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# Decision

**Matter of:** Federal Contracting, Inc., DBA Bryan Construction, Inc.--Costs

**File:** B-416454.2

**Date:** December 4, 2018

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Robert S. Gardner, Esq., and Laura A. Gardner, Esq., Law Office of Robert S. Gardner, for the protester.

Tyler E. White, Esq., Department of the Army, for the agency.

Heather Weiner, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Request for recommendation for reimbursement of the protester's costs of filing and pursuing protester's initial protest, which resulted in corrective action, is denied where the agency did not unduly delay in taking corrective action in response to the protest.

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## DECISION

Federal Contracting, Inc., doing business as Bryan Construction, Inc. (BCI), of Colorado Springs, Colorado, requests that our Office recommend that it be reimbursed the reasonable costs of filing and pursuing its protest of the award of a contract under request for proposals (RFP) No. W912PP-17-R-0006, issued by the Department of the Army, Corps of Engineers (Corps), for the design and construction of a squadron operations facility and special tactics squadron operational training facilities at Cannon Air Force Base. We dismissed BCI's protest after the agency advised our Office that it would take corrective action. Federal Contracting, Inc. DBA Bryan Construction, Inc., B-416454, June 27, 2018 (unpublished decision). BCI argues that its protest was clearly meritorious and that it was forced to file a second protest challenging the terms of the revised solicitation and the agency's announced corrective action<sup>1</sup>--and incur the associated costs--because the agency failed to implement the corrective action

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<sup>1</sup> On July 17, BCI also filed a separate request for reconsideration of our decision dismissing its first protest as academic. However, because the issues raised in the request for reconsideration were essentially identical to those asserted in BCI's protest challenging the agency's corrective action, our Office decided to consolidate the two filings, and resolve the request for reconsideration as part of the protest.

promised in its request for dismissal of the first protest, or otherwise adequately address the meritorious issue raised in its protest.

We deny the request.

## BACKGROUND

The Corps issued the solicitation on December 13, 2016, under the two-phase design-build provisions of Federal Acquisition Regulation (FAR) subpart 36.3. The RFP contemplated award of a fixed-price contract to the offeror whose proposal represented the best value to the government, all factors considered, using a tradeoff process. RFP, phase I, at 16.

Under phase one, offerors were required to submit a proposal addressing the following evaluation factors: key personnel, narrative/organization chart, and past performance. Id. at 17. Only offerors determined to be the most highly qualified in phase one would be asked to submit their design and related information for phase two. Id. at 16. Under phase two, the solicitation advised that proposals would be evaluated on the following three factors: technical, small business participation, and price. Id., phase II, at 5. The solicitation provided that “[a]ward [would] be made in Phase Two to the Offeror proposing the combination most advantageous to the Government based upon an integrated assessment of the evaluation factors for both Phase One and the Phase Two factors/subfactors.” Id., phase I, at 17.

The agency received timely phase one proposals from fifteen offerors. Of these, the agency selected five, including BCI, to advance to phase two of the competition.

The agency received phase two proposals from four offerors, including BCI. Following its evaluation of proposals, the agency concluded that another company’s proposal offered the best value, and awarded the contract to that firm. On June 5, 2018, BCI filed a protest with our Office, arguing that the agency failed to evaluate proposals in accordance with the solicitation’s evaluation criteria. Specifically, BCI alleged that the agency failed to conduct an integrated assessment of each proposal using the evaluation factors for both solicitation phases as required by the solicitation, and also failed to consider past performance in the phase two evaluation and award decision.

Prior to submission of an agency report, and without conceding the merits of any protest grounds, the agency notified our Office of its intent to take corrective action. Specifically, the Corps stated that its corrective action would consist of the following:

[The Corps] has suspended the contract awarded[. The Corps] will . . . amend[ ] the solicitation to modify language relating to the “integrated assessment” that will be performed by the Source Selection Authority in Phase II, and provide all offerors in the competitive range the opportunity to submit their revised proposals. A re-evaluation will be performed by a new Source Selection Board. If necessary, [the Corps] will conduct limited discussions. After reevaluation, a new Source Selection Decision Document will be issued [.]

Agency Report (AR), Tab 18, Notice of Corrective Action (June 22, 2018), at 1.

BCI objected to the proposed corrective action, arguing that it did not remedy all the concerns raised in the protest.<sup>2</sup> However, because the Corps proposed to amend the solicitation, accept and evaluate revised proposals, and issue a new source selection decision, we concluded that the agency action rendered BCI's protest of the agency's current award decision academic. See Sun Chem. Corp., B-288466 et al., Oct. 17, 2001, 2001 CPD ¶ 185 at 12 (agency decision to re-evaluate proposals and make a new source selection decision renders challenges to initial evaluation of proposals academic). Accordingly, on June 27, 2018, our Office dismissed BCI's protest as academic.<sup>3</sup> Federal Contracting, Inc. DBA Bryan Construction, Inc., B-416454, June 27, 2018 (unpublished decision).

On July 6, the Corps provided offerors with amendment 0009 to the solicitation, along with a letter notifying the offerors about the corrective action. As relevant here, amendment 0009 revised the solicitation to add detail "regarding the weight of the factors [to be] used in the integrated assessment of both Phase I and Phase II factors." AR, Tab 3a, amend. 0009, at 1. The amendment also advised offerors that the Construction Cost Limitation (CCL) for the project was \$36,350,000, and that "[e]xceeding the CCL may result in cancellation of the project." Id. The agency's notification letter further advised offerors that they could submit revised price proposals, and that the agency's corrective action would include "re-evaluation of competitive range proposals along with the Source Selection Board's respective ratings," and also that, "[a]fter receipt and evaluation of the revised price proposals," the contracting officer would prepare "a new [selection] decision document[.]" Protest, attach. 1, Notification Letter (July, 6, 2018), at 1.

On July 16, 2018, BCI filed a protest with our Office challenging both the agency's announced corrective action, and the terms of the revised solicitation. As relevant here, with regard to the agency's corrective action, the protester asserted that the agency failed to implement all of the "promised corrective action" that prompted dismissal of BCI's initial protest.<sup>4</sup> Protest at 9. Specifically, the protester contended that, although the agency notice to GAO stated that its corrective action would include a new source selection board, neither amendment 0009 nor the agency's letter notifying offerors about the corrective action indicated that the agency's re-evaluation would include a new source selection board. BCI also asserted that, while the agency notice to GAO

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<sup>2</sup> Specifically, BCI maintained that, in order to address the concerns, the corrective action, at a minimum, would need to reopen phase one of the evaluation.

<sup>3</sup> Our decision also advised that, to the extent the protester wanted to challenge the announced corrective action, it could do so by filing a new protest, provided that the protest met the requirements of our Bid Protest Regulations, 4 C.F.R. part 21.

<sup>4</sup> In challenging the revised solicitation terms, BCI argued that some of the changes to the evaluation scheme were unreasonable and demonstrated bias by the procurement officials in favor of the prior awardee. Protest at 12-13.

implicitly advised that offerors would be permitted to submit revised proposals, the agency's letter notifying offerors about the corrective action clearly stated that revised proposals would be limited to price proposals. Protest, attach. 1, Notification Letter (July, 6, 2018), at 1. The protester argued that, by refusing to take the "promised corrective action," the Corps had "failed to address the meritorious concerns raised by BCI in its first protest." Protest at 9.

The Corps disagreed and responded that its corrective action would adequately address the concern raised by the protester in its initial protest regarding integration of both the phase one and phase two evaluation factors. Specifically, the contracting officer stated that the agency's corrective action would consist of the following: suspending the award; amending the solicitation to assign comparative weighted values to the phase one and phase two evaluation factors and subfactors; providing the offerors an opportunity to resubmit their price proposals; and issuing a new award decision.

The contracting officer further asserted that the agency had not yet finished implementing its corrective action. In this regard, the contracting officer noted that, although the agency had begun its corrective action--including receiving revised price proposals from the offerors in the competitive range--it had not yet been able to complete its corrective action, due to the automatic statutory stay that was in place as a result of BCI filing a protest challenging the corrective action. Id.

On September 27, 2018, without explanation, BCI withdrew its protest. Thereafter, on October 5, the agency awarded the contract to BCI. Award Notice at 1.<sup>5</sup>

## DISCUSSION

The protester requests that our Office recommend that the agency reimburse BCI the reasonable costs of filing and pursuing its initial June protest. BCI argues that its initial protest was clearly meritorious and that the agency did not implement the corrective action that prompted dismissal of the protest, and likewise failed to address the meritorious issue raised in its protest.

The Corps objects to the request, pointing out that the details of its corrective action were matters within the agency's discretion. The agency asserts that its corrective action adequately addressed the issue raised by BCI in its initial protest (i.e., that the agency failed to conduct an integrated assessment of phase one and phase two factors). The Corps argues that, at the time BCI filed its second protest challenging the corrective action, the agency had not yet been given a chance to complete its corrective action. Accordingly, the agency maintains that it was premature, at that point, for the protester to argue that the agency had failed to implement appropriate corrective action.

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<sup>5</sup> Available on FedBizOpps: [https://www.fbo.gov/index?s=opportunity&mode=form&id=849a1d5018e4070ca386aafc50d19664&tab=core&\\_cvview=0](https://www.fbo.gov/index?s=opportunity&mode=form&id=849a1d5018e4070ca386aafc50d19664&tab=core&_cvview=0) (last visited Dec. 3, 2018).

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. 4 C.F.R. § 21.8(e); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 5. Although corrective action is considered prompt if taken before the due date for the agency report, reimbursement of protest costs may be appropriate where an agency does not timely implement the promised corrective action that prompted the dismissal of a clearly meritorious protest. See Career Quest, a division of Syllan Careers, Inc.--Costs, B-293435.5, Apr. 13, 2005, 2005 CPD ¶ 79 at 3 n.2. In this regard, the mere promise of corrective action, without reasonably prompt implementation, has the obvious effect of circumventing the goal of the bid protest system of affecting the economic and expeditious resolution of bid protests. Louisiana Clearwater, Inc.--Recon. and Costs, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209 at 6. Where an agency fails to implement the promised corrective action, or implements corrective action that fails to address a clearly meritorious issue raised in the protest that prompted the corrective action, such that the protester is put to the expense of subsequently protesting the very same procurement deficiency, the agency's action, even though promptly proposed, has precluded the timely, economical resolution of the protest. Id.

BCI does not dispute that the Army took corrective action prior to the time for filing the agency report in response to the initial protest. Instead, the protester argues that the agency "promised" a course of corrective action that it "apparently believed at the time it informed GAO of the action, to be the appropriate action to remedy the concern raised in the protest." Protester Response at 3. The protester asserts, however, that the agency "did not do what it promised," and chose instead to implement "less than all of the measures that it committed to taking," which the protester contends, was insufficient to address the protest issues that prompted corrective action, thereby requiring the protester to file a second protest challenging the adequacy of the corrective action. Id. The protester argues that the circumstances here are similar to those in ANAMAR Envtl. Consulting, Inc.--Costs, B-411854.4, B-411854.7, Nov. 9, 2016, 2016 CPD ¶ 327, where our Office recommended reimbursement of protester's costs of pursuing a protest even though the agency took prompt corrective action. For the reasons discussed below, we disagree that the circumstances in ANAMAR are present here.

In ANAMAR, we addressed a protester's argument that the agency had failed to implement the corrective action it proposed to resolve the initial protest, thereby requiring the protester to file a second protest based on the same arguments. ANAMAR Envtl. Consulting, Inc.--Costs, supra. The protester initially challenged the agency's evaluation of the awardee's proposal and source selection decision. Id. at 2. In response to the first protest, the agency proposed corrective action to reevaluate proposals, conduct a new trade-off analysis, and issue a new source selection decision. Id. Following corrective action, the agency affirmed the award. Id. at 3. The protester filed a second protest challenging the agency's new award decision, asserting that the agency had failed to implement its promised corrective action, and in doing so, had failed to address the issues raised in ANAMAR's first protest. Id. In response to the second protest, the agency advised our Office that it would take corrective action

because it was unclear to what extent the agency actually reevaluated the proposals and conducted a trade-off analysis based on that re-evaluation. Id.

Our decision in ANAMAR explained that “[t]he mere promise of corrective action, without reasonably prompt implementation, has the obvious effect of circumventing the goal of the bid protest system of affecting the economic and expeditious resolution of bid protests.” Id. at 8. We concluded that ANAMAR’s first protest was clearly meritorious and that, because the agency failed to conduct the corrective action promised in response to the protest, ANAMAR was forced to incur the expense of filing and pursuing its second protest, which stated the same grounds as the first. Id. at 5. We recommended, as relevant here, that the agency reimburse the protester’s costs of pursuing its initial protest because the agency did not act in good faith to implement the proposed corrective action, which had the effect of requiring the protester to incur the expense of filing its second protest of the same procurement deficiency. Id. at 8.

Here, the protester contends that it was required to file a second protest due to the agency’s failure to take its “promised” corrective action, or otherwise implement corrective action to address the allegation raised in BCI’s first protest (i.e., that the agency’s evaluation of proposals and award decision was not based on an integrated assessment of proposals using evaluation factors for both solicitation phases as required by the solicitation). The protester therefore asserts that it should be reimbursed the costs of filing its first protest. We disagree.

Although BCI filed two rounds of protests, the second protest was not based on the same arguments raised in the first protest, which as noted above, challenged the agency’s evaluation of proposals and award decision. Rather, BCI’s second protest challenged the scope of the agency’s announced corrective action, arguing that it was not adequate to address the issues raised by BCI in its initial protest. In this situation, where the allegations raised in the second protest were not the same as those raised in the initial protest, we do not agree that the circumstances are similar to those in ANAMAR. Further, as noted above, the Corps was still in the process of conducting its corrective action in response to the first protest when BCI filed its second protest, and we have no basis to conclude that the agency was failing to undertake a good faith effort to address the issue raised by the protester.<sup>6</sup> In fact, as previously noted, BCI ultimately withdrew its second protest, and thereafter, was awarded the contract by the Corps. Accordingly, on this record, we have no basis to conclude that the agency unduly delayed, or otherwise failed to act timely, in implementing its corrective action. In sum, we conclude that the reimbursement of costs is not warranted here.

The request is denied.

Thomas H. Armstrong  
General Counsel

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<sup>6</sup> Government officials are presumed to act in good faith. Career Innovations, LLC, B-404377.4, May 24, 2011, 2011 CPD ¶ 110 at 7-8.