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Comptroller General
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Decision

Matter of: KGL Food Services, WLL; Intermarkets Global–Costs

File: B-400660.7; B-400660.8

Date: June 20, 2011

Michael Charness, Esq., Amanda Dietrick, Esq., and Adrienne Goins, Esq., Vinson & Elkins LLP, for KGL Food Services, WLL; and Jonathan D. Shaffer, Esq., and Mary Pat Buckenmeyer, Esq., Smith Pachter McWhorter PLC, for Intermarkets Global, the protesters.

Catherine Kellington, Esq., and Jeremiah Kline, Esq., Department of Defense, for the agency.

Paul E. Jordan, Esq., and David A. Ashen, 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 protests challenging the agency's price realism and related technical evaluation issues, where price realism issue was clearly meritorious, but agency unduly delayed taking corrective action.
 2. Costs are not recommended where issues concerning awardee's responsibility, lack of meaningful discussions, and protesters' own technical evaluations are readily severable from successful price realism challenge based on different set of facts and legal theories.
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DECISION

KGL Food Services, WLL, of Safat, Kuwait, and Intermarkets Global (IMG), of Amman, Jordan, request that our Office recommend that they be reimbursed the costs of filing and pursuing their initial and supplemental protests challenging the Department of Defense, Defense Logistics Agency's (DLA) award of a contract to Anham FZCO, LLC, of Dubai, United Arab Emirates, under request for proposals (RFP) No. SPM300-08-R-0061, for the supply of a full service food line in Kuwait, Iraq, and Jordan.

We grant the request in part and deny it in part.

BACKGROUND

KGL and IMG filed several protests with our Office challenging DLA's award of the food services contract to Anham on numerous grounds. In its initial protest, IMG asserted that the agency failed to perform a price realism evaluation; unreasonably evaluated technical proposals (focusing primarily on IMG's own evaluation); failed to conduct a risk assessment; and made an unreasonable best value determination. KGL protested various aspects of Anham's technical evaluation; its own past performance evaluation; flaws in the risk evaluation; the lack of a price realism analysis; and the tradeoff analysis. After reviewing the agency report, both IMG and KGL submitted comments and filed supplemental protests. In its supplemental protest, IMG asserted flaws in the evaluation of Anham's responsibility; a lack of meaningful discussions; flaws in Anham's technical evaluation; and flaws in its own technical and past performance evaluations. In its supplemental protest, KGL challenged DLA's evaluation of Anham's responsibility, past performance, and aspects of Anham's technical proposal. After receipt of the supplemental agency report and the protesters' comments, our Office convened a hearing to further develop the issues of flaws in the price realism and technical evaluations.

GAO subsequently conducted an outcome prediction alternative dispute resolution (ADR) conference in which the cognizant GAO attorney indicated that GAO likely would sustain the protests on the basis that the agency's price realism determination was unreasonable. The GAO attorney also raised concerns about several aspects of the solicitation requirements and related technical evaluation—including the force protection requirements and evaluation of warehouse capacity—but indicated that these concerns would not serve as additional bases for sustaining the protests. Based on DLA's determination to take corrective action—reopening limited discussions, requesting revised proposals, and making a new source selection decision—we dismissed the protests as academic (B-400660.4 et al., July 22, 2010). KGL and IMG then filed requests for reimbursement of their protest costs.

DISCUSSION

As a general rule, we recommend that a successful protester be reimbursed its incurred costs with respect to all issues pursued, not merely those upon which it prevails. AAR Aircraft Servs.—Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 9. 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 protest cost reimbursement provisions of the Competition in Contracting Act of 1984, 31 U.S.C. § 3554(c)(1)(a) (2006). AAR Aircraft Servs.—Costs, supra; TRESP Assocs., Inc.—Costs, B-258322.8, Nov. 3, 1998, 98-2 CPD ¶ 108 at 2. Nevertheless, failing to limit the recovery of protest costs in all instances of partial or limited success by a protester may also result in an unjust cost recovery. Accordingly, in appropriate cases, 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. See, e.g., BAE Tech. Servs., Inc.–Costs, B-296699.3, Aug. 11, 2006, 2006 CPD ¶ 122 at 3; Interface Floorings Sys., Inc.–Claim for Attorneys’ Fees, B-225439.5, July 29, 1987, 87-2 CPD ¶ 106 at 2-3.

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 Sodexho Mgmt., Inc.–Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 29.

In their requests for costs, KGL and IMG have asked our Office to recommend that DLA reimburse the costs associated with all the protest issues they pursued. While DLA concedes that both protesters should be reimbursed their costs of pursuing the price realism issue identified by our Office as clearly meritorious during the ADR session, Response at 2, DLA asserts that the remaining issues were not clearly meritorious and are severable from the price realism issue. KGL and IMG maintain that their remaining issues were intertwined with the price realism issue and thus, should not be severed.

Even though our outcome prediction ADR was based on the likely sustain of the price realism issue, in our view, the challenges to Anham’s technical proposal evaluation were intertwined with and based on a related legal theory to the price realism issue. In this regard, where, as here, a solicitation expressly provides for evaluation of an offeror’s understanding of the requirements, based on the realism of proposed prices, the agency is obliged to conduct a price realism analysis. Health Net Fed. Servs., LLC, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 19. Typically, this analysis consists of an individualized approach to analyzing each proposal, including a review of each offeror’s cost elements and technical proposal. *Id.* at 20; see Federal Acquisition Regulation § 15.404-1(d) (consideration of “unique methods of performance and materials described in the offeror’s technical proposal”); Hughes STX Corp., B-278466, Feb. 2, 1998, 98-1 CPD ¶ 52 at 8 (protest sustained where agency failed to consider offeror’s technical approach as part of realism evaluation).

While price realism and technical issues are not always intertwined, see Basic Commerce and Indus., Inc.–Costs, B-401702.3, Feb. 22, 2010, 2010 CPD ¶ 258 at 4 (cost realism issue severable from non-cost evaluation issues), here, the price realism and technical issues are interrelated and not readily severable. For example, KGL asserted that “Anham’s price does not reflect the costs associated with maintaining readily accessible warehouse space, a sufficient amount of warehouse space, separate facilities for pork storage, force protected warehouse storage, and adequate truck transport,” all issues that it raised in greater detail in its technical challenges. KGL Protest at 19. IMG asserted that Anham’s “unreasonably and

unrealistically low proposed price” was “indicative of substantial proposal and technical risk,” and should have been evaluated as “technically unacceptable.” IMG Protest at 37. It further argued that “Anham’s lower, unrealistic price [could] only be the result of unrealistic assumptions or misunderstanding of contract requirements,” and that the agency report “fail[ed] to show that the agency analyzed Anham’s proposal to determine this.” IMG Comments on Agency Report at 11. Based on the agency’s need to review Anham’s technical proposal as part of its price realism analysis, we conclude that the price realism and technical issues share a common legal theory and underlying facts. Thus, KGL’s and IMG’s protest costs related to these issues (including the risk evaluation) are reimbursable.

We reach the opposite conclusion with regard to KGL’s and IMG’s protests of DLA’s evaluation of Anham’s responsibility and past performance; the protesters’ own past performance and technical evaluations; the conduct of discussions; and the best value determination. These issues are neither clearly meritorious, nor are they clearly intertwined with the price realism/Anham technical evaluation issues. Rather, whether the agency’s evaluations in these areas were reasonable are based on different legal theories and underlying facts than were relevant to the successful price realism challenge. Thus, we do not recommend payment of protest costs associated with these issues.

RECOMMENDATION

We therefore recommend that KGL and IMG be reimbursed the costs associated with filing and pursuing their protests on the price realism and related issues as discussed above, including reasonable attorneys’ fees. KGL and IMG should submit their certified claims, detailing the time spent and costs incurred, directly to the agency within 60 days of its receipt of this decision. Bid Protest Regulations, 4 C.F.R. § 21.8(f)(1) (2010).

The request is granted.

Lynn H. Gibson
General Counsel