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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: Rite-Solutions, Inc.--Costs

File: B-407920.3

Date: June 27, 2013

James J. McCullough, Esq., Fried, Frank, Harris, Shriver & Jacobson LLP, for the protester.

Richard C. Dale II, Esq., Department of the Navy, for the agency.

Mary G. Curcio, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reimbursement of protest costs for protest issues that are severable from clearly meritorious issue is denied where the issues themselves are not clearly meritorious.

DECISION

Rite-Solutions, Inc. requests that this Office recommend that Rite be reimbursed the costs incurred in filing and pursuing its protest challenging the Department of the Navy's award of a contract to Systems Resource Management, Inc., pursuant to request for proposals (RFP) No. N00024-12-R-3372, for network infrastructure and information technology services.

We deny Rite's request.

The solicitation provided for the issuance of a cost-plus fixed-fee task order to the offeror whose proposal represented the best value, considering technical capability, past performance and cost. RFP § M.32SX(d). Following the evaluation of initial proposals, multiple rounds of discussions, and the submission and evaluation of final proposal revisions (FPR), Rite was rated outstanding for technical capability, and very relevant with substantial confidence for past performance. Technical Evaluation Addendum at 1. Rite's evaluated cost was \$34,592,270. Chief of Contracting Office Statement at 1. SRM was rated acceptable for technical capability and somewhat relevant with limited confidence for past performance. Technical Evaluation Addendum at 1. SRM's evaluated cost was \$29,634,555.

Chief of Contracting Office Statement at 1. The agency performed a best value analysis and selected SRM for award of the task order.

On January 2, 2013, following a debriefing, Rite submitted a protest to our Office in which it asserted that the agency unreasonably evaluated SRM's technical, past performance and cost proposals, and made an unreasonable best value determination. Specifically, Rite asserted that SRM should not have been rated acceptable for technical capability because it did not apply for a required top secret facility security clearance until the date the task order was awarded; SRM failed to provide a required professional employee compensation plan; the agency performed an inadequate cost realism analysis; and SRM should not have been rated acceptable for past performance. On February 1, the agency submitted a report in response to Rite's protest. Based on information provided in that report, Rite filed a supplemental protest on February 11 in which it asserted that the agency held unequal discussions with SRM. Rite also reiterated that the agency performed an unreasonable best value determination. On March 14, the agency filed its report in response to the supplemental protest, and on March 25, Rite submitted comments in response to the report.

Subsequently, on April 3, the GAO attorney handling the protest conducted a conference call with the parties, to attempt to resolve the protest through our alternative dispute resolution (ADR) process.¹ The attorney advised that the protest would likely be sustained on the basis (raised in Rite's supplemental protest) that the agency held unequal discussions since the agency notified SRM of a weakness in its proposal after the conclusion of discussions and receipt of FPRs, and allowed SRM the opportunity to revise its proposal, without providing Rite with a similar opportunity. On April 5, the Navy notified our Office that it would take corrective action in response to the supplemental protest, including re-opening the procurement, conducting further discussions, and allowing the offerors to submit revised proposals. As a result, on April 8, we dismissed Rite's protests as academic. Rite Solutions, Inc., B-407920, B-407920.2, April 8, 2013.

On April 10, Rite submitted this request to our Office requesting that we recommend that it be reimbursed for the costs of filing and pursuing both the initial and supplemental protests, including reasonable attorneys' fees.

¹Pursuant to GAO's Bid Protest Regulations and our established practice, the GAO attorney handling a protest may conduct "outcome prediction" ADR by advising the parties of what the likely outcome of the protest will be. See Pond Sec. Group Italia JV--Costs, B-400149.2, Mar. 19, 2009, 2009 CPD ¶ 61 at 3 n.1.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs, including reasonable attorneys' fees, if, 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 the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. 4 C.F.R. § 21.8(e) (2013); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. Our willingness to inform the parties through outcome prediction ADR that a protest is likely to be sustained, as we did here, is generally an indication that the protest is viewed as clearly meritorious, and 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. Additionally, while we consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest, we generally do not consider it to be prompt where it is taken after that date. AGFA HealthCare Corp.--Costs, B-400733.6, Apr. 22, 2009, 2009 CPD ¶ 90 at 3-4.

Here, the agency elected to take corrective action in response to the supplemental protest asserting unequal discussions, but did not do so until after the agency submitted its report in response to the supplemental protest, and after our Office advised the agency of the likely outcome of the protest. The agency does not dispute that Rite is entitled to recover the costs of filing and pursuing its protest that the agency engaged in unequal discussions. Accordingly, we do not address this issue.

The remaining issues raised by Rite with respect to the evaluation of SRM's proposal and the best value determination do not meet the clearly meritorious standard necessary for our cost reimbursement recommendation. Further, 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, *supra*, 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. 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.

Here, Rite's protest against the evaluation and source selection decision were not clearly intertwined with its protest that discussions were not equal. Specifically, whether the agency's evaluation of proposals and its source selection decision were

reasonable concern legal theories and underlying facts that are distinct and severable from those relevant to the issue of unequal discussions. See Focused Mgmt., Inc.--Costs, B-404029.6, Oct. 3, 2011, 2011 CPD ¶ 204 at 4-5. Under these circumstances, we agree with the agency that Rite's reimbursement of protest costs should be limited to those costs incurred in connection with its unequal discussions basis of protest.

Rite's request for reimbursement of protest costs for issues other than unequal discussions is denied.

Susan A. Poling
General Counsel