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# Decision

**Matter of:** Quantum Dynamics, Inc.--Costs

**File:** B-416490.2

**Date:** November 5, 2019

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Michael E. Samuels, Esq., and Kristen E. Ittig, Esq., Arnold & Porter Kaye Scholer, LLP, for the protester.

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## DIGEST

Request for a recommendation for reimbursement of costs of filing and pursuing a prior protest is dismissed as untimely where the protester has failed to diligently pursue its challenge to the agency's failure to implement the promised corrective action.

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## DECISION

Quantum Dynamics, Inc., a small business of Macon, Georgia, requests reimbursement of the costs of filing and pursuing its earlier protest that challenged the sole-source award of contract No. W9133L-18-C-0014, issued to Summit Technologies, Inc., of Winter Park, Florida, by the Department of the Army, for network engineer expertise for the National Guard Bureau's intelligence, surveillance, and reconnaissance operational units. Quantum Dynamics contends that it is entitled to reimbursement of the costs of filing and pursuing its protest, and this claim, because the agency failed to implement the promised corrective action in a timely manner.

We dismiss the request.

## BACKGROUND

On May 31, 2018, the agency awarded sole-source contract No. W9133L-18-C-0014 to Summit for information systems security officer (ISSO) program management and configuration management (CM) services. Agency Report (AR), Tab 5, Justification and Approval (J&A), at 2; AR, Tab 6, Sole-Source Contract, at 1. At the time of the sole-source award, Summit had been performing these services as the prime contractor

under five task orders issued under a previously awarded indefinite-delivery, indefinite-quantity contract, which expired on the date the agency made the sole-source award. AR, Tab 5, J&A, at 2.

The agency explained in the J&A that it had been conducting market research to develop an acquisition strategy for the follow-on requirements of the prior contract. Id. at 3. Specifically, for the ISSO tasks, the agency issued sources sought notices on the Air Force Way web portal to Network-Centric Solutions contract holders (AFWAY/NETCENTS) and the Federal Business Opportunities website, and requested an in-scope determination from the General Services Administration (GSA) for its One Acquisition Solution for Integrated Services (OASIS) contracts. Id. at 3-4. For the CM tasks, the agency issued a sources sought notice on AFWAY/NETCENTS. Id. at 4.

As a result of this market research, the agency concluded that “a market does exist to satisfy the agency’s requirements and that multiple firms currently provide similar services for other agencies. . . [and] the [g]overnment intends to issue competitive task orders” for these services. Id. However, because the task orders under which Summit had been providing these services were expiring on May 31, 2018, the agency awarded the 12-month sole-source contract to Summit to prevent an interruption in service until the two follow-on task orders could be awarded. Id. at 3.

On June 6, following Quantum’s inquiry regarding Summit’s continued performance of its prior contract, the agency published its J&A. Protest at 2. On June 18, Quantum filed a protest of the sole-source award with our Office.

In its 2018 protest, Quantum argued that the Army’s J&A for its sole-source award lacked a reasonable basis and reflected a lack of advanced procurement planning by the agency. Quantum Dynamics, Inc., B-416490, Aug. 27, 2018 (unpublished decision). By notice dated July 13, before the agency report was due, the Army informed our Office that it intended to take corrective action and requested that our Office dismiss the protest as academic. Id. Because the agency stated that it intended to continue with the performance of the protested contract, our Office requested that the agency clarify its intended corrective action. Id. at 3. In response, the Army revised its notice of corrective action, expressly stating that the basis for the sole-source award as stated in the J&A “did not properly demonstrate the justification for other than full and open competition” and that “[p]roper steps were not taken to meaningfully consider competing offerors’ ability to provide the requested services.” AR, Tab 8, Revised Notice of Corrective Action, July 25, 2018, at 1. The contracting officer described the revised intended corrective action as follows:

Therefore, I intend to go back to the acquisition planning phase in order to fully consider all available options for procuring these critical services. This consideration includes assessing the ability of other offerors to provide the requested services by reviewing responses received from the Agency’s previous sources sought notifications and reviewing other potential acquisition vehicles, as appropriate. I plan on determining a new

acquisition strategy, and, if the review does not support a basis for the current sole-source bridge contract, terminating the current bridge contract once performance on a new contract can be started.

Id. The Army also stated that it “intend[s] to make a new determination on the procurement of these services no later than forty-eight (48) days” from the date of the notice. Id. at 2. On August 27, our Office found that the agency’s corrective action rendered the protest academic and dismissed the protest. Quantum Dynamics, Inc., supra. Our Office did not hear from the protester again until it filed this request.

On May 31, 2019, the sole-source award issued to Summit--the subject of the June 2018 protest--expired. AR, Tab 6, Sole-Source Contract, at 35-36. Almost a month later, on June 28, Quantum filed this request that GAO recommend the reimbursement of its costs incurred in pursuing its protest pursuant to 4 C.F.R. § 21.8(e).

## DISCUSSION

In seeking a recommendation for reimbursement of its reasonable costs of filing and pursuing its protest of June 18, 2018, Quantum alleges that the agency failed to take the promised corrective action that prompted our Office to dismiss a clearly meritorious protest as academic. Request for Costs at 1-2. The agency opposes the request, arguing that the Army has taken “steps to implement its promised corrective action, and that it has made reasonable progress towards that goal.” Response to Request for Costs at 11. The agency also provided declarations from contracting officers attesting to various acquisition planning activities related to competing the ISSO and CM requirements.<sup>1</sup> Id. The protester responds that the agency’s declarations “endeavor to create the appearance” that the agency has been making progress, but actually shows

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<sup>1</sup> We note that the agency actions enumerated in the contracting officers’ declarations and summarized in the agency report as efforts to implement the corrective action--such as splitting up the requirements into ISSO and CM, conducting market research on AFWAY/NETCENTS, obtaining an in-scope determination on using GSA OASIS--were acquisition planning activities that were already contemplated and in progress at the time the Army issued the protested sole-source award. See AR, Tab 5, J&A, at 3-4. Despite the agency’s arguments, the record here does not provide any evidence that the Army has made progress towards making a new determination with respect to the improper sole-source award that was the subject of Quantum’s protest. A promise of corrective action, without reasonably prompt implementation, particularly in situations, as here, where a contract has been improperly awarded and the contractor is allowed to continue to perform the contract, has the obvious effect of circumventing the goal of the bid protest system established by the Competition in Contracting Act--that is, the economic and expeditious resolution of bid protests. See 31 U.S.C. § 3554; Commercial Energies, Inc.--Recon. & Ent. to Costs, B-243718.2, Dec. 3, 1991, 91-2 CPD ¶ 499 at 5; Pemco Aeroplex, Inc.--Recon. & Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 7.

that the agency's failure to implement prompt corrective action was unreasonable. Comments to Agency Response at 3.

In response to our request for the parties to address the issue of timeliness of the protester's request, the agency also asks that our Office dismiss the protester's request as untimely, or for failure to diligently pursue its claim. Agency Response on Timeliness at 4. The protester objects to the agency's request for dismissal, arguing that Quantum diligently pursued the matter with the agency, and that neither GAO regulations nor prior decisions establish a deadline for filing a request for reimbursement of costs where the agency has failed to implement the corrective action. Protester Response on Timeliness at 3-4.

We find here that the protester has failed to diligently pursue its request that our Office recommend reimbursement of the cost of pursuing its earlier protest.

The Competition in Contracting Act mandates that our bid protest forum provide for the inexpensive and expeditious resolution of protests. See 31 U.S.C. § 3554(a)(1). Thus, our Bid Protest Regulations contain strict rules for the timely submission of protests, comments, and requests for reconsideration or for recommendation of reimbursement of costs. See 4 C.F.R. §§ 21.2(a), 21.8. Because our regulations contemplate prompt resolution of protest matters, including claims for protest costs, we require protesters to diligently pursue such claims. System Studies & Simulation, Inc.--Costs, B-409375.5, May 8, 2015, 2015 CPD ¶ 155 at 2 (failure to diligently pursue claim for amount of costs); see also Holloway & Co., PLLC--Costs, B-311342.5, July 6, 2009, 2009 CPD ¶ 146 at 2-3 (finding untimely request for recommendation on the amount of reimbursement where the protester waited more than 8 months after seeking reconsideration of the contracting officer's decision regarding its claim).

Our requirement for diligent pursuit has traditionally applied to the initiation of protests or requests for recommendation on the amount of costs--as opposed to requests for recommendation for reimbursement of costs. See id.; see also Waterfront Techs., Inc., B-403638.3, Feb. 22, 2011, 2011 CPD ¶ 49 at 2 (protester has an affirmative obligation to diligently pursue the information that forms the basis of its protest and cannot passively await information providing a basis for a protest); Image Contracting Inc., B-243023, June 24, 1991, 91-1 CPD ¶ 596 at 2 (finding untimely a protest where the protester waited 6 months--during which time the project was substantially completed--for a response from the agency on its protest filed with the agency before filing a protest in our Office). We conclude that the rationale for the rule on diligent pursuit applies equally to requests for a recommendation of reimbursement of costs.<sup>2</sup>

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<sup>2</sup> We note that, although Quantum has filed this claim as a request for recommendation for reimbursement of costs, these arguments could essentially comprise a protest of the agency's failure to implement its corrective action.

Here, the agency promised to implement its corrective action and “make a new determination on the procurement of [the] services” under the sole-source contract within 48 days of July 25, 2018, the date of its revised corrective action notice. AR, Tab 8, Revised Notice of Corrective Action, at 2. The protester alleges that it contacted the Army on October 16, approximately a month after the promised 48 days passed, and was informed that a solicitation would be forthcoming within 30 additional days. Protest at 2. Quantum also contends that it contacted the agency repeatedly after its October 16 inquiry for further updates on the status of the corrective action and received no response from the agency. Protester Response on Timeliness at 3-4 (citing Email Correspondence from Quantum to Agency dated May 10, June 5, and June 6, 2019). However, Quantum did not request reimbursement of costs for the agency’s undue delay in implementing its corrective action until June 28, 2019, nearly a month after the protested sole-source contract was fully performed, when no meaningful relief remained for the protester.

The protester waited nearly ten months after September 2018, when the agency initially planned to complete its corrective action, until the performance on the initially protested sole-source contract was completed in its entirety, and another 28 days thereafter, to challenge the agency’s failure to implement its corrective action. Under these circumstances, the protester’s actions demonstrate a lack of diligence in pursuing its claim to our Office. Because the protester failed to diligently pursue its claim to our Office, we consider Quantum’s request for a recommendation for reimbursement of costs to be untimely.

The request is dismissed.

Thomas H. Armstrong  
General Counsel