirement's urgency to their mission success necessitates a sole source situation and Leidos Corporation as the only viable contracting solution." AR, Tab 9, NDU J&A at 4; see also Comments on Resp. to Req. for Costs at 5 ("The GAO during the ADR session theorized that some language in the J&A could be relevant to unusual and compelling urgency, found unequivocally that the December 22 J&A *did not assert that justification*, and explained in exhaustive detail that the J&A *failed* to support the 'one responsible source' exception that DISA did claim.").

failed to provide justification for the sole-source award of NDU's requirements to Leidos. For example, the NDU J&A cites the statutory exception that there is only one responsible source, 10 U.S.C. § 3204(a)(1), and to demonstrate Leidos's unique qualifications states that it was the sole awardee of the DES contract. The GAO attorney explained that Leidos's status as the sole DES contract awardee was insufficient to demonstrate it was the only responsible source. The NDU J&A improperly characterized as NDU's requirement the DES contract itself, rather than NDU's enterprise IT support services that the agency sought to acquire from Leidos. Moreover, the record shows that OSC was performing under its current contract with NDU many of the same services the agency sought to transfer to Leidos, yet the NDU J&A contained no consideration of this fact.

In addition, as noted, the NDU J&A inaccurately stated that the requirements were new and that there was no prior procurement history. The GAO attorney advised that these defects in the NDU J&A provided a basis to sustain the protest. See *WorldWide Language Resources, Inc.; SOS International Ltd.*, B-296993 *et al.*, Nov. 14, 2005, 2005 CPD ¶ 206 (protests sustained where justification was premised on the conclusion that the awardee was the only responsible source, yet the capabilities of firms other than the awardee were not in fact considered); *Audio Intelligence Devices*, B-224159, Dec. 12, 1986, 86-2 CPD ¶ 670 (protest sustained where written justification for the sole-source award lacked adequate demonstration of the rationale for agency's conclusion that only the proposed awardee could provide the required products). DISA did not take corrective action until after it filed an initial and supplemental agency report and our Office advised during outcome prediction ADR that we would likely sustain the protest. Thus, we find that the agency unduly delayed taking corrective action in response to a clearly meritorious protest allegation, and that OSC is entitled to costs.

The agency further argues that OSC should not recover its costs for issues our Office stated would be dismissed. DISA states: "In the event the GAO determines OSC is entitled to an award of attorney's fees and costs as a result of outcome prediction, the GAO should recommend OSC recover costs only as to the illegal unjustified sole-source award allegation, because the GAO predicted that it would dismiss or deny the three other distinct protest grounds as premature." Resp. to Req. for Costs at 2.

Generally, we consider a successful protester entitled to costs incurred with respect to all issues pursued, not merely those upon which it prevails. See *Coulson Aviation (USA) Inc.; 10 Tanker Air Carrier, LLC--Costs*, B-406920.6, B-406920.7, Aug. 22, 2013, 2013 CPD ¶ 197 at 5. However, 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. 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. See *Deque Sys., Inc.--Costs, supra* at 5.

In this case, we find that a common core set of facts and the legal arguments raised inextricably link all the protest allegations. All of OSC's protest allegations arise out of NDU's plans to work with DISA to issue a sole-source task order to Leidos to perform, among other things, the work that OSC currently is performing for NDU. This act formed the basis for OSC's arguments that the task order to Leidos would constitute an illegal and unjustified sole-source award that does not satisfy the exceptions to competition requirements provided in CICA, would be outside the scope of Leidos's DES contract, would violate the rule of two, and would create an impermissible OCI. Accordingly, each of OSC's protest grounds share a common core set of facts--the planned issuance of a sole-source task order to Leidos--and therefore we find that the protest issues are not readily severable.

RECOMMENDATION

We recommend that DISA reimburse OSC its reasonable protest costs, including attorneys' fees, related to all of the protest grounds raised by OSC. The protester should submit its claim for costs detailing and certifying the time expended and costs incurred, directly to DISA within 60 days of receipt of this decision.

The request is granted.

Edda Emmanuelli Perez
General Counsel