



## Decision

**Matter of:** Intercontinental Construction Contracting, Inc.--Costs

**File:** B-400729.3

**Date:** March 4, 2009

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Hal J. Perloff, Esq., Daniel J. Donohue, Esq., and Sarah M. Graves, Esq., Akerman Senterfitt Wickwire Gavin, for the protester.  
CPT Robert T. Wu, Department of the Army, for the agency.  
Kenneth Kilgour, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Request that the Government Accountability Office recommend reimbursement of protest costs is denied where the initial protest grounds were not clearly meritorious and the agency did not unduly delay taking corrective action after the protester later raised specific challenges based on review of the agency report.

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### DECISION

Intercontinental Construction Contracting, Inc. (ICCI), of Passaic, New Jersey, requests that we recommend that it be reimbursed the costs of filing and pursuing its protest challenging the agency's evaluation of proposals submitted in response to solicitation No. W912PQ-08-R-0017, issued by the National Guard Bureau (NGB) for replacement of the pararescue training facility at the New York Air National Guard Base. We dismissed the protest after the agency advised our Office that it would be reevaluating proposals. ICCI argues that its protest was clearly meritorious and that the agency unduly delayed taking corrective action until after the due date for the agency report and the protester had filed comments on the agency report.

We deny the request.

The agency issued the solicitation on June 20, 2008; ICCI and Racanelli Construction Company, Inc., among others, submitted proposals. The agency made award to Racanelli, and ICCI protested that award to this Office on October 10. In its protest, ICCI alleged that "[u]pon information and belief, the Bureau's rating of ICCI was unjustifiably low based upon ICCI's strong record in performing government construction work of similar size and scope. Accordingly, the Bureau's evaluation of

ICCI's lower-priced proposal provided the best value to the government." Protest at 5.

After we denied requests to dismiss the protest by the agency and the intervenor, the agency filed its report on November 10.<sup>1</sup> On November 20, the protester submitted its comments on the agency report. In its comments, the protester alleged the following specific shortcomings in the agency's evaluation of its past performance:

The agency's conclusions regarding ICCI's past performance are flawed and unreasonable in three critical respects. First, the agency irrationally and unreasonably excluded positive past performance questionnaires for ICCI by assigning no relevancy weighting to two pertinent projects and simply ignoring them [in] the evaluation. Secondly, the agency irrationally and unreasonably assigned low relevancy weightings (semi-relevant and not-relevant) to several of ICCI's past performance projects. Finally, the agency irrationally and unreasonably failed to aggregate ICCI's past performance on concurrent projects in making its overall relevancy determinations of ICCI's past performance as provided for in the RFP.

Comments, Nov. 20, 2008, at 4.

Our Office convened a teleconference on December 2 to discuss the status of the protest. During that teleconference, the agency stated, with respect to the first allegation quoted above, that it had the past performance questionnaires at the time that it conducted the evaluation, but that it excluded them from consideration because the protester had not included the questionnaires in its proposal. We advised the agency that the questionnaires were past performance information too close at hand to ignore, see GTS Duratek, Inc., B-280511.2, B-280511.3, Oct. 19, 1998, 98-2 CPD ¶ 130 at 15, and that we would be likely to sustain the protest on this ground alone. Soon after the teleconference, on December 8, the agency advised that it had decided to take corrective action. We then dismissed the protest as academic.

The protester argues that the agency report confirms ICCI's original protest allegation, namely, "that the Agency's evaluation of ICCI's past performance was irrational based on the Agency's failure to consider ICCI's strong record in performing government construction work of similar size and scope." Request for Costs at 3. Thus, the protester asserts, the agency unduly delayed taking corrective

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<sup>1</sup> On November 12, the protester filed a supplemental protest challenging the past performance portion of the agency's evaluation of the awardee's proposal. We dismissed that protest on November 13 for failure to state a valid basis for challenging the agency's evaluation.

action when, in response to the protest, it produced an agency report instead of taking corrective action. We disagree.

Under the Competition in Contracting Act of 1984, 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). Where an agency takes corrective action in response to a protest, we may recommend that the protester recover the reasonable costs of filing and pursuing the protest, where we conclude that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. See 4 C.F.R. § 21.8(e) (2008); Georgia Power Co.; Savannah Elec. and Power Co.--Costs, B-289211.5, B-289211.6, May 2, 2002, 2002 CPD ¶ 81 at 5. A protest is clearly meritorious where a reasonable agency inquiry into the protest allegations would have shown facts disclosing the absence of a defensible legal position. AVIATE LLC, B-275058.6, B-275058.7, Apr. 14, 1997, 97-1 CPD ¶ 162 at 16. As a general rule, so long as an agency takes corrective action by the due date of its protest report, we regard the action as prompt, and will not consider a request to recommend reimbursement of protest costs. CDIC, Inc.--Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52. If it is in the protester's comments on the agency report that the agency is presented for the first time with information that clearly calls into questions the agency's challenged determination, and the agency then promptly takes corrective measures, we will conclude that the agency did not unduly delay in taking corrective action. LSL Indus., Inc.--Costs, B-291777.2, Aug. 18, 2003, 2004 CPD ¶ 99 at 4.

Here, we cannot say that the protester's general allegation that the agency failed to consider the protester's "strong record" in performing government construction work was clearly meritorious. ICCI has not shown that its initial protest on this ground was clearly meritorious in the sense that it presented a prima facie case that, without more, demonstrated a valid basis for our Office to sustain its protest. Career Quest, a Div. of Syllan Careers, Inc.--Costs, B-293435.5, Apr. 13, 2005, 2005 CPD ¶ 79 at 3. Rather, in order for us to reach a decision about ICCI's initial protest allegations, we had to further develop the record, including a complete agency report and the protester's comments on the report. Because ICCI's initial protest did not present what could reasonably be described as clearly meritorious issues, it follows that there is no basis for recommending reimbursement of ICCI's protest costs. Id.

Moreover, the agency did not unduly delay taking corrective action in response to the protester's comments on the agency report. The promptness of the agency's corrective action is not measured from the protester's initial protest where the initial protest did not identify the specific areas where the agency improperly evaluated the protester's proposal. See Henkels & McCoy, Inc., B-250875 et al., Feb. 24, 1993, 93-1 CPD ¶ 174 at 4. As quoted above, the initial protest broadly challenged the reasonableness of the agency's evaluation of the protester's past performance without specifically identifying the agency's failure to consider certain past performance questionnaires and certain relevancy determinations. It was not until it reviewed the agency report that ICCI protested, with specificity, the propriety of its

past performance evaluation. We recognize that ICCI was not able to raise these specific issues before it received the agency report and reviewed the agency's evaluation. The fact remains, however, that once ICCI further articulated its challenge, the agency promptly determined that the evaluation was flawed and took corrective action. As noted above, the protester submitted its comments on the agency report on November 20, and on December 8, 18 days later, the agency took corrective action. See J.A. Jones Mgmt. Servs., Inc.-Costs, B-284909.4, July 31, 2000, 2000 CPD ¶ 123 at 3-4 (noting that, when the agency responded within 17 days to the new information offered by the protester, it had not unduly delayed in taking corrective action).

The request is denied.

Gary L. Kepplinger  
General Counsel