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**Comptroller General
of the United States**

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

Decision

Matter of: Honeywell Technology Solutions, Inc.--Costs

File: B-296860.3

Date: December 27, 2005

Anne B. Perry, Esq., and Charmaine A. Howson, Esq., Sheppard Mullin Richter & Hampton LLP, for the protester.

Charles G. Steenbuck, Esq., and Gregory L. Edefsen, Esq., Department of the Navy, for the agency.

Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where Government Accountability Office (GAO) attorney, in conducting outcome prediction alternative dispute resolution (ADR), advised parties that protest issue related to organizational conflict of interest would likely be sustained (which led agency to take corrective action that rendered entire protest academic), but GAO attorney did not address other, separate issues raised by protest, GAO does not recommend reimbursement of costs associated with the unresolved issues, which were severable from the organizational conflict of interest issue addressed during ADR.

DECISION

Honeywell Technology Solutions, Inc. requests that our Office recommend that it be reimbursed the costs of filing and pursuing an initial and a supplemental protest challenging the award of a contract to Assurance Technology Corporation (ATC) under request for proposals (RFP) No. N00173-04-R-LS02, issued by the Department of the Navy, Naval Research Laboratory, for technical and engineering support services. Because the agency has agreed to pay the costs associated with one of the bases of protest, which our Office's attorney identified as clearly meritorious in the context of an "outcome prediction" alternative dispute resolution (ADR) conference, the issue for our Office is whether the protester's reimbursement should be limited to that single issue.

We deny the request.

Honeywell filed a timely protest with our Office challenging the Navy's award of the technical and engineering support services contract to ATC. In its protest, Honeywell raised numerous challenges to the agency's award decision including: (1) ATC had material organizational conflicts of interest (OCI) that ATC failed to disclose and the Navy failed to identify or evaluate; (2) the Navy failed to properly evaluate proposals in accordance with the evaluation factors; (3) the Navy's price realism analysis was unreasonable; and (4) as a consequence of these errors, the Navy's price/technical tradeoff was flawed.

With regard to the OCI concerns, Honeywell raised two issues stemming from ATC's performance of a separate Navy space systems development department (SSDD) contract, No. N00173-01-C-2006. First, Honeywell asserted that ATC had obtained non-public proprietary cost and technical data in connection with Honeywell's performance as the incumbent contractor for the technical and engineering support services contract, which provided ATC with an unfair competitive advantage in the procurement at issue. According to Honeywell, ATC learned this information as a result of ATC's program management activities under the SSDD contract. Second, Honeywell maintained that in performing the SSDD contract, ATC would be required to supervise a significant portion of its own work under the technical and engineering support services contract, thus creating an "impaired objectivity" conflict of interest. Protest at 13. With regard to the second OCI issue, Honeywell argued that the Navy's technical and price evaluation were compromised because the Navy did not consider the impact associated with mitigating ATC's conflict. *Id.* at 17.

After receipt of the agency report, Honeywell filed its comments, in which it continued to argue the issues raised in its initial protest and also raised a supplemental basis of protest—that the Navy had improperly conducted pre-award discussions only with ATC. At the request of our Office, the agency filed a supplemental agency report addressing the supplemental protest issue as well as the arguments raised in Honeywell's comments. After receipt of Honeywell's comments on the supplemental report, our Office held what we refer to as an "outcome prediction" alternative dispute resolution (ADR) conference, in which the GAO attorney told the parties that it was his view that the protest was likely to be sustained with regard to the first OCI issue. At the conference, the GAO attorney expressed the view that the record demonstrated that ATC had obtained Honeywell's proprietary information in connection with Honeywell's performance of the incumbent technical and engineering support services contract and that this information was obtained as a consequence of ATC's performance of its SSDD contract. The record further indicated that the agency did not recognize this issue until after Honeywell had filed its protest and that no measures had been taken to mitigate the conflict. The parties were advised that we have found awards improper where agencies have failed to recognize conflicts and failed in their obligations under the Federal Acquisition Regulation to identify and evaluate potential conflicts and to take appropriate measures to resolve them. See Purvis Sys., Inc., B-293807.3,

B-293807.4, Aug. 16, 2004, 2004 CPD ¶ 177; Science Applications Int'l Corp., B-293601 et al., May 3, 2004, 2004 CPD ¶ 96.

In addition, during the ADR conference, the GAO attorney identified areas of concern, which, in the event the case proceeded to a written decision, would require further development through a hearing. Specifically, the GAO attorney indicated that a hearing would be required to more fully develop the record concerning the second OCI issue, as well as particular technical evaluation and price realism issues raised by Honeywell. Because further development of the record was required, no opinion was given regarding the likely outcome of these issues, although the GAO attorney framed his concerns regarding these issues for the parties in the event a hearing proved necessary.¹ No other issues were discussed.

After the ADR conference, the Navy submitted a letter to our Office indicating that it would take corrective action by conducting “a supplemental review of the proposals Particular regard will be given to the issues of: organizational conflicts of interest (OCI) (of both the “unfair competitive advantage” and “impaired objectivity” types)[.]” Letter from Navy to GAO, Sept. 26, 2005. In addition, the letter indicated that the supplemental review of the proposals would also consider the technical and price realism issues specifically discussed during the ADR conference, which, as noted above, would have required further development by our Office, in the absence of the Navy’s corrective action. Based on the proposed corrective action, we dismissed the protests as academic.²

As a general rule, we consider a successful protester entitled to costs incurred with respect to all issues pursued, not merely those upon which it prevails. 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 Contracting Act. AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 9; 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 result in an unjustified windfall to the protester and cost to the government. Accordingly, in appropriate cases we have limited the recommended reimbursement of protest costs where a part of the costs is allocable to a losing protest issue that is so clearly severable as to essentially constitute a

¹ The GAO attorney characterized his discussion of the other issues as relating to the parties’ “litigation risk,” another kind of ADR that GAO also uses.

² In response to concerns raised by Honeywell regarding the sufficiency of the agency’s proposed corrective action, the Navy indicated that it would continue to suspend ATC’s performance under the contract until it had fully implemented corrective action.

separate protest. See, e.g., ProTech Corp., B-294818, Dec. 30, 2004, 2005 CPD ¶ 73 at 7 n.10; TRW, Inc.–Costs, supra; 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 claims are interrelated or intertwined—i.e., the successful and unsuccessful claims share a common core set of facts, are based on related legal theories, or are otherwise not readily severable. See Department of the Army–Modification of Remedy, B-292768.5, Mar. 25, 2004, 2004 CPD ¶ 74 at 2-3; Sodexho Mgmt., Inc.–Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 29; Department of the Navy–Recon. and Modification of Remedy, B-246784.4, Feb. 17, 1993, 93-1 CPD ¶ 147 at 6-7.

In its request for costs, Honeywell has asked our Office to recommend that the Navy pay the costs associated with all the protest issues it pursued. The Navy concedes Honeywell’s entitlement to costs for the single OCI issue identified by our Office’s attorney as clearly meritorious during the ADR session. According to the Navy, the other issues are not clearly meritorious and are severable from the OCI issue which prompted corrective action, and, as a consequence, Honeywell should not recover its costs for these other issues. We agree with the agency.

In our view, the OCI issue raised by Honeywell concerning ATC’s access to Honeywell’s proprietary information was the only clearly meritorious issue raised in Honeywell’s protest and this issue is severable from Honeywell’s other grounds for protest.³ In reaching this conclusion we note that this OCI issue arose in connection with Honeywell’s and ATC’s performance of separate Navy contracts and had no bearing on the agency’s technical or price evaluation of either Honeywell’s or ATC’s proposals. As a consequence, this OCI issue did not share a common core of relevant facts with those underpinning Honeywell’s challenge to the Navy’s technical and price evaluation, nor did it relate to the improper discussions issue, which concerned ATC’s submission of supplemental subcontractor information.

Moreover, while we recognize that Honeywell raised two OCI issues, both of which relate to ATC’s performance of its SSDD contract (No. N00173-01-C-2006), we find it

³ We consider a protest to be “clearly meritorious” when a reasonable agency inquiry into the protester’s allegations would show that the agency lacked a defensible legal position, that is, that the protest does not involve a close question. East Penn Mfg. Co., Inc.–Costs, B-291503.4, Apr. 10, 2003, 2003 CPD ¶ 83 at 3. During the ADR session, only one OCI issue was identified as clearly meritorious—no opinion was rendered regarding the other issues. Rather, resolving the other issues would have required substantial further case development through a hearing. As such, these other issues did not constitute “clearly meritorious” bases of protest.

appropriate to distinguish between these bases of protest as well. As explained above, Honeywell alleged both that ATC had gained access to Honeywell's proprietary information, as a consequence of ATC's performance of its SSDD contract--resulting in an improper and unfair competitive advantage--and that the Navy failed to properly consider and evaluate the impaired objectivity associated with ATC's performance under the SSDD contract, since ATC's performance under the SSDD contract would result in ATC supervising its own performance under the technical and engineering support services contract. While both issues stem from ATC's performance of the SSDD contract, that fact alone is not controlling. The first OCI issue turns on the exchange of Honeywell information in connection with the SSDD contract, ATC's potential use of the information, and the agency's consideration of this conflict. The second issue, unlike the first, turns on the nature of ATC's obligations under the SSDD contract, its obligations under the technical and engineering support services contract, and whether those duties intersect in a way to create a potential conflict of interest, as well as the agency's efforts to evaluate and mitigate any conflict. Since the facts and legal analysis supporting these OCI issues are separate and distinct, we conclude that the issues are severable for the purpose of limiting Honeywell's costs to the one clearly meritorious OCI issue raised in its protest.

The request is denied.

Anthony H. Gamboa
General Counsel