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Decision

Matter of: Chags Health Information Technology, LLC; Grove Resource Solutions, Inc.; Next Phase Solutions and Services, Inc.; SparkSoft Corporation; All Points Logistics, Inc.; Delmock Technologies, Inc.; Apprio, Inc.; Leader Communications, Inc.; VariQ Conviso Joint Venture LLC; Strategi Consulting LLC; Innosoft Corporation; Analytica LLC--Costs

File: B-413116.38; B-413116.39; B-413116.40; B-413116.41; B-413116.42; B-413116.43; B-413116.44; B-413116.45; B-413116.46; B-413116.47; B-413116.48; B-413116.51

Date: April 19, 2017

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Anthony E. Marrone, Esq., Mogbeyi Omatete, Esq., Tony A. Ross, Esq., Department of Health and Human Services, Centers for Medicare and Medicaid Services, for the agency.

Eric M. Ransom, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. GAO recommends reimbursement of the costs of filing and pursuing challenges against the agency's evaluation under experience/past performance factors and best-value tradeoff decision, where the evaluation challenges were clearly meritorious, or intertwined with clearly meritorious issues.
 2. GAO does not recommend reimbursement of the costs of pursuing arguments challenging agency's evaluation under price and process maturity factors, which were severable from the protester's clearly meritorious complaints, and not themselves clearly meritorious.
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DECISION

Chags Health Information Technology, LLC, of Columbia, Maryland; Grove Resource Solutions, Inc., of Frederick, Maryland; Next Phase Solutions and Services, Inc., of Greenbelt, Maryland; SparkSoft Corporation, of Columbia, Maryland; All Points Logistics, Inc., of Merritt Island, Florida; Delmock Technologies, Inc., of Baltimore, Maryland; Apprio, Inc., of Washington, District of Columbia; Leader Communications, Inc., of Oklahoma City, Oklahoma; VariQ Conviso Joint Venture LLC, of Washington, District of Columbia; Strategi Consulting LLC, of Chevy Chase, Maryland; Innosoft Corporation, of Columbia, Maryland; and Analytica LLC, of Washington, District of Columbia; request that our Office recommend that they be reimbursed the costs associated with filing and pursuing their respective protests against the award of multiple contracts under request for proposals (RFP) No. RFP-CMS-2016-SPARC, which was issued by the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), for the Strategic Partners Acquisition Readiness Contract (SPARC) program.

We grant the requests in part and deny them in part.

BACKGROUND

CMS issued the RFP on August 3, 2015, for the purpose of establishing multiple indefinite-delivery, indefinite-quantity contracts to provide support services to develop and maintain CMS information technology systems. The RFP advised that the competition, and the resulting contracts, would be divided into two pools--a small business pool and an unrestricted pool. The small business pool was further divided into an all small business pool, and separate 8(a), HubZone, service-disabled veteran-owned, and woman-owned small business pools.

The contract awards in each pool were to be made on a best-value basis considering four technical evaluation factors and price. The technical evaluation factors were: (1) corporate experience; (2) past performance; (3) process maturity; and (4) small business participation. As relevant here, the evaluation under the process maturity factor was to consider the maturity of the firms' software development processes on the basis of their Capability Maturity Model Integration (CMMI) appraisal level, and other

certifications such as International Organization for Standardization management certifications.

CMS awarded multiple contracts under this procurement in June, 2016. In protests filed with our Office in June and July of 2016, the unsuccessful offerors challenged the awards, contesting the agency's evaluation of proposals under the experience, past performance, process maturity, and price factors, as well as the resulting best-value determination.¹

On September 7, 2016, after development of the protest record, the cognizant Government Accountability Office (GAO) attorney conducted an "outcome prediction" alternative dispute resolution (ADR) conference with the parties. In the course of that conference, the GAO attorney advised the agency that GAO would likely sustain all protests concerning the awards under the small business set-aside pools. In response to the ADR conference, the agency informed our Office that it intended to take corrective action consisting of, at a minimum, reconsideration of the evaluation of proposals and documentation of a new best-value tradeoff analysis and source selection decision. Based on the agency's proposed corrective action, our Office dismissed the protests as academic. Next Phase Solutions and Servs., Inc., et al., B-413116.3 et al., Sept. 13, 2016 (unpublished decision). Following the dismissal of the protests, the protesters requested that our Office recommend that they be reimbursed their costs of filing and pursuing their protests.

DISCUSSION

The protesters each request that our Office recommend that CMS reimburse the costs associated with all protest allegations they pursued. In response, CMS does not dispute that the protesters should be reimbursed their costs of pursuing challenges to the agency's evaluation under two factors: corporate experience and past performance. CMS, however, disputes the protesters' requests for reimbursement with respect to other challenges, principally to the best-value tradeoff decision, the price evaluation, and the agency's evaluation under the process maturity factor.

When a procuring agency takes corrective action in response to a protest, our Office may recommend under 4 C.F.R. § 21.8(e) that the agency reimburse the protester its reasonable protest costs where, based on the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing protesters to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Pemco

¹ The protesters relevant to this decision were all small business firms that competed in the small business set-aside pools under the RFP. A number of these protests were consolidated for development of the initial protest record. These protesters are again consolidated in this decision concerning the firms' requests for reimbursement of their protest costs.

Aeroplex, Inc.--Recon. & Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 5. A protest is clearly meritorious when a reasonable agency inquiry into the protest allegations would show facts disclosing the absence of a defensible legal position. The Real Estate Ctr.--Costs, B-274081.7, Mar. 30, 1998, 98-1 CPD ¶ 105 at 3. A GAO attorney will inform the parties through outcome prediction ADR that a protest is likely to be sustained only if he or she has a high degree of confidence regarding the outcome; therefore, the willingness to do so is generally an indication that the protest is viewed as clearly meritorious, and satisfies the “clearly meritorious” requirement for the purpose of recommending reimbursement of protest costs. National Opinion Research Ctr.--Costs, B-289044.3, Mar. 6, 2002, 2002 CPD ¶ 55 at 3; Inter-Con Sec. Sys., Inc.: CASS, a Joint Venture--Costs, B-284534.7, B-284534.8, Mar. 14, 2001, 2001 CPD ¶ 54 at 3.

As noted above, CMS does not contest the protesters’ requests that we recommend reimbursement of the protester’s costs associated with challenging the agency’s evaluation of proposals under the corporate experience and past performance evaluation factors. For the reasons discussed below, we reject the agency’s contention that the protesters should not be reimbursed their protest costs in connection with their challenges to the best-value determination, but agree that they should not be reimbursed their costs in connection with their other challenges, primarily regarding the agency’s price evaluation, and its evaluation under the process maturity factor.

As a general rule, our Office recommends that a successful protester be reimbursed the costs incurred with respect to all the issues pursued, not merely those upon which it has prevailed. The Salvation Army Cmty. Corr. Program--Costs, B-298866.3, Aug. 29, 2007, 2007 CPD ¶ 165 at 7. In appropriate cases, however, we have limited our recommendation for the award of protest costs where a part of those costs is allocable to an unsuccessful protest issue that is so clearly severable from the successful issues as to essentially constitute a separate protest. Burns & Roe Servs. Corp.--Costs, B-310828.2, Apr. 28, 2008, 2008 CPD ¶ 81 at 3. In determining whether protest issues are so clearly severable as to essentially 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. Id.

In applying these principles, we have severed costs arising from allegations of misevaluation under separate evaluation factors on the basis that they are not clearly intertwined. For example, challenges to a past performance evaluation were not clearly intertwined with clearly meritorious challenges to the technical factor evaluation and the resulting tradeoff. Genesis Bus. Sys.--Costs, B-411264.11, Dec. 10, 2015, 2015 CPD ¶ 389 at 4; see also Carney, Inc.--Costs, B-408176.13, Feb. 14, 2014, 2014 CPD ¶ 82 at 5 (severing costs for alleged misevaluation of price from clearly meritorious challenge to technical capability factor evaluation); Loyal Source Gov’t Servs., LLC--Costs, B-407791.4, Feb. 14, 2014, 2014 CPD ¶ 139 at 4 (severing costs for evaluation challenges from clearly meritorious challenge to adequacy of best value tradeoff rationale). In a similar fashion, we severed the costs for challenges to the evaluation of

the awardee and to the agency's alleged failure to amend a solicitation because those issues were not clearly intertwined with a clearly meritorious allegation of unequal discussions. VSE Corp.; The Univ. of Hawaii--Costs, B-407164.11, B-407164.12, June 23, 2014, 2014 CPD ¶ 202 at 8.

Regarding the costs for the best-value tradeoff protest allegations, it is readily apparent that the agency's tradeoff analysis required an integrated assessment of the evaluation factors, to include the experience and past performance evaluation findings, which the agency concedes were flawed. Since the best-value tradeoff decision was necessarily based on these flawed evaluation findings, we consider all of the protesters' arguments in connection with the tradeoff decision to be necessarily intertwined with the protester's meritorious challenges. Accordingly, we reject the agency's arguments to sever costs in this regard.

We agree, however, with the agency that other challenges to include the protester's challenges of the agency's price evaluation--including allegations that the agency failed to conduct adequate price reasonableness or price realism analyses--and their challenges to their evaluation under the process maturity factor, should be severed in this case. With respect to the agency's price evaluation, multiple protesters alleged that the agency's award decision was flawed because certain of the awardees' prices were unreasonably high, or unrealistically low. We conclude that these issues are not intertwined with the protesters' successful challenges to the agency's experience and past performance evaluations. As compared to the experience and past performance factors, the price factor was independently evaluated and did not involve the same core nucleus of operative facts, nor did the issues raised turn on related legal theories or principles.

In addition, these issues were not independently clearly meritorious, and thus provide no basis on which to recommend reimbursement of protest costs. The record reflects that the agency conducted a fulsome price analysis identifying the mean and median price in each pool, and calculating each offeror's upward or downward deviation from those metrics. The agency then assessed price reasonableness on the basis of comparison of the prices to each other and to the mean and median, and in consideration of differences in the relative skill levels of employees offered in each proposal, ultimately concluding that all offerors' prices were reasonable. See, Agency Report (AR), Tab 7A, Price Analysis. The agency also considered the effect of low prices and, while the language used by the agency did not precisely refer to realism, the agency concluded that the low prices' deviation from the mean and median were not so significant as to create a risk to the government. Id.

We also agree with the agency that the various challenges to the agency's evaluation of proposals under the process maturity evaluation factor are severable from the clearly meritorious protest allegations. In reaching this conclusion we note that this factor, like the price factor, was evaluated independently from the experience and past performance factors and the allegations raised did not share a common core of facts.

Moreover, the arguments concerning the agency's process maturity evaluation were not clearly meritorious.

In this regard, many of the protesters noted factual errors concerning proposal content, and inconsistent treatment of the offerors in connection with the technical evaluation panel's (TEP) evaluation of the process maturity factor. While we agree with the protester's arguments regarding many of the errors identified in the TEP evaluation, the record reflects that the errors--with respect to the process maturity evaluation specifically--were addressed by the contracting officer contemporaneously as part of the selection decision process. The contracting officer's own analysis of the offerors under the process maturity factor (as shown in the source selection decision document's (SSDD) Relative Technical Merit Charts) appropriately grouped the offerors accordingly to a logical, objective methodology that was consistent with the evaluation criteria. AR, Tab 9A, SSDD, at 46, 71, 100-101, 174-176, 260-261. Accordingly, we have no basis to find the protester's arguments, based on the identified errors in the TEP evaluation, to be clearly meritorious.

A smaller number of protesters presented other challenges under the process maturity factor. For example, Next Phase and All Points asserted that the agency erred in not accepting CMMI assessments completed, or to be completed subsequent to the RFP closing date but prior to task order performance, while Analytica, Strategi, and Delmock argued that the agency otherwise failed to follow the RFP evaluation criteria. We conclude that these challenges were also not clearly meritorious.

Specifically, we conclude that Next Phase's and All Points' allegations presented challenges to the ground rules of the competition set forth in the RFP, and were untimely where they were not filed prior to the closing date for receipt of proposals. Our timeliness rules specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1); see AmaTerra Env'tl. Inc., B-408290.2, Oct. 23, 2013, 2013 CPD ¶ 242 at 3. Here, on its face, the evaluation criteria required that "[c]ertifications must be current and valid at the time of submission and held by the business unit that is proposing under this procurement." AR, Tab 3D, RFP Amendment 0003, at 110. Where the RFP definitively established that the process maturity factor evaluation would evaluate the CMMI appraisal level attained by the offeror as demonstrated by the offeror at the time of proposal submission, the protesters' challenges to these criteria were untimely protests of the terms of the solicitation.²

With respect to the allegations of Analytica, we conclude that the agency did not depart from the evaluation criteria in concluding that the lack of a CMMI level assessment was

² To the extent the protesters argue that the RFP was ambiguous with respect to the definition of "certifications," or "submission," we conclude that the ambiguities were patent, and were also required to be challenged prior to the closing date for receipt of proposals.

itself evidence of a lack of process maturity, despite CMMI assessments showing significant progress toward achieving CMMI level 3. In this regard, the evaluation criteria established that “CMS will consider the maturity demonstrated by the CMMI Assessment level (as well as other professional industry certifications) attained by the business unit proposing to perform the SPARC services.” Id. at 109. Where an offeror had not “attained” any CMMI level, we cannot conclude that the agency erred in concluding that the offeror, essentially, had not demonstrated its process maturity under the terms of the RFP and warranted a poor rating under the process maturity factor.³

Finally, concerning the allegations of Strategi and Delmock, we conclude that the agency did not apply an unstated requirement for “other certifications” or err in making awards to offerors that did not possess a CMMI level 3 assessment. Rather, the record demonstrates that the agency afforded “more credit” to offerors possessing other certifications, as anticipated by the RFP, and that the evaluation criteria did not establish CMMI level 3 as a minimum requirement for award. Id.

³ Analytica’s protest did not present any clearly meritorious allegations, such as challenges to the agency’s evaluation of proposals under the corporate experience or past performance factors, or to the best value tradeoff. Accordingly, we do not recommend that Analytica be reimbursed the costs of filing and pursuing its protest. In its response to the agency’s request to sever reimbursement for its challenges, Analytica argues that it should be reimbursed because during the ADR conference, it inquired if its own protest should be regarded as likely to be sustained, and was informed by the GAO attorney that the answer was “yes.” While a GAO attorney’s indication, in outcome prediction ADR, that a protest is likely to be sustained is generally a signal that the protest is viewed as clearly meritorious, National Opinion Research Ctr.--Costs, supra, that does not mean that every argument advanced by a protester is necessarily clearly meritorious or entitled to reimbursement. See Genesis Bus. Sys.--Costs, supra. Further, in the context of a consolidated multi-party protest, as here, the GAO attorney’s indication that each protest is likely to be sustained is not necessarily an endorsement of each individual protester’s arguments. Rather, as explained in the ADR conference here, these protests were all likely to be sustained because, on the basis of clearly meritorious arguments concerning errors, inconsistencies and unequal treatment under the corporate experience and past performance factors--arguments not raised by Analytica--the evaluation was considered so flawed that our Office could not determine the relative rankings of the offerors. Accordingly, although the GAO attorney advised that the Analytica protest was likely to be sustained, the ADR conference did not substantively address Analytica’s specific protest arguments, and we cannot conclude that Analytica should be reimbursed the costs of pursuing protest grounds that were not themselves clearly meritorious, and not intertwined with successful protest grounds.

RECOMMENDATION

We recommend that the protesters, with the exception of Analytica, be reimbursed the costs associated with filing and pursuing their protests, including reasonable attorneys' fees, to the extent those costs were incurred in connection with challenges to the agency's evaluation of proposals under the corporate experience or past performance evaluation factor, or challenges to the best-value tradeoff decision. We do not recommend reimbursement for protest grounds challenging the agency's price evaluation, challenges in connection with the agency's evaluation under the process maturity factor, or any other challenges not associated with the evaluation of proposals under the corporate experience and past performance factors, or the best-value tradeoff decision. The protesters should submit their claims for costs associated with the protest grounds recommended for reimbursement, detailing and certifying the time expended and costs incurred, directly to CMS within 60 days of receipt of this decision.

The requests are granted in part and denied in part.

Susan A. Poling
General Counsel