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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Focused Management, Inc.--Costs

File: B-404029.6

Date: October 3, 2011

Brian W. Craver, Esq., Person & Craver LLP, for the protester.
Scott F. McCleary, Esq., General Services Administration, for the agency.
Paul E. Jordan, Esq., and Scott H. Riback, 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 protest challenging the agency's failure to include protester in discussions with other offerors in the competitive range, where issue was clearly meritorious but agency unduly delayed taking corrective action.
 2. Protest costs are not recommended where issues concerning evaluation of protester's technical proposal are readily severable from successful discussions challenge based on different set of facts and legal theories.
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DECISION

Focused Management, Inc. (FMI), of Alexandria, Virginia, requests that our Office recommend that it be reimbursed the costs of filing and pursuing its protests challenging the General Services Administration's (GSA) issuance of a task order to JMA Information Technology, of Overland Park, Kansas, under solicitation No. 5TS12100254, for information technology (IT) project management services for the Department of Agriculture.

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

BACKGROUND

FMI filed several protests with our Office challenging GSA's issuance of a task order for these IT services. In its initial protest, FMI protested the issuance of the task order to Cherokee Services Group LLC (CSG) asserting that the agency failed to conduct meaningful discussions, unreasonably evaluated its proposed staffing,

misread and ignored aspects of its proposal, and failed properly to consider price in its source selection. Prior to submission of an agency report (AR), GSA announced that it would take corrective action by conducting discussions with all four vendors in the competitive range, evaluating the proposals consistent with the evaluation criteria, and making a new source selection. We dismissed the protest as academic (B-404029, Oct. 5, 2010).

When GSA subsequently issued a task order to JMA, FMI protested the evaluation of its (revised) proposal and CSG protested JMA's proposed staffing. With regard to FMI's protest, the agency proposed to reevaluate FMI's proposal and make a new source selection. With regard to CSG's protest, GSA proposed to take corrective action including conducting discussions, reevaluating the proposals consistent with the evaluation criteria, and making a new source selection. We dismissed both protests as academic (B-404029.2, Jan. 10, 2011; B-404029.3, Jan. 10, 2011).

GSA again selected JMA for the task order and FMI protested a third time, challenging the agency's evaluation of FMI's proposal regarding its staffing plan, technical approach, quality control plan, and transition plan, as well as the agency's failure to meaningfully consider price in the best value determination. In its report responding to these issues, GSA stated that it had "opened discussions with CSG and JMA" ; there was no mention of whether discussions were held with FMI. AR at 2-3. The Government Accountability Office (GAO) attorney handling the protest conducted a telephone conference with counsel for the agency, the protester, and the intervenor in which GSA verified that FMI had not been included in discussions.

FMI subsequently filed a fourth protest challenging the agency's failure to include it in discussions. GSA filed a supplemental report in which it defended FMI's exclusion on the basis that its exchanges with CSG and JMA had been clarifications and not discussions. FMI filed comments on the AR and supplemental AR.

After development of the record, the GAO attorney conducted an outcome prediction, alternative dispute resolution (ADR) conference. During this conference call, the GAO attorney indicated that GAO likely would sustain the protests on the basis that the agency had unreasonably failed to include FMI in its last round of discussions. In this regard, when an agency conducts discussions, it must do so with all offerors in the competitive range. Computer Scis. Corp. et al., B-298494.2 et al., May 10, 2007, 2007 CPD ¶ 103 at 9. Here, the agency's communications with JMA concerned its key personnel--a material solicitation requirement--and JMA's revised proposal's removal of those personnel, coupled only with a promise to replace them in the future, constituted a material modification. As such, the agency's communications constituted discussions and not mere clarifications. See Priority One Servs., Inc., B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 at 5 (acid test for discussions is whether it can be said that an offeror was provided the opportunity to revise or modify its proposal).

Because our recommendation involved the agency reopening negotiations with all vendors in the competitive range, we did not reach the merits of FMI's evaluation issues. Based on GSA's determination to take corrective action--conducting discussions with all offerors in the competitive range on all technical and price matters, obtaining revised proposals, and making a new source selection--we dismissed the protests as academic (B-404029.4, B-404029.5, May 23, 2011).

DISCUSSION

In its request for costs, FMI asks our Office to recommend that GSA reimburse the costs associated with all issues it pursued from its first to its most recent protests. While GSA concedes that the protester should be reimbursed its costs of pursuing the protest challenging its exclusion from the last round of discussions, GSA asserts that the remaining issues either were not clearly meritorious and are severable from the discussions issue, or were issues raised in its first and second protests in response to which the agency took prompt corrective action.

With regard to FMI's first and second protests, we agree that the agency took corrective action promptly because the agency acted prior to the deadline for submitting its agency reports. When an agency takes corrective action before the due date set for receipt of the agency report, our Office views such action as prompt and will not recommend the reimbursement of costs. The Sandi-Sterling Consortium--Costs, B-296246.2, Sept. 20, 2005, 2005 CPD ¶ 173 at 2-3. Thus, with respect to the costs incurred by FMI in connection with those protests, we have no basis to recommend their reimbursement.

With regard to FMI's third protest challenging the evaluation of its proposal, these protest issues were not clearly meritorious. For example, the evaluators found FMI's proposal minimally acceptable under the technical expertise/staffing plan factor because one of FMI's key personnel lacked ample experience and had minimal time in some positions. FMI asserted that the RFQ did not specifically require "ample" experience. We disagree.¹ Task 2.4 required the contractor to provide personnel possessing and demonstrating knowledge, skills, abilities, expertise, and experience related to various work aspects. Based on these requirements and the fact that FMI's key employee possessed multiple, but short duration jobs, instead of longer term jobs, and had limited experience in certain required areas, the agency reasonably could conclude that FMI's proposed key employee was unacceptable. See Carlson Wagonlit Travel, B-287016, Mar. 6, 2001, 2001 CPD ¶ 49 at 3.

¹ In evaluating proposals, an agency properly may take into account specific, albeit not expressly identified, matters that are logically encompassed by, or related to, the stated evaluation criteria. Independence Constr., Inc., B-292052, May 19, 2003, 2003 CPD ¶ 105 at 4.

With respect to FMI's fourth protest regarding its exclusion from discussions, the agency does not dispute that FMI is entitled to reimbursement of its protest costs, but argues that the costs associated with protesting the lack of discussions are properly severable from the cost associated with FMI's unsuccessful evaluation challenges. We agree.

As discussed above, in our ADR telephone conference we pointed out that the agency's failure to include FMI in the last round of discussions was unreasonable. Our willingness to use ADR was an indication that we viewed the protest as clearly meritorious, and satisfied 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. We thus recommend reimbursement of FMI's costs for this protest ground.

However, we also agree with GSA's contention that the costs associated with FMI's discussions challenge are properly severable from its evaluation challenges. Although as a general rule, we may recommend that a successful protester be reimbursed its incurred costs with respect to all issues pursued and not merely those upon which it prevails, AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 9, 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. 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 Sodexo Mgmt., Inc.--Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 29.

FMI's technical issues were not clearly intertwined with the discussions issue raised in its fourth protest. Whether the agency's evaluation in these areas was reasonable concerns legal theories and underlying facts that are distinct and severable from those relevant to FMI's exclusion from the last round of discussions. See Basic Commerce and Indus., Inc.--Costs, B-401702.3, Feb. 22, 2010, 2010 CPD ¶ 258 at 4 (cost realism and non-cost issues severable); KAES Enters., LLC--Protest and Costs, B-402050.4, Feb. 12, 2010, 2010 CPD ¶ 49 at 4 (elimination from competitive range without considering price severable from technical evaluation issues). In light of these considerations, we decline to recommend payment of protest costs associated with FMI's technical evaluation issues.

RECOMMENDATION

We recommend that FMI be reimbursed the costs associated with filing and pursuing its protest on the issue of its exclusion from discussions, including reasonable attorneys' fees. FMI should submit its certified claim, 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) (2011).

The request is granted in part and denied in part.

Lynn H. Gibson
General Counsel