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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: NMR Consulting, Inc.

File: B-412460.2

Date: February 10, 2016

Antonio R. Franco, Esq., Michelle E. Littlekin, Esq., Patrick Rothwell, Esq., and Jacqueline K. Unger, Esq., Piliero Mazza PLLC, for the protester.
Major Christopher Cross, Department of the Army, for the agency.
Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request that Government Accountability Office recommend that agency reimburse protester the costs associated with filing and pursuing a protest is denied where agency took prompt corrective action by the deadline for submitting the agency report, and protest was not clearly meritorious.

DECISION

NMR Consulting, Inc. requests that we recommend that the Department of the Army pay the costs associated with its filing and pursuing a protest, including reasonable attorneys' fees, challenging the agency's exclusion of the firm from competition under solicitation No. PKH-15-21746, issued to acquire information technology support services.

We deny the request.

NMR filed a protest in our Office on November 13, 2015 challenging the agency's decision to exclude the firm from consideration under the subject acquisition based on an alleged conflict on the part of the company. Specifically, the agency initially excluded the firm from the competition because its president is married to the Deputy Director of the Defense Occupational and Environmental Health Readiness System Industrial Hygiene Enterprise Sustainment program, which is the acquiring activity.

On December 14, the date on which the agency's report in the protest was due, the agency advised our Office that it intended to take corrective action in response to

the protest. Specifically, the agency advised our Office that it would reconsider its decision to exclude NMR from the acquisition, and would conduct a further investigation into the circumstances surrounding the alleged conflict. Based on the agency's intended corrective action, we dismissed NMR's protest as academic. (B-412460, Dec, 15, 2015, unpublished decision.)

NMR requests that we recommend that it be reimbursed the costs associated with filing its earlier protest. According to NMR, the agency's decision to conduct a further investigation into its original exclusion of NMR demonstrates that the initial decision to exclude the firm was unreasonable. NMR also maintains that the agency unreasonably delayed taking corrective action by waiting until the date on which the agency report was due.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs if, 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. Bid Protest Regulations, 4 C.F.R. § 21.8(e); MacroUSA Corp.--Costs, B-408444.2, Feb. 11, 2014, 2014 CPD ¶ 65 at 2. Generally, where an agency takes corrective action by the due date of its report, we regard the action as prompt, and will not consider a request to recommend reimbursement of protest costs. A-Ability Med. Equip., Inc.--Costs, B-403256.3, Apr. 4, 2011, 2011 CPD ¶ 81 at 2.

Here, as noted, the agency took corrective action in response to NMR's protest by the due date for submission of the agency report. We regard the agency's action as prompt, and therefore have no basis to conclude that the Army unduly delayed taking corrective action.

We also note that NMR's protest was not clearly meritorious. In this connection, the mere fact that an agency takes corrective action does not establish that the protest was clearly meritorious. Diligent Consulting, Inc.--Costs, B-299556.3, June 26, 2007, 2007 CPD ¶ 125 at 5. Here, as noted, the agency is further investigating the question of whether, based upon the marital relationship between the protester's president and the agency's deputy program director, there exists a conflict that should result in the protester being excluded from competing for the agency's requirement. In view of these circumstances, the protest does not present an allegation that is clearly meritorious. Rather the agency's initial exclusion of the

protester from the competition appears at least facially reasonable under the circumstances, see Asia Resource Partners K.K., B-400552, Nov. 5, 2008, 2008 CPD ¶ 201, and the question of whether or not there exists a conflict is currently being evaluated by the agency.¹ .

We deny the request.

Susan A. Poling
General Counsel

¹ The protester also suggests that we should conclude that it does not have a conflict and recommend that it be included in the competition. In light of the agency's ongoing investigation of the matter, any such conclusion on our part clearly would be premature.