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**Comptroller General
of the United States**

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

Decision

Matter of: Computer Cite

File: B-412162.3

Date: July 15, 2016

William M. Jack, Esq., Dorn C. McGrath III, Esq., and Amba M. Datta, Esq., Kelley Drye & Warren LLP, for the protester.

Andrew K. Lieberman, Esq., Department of Homeland Security, United States Customs and Border Protection, for the agency.

Pedro E. Briones, Esq., and Noah B. Bleicher, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging that an agency has unreasonably delayed completing its corrective action in response to a previous protest is dismissed where the protester has failed to allege any improper agency action or violations of procurement law or regulation.

DECISION

Computer Cite (CCite) of San Ramon, California, protests the implementation of corrective action by the Department of Homeland Security, United States Customs and Border Protection (CBP), proposed in response to a protest of the agency's award of a contract (and issuance of an initial task order) to CCite under solicitation No. HSBP1015R0027 for financial operations administrative services. CCite contends that the agency has unreasonably delayed implementing corrective action.

We dismiss the protest.

BACKGROUND

This is the third protest of this procurement. The first protest was filed by Dextera Corporation on September 24, 2015, and challenged CBP's September 16 award to CCite. Prior to submitting an agency report in response to Dextera's protest, CBP informed the parties on October 8 that it would take corrective action by reevaluating proposals and making a new best-value decision. CBP Email to Parties, 1:43 p.m., Oct. 8, 2015, at 1. CBP further stated that it would suspend contract performance during the pendency of corrective action and that if a different

offeror was selected for award, the agency would terminate CCite's contract and make award to that offeror. CBP Email to Parties, 3:57 p.m., Oct. 8, 2015, at 1. Thereafter, on October 13, our Office dismissed Dextera's protest as academic based on CBP's proposed corrective action. Dextera Corp., B-412162, Oct. 13, 2015 (unpublished decision).

On April 19, 2016, CBP informed CCite that its contract and task order were terminated for the convenience of the government. See Protest B-412612.2, attach. D, Contracting Officer Email to CCite, Apr. 19, 2016, at 1. CBP advised CCite that the termination was necessary to award a bridge contract to the incumbent contractor for the required services, that CBP had awarded the bridge contract, and that "[i]n the next few weeks, [CBP] will be in a position to share information relating to the outcome of the corrective action that was taken as a result of the protest." Id.

In response, on April 29, CCite filed a protest with our Office (the second protest under this procurement) challenging CBP's implementation of corrective action, because the agency terminated CCite's award allegedly before reevaluating proposals and making a new best-value determination, as proposed by CBP in response to the first (Dextera's) protest. Protest B-412612.2 at 1, 4-5. CCite requested as relief that CBP withdraw the termination, reinstate the original award to CCite, and complete its reevaluation and new award decision. Id. at 7.

On May 10, prior to submitting an agency report in response to CCite's protest, CBP informed the parties that it would rescind the termination and reinstate CCite's award. CBP Email to Parties, May 10, 2016, at 1. CBP stated that the stop work order issued on September 26, 2015, would remain in effect and that the agency would "continue with the acquisition process[,] including conducting a best[-]value determination and source selection." Id.

On May 11, in response to CBP's proposed corrective action, CCite expressed "significant concerns regarding the duration of the Agency's corrective action" and requested that CBP provide a timeline for completing its corrective action. CCite Email to Parties, May 11, 2016, at 1.

On May 12, CBP replied that it anticipated making award within 10 to 12 weeks. CBP Email to Parties, May 12, 2016, at 1.

On May 19, we dismissed CCite's protest as academic because CBP granted the relief requested by CCite. Computer Cite, B-412162.2, May 19, 2016 (unpublished decision).

CCite filed the instant protest (the third protest under this procurement) on May 20.

DISCUSSION

CCite argues that CBP has unreasonably delayed implementing the corrective action that it proposed in October 2015 (in response to the first protest), and claims that the delay has resulted in CCite losing almost the entire base year of contract performance. Protest at 1, 6. According to CCite, CBP's initial evaluation only took 2 months to complete,¹ yet the agency has provided no explanation for not completing its reevaluation of proposals and making a new award decision several months later. Id. at 4-5. CCite requests as relief that CBP complete its reevaluation promptly and that the agency reimburse CCite for its costs (including attorneys' fees) of pursuing both its initial and instant protests. Id. at 7-8.

CBP requests that our Office dismiss CCite's protest as academic and untimely, and because CCite has not been prejudiced by the amount of time that has elapsed since the agency proposed taking corrective action. Request for Dismissal (Request) at 3-7. With respect to the protest being academic, CBP argues that it has already advised CCite that the agency anticipates making award within 10 to 12 weeks and that the agency can provide no further remedy "[g]iven the Agency's current spate of priorities and personnel obligations[.]" Id. at 6. With respect to timeliness, CBP asserts that CCite should have challenged the alleged delay when CCite filed its initial protest on April 29. Id. at 3-4. With respect to prejudice, CBP states that, if as a result of corrective action the agency deems CCite's proposal to again represent the best value to the government, then the stop work order would be lifted and CCite will be entitled to fully perform the base year of the contract. Id. at 4-5. Thus, according to the agency, CCite is not prejudiced by the alleged delay, because CCite would be in the same position contractually as it was prior to Dexter's protest. Id. at 5.

CCite disagrees. Specifically, CCite disputes that CBP has granted the relief requested because, in CCite's view, the agency has not promised to complete the reevaluation in a timely manner or addressed CCite's request for protest costs. See Response to Request for Dismissal (Response) at 1. According to CCite, its protest is timely because CBP only informed the parties on May 12 that it would take an additional 10 to 12 weeks to complete the reevaluation and award determination. Id. at 2-3. CCite also maintains that it has been prejudiced because the delay: (1) circumvents the goal of the bid protest system to resolve protests expeditiously; (2) "harms CCite's ability to obtain and work under the contract"; and (3) has required CCite to file a second protest to compel CBP to complete the reevaluation and make a new award promptly. Id. at 1, 4.

¹ Proposals in response to the solicitation were due July 17, 2015, and, as noted above, CBP made award to CCite on September 16.

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-3556. Our role in resolving bid protests is to review whether a procurement action constitutes a violation of a procurement statute or regulation. 31 U.S.C. § 3552. To achieve this end, our Bid Protest Regulations, 4 C.F.R. §§ 21.1(c)(4) and (f), require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. Midwest Tube Fabricators, Inc., B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

Here, CCite has failed to allege a cognizable basis of protest. Although CCite objects to the length of time that it has taken CBP to complete its proposed corrective action, CCite has not identified any procurement law or regulation that the agency has allegedly violated. See Protest at 4-6; Response at 1-6. In this respect, the protester has not alleged that the agency was required to have completed its corrective action by an earlier date, nor has the protester asserted that any alleged delay is contrary to law or regulation. For instance, CCite's complaint that the delay has harmed its "ability to obtain and work under the contract" does not establish a violation of procurement law or regulation. See Response at 1; see generally AdaRose Inc.--Protest & Costs, B-299091.2, Jan. 14, 2008, 2008 CPD ¶ 18 at 2 n.1 (rejecting protester's argument that delay in implementing corrective action resulted in loss of revenue). Similarly, the protester has not alleged any bad faith by agency personnel. See Response at 6; Lear Siegler Mgmt. Servs. Corp.--Recon., B-241447.3, Dec. 13, 1990, 90-2 CPD ¶ 487 at 2 (protest that corrective action was a ruse to prevent GAO from acting on initial protest is denied; to show bad faith, protester must submit convincing evidence that contracting officer directed actions with specific and malicious intent to injure the protester).

Thus, we find that, without more, CCite's protest does not include sufficient information to establish the likelihood that CBP in this case violated applicable procurement laws or regulations.² See, e.g., Lackland 21st Century Servs.

² CCite's reliance on three GAO decisions in which our Office granted protesters' requests for the costs of filing and pursuing protests is misplaced. See Protest at 4, citing Louisiana Clearwater, Inc.--Recon. & Costs, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209; Pemco Aeroplex, Inc.--Recon. & Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97 2 CPD ¶ 102; Commercial Energies, Inc.--Recon. & Declaration of Entitlement to Costs, B-243718.2, Dec. 3, 1991, 91-2 CPD ¶ 499. In this respect, in the context of a claim for costs pursuant to 4 C.F.R. § 21.8(e), our Office considers whether an agency unduly delayed taking corrective action in the face of a clearly meritorious protest. E.g., Flour Energy Tech. Servs., LLC--Costs, B-411466.3, June 7, 2016, 2016 CPD ¶ 160 at 2. This standard of

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Consolidated--Protest & Costs, B-285938.6, July 13, 2001, 2001 CPD ¶ 124 at 5 (our bid protest jurisdiction is limited to reviewing whether an agency action complied with procurement statutes and regulations, and argument that agency unduly delayed implementing corrective action was unmeritorious where the agency reasonably awaited conclusion of inspector general cost review before making contract award); cf. Envirosolve LLC, B-294974.4, June 8, 2005, 2005 CPD ¶ 106 at 7-9 (sustaining protest where record shows that agency failed to implement corrective action proposed in response to earlier protest, and instead issued noncompetitive purchase orders with additional contract requirements to select vendors based upon the personal preference of local agency personnel).

Moreover, we disagree with CCite that our Office can provide any relief to the protester. As the agency points out, it already advised CCite (on May 12) that CBP anticipates completing its corrective action within 10 to 12 weeks.³ Therefore, notwithstanding CCite's request that CBP complete its corrective action "promptly" or "in a timely manner," we know of no other remedy that CBP can provide to the protester at this point. See Protest at 7; Response at 1. Indeed, as noted above, CBP maintains that, given its current priorities and personnel obligations (which CCite does not question), the agency cannot implement corrective action more promptly. See Request at 6. Quite simply, CCite prefers that CBP accelerate its implementation of corrective action, but CCite provides no basis for us to sustain its protest in that regard.⁴

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review has no application here. CCite's current challenge is not a claim for costs (pursuant to 4 C.F.R. § 21.8(e)) in response to the agency's October 2015 decision to take corrective action; rather CCite raises new allegations of allegedly improper agency action, albeit without sufficient legal support.

³ In this respect, we also disagree that CCite was "put to the expense of protesting a second time to get the Agency to promptly complete the reevaluation[.]" See Response at 4.

⁴ We also agree with CBP that CCite has not shown that it has been prejudiced by the alleged delay. In this respect, the agency states that the alleged delay will not prevent CCite from fully performing the base year of the contract if CCite is selected for award again. (Notably, CCite does not respond to CBP's assertions in this regard. See Response at 1, 4-5.) Thus, in addition to being legally insufficient, the protester has not established that CBP's alleged delay in the corrective action has competitively prejudiced CCite, which is an essential element of a viable protest. See Guidline Instruments, Inc., B-409924.2, Jan. 13, 2015, 2015 CPD ¶ 36 at 5 (our Office will not sustain a protest where the protester fails to demonstrate prejudice).

CCite's protest is dismissed without further action.⁵ See 4 C.F.R. §§ 21.2(b), 21.5(f).

Susan A. Poling
General Counsel

⁵ We also dismiss CCite's request that we recommend that CBP reimburse CCite for the costs of pursuing its two protests. With respect to CCite's initial protest (B-412262.2), we have no basis to recommend reimbursement of protest costs because, as noted above, CBP took corrective action (i.e., rescinding the termination) prior to submitting an agency report in response to that protest. When an agency takes corrective action before the due date set for receipt of the agency report, our Office views such action as prompt and will not recommend the reimbursement of costs. LGS Innovations LLC, B-405932.3, Apr. 26, 2012, 2012 CPD ¶ 147 at 2. With respect to CCite's instant protest (B-412262.3), we also have no basis to recommend reimbursement of protest costs, because, as discussed above, CCite's protest is not cognizable. We will only recommend that an agency pay protest costs where the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. CSL Birmingham Assocs.; IRS Partners-Birmingham--Entitlement to Costs, B-251931.4, B-251931.5, Aug. 29, 1994, 94-2 CPD ¶ 82 at 3.