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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Alaska Structures, Inc.—Costs

File: B-298156.2

Date: July 17, 2006

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Peter F. Pontzer, Esq., Department of the Army, for the agency.
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DIGEST

1. Government Accountability Office will not recommend that protester be reimbursed its protest costs where the agency promptly took corrective action before the date set for filing its report on the protest.
 2. Request for recommendation for reimbursement of protest costs relating to subsequent protest of allegedly defective solicitation, undertaken after prior protest of original solicitation led to corrective action, is denied where the record does not show that the issue which the agency's corrective action failed to address was clearly meritorious.
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DECISION

Alaska Structures, Inc. requests that we recommend that it be reimbursed the costs of filing and pursuing its protest challenging the terms of request for quotations (RFQ) No. 129731, issued by the Army Medical Research Acquisition Activity, Army Medical Material Agency, Department of the Army, for a portable hospital system. We dismissed the protest after the agency advised our Office that it would take corrective action by canceling, and subsequently revising and reissuing, the RFQ. Alaska Structures argues that it was forced to file its most recent protest, and incur the associated costs, because the agency failed to properly implement the corrective action promised in response to a prior protest filed by Alaska Structures raising the same alleged solicitation defects.

We deny the request.

On September 21, 2005, the Army issued RFQ No. 113332 for a 250-bed portable hospital system.¹ On September 26, Alaska Structures protested to our Office, arguing that the RFQ failed to provide vendors with sufficient time to prepare and submit quotations. On October 4, the Army provided notice that it was taking corrective action in response to Alaska Structures' protest by resoliciting the requirement and allowing more time for vendors to respond to the solicitation. Based on the agency's announced corrective action, we dismissed Alaska Structures' September 26 protest without rendering a decision on the protest's merits. Alaska Structures, Inc., B-297286, Oct. 12, 2005.

On October 26, the Army issued RFQ No. 117562 for a similar 250-bed portable hospital system. On December 15, Alaska Structures again protested to our Office, arguing that various solicitation requirements were defective.² On January 11, 2006, the Army provided notice that it was taking corrective action in response to Alaska Structures' protest by canceling the underlying RFQ and preparing a new solicitation.³ We subsequently dismissed Alaska Structures' December 15 protest without rendering a decision on the protest's merits. Alaska Structures, Inc., B-297743, Jan. 19, 2006.

On March 1, the Army issued the instant solicitation, RFQ No. 129731, for a 150-bed portable hospital system. On March 31, Alaska Structures again protested to our Office, arguing that various terms of the RFQ were defective. Specifically, Alaska Structures alleged that the agency improperly intended to purchase non-Federal Supply Schedule (FSS) items using FSS procedures; the solicitation's functional characteristics were vague and ambiguous; the RFQ failed to provide vendors with equal information concerning mandatory compatibility requirements; the solicitation contained internally inconsistent evaluation criteria; and the evaluation criteria improperly contained requirements that were not also contained in the functional characteristics. Protest, Mar. 31, 2006, at 10-19.

¹ The Army is conducting this procurement on behalf of the Federal Emergency Management Agency, the user activity.

² RFQ No. 117562 utilized a "brand name or equal"-type specification, which identified a specific manufacturer's products as well as various minimum essential characteristics for the portable hospital system requirement. Alaska Structures protested that a number of the RFQ's minimum essential characteristics were vague, ambiguous, and/or inconsistent, and with regard to one minimum essential characteristic, unduly restricted competition to the identified brand name product. Protest, Dec. 15, 2005, at 5-18.

³ As part of the outlined corrective action, the contracting officer stated that the revised solicitation would utilize new performance or functionality-based specifications that would avoid reference to any particular manufacturer's products. Army Letter to GAO, Jan. 11, 2006, at 4.

On April 26, the Army notified our Office of its intent to cancel the RFQ here, and to revise and reissue the solicitation. While not agreeing with all of the protester's arguments and allegations, the agency stated that it would address, in whole or in part, four of the five issues raised by Alaska Structures (*i.e.*, all but the assertion that the RFQ's functional characteristics were improperly vague and ambiguous).⁴ Army Letter to GAO, Apr. 26, 2006, at 3. We found that the cancellation of the RFQ rendered Alaska Structures' protest of that solicitation academic, and since it is not our practice to consider academic protests, we dismissed the protest.⁵ Alaska Structures, Inc., B-298156, May 3, 2006.

Alaska Structures now requests that our Office recommend that the agency reimburse the protester's costs of filing and pursuing its March 31 protest, including attorneys' fees. Alaska Structures argues that, in light of the Army's failure to properly implement the corrective action as promised in response to the prior protest, Alaska Structures was forced to file the March 31 protest and thus expend unnecessary time and resources to obtain relief. Protester's Comments, June 2, 2006, at 2. The agency opposes Alaska Structures' request, arguing that its corrective action was promptly taken in light of when the protester first identified the deficiencies that became the basis for its corrective action.

Under the Competition in Contracting Act of 1984, as amended, our Office may recommend that protest costs be reimbursed where we find that an agency's action violated a procurement statute or regulation. 31 U.S.C. § 3554(c)(1) (2000). Our Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2006), further provide that where an agency takes corrective action in response to a protest, our Office may recommend that the agency pay the protester its costs of filing and pursuing the protest. Our Regulations do not contemplate a recommendation for the reimbursement of protest costs in every case in which an agency takes corrective action, but rather only where an agency unduly delays taking corrective action in the face of a clearly meritorious protest.⁶ Information Ventures, Inc.--Costs, B-294580.2 *et al.*, Dec. 6, 2004, 2004 CPD ¶ 244 at 2; Oklahoma Indian Corp.--Claim for Costs, B-243785.2, June 10, 1991,

⁴ The contracting officer also described these four issues as ones that Alaska Structures had not previously raised. Army Letter to GAO, Apr. 26, 2006, at 3. With respect to the fifth issue, the Army stated that, despite its disagreement with the protester's arguments on this point, it reserved the right to further clarify the specifications in this area. *Id.* at 3 n.1.

⁵ We subsequently denied the protester's request for reconsideration of our dismissal decision. Alaska Structures, Inc.--Recon., B-298156.3, June 1, 2006.

⁶ A protest is clearly meritorious when a reasonable agency inquiry into the protester's allegations would show facts disclosing the absence of a defensible legal position (*i.e.*, not a close question). PADCO, Inc.--Costs, B-289096.3, May 3, 2002, 2002 CPD ¶ 135 at 3.

91-1 CPD ¶ 558 at 2. As a general rule, so long as an agency takes corrective action in response to a protest by the due date of its protest report, we regard such action as prompt and decline to consider favorably a request to recommend reimbursement of protests costs. The Sandi-Sterling Consortium--Costs, B-296246.2, Sept. 20, 2005, 2005 CPD ¶ 173 at 2-3; Envirosolve--Costs, B-294420.3, Feb. 17, 2005, 2005 CPD ¶ 35 at 3. Our rule is intended to prevent inordinate delay in investigating the merits of a protest and taking corrective action once an error is evident, so that a protester will not incur unnecessary effort and expense in pursuing its remedies before our Office. PADCO, Inc.--Costs, *supra*, at 3-4.

Here, there is no question that the agency's corrective action was prompt, as the decision to cancel the solicitation here occurred prior to the date set for the filing of the agency's report.⁷ Under these circumstances, the recovery of protest costs is not appropriate. See QuanTech, Inc.--Costs, B-278380.3, June 17, 1998, 98-1 CPD ¶ 165 at 2-3.

Alaska Structures argues that the reimbursement of its protest costs nevertheless is warranted here because the agency failed to implement in a timely manner the promised corrective action that prompted the dismissal of its prior protest. Specifically, the protester contends that, in response to its December 15 protest, the Army agreed to address, among other things, the key issue raised--that the specifications were so vague and ambiguous as to prevent vendors from competing intelligently and on an equal basis. Alaska Structures argues that, notwithstanding the Army's prior promise that it would correct this deficiency, the subsequent solicitation again contained specifications that were vague and ambiguous, thereby necessitating the filing of its March 31 protest. The protester contends that because it was forced to expend additional time and resources to, in effect, raise the same issue twice, it should be reimbursed the costs of pursuing its March 31 protest. Protest, May 4, 2006, at 6-7.

We have recognized that the reimbursement of protest costs may be appropriate where an agency does not timely implement the promised corrective action that prompted the dismissal of a clearly meritorious protest. See Career Quest, a division of Syllan Careers, Inc.--Costs, B-293435.5, Apr. 13, 2005, 2005 CPD ¶ 79 at 3 n.2; East Bay Elevator Co., Inc.--Costs, B-286315.2, July 26, 2001, 2001 CPD ¶ 128 at 2. As we have noted, the mere promise of corrective action, without reasonably prompt implementation, has the obvious effect of circumventing the goal of the bid protest

⁷ Because the agency's action was prompt, we need not reach the second prong of our test--whether the March 31 protest was clearly meritorious. As noted below, however, there is insufficient support in the record for a determination that any of Alaska Structures' protests were clearly meritorious. Each protest was dismissed early in the development of the record and prior to preparation of an agency response on the merits of each.

system of effecting the economic and expeditious resolution of bid protests. Louisiana Clearwater, Inc.–Recon. & Costs, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209 at 6; Pemco Aeroplex, Inc.–Recon. & Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 7-8. Where an agency fails to implement the promised corrective action, or implements corrective action that fails to address a clearly meritorious issue raised in the protest that prompted the corrective action, such that the protester is put to the expense of subsequently protesting the very same procurement deficiency, the agency's action, even though promptly proposed, has precluded the timely, economical resolution of the protest. See Louisiana Clearwater, Inc.–Recon. & Costs, *supra*; Envirosolve LLC, B-294974.4, June 8, 2005, 2005 CPD ¶ 106 at 7.

In this case, we conclude that recovery of protest costs is not warranted because, while Alaska Structures raised the same issue of vague and ambiguous specifications in more than one protest, we cannot conclude that the issue was clearly meritorious.

As set forth above, Alaska Structures' December 15 protest alleged that the Army's brand name or equal-type specification was vague, ambiguous, and unduly restrictive of competition. The Army then agreed to take corrective action by issuing a revised solicitation that would use performance or functionality-based specifications and avoid reference to any particular manufacturer's products. On March 31, Alaska Structures protested that, among other things, the agency's revised functional characteristics were vague and ambiguous.⁸ While the Army agreed to again take corrective action in response to Alaska Structures' March 31 protest, it was with regard to the four protest issues being raised for the first time, and not Alaska Structures' assertion that the characteristics were improperly vague and ambiguous.

Alaska Structures' argument that the agency's corrective action in response to its December 15 protest was deficient because it failed to address the issue of vague and ambiguous specifications is premised upon an essential but unproven assumption—that the allegation was clearly meritorious. Alaska Structures has not established, and the record otherwise does not show, that the issue was in fact clearly meritorious; also, as noted above, because the corrective action was taken so early in development of the protests, no agency responses on the merits were prepared. See Career Quest, a division of Syllan Careers, Inc.–Costs, *supra*, at 3. In

⁸ It is important to note that the remaining issues raised by Alaska Structures in its March 31 protest—that the agency improperly intended to purchase non-FSS items using FSS procedures; the RFQ failed to provide vendors with equal information concerning mandatory compatibility requirements; the solicitation contained internally inconsistent evaluation criteria; and the evaluation criteria improperly contained requirements that were not also contained in the functional characteristics—were not ones that Alaska Structures raised in its December 15 protest.

short, we cannot say that Alaska Structures' December 15 protest presented what could reasonably be described as a clearly meritorious issue; thus, we have no basis to find that the Army's corrective action failed to address a clearly meritorious issue such that Alaska Structures was put to the expense of protesting again the very same procurement deficiency.

The request for a recommendation that the agency reimburse Alaska Structures' protest costs is denied.

Gary L. Kepplinger
General Counsel