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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Burns and Roe Services Corporation--Costs

File: B-310828.2

Date: April 28, 2008

Gerald E. Wimberly, Esq., McGlinchey Stafford PLLC, for the protester.
Sherry Kinland Kaswell, Esq., Department of the Interior, for the agency.
Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

In recommending reimbursement of protest costs, GAO will not sever successful issues from unsuccessful issues--but rather recommends reimbursement for all issues raised--where issues are interconnected and based on common factual underpinnings.

DECISION

Burns and Roe Services Corporation (BRSC) requests that we recommend reimbursement of the costs of filing and pursuing its protest challenging the award of a contract to CH2M Hill Constructors, under Department of the Interior request for proposals (RFP) No.06SP340020, for support services for the Yuma Desalting Plant.

We recommend that the agency reimburse BRSC the costs of filing and pursuing its protest.

In its protest, filed on November 19, 2007, BRSC argued that the agency misevaluated its technical proposal and past performance, failed to hold meaningful discussions, and treated BRSC and CH2M disparately during the evaluation process. The agency submitted its report in response to the protest on December 21, and on January 4, 2008, BRSC submitted comments in response to the report. Thereafter, the GAO attorney handling the protest contacted the parties to assess their interest in

“outcome prediction” alternate dispute resolution (ADR).¹ The parties agreed to participate in ADR, during which the GAO attorney informed the parties that she was specifically concerned with the protester’s allegation that the agency had failed to hold meaningful discussions with respect to recruiting. In this regard, prior to the ADR the parties had submitted arguments on the issue. Based on the ADR, the agency agreed to take corrective action. Specifically, the agency agreed to reopen discussions and make a new award determination. Thereafter, we dismissed the protest as academic (B-310828, Feb. 13, 2008).

On February 20, BRSC timely requested, pursuant to our Bid Protest Regulations, that it be reimbursed the costs of filing and pursuing its protest. 4 C.F.R. § 21.8(e) (2007). Interior acknowledges that BRSC is entitled to recover its protest costs.² The agency requests, however, that recovery be limited to only those reasonable costs relating to the protest issue about which the GAO attorney expressed concern during the ADR, that is, the agency’s alleged failure to conduct meaningful discussions.

As a general rule, we consider a successful protester entitled to be reimbursed costs incurred 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 cost reimbursement provisions of the Competition in

¹ In outcome prediction ADR, the cognizant GAO attorney convenes the parties, at their request or at GAO’s initiative, and explains what he or she believes the likely outcome will be and the reasons for that belief. A GAO attorney will engage in this form of ADR only if there is a high degree of confidence regarding the outcome. Where the party predicted to lose the protest takes action obviating the need for a written decision (either the agency taking corrective action or the protester withdrawing the protest), our Office closes the case. Although the outcome prediction reflects the view of the GAO attorney and, generally, that of a supervisor as well, it is not a decision of our Office, and it does not bind our Office should issuance of a written decision remain appropriate. See T Square Logistics Servs. Corp., B-297790.4, Apr. 26, 2006, 2006 CPD ¶ 78 at 3 n.1.

² Protest costs generally are awarded where an agency fails to take prompt corrective action in response to a clearly meritorious protest. See Pemco Aeroplex, Inc.–Recon. and Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 5. This standard is met where, after submitting its report, an agency takes corrective action on the protest, based upon outcome prediction ADR indicating that the protest would likely be sustained. See, e.g., National Opinion Research Ctr.–Costs, B-289044.3, Mar. 6, 2002, 2002 CPD ¶ 55 at 3; Millar Elevator Serv. Co.–Costs, B-284870.3, Aug. 3, 2000, 2000 CPD ¶ 126 at 3.

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 award determination. 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 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.

We previously have found that the three issue areas raised by BRSC in its protest--misvaluation of proposals, failure to hold meaningful discussions, and treating offerors unequally--involve the same core facts, and thus are intertwined for purposes of considering whether protest costs should be reimbursed. BAE Tech. Servs. Inc.--Costs, B-296699.3 Aug. 11, 2006, 2006 CPD ¶ 122 at 3. The agency has presented no argument or evidence that persuades us that our view in this regard should be changed under the facts of this case. Under these circumstances, we conclude that the evaluation, discussions, and equal treatment issues raised in BRSC's protest are not severable, and that BRSC therefore should be reimbursed its reasonable costs related to all of these issues. BRSC is not required to separate the costs associated with its arguments relating to the agency's failure to conduct meaningful discussions from the costs associated with the other arguments raised in its protest. BRSC should submit its claim to the agency.

The request for protest costs is granted.

Gary L. Kepplinger
General Counsel