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**Comptroller General
of the United States**

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

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Decision

Matter of: MEC Development, LLC--Costs

File: B-403295.2

Date: October 18, 2010

Antonio R. Franco, Esq., Stephen J. Koprince, Esq., and Kelly E. Buroker, Esq., PilieroMazza PLLC, for the protester.

Lawrence M. Anderson, Esq., and Major Michelle L. Crawford, Department of the Air Force, 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

Request for recommendation that agency reimburse costs for second protest alleging conflicts of interest by the awardee because agency failed to adequately address the same issues raised in a prior protest, is denied where agency promptly proposed corrective action in response to the second protest and the first protest was not clearly meritorious.

DECISION

MEC Development, LLC, of Mandaree, North Dakota, requests that the firm be reimbursed the costs of filing and pursuing its protest of the award of a contract to ComCon Technologies, Inc., of Mililani, Hawaii, under solicitation No. FA5215-10-R-7001, issued by the Department of the Air Force for exercise planner support services at Hickam Air Force Base, Hawaii.

We deny the request.

On May 14, 2009, the Air Force awarded ComCon a contract for exercise planner support services at Hickam Air Force Base, Hawaii on a sole-source basis. On June 5, MEC filed a protest with our Office alleging that the sole-source award to ComCon was improper. In its protest, MEC alleged that the work should have been competed and that award to Comcon was improper because the firm had an unmitigated conflict of interest. In this regard, MEC alleged conflicts based on ComCon having hired a government employee, [DELETED], who assisted in drafting the solicitation's performance work statement.

Specifically, MEC alleged that Mr. [DELETED] may have had access to relevant, confidential information that was improperly disclosed to ComCon and that Mr. [DELETED] could have been instrumental in steering the contract award to ComCon given that he was engaged in employment negotiations with ComCon at the same time he was working for the Air Force. MEC also alleged various conflicts on the part of ComCon's president, who was a Colonel in the Air Force reserves. According to MEC, ComCon's president may have had unequal access to information as a result of having served as a reserve officer at Hickham Air Force Base, may have encouraged Air Force procurement officials to make award to ComCon, and may have caused procurement officials to feel pressure to make award to ComCon given that he was "in their chain of command." Protest, June 5, 2010, at 10. According to MEC, the above allegations created, at a minimum, apparent conflicts that should have been addressed by the Air Force.

Shortly after MEC filed its protest, the Air Force offered to withdraw the sole-source award and compete the procurement as an 8(a) set-aside. MEC then withdrew its protest on June 9.

Based on the allegations in MEC's June 5 protest, the Air Force's legal office conducted an investigation of Mr. [DELETED]'s involvement in the procurement. The investigating officer found that, after the Air Force made the sole-source award to ComCon, Mr. [DELETED] had entered into employment discussions with ComCon's president and accepted an offer of employment while still employed with the Air Force. In addition, the investigation found that in an e-mail message dated May 27, 2009, also after the contract had been awarded to ComCon, Mr. [DELETED] provided ComCon with information which he learned as a consequence of a conversation he had with another government employee. Specifically, on May 27, he sent ComCon's president the following message:

The other thing Ken mentioned is that there's a specific requirement for 8 employees. I didn't see that in the PWS you forwarded, and I know it wasn't in earlier PWS's, but I'm wondering if that—and who knows what else—may have recently been slipped in there.

Agency Report (AR), Tab 4, Procurement Integrity Act Memorandum, Oct. 2, 2009, Attach. 13.

Based on the May 27 e-mail, the investigating officer found that Mr. [DELETED] had in fact shared information with ComCon. AR, Tab 4, Procurement Integrity Act Memorandum, supra at 1. Ultimately, he concluded, however, that Mr. [DELETED]'s actions did not create an improper conflict of interest by affording one contractor a competitive advantage over another, and that Mr. [DELETED] did not violate the Procurement Integrity Act by seeking employment with ComCon. Id.

On July 1, 2010, the Air Force notified MEC that ComCon had been selected as the awardee under the competitive procurement. MEC then filed a second protest on July 12, alleging the same conflict issues raised in its June 5, 2009 protest. On August 9, before the due date for the submission of the agency report, the Air Force notified our Office that it intended to take corrective action to include suspending ComCon's award and investigating the conflict issues raised in the protest. Because the agency's proposed corrective action rendered the protest academic, we dismissed the protest on August 12.

MEC requests that we recommend that the agency pay the protest costs associated with its second protest since that protest was necessary only because the agency failed to adequately address the conflict issues raised in its first protest.

Where a procuring agency takes corrective action in response to a protest, we may recommend that it reimburse the protester its protest costs where, based on the circumstances of the case, we determine that the 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. Taylor Consultants, Inc.–Costs, B-400324.3, Feb. 2, 2009, 2009 CPD ¶ 37 at 3. Generally, when an agency takes corrective action before the due date for its report, our Office regards such action as prompt and will not recommend reimbursement of costs. The Sandi-Sterling Consortium–Costs, B-296246.2, Sept. 20, 2005, 2005 CPD ¶ 173 at 2-3. We have recognized, however, that the mere promise of corrective action, without reasonably prompt implementation, has the obvious effect of circumventing the goal of the bid protest system for the economic and expeditious resolution of bid protests. See Louisiana Clearwater, Inc.–Recon. and Costs, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209 at 6; Pemco Aeroplex, Inc.–Recon. and Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 7-8. Thus, where an agency fails to implement the promised corrective action, or implements corrective action that fails to address a clearly meritorious issue raised in an initial protest, such that the protester is put to the expense of subsequently protesting the very same procurement deficiency, the agency's action has precluded the timely, economical resolution of the protest. Louisiana Clearwater, Inc.–Recon. and Costs, *supra*.

Here, we find no basis to conclude that MEC's initial protest grounds were clearly meritorious, which is an essential prerequisite to its request for costs, see Taylor Consultants, Inc.–Costs, *supra*, and it is apparent that the agency's corrective action in response to the second protest was promptly taken as a result of the Air Force learning new information concerning the activities of Mr. [DELETED]. In its first and second protests, MEC alleged conflicts associated with two individuals, Mr. [DELETED], and ComCon's president. With regard to the conflicts stemming from Mr. [DELETED]'s interactions with ComCon, MEC suggests that its initial protest was clearly meritorious as reflected by the fact that Mr. [DELETED], in the May 27 e-mail quoted above, provided ComCon with information about the agency's

requirements, specifically, a requirement for eight employees. MEC suggests that the disclosure gave ComCon unequal access to competitively useful information since, during the course of the subsequent competition, the Air Force denied offerors' requests for the same type of information about the incumbent contract (e.g., the number of full-time employees working on the incumbent contract, the number of project officers, forward operations support officers, and administrative staff currently employed at each work station, etc.). According to MEC, had the agency adequately addressed the conflict created by Mr. [DELETED]'s actions, it would not have needed to file its second protest.

MEC's allegations with respect to Mr. [DELETED]'s disclosure do not establish that its initial protest was clearly meritorious. Specifically, MEC has not established that the information provided by Mr. [DELETED] to ComCon was in fact competitively useful. See Health Net Fed. Servs., LLC, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD

¶ 220 at 29 (in determining whether an offeror obtained an unfair competitive advantage in hiring a former government official based on the individual's knowledge of non-public information, we consider a variety of factors, including whether the non-public information was competitively useful). Moreover, it is not apparent that the information was improperly disclosed to ComCon given that it was provided to ComCon after it had been awarded the contract to provide the subject support services to the agency. As a general matter, knowledge that an incumbent--which ComCon was at the time Mr. [DELETED] informed ComCon of the requirement for eight employees--gains in performing a contract does not create an unfair competitive advantage for the incumbent. See University Research Corp., B-228895, Dec. 29, 1987, 87-2 CPD ¶ 636 at 5.

It is also apparent that the agency's second notice of corrective action was prompted by new facts concerning the activities of Mr. [DELETED], which the agency first learned while preparing its report in response to MEC's second protest. In this regard, the agency provided the protester with a detailed record of Mr. [DELETED]'s e-mail contacts with ComCon representatives in response to MEC's request for costs. MEC relies on several of these e-mails to support its request. See MEC's Comments, Sept. 7, 2010, at 6-8. These messages, however, were sent after the initial protest was filed, and after the agency concluded its initial investigation of Mr. [DELETED]'s activities. Based on this new and independent information, the agency reasonably decided to take corrective action a second time. Since the second corrective action was precipitated by the agency learning information which did not exist at the time of the first protest, the allegations associated with Mr. [DELETED]'s activities raised in the first protest cannot reasonably be used to determine whether the agency's corrective action in response to the second protest was prompt.

Regarding the conflicts stemming from ComCon's president's service as an Air Force reservist, while it does not appear that the agency investigated this matter in response to MEC's first protest, MEC fails to establish that its protest allegations

were clearly meritorious. Rather, our Office would need to develop the record to determine whether MEC's allegations were supported by the underlying facts and the issues would have required substantial further legal analysis. Because we cannot conclude that MEC's allegations were clearly meritorious, it follows that there is no basis for recommending MEC's entitlement to its protest costs.

The request is denied.

Lynn H. Gibson
Acting General Counsel