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Decision

Matter of: 22nd Century Technologies, Inc.--Costs

File: B-422659.4

Date: January 14, 2025

W. Brad English, Esq., Maynard Nexsen, PC, for the protester.
Julie A. Neville, Esq., Administrative Office of the United States Courts, for the agency.
Michael P. Price, 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 denied where the request concerns protest challenges that were not intertwined with the meritorious protest ground or otherwise independently clearly meritorious.

DECISION

22nd Century Technologies, Inc., of McLean, Virginia, requests that our Office recommend that it be reimbursed the reasonable costs of filing and pursuing its protest challenging the issuance of a call order to Lamb Informatics Limited, of Fairfax, Virginia, under request for quotations (RFQ) No. USCA24Q0007, issued by the Administrative Office of the United States Courts (AOUSC) for centralized management and operational support services for the agency's enterprise information technology infrastructure. The requester contends that it should be reimbursed for all costs associated with its underlying protest.

We deny the request.

BACKGROUND

AOUSC issued the RFQ on October 31, 2023, to holders of the judiciary information technology services blanket purchase agreement (BPA). Contracting Officer's Statement (COS) at 1. The RFQ contemplated the issuance of a single fixed-price call order against the underlying BPA and established that the agency would issue the order to the vendor whose quotation represented the best value to the government considering three evaluation factors: (1) technical approach; (2) corporate experience; and (3) price. *Id.*

The RFQ contemplated the issuance of an order without the agency conducting exchanges; however, the solicitation contained multiple provisions that permitted the agency to conduct exchanges at the agency’s discretion. In this regard, the RFQ provided that the agency “reserve[d] the right to communicate with” the vendor whose quotation was “best-suited (i.e., the apparent successful awardee),” and only that vendor. *Id.* at 2. The solicitation also incorporated “Judiciary Provision 3-100,” which permitted the agency “to conduct discussions if the contracting officer later determine[d] them to be necessary.” Agency Report (AR), Tab 3.4, Judiciary Provision 3-100 at 5.

AOUSC received four quotations by the November 22 deadline for receipt of quotations. COS at 2. After the agency’s initial evaluation of quotations, the contracting officer determined it to be in the best interest of the government to negotiate with all four vendors. *Id.* at 3. After providing each vendor with information pertaining to areas of their quotations in which the agency had decreased confidence and permitting vendors to ask clarifying questions and submit revised quotations, the agency completed its final price and technical evaluations by May 24, 2024, yielding the following results:

	22nd Cent. Technologies	Lamb Informatics
Technical Approach	High Confidence	High Confidence
Corp. Experience	High Confidence	High Confidence
Price	\$62,012,755	\$61,813,042

The contracting officer finalized an award decision memorandum on June 5, documenting the agency’s decision to issue the order to Lamb Informatics. On June 7, AOUSC notified 22nd Century that it had not been selected for the order. AR, Tab 7.1, Notice of Nonselection to 22nd Century at 1.

22nd Century filed a protest with our Office on June 17 alleging various errors with the procurement. The requester initially challenged the agency’s conduct of exchanges, arguing that the exchanges were either misleading or that the agency deviated from the terms of the solicitation by having exchanges with another vendor after the protester. Protest at 13-14. In this regard, the requester argued that because the agency held exchanges with 22nd Century, it was “apparent that the [a]gency had concluded that [22nd Century] was [the] best-suited [vendor].” *Id.* at 13. The requester therefore was under the impression that the agency had conducted exchanges with only 22nd Century pursuant to the solicitation provision that reserved the right for the agency to communicate only with the vendor whose quotation was “best-suited.” *Id.*

According to the requester, after the exchanges the agency informed 22nd Century that its quotation revisions addressed the issues that the agency identified. *Id.* However, because another vendor was selected for award, the requester argued that the agency either (1) engaged in “misleading discussion[s]” by informing 22nd Century that it had addressed all remaining issues when it in fact had not; or (2) deviated from the terms of the solicitation concerning exchanges with the best-suited vendor when it decided to “move on to [the awardee].” *Id.* at 14. 22nd Century also challenged the agency’s

evaluation of its revised quotation, and further argued that the agency's evaluation of Lamb Informatics's corporate experience and its responsibility determination were flawed. *Id.* at 14-20. Finally, the requester argued that the agency's award decision was unreasonable. *Id.* at 20-21.

On July 1, AOUSC filed a request for dismissal of the protest. Req. for Dismissal at 4. The agency argued that 22nd Century's first two grounds of protest were legally insufficient because, in conducting exchanges, the agency relied on Judiciary Provision 3-100 to conduct discussions, and therefore was not conducting exchanges at that time with a "best-suited" vendor as alleged in the protest. *Id.* at 2-3. The agency also requested dismissal of the challenges to Lamb Informatics's corporate experience and responsibility in part because the agency argued the challenges were speculative or a "red herring." *Id.* at 3-4. Finally, the agency requested dismissal of the challenge to the agency's award decision on the basis that it was based entirely on the other dismissible challenges. *Id.* at 4.

On July 10, our Office stated that we intended to dismiss 22nd Century's challenge to AOUSC's responsibility determination with respect to Lamb Informatics while declining to dismiss the other protest grounds, and advised the agency that it should respond to the remaining protest grounds in its agency report. Electronic Protest Docketing System (Dkt.) No. 20. The following day, 22nd Century filed a supplemental protest raising additional challenges to the agency's conduct of exchanges. 1st Supp. Protest at 2-5. In this regard, the requester argued that the solicitation provided that the agency could conduct exchanges with only the vendor it determined to be best-suited, and that by not identifying a best-suited vendor but still conducting exchanges, the agency deviated from the terms of the solicitation and conducted exchanges that were misleading. *Id.* at 2-4. In the alternative, the requester argued that the solicitation was latently ambiguous with regard to the manner in which the agency would conduct exchanges. *Id.* at 4-5.

Our Office instructed AOUSC to file a single agency report that responded to both the initial and first supplemental protest. GAO Notice of Supp. Briefing Schedule at 1. In its report, the agency produced various documents responding to the protest, including the award memorandum documenting the agency's selection decision. 22nd Century filed a second supplemental protest and comments on the agency report on July 29, and July 30 respectively.¹

In its comments, the requester withdrew its "challenge to the agency's evaluation of Lamb Informatics's corporate experience. See Comments at 5 n.5. In its second supplemental protest, 22nd Century raised additional grounds of protest based on documents produced in the agency report. The requester argued that the agency's

¹ Our Office granted 22nd Century and Lamb Informatics a 1-day extension to file comments on the agency report but advised that the deadline for supplemental protest grounds remained as prescribed by our Bid Protest Regulations at 4 C.F.R. § 21.2. Dkt. No. 35.

exchanges concerning price were misleading because the agency advised 22nd Century during exchanges that it had compared prices to a government estimated rate, yet the price evaluation indicated that the agency did not actually have a government estimate, and instead compared prices to those of the incumbent contractor. 2nd Supp. Protest at 1-4.

22nd Century also raised a new challenge concerning the agency's award decision, arguing that the agency's best-value determination strayed from the RFQ's evaluation scheme. *Id.* at 4-7. In this regard, 22nd Century argued that it and Lamb Informatics had received identical ratings of high confidence under both the technical and corporate experience factors, and that 22nd Century's pricing was merely 0.32 percent higher than the awardee. *Id.* at 5-6. The requester argued that the award decision memorandum, however, demonstrated that the agency never compared the relative merit of vendors' quotations, as required by the solicitation, and instead focused on price alone. The requester asserted that this was a critical flaw given that its quotation, like the awardee's, had the highest ratings under the non-price factors and the quotations were therefore nearly identical in merit, and the solicitation contemplated issuance of an order on a best-value tradeoff basis. *Id.* The agency filed a supplemental agency report to which 22nd Century and Lamb Informatics provided comments by August 12.

On September 3, the GAO attorney assigned to the protest conducted an outcome prediction alternative dispute resolution (ADR) conference call with the parties. During the ADR conference call, the GAO attorney advised the parties that our Office was likely to sustain the protest with respect to 22nd Century's challenge to the selection decision raised in its second supplemental protest, on the basis that AOUSC's best-value determination was inadequately documented and precluded our Office from reviewing the reasonableness of that determination. *22nd Century Technologies, Inc., B-422659 et al.*, Sep. 9, 2024 (unpublished decision) at 1. In this regard, the GAO attorney advised that the contemporaneous documentation of the agency's best-value decision in its award memorandum failed to compare the relative merits of the competing quotations, which was insufficient to support the agency's best-value tradeoff where both the protester's and awardee's quotations received identical ratings of high confidence under each non-price factor, and where there was almost no difference in price between the two highly rated quotations. *Id.*

In response to the ADR conference call, AOUSC filed a notice of corrective action, pledging to conduct a new best-value determination that ensured "the relative merits of the competing proposals are thoroughly analyzed and documented in a new [a]ward [d]ecision [m]emorandum." *Id.* at 2. Based on the agency's proposed corrective action, we dismissed the protest as academic on September 9. *Id.* at 1.

Following dismissal of the protest, 22nd Century filed this request that GAO recommend the reimbursement of its costs of filing and pursuing its protest. Req. for Costs at 1.

DISCUSSION

22nd Century asks our Office to recommend that AOUSC reimburse the requester for the costs associated with filing and pursuing all of its protest grounds, including: (1) the agency's best-value decision did not comply with the solicitation, the basis for which GAO stated it would sustain the protest during the ADR conference call; (2) the agency's evaluation of Lamb Informatics's corporate experience; (3) the agency's responsibility determination with respect to Lamb Informatics; and (4) the various challenges to the agency's conduct of exchanges. Comments on Req. for Costs at 1-2. The requester contends that the agency unduly delayed taking corrective action in response to its clearly meritorious protest ground challenging the best-value determination, and the remaining protest grounds are not clearly severable from this successful ground. See Req. for Costs at 1-4.

AOUSC does not object to 22nd Century's request as it pertains to the challenge to the agency's best-value decision but contends that the requester is not entitled to costs associated with any other protest grounds. See Resp. to Req. for Costs at 1. Accordingly, the only remaining question for resolution by our Office is whether the protester should be reimbursed for the challenges raised in the protest beyond those AOUSC does not dispute. See *Octo Consulting Grp., Inc.--Costs*, B-414801.4, Dec. 14, 2017, 2018 CPD ¶ 52 at 3.

AOUSC requests that our Office "decline to recommend that the [a]gency reimburse 22nd Century's costs incurred in pursuing the [other] severable protest grounds." Resp. to Req. for Costs at 4. AOUSC argues that 22nd Century's non-meritorious protest grounds are severable from the meritorious issue relating to the agency's best-value determination and documentation. *Id.* at 1. In this regard, the agency maintains that the protest grounds relating to the agency's evaluation of Lamb Informatics's corporate experience and the agency's responsibility determination were not at issue at the time of the outcome prediction ADR, and thus were "both severable from the remaining protest issues and not meritorious." *Id.* at 3. Regarding the remaining protest grounds, the agency contends that all of them pertain in some way to the agency's conduct of exchanges, which was "an issue completely separate from the qualitative analysis documentation issue on which 22nd Century was likely to prevail." *Id.* Accordingly, the agency requests that our Office decline to recommend reimbursement for these severable protest grounds. *Id.* at 4.

As a general rule, when resolving requests for recommendations for protest costs, we will recommend a successful protester receive costs incurred with respect to all issues pursued, not merely those upon which it prevails. *JRS Staffing Servs.--Costs*, B-410098.6 *et al.*, Aug. 21, 2015, 2015 CPD ¶ 262 at 5. 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, 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. On the other hand, failing to limit 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* at 5.

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 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 a separate protest, 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*, B-415965.5, Aug. 23, 2018, 2018 CPD ¶ 304 at 5.

In applying these principles, we have severed costs arising from allegations of misevaluation of quotations from a clearly meritorious challenge to the adequacy of the agency's best-value tradeoff rationale. See *Loyal Source Gov't Servs., LLC--Costs*, B-407791.4, Feb. 14, 2014, 2014 CPD ¶ 139 at 4; *Protection Strategies, Inc.--Costs*, B-414573.3, Nov. 9, 2017, 2017 CPD ¶ 348 at 8. We have further severed costs arising from allegations of misevaluation of quotations from a clearly meritorious allegation of unequal discussions. *BluePath Labs, LLC--Costs*, B-417960.4, May 19, 2020, 2020 CPD ¶ 175 at 4.

On the record before us, we find no basis to conclude that the remaining facts and legal arguments are clearly intertwined with the meritorious challenge to the adequacy of the agency's best-value determination. This protest ground is distinct from 22nd Century's other arguments related to the agency's conduct of exchanges and the reasonableness of the agency's evaluation of Lamb Informatics's quotation and responsibility determination. The requester argues that its challenges concerning the awardee are intertwined because they "involve[] the same procurement, the same evaluation, the same tradeoff, and same award decision" as 22nd Century's meritorious ground, and "[m]ore importantly, they were included in 22nd Century's first protest along with the successful protest ground[.]" Comments on Req. for Costs at 2. The requester similarly argues that it "continued to pursue" protest grounds related to exchanges across its two supplemental protests, and thus, these grounds are not readily severable. *Id.* However, this is not the standard applied by our Office in determining whether protest issues are severable. Resolution of these protest issues would not involve a common set of facts or legal theories such that they would be considered interrelated or intertwined with the protest ground that was clearly meritorious, and the requester has not argued as such. See *Protection Strategies, Inc., supra* at 8.

Additionally, 22nd Century's remaining protest grounds were not independently clearly meritorious, and thus provide no basis on which to recommend reimbursement of costs. *Deque Sys., Inc.--Costs, supra* at 6. 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 protest its reasonable protest costs where, based on the

circumstances of the case, we determine that the agency unduly delayed in 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*, B-416872.4, May 10, 2019, 2019 CPD ¶ 177 at 3.

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. *Abacus Tech. Corp.--Costs*, B-416390.6, Sept. 27, 2019, 2019 CPD ¶ 349 at 7. As a prerequisite to our recommending that costs be reimbursed where a protest has been settled 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. *InfraMap Corp.--Costs*, B-405167.3, Mar 26, 2012, 2012 CPD ¶ 123 at 3. Here, none of the allegations raised by 22nd Century in its protests meet the clearly meritorious standard.

As explained above, 22nd Century withdrew its challenge to the agency's evaluation of Lamb Informatics's quotation under the corporate experience factor and our Office further provided that we intended to dismiss 22nd Century's challenge to the agency's responsibility determination with respect to Lamb Informatics. Accordingly, these protest grounds are not independently clearly meritorious, and we find no basis on which to recommend the reimbursement of protest costs. See *Odle Mgmt. Grp., LLC--Costs*, B-414952.4, Oct. 2, 2018, 2019 CPD ¶ 37 at 5 (explaining that dismissed issues are not clearly meritorious); *Spectrum Investors, LLC--Costs*, B-418891.4, Sept. 21, 2022, 2022 CPD ¶ 242 at 16 n.13 (explaining that withdrawn issues provide no basis for which our Office will recommend reimbursement of protest costs).

We also find that 22nd Century's arguments concerning the conduct of exchanges are not clearly meritorious because AOUSC presented defensible legal positions in response to these protest grounds. For example, the agency argued that the solicitation included Judiciary Provision 3-100, which permitted the contracting officer to conduct exchanges with all vendors if it was determined necessary. Accordingly, the agency maintains that it did not identify a "best-suited" vendor with whom it intended to exclusively conduct exchanges, but rather, conducted exchanges with each of the four vendors as permitted by the terms of the solicitation. Memorandum of Law at 3-5. The agency further argues that its evaluation of the requester's revised quotation was consistent with this exchanges process--that is, the agency was not evaluating only the requester's revised quotation on the basis that the requester was the best-suited vendor, but rather, it was evaluating all vendors' revised quotations against the selection criteria. *Id.* at 5-6. This argument is supported by the contemporaneous record, which demonstrates that the agency advised vendors it was conducting "negotiations" pursuant to Judiciary Provision 3-100, and then evaluated all vendors' revised quotations after negotiations were conducted. See, *e.g.*, AR, Tab 5.1, 22nd Century Negotiations Request at 1; AR, Tab 13, Award Decision Memorandum at 28-56. Accordingly, at a minimum, the agency presented defensible legal positions in response

to each of the requester's remaining grounds of protest such that the grounds were not clearly meritorious.²

Because the remaining protest grounds were not intertwined with the protester's clearly meritorious protest ground and were not otherwise independently clearly meritorious, we find no basis on which to recommend reimbursement of protest costs.

The request is denied.

Edda Emmanuelli Perez
General Counsel

² To the extent this decision does not address each collateral argument raised by 22nd Century in its underlying protest, our Office has considered them all and find that none were clearly meritorious to form a basis on which our Office would recommend the reimbursement of protest costs. Furthermore, we note that in its request for reimbursement and subsequent comments on the agency's response, 22nd Century did not offer arguments in this regard.