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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Panacea Consulting, Inc.--Costs

File: B-299307.3; B-299308.3

Date: July 24, 2007

Lars E. Anderson, Esq., J. Scott Hommer, III, Esq., Peter A. Riesen, Esq., and Keir X. Bancroft, Esq., Venable LLP, for the protester.
Herman J. Narcho, Esq., and Dennis Adelson, Esq., Department of Labor, for the agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Request for recommendation that protester be reimbursed costs of filing and pursuing protest is granted, in part, where agency took corrective action in response to outcome prediction alternative dispute resolution conducted by GAO attorney.

2. Recovery of protest costs is limited to those issues upon which protester prevailed, where those issues were based on distinct core of facts and legal theories unrelated to facts and legal theories underlying unsuccessful arguments.

DECISION

Panacea Consulting, Inc. requests that we recommend that it be reimbursed the costs of filing and pursuing its protest against the issuance of delivery orders to Systems Integration and Development, Inc. (SID) under solicitation Nos. FY07FA1-64079E446-0001 and FY07FA3-64079E448-0001, issued by the Department of Labor for, respectively, project management and support services and core research and development support services.

We recommend that Panacea be reimbursed its protest costs to the extent discussed below.

In its protest, Panacea initially asserted that the agency unreasonably evaluated SID's submissions because it identified numerous key personnel who were Panacea employees. According to the protester, it was unreasonable for the agency to give SID credit for these employees because they were bound by "non-compete"

agreements with Panacea, and thus would not be available to work for SID. In a related assertion, Panacea argued that these key employees violated the procurement integrity provisions, 41 U.S.C. § 423 (2000), by allegedly sharing Panacea's proprietary information with SID. After the agency submitted its report in response to the protest, Panacea raised two additional protest grounds--the agency improperly gave disproportionate weight to price versus technical considerations in the source selections, and failed to document the basis for the numeric scores assigned to the submissions during its evaluation and source selection. The agency responded to these allegations and the protester filed supplemental comments.

The cognizant GAO attorney subsequently conducted an outcome prediction alternative dispute resolution (ADR) conference.[1] He advised the agency that Panacea's protest appeared to be meritorious insofar as the record showed that the agency had, in fact, improperly weighted the price and technical considerations in the evaluations and source selection decisions, and that the record was lacking in support for the evaluation scores assigned to the competing submissions. Accordingly, the GAO attorney advised the agency that it could address these concerns by reevaluating submissions in a manner consistent with the terms of the solicitations, and preparing narrative materials to explain the basis for the point scores assigned and the source selection decisions made. The GAO attorney also advised the parties that Panacea's remaining assertions appeared to be without merit.

In response to the ADR, the agency advised our Office that it intended to take corrective action by reevaluating the submissions in a manner consistent with the terms of the solicitations, and that it also intended to prepare narrative materials in support of its evaluation. In view of these representations, we dismissed Panacea's protest as academic (B-299307 et al., Mar. 28, 2007).

Shortly after we dismissed the protest, Panacea filed this request. In response, the agency argues that reimbursement of costs is not warranted because it did not agree to pay Panacea's protest costs during the ADR procedure discussed above; had the GAO attorney indicated that reimbursement was recommended, the agency would have declined to take corrective action and instead elected to await our decision. The agency asserts that reimbursement is not appropriate in any case, because the protest was not clearly meritorious. The agency notes, in this regard, that the GAO attorney indicated that Panacea's initial protest allegations appeared to be without merit, and that the price/technical evaluation weighting challenged in the supplemental protest concerned an evaluation methodology that had long been used by the agency, so it was not clear that this methodology was erroneous. The agency also maintains that, in any event, it has now performed the reevaluation and

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[1] For a description of the outcome prediction ADR process, see Alaska Structures, Inc.--Costs, B-298575.4, Jan 22, 2007, 2007 CPD ¶17 at 4 n. 4.

determined, once again, that SID is the successful offeror under both acquisitions. Accordingly, the agency maintains, Panacea should not be reimbursed its costs as a result of any earlier misevaluation of submissions.

When a procuring agency takes corrective action in response to a protest, we may recommend that the agency reimburse the protester its 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. Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2007); Pemco Aeroplex, Inc.--Recon. and Costs, B-275587.5, 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 that a protest is likely to be sustained only if he or she has a high degree of confidence regarding the outcome; it follows that the attorney's willingness to do so is generally an indication that the protest satisfies the "clearly meritorious" requirement for purposes 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.

Here, aside from the GAO attorney's indication during ADR that the two protest grounds in question likely would be sustained--which, as noted above, indicates that the protest grounds are considered to be clearly meritorious--we think a reasonable agency inquiry would have shown that there was no legally defensible agency position with regard to these arguments. As noted during the ADR, the record showed that the agency had weighted the evaluation criteria differently during the evaluations than the manner stated in the solicitations. It likewise should have been apparent to the agency that the evaluation records were legally inadequate for proper source selection decisions, since the record contained no information explaining the basis for the scoring of the submissions or the source selection decisions. Blue Rock Structures, Inc., B-293134, Feb. 6, 2004, 2004 CPD ¶ 63 at 5 (where agency fails to adequately document the basis for its source selection decision, it runs the risk that GAO may be unable to determine that the agency's decision is reasonable). We conclude that the protest grounds in question were clearly meritorious.

The agency's assertion that reimbursement is not warranted because the reevaluation resulted in the same source selection decision is without merit. Again, where an agency has taken corrective action, the determinative considerations for us in deciding whether costs should be reimbursed are whether the corrective action was unduly delayed (here, the agency does not argue that it was prompt, and we generally consider action to be unduly delayed where, as here, it is taken after the agency report due date), and whether the arguments raised were clearly meritorious. The fact that a reevaluation as part of corrective action resulted in the same source

selection decision has no bearing on our assessment. Based on these considerations, as discussed, reimbursement is warranted here.

We will recommend that a protester's recovery of protest costs be limited to the issues on which the protest was sustained where those issues are so clearly severable from the unsuccessful issues as to essentially constitute a separate protest. Sodexho Mgmt., Inc.--Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 29. Issues are severable where they do not share a common core of facts and are not based upon related legal theories. Id. Here, Panacea's initial bases for protest (which, as our Office's attorney advised the parties, appeared to be without merit) are clearly severable from its two supplemental protest grounds (which, as our attorney indicated, appeared to be meritorious). The initial and subsequent arguments were based on entirely distinct core sets of facts and legal theories. Thus, Panacea's recovery here should be limited to the costs incurred in connection with its supplemental protest grounds. Panacea should submit its certified claim, detailing the time spent and the costs incurred, directly to the agency within 60 days of its receipt of this decision. 4 C.F.R. § 21.8(f).

The request is granted.

Gary L. Kepplinger
General Counsel