



**DOCUMENT FOR PUBLIC RELEASE**

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

## Decision

**Matter of:** TRAX International Corporation--Costs

**File:** B-410441.8

**Date:** August 17, 2016

---

Amy Laderberg O'Sullivan, Esq., James G. Peyster, Esq., Olivia L. Lynch, Esq., Robert J. Sneckenberg, Esq., and Sarah Bartle, Esq., Crowell & Moring LLP, for the protester.

Evan C. Williams, Esq., and Scott N. Flesch, Esq., Department of the Army, for the agency.

Evan D. Wesser, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

---

### DIGEST

1. Reimbursement of costs of filing and pursuing a protest challenging the agency's implementation of corrective action in response to an initial protest is recommended where the agency unduly delayed taking corrective action in response to a clearly meritorious protest challenging the agency's failure to ensure that offerors were competing and being evaluated on a common basis.

2. Reimbursement of costs of filing and pursuing challenges to the reasonableness of the agency's evaluation of mission capability and cost proposals is recommended where the evaluation challenges were intertwined with the clearly meritorious protest issue.

3. Request for a recommendation of reimbursement of costs of filing and pursuing a prior protest is dismissed as untimely where the request effectively seeks reconsideration of a decision denying a prior request that the same protest costs be reimbursed.

---

### DECISION

TRAX International Corporation, of Las Vegas, Nevada, requests that our Office recommend that it be reimbursed the reasonable costs of filing and pursuing its protests of the award of a contract to Jacobs Technology, Inc., of Tullahoma, Tennessee, under request for proposals (RFP) No. W9124R-13-R-0001, which was

issued by the Department of the Army, for mission test support services at the Army Yuma Proving Ground.

We grant the request in part and dismiss the request in part.

## BACKGROUND

On September 22, 2015, TRAX protested the award of a contract to Jacobs, arguing that the Army unreasonably evaluated proposals under the RFP's non-cost and cost evaluation factors, failed to engage in meaningful and equal discussions, and failed to resolve an organizational conflict of interest (OCI) concern relating to the awardee. Subsequent to the filing of the agency's report, TRAX filed a supplemental protest expanding its arguments concerning the agency's evaluation of proposals and conduct of discussions with the offerors. Subsequent to the supplemental protest, the Army notified our Office that it intended to take corrective action.

On November 18, our Office dismissed the protest as academic. Pursuant to 4 C.F.R. § 21.8(e), TRAX filed a request that we recommend that it be reimbursed for the costs of filing and pursuing its protest. On August 26, 2015, our Office denied TRAX's request. TRAX Int'l Corp.--Costs, B-410441.5, Aug. 26, 2015, 2015 CPD ¶ 276.

After concluding its corrective action, the Army again selected Jacobs' proposal for award. On December 21, 2015, TRAX protested the second award to Jacobs. TRAX alleged, among other grounds, that the agency had failed to: ensure that offerors were competing and evaluated on a common basis with regard to the baseline labor hours to be used in formulating their respective staffing and cost proposals; reasonably evaluate proposals under the mission capability, past performance, and small business utilization evaluation factors; conduct a reasonable cost realism evaluation of Jacobs' cost proposal; and resolve Jacobs' alleged OCI. Subsequent to the filing of the agency's report, TRAX filed a supplemental protest expanding its arguments concerning the agency's evaluation of proposals under the mission capability and cost evaluation factors.

After development of the protest record, the cognizant Government Accountability Office (GAO) attorney conducted an "outcome prediction" alternative dispute resolution (ADR) conference. In the course of that ADR, the GAO attorney advised the Army that GAO would likely sustain TRAX's protest challenging the agency's failure to reasonably ensure that offerors were competing and being evaluated on a common basis with regard to the baseline labor hours to be used in formulating their respective staffing and cost proposals. In response to the ADR, the Army informed our Office that it intended to take corrective action consisting of, at a minimum, reopening discussions, providing additional instruction regarding the baseline staffing information to be used by offerors in preparing their respective staffing and

cost proposals, allowing for the submission of revised proposals, and rendering a new source selection decision. Based on the agency's proposed corrective action, GAO dismissed TRAX's protest as academic. TRAX Int'l Corp., B-410441.6, B-410441.7, Mar. 23, 2016 (unpublished decision). On April 7, TRAX filed the instant request that GAO recommend the reimbursement of its costs of filing and pursuing its protests pursuant to 4 C.F.R. § 21.8(e).

## DECISION

TRAX seeks a recommendation that it be reimbursed its reasonable costs of filing and pursuing certain of its alleged protest grounds raised in both its most recent protest, B-410441.6, B-410441.7, and its previous protest, B-410441, B-410441.3. For the reasons that follow, we recommend that TRAX be reimbursed its reasonable costs of filing and pursuing the protest grounds raised in B-410441.6, B-410441.7, addressed below, because the Army unduly delayed taking corrective action in response to a clearly meritorious protest ground, and the other protest grounds are intertwined with the meritorious protest ground and not severable. We dismiss, however, TRAX's request relating to costs incurred in filing and pursuing its protest in B-410441, B-410441.3 because it is an untimely request for reconsideration of our prior decision denying TRAX's request for the same costs in TRAX Int'l Corp.--Costs, supra.

### Costs Relating to Protest B-410441.6, B-410441.7

TRAX seeks a recommendation regarding recovery of its costs of filing and pursuing two categories of protest grounds. First, the protester requests a recommendation that it be reimbursed its costs of filing and pursuing its failure to evaluate proposals on a common basis protest ground, which was the ground addressed during the outcome prediction ADR. Second, TRAX requests that our Office recommend that it be reimbursed for the costs of filing and pursuing its additional challenges to the agency's evaluation of mission capability and cost proposals, which the GAO attorney conducting the outcome prediction ADR indicated were rendered academic as a result of our Office likely sustaining the failure to evaluate on a common basis protest ground.<sup>1</sup> For the reasons that follow, we recommend that TRAX be reimbursed the costs of filing and pursuing both requested categories of protest grounds.

---

<sup>1</sup> TRAX did not request that we recommend the reimbursement of its costs for filing and pursuing its other grounds of protest, namely the agency's alleged unreasonable evaluation under the past performance and small business utilization factors and failure to resolve Jacobs' alleged OCI. Therefore, our recommendation with respect to the reimbursement of protest costs is limited to the protest grounds addressed herein.

When a procuring agency takes corrective action in response to a protest, our Office may recommend under 4 C.F.R. § 21.8(e) that the agency reimburse the protester the reasonable costs of filing and pursuing its protest, 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. Pemco Aeroplex, Inc.--Recon. & Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 5. A protest is clearly meritorious when a reasonable agency inquiry into the protest allegations would show facts disclosing the absence of a defensible legal position. The Real Estate Ctr.--Costs, B-274081.7, Mar. 30, 1998, 98-1 CPD ¶ 105 at 3. A GAO attorney will inform the parties through outcome prediction ADR that a protest is likely to be sustained only if he or she has a high degree of confidence regarding the outcome; therefore, the willingness to do so is generally an indication that the protest is viewed as clearly meritorious, and satisfies the “clearly meritorious” requirement for the purpose of recommending reimbursement of protest costs. National Opinion Research Ctr.--Costs, B-289044.3, Mar. 6, 2002, 2002 CPD ¶ 55 at 3; Inter-Con Sec. Sys., Inc.; CASS, a Joint Venture--Costs, B-284534.7, B-284534.8, Mar. 14, 2001, 2001 CPD ¶ 54 at 3.

As addressed during the outcome prediction ADR, the GAO attorney advised that our Office would likely sustain the failure to evaluate on a common basis protest ground because the RFP unequivocally directed offerors to rely on staffing data from one of the RFP’s technical exhibits and that the staffing figures in the relevant exhibit were to be considered as full time equivalents (FTEs). The Army’s decision to allow Jacobs to base its labor hours baseline on other than FTEs, after engaging in discussions with Jacobs on this point but without affording the other offerors the same opportunity, was unreasonable because it resulted in offerors proposing materially different labor hour baselines. This, in turn, precluded a reasonable comparison of offerors’ respective proposed staffing approaches and costs. On this record, we conclude that this argument was clearly meritorious.

In addition to the failure to evaluate on a common basis issue that was the topic of the ADR, we also conclude that the protester should be reimbursed for the protest costs associated with its other challenges to the agency’s evaluation under the mission capability and cost evaluation factors. Generally, we consider a successful protester entitled to costs incurred with respect to all issues pursued, not merely those upon which it prevails. In our view, limiting recovery of protest costs in all cases to only those issues on which the protester prevailed would be inconsistent with the broad, remedial Congressional purpose behind the cost reimbursement provisions of the Competition in Contracting Act. JV Derichebourg-BMAR & Assocs., LLC--Costs, B-407562.3, May 3, 2013, 2013 CPD ¶ 108 at 3. For purposes of determining entitlement to protest costs, we generally consider all issues concerning the evaluation of proposals to be intertwined--and thus not severable--and therefore generally will recommend reimbursement of the costs

associated with both successful and unsuccessful challenges to an evaluation. Fluor Energy Tech. Servs, LLC--Costs, B-411466.3, June 7, 2016, 2016 CPD ¶ 160 at 3; Coulson Aviation (USA) Inc.; 10 Tanker Air Carrier, LLC--Costs, B-406920.6, B-406920.7, Aug. 22, 2013, 2013 CPD ¶ 197 at 5.

Here, the agency's failure to adequately ensure that offerors were competing and being evaluated on a common basis with regard to the same labor hour baseline permeated both the mission capability and cost proposals. As indicated during the outcome prediction ADR, because the offerors' staffing plans and cost proposals would be impacted by any subsequent RFP amendments or discussions to correct for the lack of a common basis for evaluation, TRAX's remaining protest challenges to the agency's evaluation of offerors' mission capability and cost proposals were rendered academic. On this record, we conclude that these evaluation challenges are inextricably intertwined with the clearly meritorious lack of a common basis for evaluation issue, and thus recommend that the protester be reimbursed for the costs of filing and pursuing these protest grounds.

Therefore, we recommend that the protester be reimbursed its reasonable costs for filing and pursuing its lack of a common baseline for evaluation and mission capability and cost evaluation challenges raised in B-410441.6, B-410441.7.

#### Costs Relating to Protest B-410441, B-410441.3

TRAX also requests that we recommend that it be reimbursed for the costs of filing and pursuing its protest grounds in B-410441, B-410441.3, which asserted that the Army had failed to reasonably ensure that offerors were competing and being evaluated based on a common basis with respect to the baseline labor hours to be used in formulating offerors' respective staffing and cost proposals. We dismiss the request because it is an untimely request for reconsideration of our prior decision in TRAX Int'l Corp.--Costs, supra.

Our Bid Protest Regulations require that any request for reconsideration must be filed not later than 10 days after the basis for reconsideration is known or should have been known. 4 C.F.R. § 21.14(b). Here, as noted above, TRAX previously filed a request that our Office recommend the reimbursement of protest costs following the Army's decision to take corrective action in response to protest B-410441, B-410441.3. On August 26, 2015, our Office denied the protester's request. TRAX Int'l Corp.--Costs, supra. To the extent that TRAX contends that subsequent, repeated failures to evaluate proposals using a common baseline for evaluation justifies a different result, it was incumbent on the protester to have timely sought reconsideration within 10 days of when it knew or should have known the basis for reconsideration. TRAX's renewed request for costs, which was filed

15 days after our dismissal of protest B-410441.6, B-410441.7 as academic in light of the agency's stated intent to take corrective action, is therefore untimely.<sup>2</sup>

## RECOMMENDATION

We recommend that TRAX be reimbursed the costs associated with filing and pursuing its protest in B-410441.6, B-410441.7 challenging the agency's failure to solicit and evaluate proposals on a common basis and evaluation of mission capability and cost proposals, including reasonable attorneys' fees. TRAX should submit its certified claim, detailing the time spent and costs incurred, directly to the agency within 60 days of its receipt of this decision. Bid Protest Regulations, 4 C.F.R. § 21.8(f)(1).

The request is granted in part and dismissed in part.

Susan A. Poling  
General Counsel

---

<sup>2</sup> We also find this case to be distinguishable from our Office's previous decisions where we have recommended that a protester be reimbursed for the costs of filing and pursuing an initial protest where the agency failed to implement the corrective action cited as the basis to dismiss an earlier protest, thereby forcing the protester to again protest based on the same facts and legal issues. See, e.g., Chase Supply, Inc.--Costs, B-411849.3, May 17, 2016, 2016 CPD ¶ 134; Louisiana Clearwater, Inc.--Recon. & Costs, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209. Unlike those decisions, TRAX here specifically sought--and our Office denied--a recommendation for the reimbursement of its costs of filing and pursuing its initial protest after the agency's decision to take corrective action in response to the initial protest.