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Comptroller General  
of the United States

United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** Chase Supply, Inc.--Costs

**File:** B-411849.3

**Date:** May 17, 2016

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Fred Fielding, Chase Supply, Inc., for the protester.  
John R. Hart, Esq., Defense Logistics Agency, for the agency.  
Stephanie B. Magnell, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protester's request for a recommendation that it be reimbursed its costs of filing and pursuing its protest is granted, where the record shows that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest.

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### DECISION

Chase Supply, Inc. of Hampton, Virginia, a small business, requests that we recommend that it be reimbursed the costs of filing and pursuing its protest challenging the award of a purchase order to HBD Industries, Inc., of Chanute, Kansas, a large business, under request for quotations (RFQ) No. SPE7M4-15-Q-0276, which was issued by the Defense Logistics Agency-Land and Maritime (DLA) for air duct hoses. We dismissed the protest after the agency advised our Office that it would take corrective action by cancelling the awarded order. Chase argues that its protest was clearly meritorious and that the agency's corrective action was unduly delayed.

We recommend that Chase be reimbursed its protest costs.

### BACKGROUND

On April 2, 2015, DLA issued the RFQ to purchase 668 air duct hoses, identified under national stock number (NSN) 4720-01-398-9929.<sup>1</sup> RFQ at 5. Quotations

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<sup>1</sup> This amount was later reduced to 600 air duct hoses. See First Req. for Dismissal, Sept. 24, 2015, Exhs. 2, 3.

were due by 3 p.m. on April 7, and Chase timely submitted its quotation. Req. for Dismissal, Exh. 4, Review of Quotations, at 1; Exh. 9, Summary of Procurement, at 1.

Shortly after DLA issued the RFQ, Chase filed three protests at GAO (which were docketed as B-411059.2, B-411094.2, and B-411127.2), each of which concerned a different solicitation, and two of which (B-411094.2 and B-411127.2) concerned the same NSN at issue in B-411849.2--the protest upon which Chase seeks reimbursement here. In these three protests, Chase alleged that DLA failed to evaluate quotations in accordance with the solicitations.<sup>2</sup> Throughout the protests, the agency argued that its price evaluations were consistent with the RFQs. See, e.g., DLA Post-Hearing Comments, B-411059.2 et al., May 20, 2015, at 4-7.

On June 24, DLA requested that protests B-411059.2, B-411094.2, and B-411127.2 be dismissed, because the agency intended to take corrective action by cancelling the procurements due to "errors in these solicitations." Corrective Action Ltr., B-411059.2 et al., June 24, 2015, at 1. Specifically, DLA explained that "the RFQs did not provide notice to potential offerors that DLA's procedure for making a Fair Market Price . . . determination differed" from the price evaluation described in the solicitation. Id. DLA stated that it would remedy the flawed procurements by taking the following actions:

- (1) Review its current supply needs for the two National Stock Number Items and issue new solicitations that provide proper notice on how pricing determinations will be made, (2) The new solicitations will also properly reflect DLA Land and Maritime's FAT [first article testing] waiver requirements, and (3) If applicable, provide proper notice under FAR [§] 19.506(a).

Id. Also, on June 24, the same day that DLA informed us that it intended to cancel the solicitations underlying protests B-411059.2, B-411094.2, and B-411127.2 because the master solicitation did not reflect the agency's intended evaluations, the DLA contracting officer under B-411094.2, who also testified at our hearing in those protests, used the same master solicitation to issue an order under this RFQ, for the same NSN item at issue in B-411094.2, to a large business.<sup>3</sup> See B-411059.2 et al., Notice of Corrective Action, June 24, 2015, at 1; B-411849.2, AR, Tab 7, Simplified Acquisition Award Documentation, at 1.

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<sup>2</sup> The requests for quotations incorporate by reference the DLA Master Solicitation for eProcurement Automated Simplified Acquisitions. Although the effective date of the master solicitation differed slightly between procurements, the relevant price evaluation terms remained the same.

<sup>3</sup> For a more detailed discussion of these protests, see Chase Supply, Inc.--Entitlement, B-411059.3 et al., May 17, 2016, 2016 CPD ¶ \_\_.

On July 1, Chase filed an agency-level protest that challenged the award of the order under the instant RFQ, on the basis that the agency had acknowledged on June 24 that the terms of the master solicitation were flawed. Protest, B-411849, Exh. 1, Agency-Level Protest, July 1, 2015, at 1. Specifically, Chase contended that the RFQs' inaccurate descriptions of the agency's intended price evaluation had affected Chase's proposed pricing. *Id.* at 4 ("Had we an understanding of how DLA was to disclose the procedure for making [fair market price] evaluations, we may have changed our pricing to the extent that we might have been low bid and in line for award."). After initially arguing that Chase's protest was untimely, and following Chase's subsequent protest to our office, DLA elected to consider the merits of Chase's protest. Protest, B-411849, Exh. 2, DLA Email to Chase, July 21, 2015, at 1; Protest, B-411849.2, at 1; DLA Email to Chase Regarding DLA Proposed Corrective Action, Aug. 7, 2015, at 2; Chase Email to GAO Withdrawing Protest, Aug. 10, 2015, at 1.

DLA subsequently denied Chase's agency-level protest, concluding that it was untimely because it challenged the terms of the RFQ, but had not been filed prior to April 7, the date set for receipt of quotations. DLA Ltr. to Chase, Sept. 1, 2015, at 1 (Chase "should have raised this issue of protest prior to the RFQ closing date of April 7, 2015."). Chase filed its protest with our Office on September 17.<sup>4</sup>

On September 24, DLA requested that we dismiss this protest, arguing that while the agency's evaluation failed to follow the terms of the RFQ,<sup>5</sup> the protester nevertheless had not been prejudiced because, even if the agency had evaluated prices in accordance with the RFQ, the protester would not have been the lowest-priced offeror. First Req. for Dismissal, Sept. 24, 2015, at 2. We denied DLA's request for dismissal because its argument failed to respond to Chase's statement that its price could have been lower had the RFQ reflected the agency's intended evaluation.<sup>6</sup> GAO Email, Oct. 13, 2015, 2:23 p.m., [citing](#) Protest B-411849.2,

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<sup>4</sup> Although DLA's letter denying the agency-level protest as untimely was dated September 1, DLA did not provide it to Chase until September 9; Chase's protest was therefore timely filed according to our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3), which require that a protest initially filed with the agency must be filed with our Office within 10 days of initial adverse agency action.

<sup>5</sup> First Req. for Dismissal, Sept. 24, 2015, at 1 ("The Contracting Officer separately evaluated the elements of unit pricing and [first article testing] costs, contrary to the terms of the solicitation.").

<sup>6</sup> DLA's corrective action notice in response to protests B-411059.2, B-411094.2 and B-411127.2 stated that it would correct the flawed solicitation by "provid[ing] proper notice on how pricing determinations will be made," effectively acknowledging that the solicitation did not provide vendors with adequate notice

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Exh. 1, Agency-Level Protest, July 1, 2015, at 2. As discussed above, with regard to protests B-411059.2, B-411094.2 and B-411127.2, the agency advised our Office on June 24 that the solicitations did not reflect the agency's intended evaluations. B-411059.2 et al., Notice of Corrective Action, June 24, 2015, at 1.

On October 1, GAO held a conference call and asked DLA to address whether the terms in the instant RFQ differed from those in protests B-411059.2, B-411094.2, and B-411127.2--which the DLA had confirmed were flawed with regard to the price evaluation criteria. The agency confirmed that the relevant price evaluation criteria was the same.

On October 16, DLA filed a second request for dismissal, stating that it planned to take corrective action, which rendered the protest academic. Second Req. for Dismissal, Oct. 16, 2015, at 2. Specifically, the agency explained that, "[d]ue to the error in the solicitation, DLA Land and Maritime cannot defend the acquisition on its merits and has decided to take corrective action by cancelling Order M-2526." Id. Chase objected to the agency's proposed corrective action, arguing that DLA's evaluation and award practice was in fact designed to benefit HBD as a favored awardee.<sup>7</sup> Chase Objection to DLA Request for Dismissal, Oct. 20, 2015, at 1-2.

We ultimately found that DLA's cancellation of the order rendered the protest academic and dismissed the protest on November 9.

## DISCUSSION

Chase requests that our Office recommend that the agency reimburse the protester's costs of filing and pursuing its protest. The agency opposes Chase's request, arguing that it took timely corrective action. For the reasons discussed below, we conclude that the record here demonstrates that the agency's corrective action was not timely, and we recommend that the agency reimburse Chase for its protest costs.

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

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regarding the agency's intended price evaluation. Notice of Corrective Action, B-411059.2 et al., June 24, 2015, at 1.

<sup>7</sup> DLA had previously awarded HBD a contract for 220 units of this same NSN in a protested procurement in which the agency took similar corrective action (B-411491). See also protests B-411059.2 and B-411127.2, for procurement of similar and identical NSNs, respectively, where DLA ultimately took corrective action after making award to HBD, a large business.

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. Competition in Contracting Act of 1984, 31 U.S.C. § 3554(c)(1)(A); Bid Protest Regulations, 4 C.F.R. § 21.8(e). A protest is clearly meritorious where a reasonable agency inquiry into the protester's allegations would reveal facts showing the absence of a defensible legal position. Basic Commerce & Indus., Inc.--Costs, B-401702.3, Feb. 22, 2010, 2010 CPD ¶ 258 at 3-4; Information Ventures, Inc.--Costs, B-294567.2, Nov. 16, 2004, 2004 CPD ¶ 234 at 2.

DLA does not dispute that Chase's protest was clearly meritorious; instead, the agency's opposition rests on the position that it took timely corrective action by filing the notice of corrective action on the date the agency report was due.<sup>8</sup> DLA Resp. to Chase Req. for Entitlement, Nov. 25, 2015, at 1. 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 protest costs. Alsalam Aircraft Co.--Costs, B-401298.3, Nov. 5, 2009, 2009 CPD ¶ 208 at 3.

However, in certain circumstances, we have found that an agency's corrective action was not prompt, even where it was taken before the submission of an agency report. See Louisiana Clearwater, Inc.--Recon. & Costs, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209. In Louisiana Clearwater, the agency failed to implement the corrective action cited as the basis to dismiss an earlier protest, forcing the protester to again protest based on the same facts and legal issues. Id. In awarding costs on the second corrective action, which was taken prior to the due date for the agency report, we held that "promptness must be determined in light of the fact that this corrective action is the same remedy we presumed was encompassed by the corrective action the agency proposed in response to the original protest." Id. at 6. We find the situation here to be analogous to that in Louisiana Clearwater.

On the same day that DLA informed us that it was taking corrective action in the three protests before us due to inconsistencies between the master solicitation and the agency's intended method of price evaluation, DLA awarded the contract at issue here for the same item at issue in two of those protests using the same

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<sup>8</sup> Moreover, in our view, Chase's protest challenging DLA's award to HBD was clearly meritorious, because although the agency awarded the contract to HBD on June 24, on the same day the agency informed our Office in connection with protests B-411059.2, B-411094.2, and B-411127.2 that the solicitation terms in all three protested procurements were flawed. Indeed, DLA's request for dismissal of the protest, for which Chase seeks costs here, cites as its basis "the error in the solicitation." Second Req. for Dismissal, Oct. 16, 2015, at 2.

master solicitation. Not only were the master solicitation and purchased item the same, but the contracting officer who awarded the RFQ at issue here was the same contracting officer who had testified at a GAO hearing on the three prior protests.

Furthermore, in the instant protest, Chase argued that the solicitation did not describe the agency's intended basis of award. The agency ultimately took corrective action on the same basis as the corrective action in the three prior protests, again acknowledging that the master solicitation did not accurately describe how the agency intended to evaluate quotations.

Although the RFQs in B-411094.2, B-411127.2 and B-411849.2 are nominally different, the record shows that the agency simultaneously cancelled and made award for the same item using the same flawed price evaluation terms. On this basis, we find that the agency's corrective action in the instant protest, coming 3-1/2 months after its disavowal of the master solicitation and promise of effective action, was not prompt.

Indeed, despite prevailing when the agency first took corrective action, the protester was again forced to pursue the issue through two agency-level protests, and two protests to GAO, including preparing a responses to two motions to dismiss, before the agency ultimately undertook corrective action. Had DLA implemented the original corrective action and withheld award of the requirement until the flaws in the master solicitation were addressed, the protester would not have had to expend the effort in pursuing the second protest at GAO.

Thus, the facts of this protest fall under our broad standard, as well as the fact pattern and rationale of Louisiana Clearwater. For the situation presented here, where the agency continued to defend award up until October 20, after confirming to us on June 24--and again on October 1--that the master solicitation was flawed, we find that the agency unduly delayed taking corrective action in response to a clearly meritorious protest.

## RECOMMENDATION

We recommend that DLA reimburse Chase's costs of filing at GAO and pursuing this protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester's certified claim for costs, detailing the time spent and the cost incurred, must be submitted to the agency within 60 days after receiving this decision.

The request that GAO recommend that Chase be reimbursed its protest costs is granted.

Susan A. Poling  
General Counsel