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

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## Decision

**Matter of:** Contrack International, Inc.-Costs

**File:** B-401871.3

**Date:** February 17, 2010

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Kevin P. Connelly, Esq., Joshua C. Drewitz, Esq., and Amanda B. Weinder, Esq., Seyfarth Shaw LLP, for the protester.

Sam Z. Gdanski, Esq., Gdanski & Gdanski, LLP, for Zafer Construction Company, an intervenor.

Patrick D. Bowman, Esq., Department of the Army, Corps of Engineers, for the agency.

Linda C. Glass, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Request for recommendation that agency reimburse protester for the costs incurred in filing and pursuing initial and supplemental protests is denied where the record does not establish that the protests, which concerned the agency's evaluation of proposals, and its best value decision, were clearly meritorious.

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### DECISION

Contrack International, Inc., of McLean, Virginia, requests that we recommend that the Department of the Army reimburse Contrack for the costs incurred in filing and pursuing its protest and supplemental protest challenging the agency's evaluation of proposals submitted in response to request for proposals (RFP) No. W917PM-09-R-0075, issued by the Army for the design and construction of an Ammunition Supply Point at Bagram Airfield in Afghanistan. We dismissed both protests after the agency advised our Office that it would be amending the RFP to allow all competitive range offerors to submit revised proposals. Contrack argues that its initial protest was clearly meritorious, and that the agency unduly delayed taking corrective action until after the due date for the agency report and after the protester had filed both comments on the agency report and a supplemental protest.

We deny the request.

The RFP was issued on May 25, 2009, and provided for the evaluation of proposals on a "best value" basis using the following factors, listed in descending order of

importance: experience, past performance, project management plan and price. All evaluation factors combined were equal to price. RFP at 22-24. With respect to the past performance evaluation factor, the RFP provided that the agency would evaluate past performance information to assess the level of performance risk associated with the offeror’s likelihood of success in performing the requirements. Id.

Timely proposals were received from 15 offerors, including Contrack. The proposals were evaluated by the source selection evaluation board (SSEB) with the following results for the highest rated proposals:

|                         | <b>Contrack</b> | <b>Zafer</b> | <b>Offeror A</b> | <b>Offeror B</b> |
|-------------------------|-----------------|--------------|------------------|------------------|
| Experience              | Excellent       | Good         | [DELETED]        | [DELETED]        |
| Past Performance        | Marginal        | Excellent    | [DELETED]        | [DELETED]        |
| Project Management Plan | Satisfactory    | Good         | [DELETED]        | [DELETED]        |
| Overall Rating          | Satisfactory    | Good         | [DELETED]        | [DELETED]        |
| Acceptability Rating    | Acceptable      | Acceptable   | [DELETED]        | [DELETED]        |
| Risk Rating             | Marginal        | Low          | [DELETED]        | [DELETED]        |
| Price                   | \$42,852,719    | \$42,752,382 | [DELETED]        | [DELETED]        |

Agency Report, Tab 8, Source Selection Evaluation Report, at 3.

The source selection authority (SSA) determined that Zafer represented the best value, and award was made to Zafer on August 26. Contrack was notified of the selection decision and, thereafter, requested a debriefing; the debriefing was provided by the agency on August 29.

On September 4, Contrack filed its initial protest; in that protest, Contrack challenged the agency’s evaluation and selection decision. As relevant here, Contrack specifically challenged the agency’s evaluation of its proposal as “satisfactory” under the project management plan evaluation factor. Contrack argued that the agency’s evaluation of the project management plan was unreasonable and inconsistent with the RFP criteria in that the agency unfairly assessed weaknesses against Contrack’s plan for failing to provide a sufficient level of detail in two areas: design phase management procedures, and how quality would be checked during design management. Contrack argued that it provided the same level of detail as it did when addressing every other element of the evaluation, and did so within the solicitation’s page limitation. Contrack also argued that if the agency had treated it and Zafer equally, it would have found that elements of Zafer’s project management plan were also lacking in detail. Contrack’s initial protest also challenged the agency’s evaluation of Contrack’s and Zafer’s proposals under the past performance evaluation factor.

On October 5, the agency submitted a report responding to Contrack's initial protest; in that report, the agency maintained that its evaluation was reasonable and consistent with the stated evaluation criteria. Specifically with respect to the agency's evaluation of Contrack's project management plan, the agency stated that it reasonably questioned Contrack's ability to manage the project because of insufficient detail in Contrack's management procedures for the design phase of the project.

With regard to Contrack's past performance, the agency explained that the SSEB recognized that Contrack had extensive experience constructing munitions storage facilities and many years of experience working in Afghanistan including at Bagram Airfield. AR, Tab 8, SSEB Evaluation Report, at 13. The SSEB, however, found that Contrack's record of past performance revealed some deficiencies that placed the company at a significant disadvantage regarding future performance and increased the risk of contract performance to a marginal level.

Specifically, the SSEB found unsatisfactory and marginal ratings in several of the underlying elements of Contrack's performance ratings memorialized in the Construction Contractor Appraisal Support System (CCASS). For example, in some cases—despite receiving an overall rating of satisfactory—Contrack received ratings of marginal or unsatisfactory for elements like adherence to schedule or resolution of delays. The SSEB recognized that Contrack's overall rating for these contracts was satisfactory but felt that the ratings for these underlying elements warranted a marginal past performance rating. *Id.* at 11. Additionally, the SSEB determined that Contrack had submitted frequent requests for equitable adjustments, for unreasonable amounts, raising concerns within the agency that Contrack was abusing the contract disputes process.

The agency report also addressed Zafer's past performance ratings. Specifically, the SSEB reviewed CCASS reports for Zafer which included two "outstanding" ratings for performance of projects in Afghanistan, which led the SSEB to assign a rating of excellent to the company for past performance. In his statement submitted with the agency's report, the contracting officer (CO) noted that past performance ratings of outstanding are rare in Afghanistan construction projects, and the agency adopted the SSEB's rating in this area. CO's Statement, Oct. 2, 2009, at 2.

On October 16, Contrack filed a supplemental protest; in the protest, Contrack argued that the agency's evaluation of the awardee's and protester's project management plans was unreasonable because, despite the solicitation's 6-page limit for project management plans, Zafer submitted a 20-page plan which was improperly

accepted and rewarded in the evaluation for its comparatively greater level of detail.<sup>1</sup> Before submitting a supplemental agency report, the agency took corrective action. Specifically, the agency stated that it had reviewed the issues raised in the supplemental protest and decided to terminate the awarded contract, issue an amendment, and seek revised proposals from all offerors in the competitive range. We dismissed Contrack's protests based on the agency's pending corrective actions.

On November 16, Contrack submitted this request that we recommend reimbursement of its costs related to filing and pursuing its various protests. The agency opposes the requested recommendation, maintaining that the issues raised in the initial protest were not clearly meritorious, and that the page limitation issue, which triggered the corrective action, was not raised until the supplemental protest. The agency therefore argues that its corrective action was promptly taken prior to submitting a report in response to the supplemental protest.

Pursuant to the Competition in Contracting Act of 1984 (CICA), our Office may recommend that protest costs be reimbursed where we find that an agency's action violated a procurement statute or regulation, 31 U.S.C. § 3554(c)(1) (2000). Our Bid Protest Regulations provide that where a contracting agency decides to take corrective action in response to a protest, we may recommend that the protester be reimbursed for its protest costs. 4 C.F.R. § 21.8(e) (2009).

This authority does not mean that we will recommend reimbursement of protest costs in every case in which an agency decides to take corrective action; rather, we will recommend reimbursement only where an agency unduly delayed its decision to take corrective action in the face of a clearly meritorious protest. CSL Birmingham Assocs.; IRS Partners-Birmingham-Entitlement to Costs, B-251931.4, B-251931.5, Aug. 29, 1994, 94-2 CPD ¶ 82 at 3. Thus, as a prerequisite to our recommending the reimbursement of costs where a protest has been settled by corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious, *i.e.*, not a close question. PADCO, Inc. – Costs, B-289096.3, May 3, 2002, 2002 CPD ¶ 135 at 3. A protest is “clearly meritorious” where a reasonable agency inquiry into the protester's allegations would reveal facts showing the absence of a defensible legal position. First Fed. Corp. – Costs, B-293373.2, Apr. 21, 2004, 2004 CPD ¶ 94 at 2. The mere fact that an agency decides to take corrective action does not establish that a statute or regulation clearly has been violated. Spar Applied Sys. – Declaration of Entitlement, B-276030.2, Sept. 12, 1997, 97-2 CPD ¶ 70 at 5.

As a preliminary matter, the agency maintains that it promptly took corrective action in response to the protester's supplemental protest in which the protester asserted that the agency unreasonably evaluated Zafer as “good” under the project

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<sup>1</sup> Contrack also raised additional allegations concerning the agency's price evaluation and past performance evaluation.

management plan evaluation factor, and improperly credited Zafer with submitting a detailed plan despite the solicitation's page limitation. We disagree.

Based on our review of the record, we believe the agency should have recognized the page limitation issue when it responded to the initial protest alleging unequal treatment under the project management plan evaluation factor. A thorough review of the RFP requirements, and of the evaluation of these plans, should have revealed the page limitation discrepancy.

That said, given the results of the evaluation here, our analysis of whether the initial protest was clearly meritorious cannot end with the page limitation issue. In short, we cannot agree that, on this record, a change in Contrack's rating under this one factor would have changed the outcome here. Specifically, even if Contrack received the same rating as Zafer under this factor, the record suggests it would remain a higher-risk, higher-priced offeror. Hence, it appears that Contrack needs to prevail on an additional issue before we could conclude that its protest, as a whole, was clearly meritorious.

Throughout this protest, the agency has also defended its evaluation of the protester's and awardee's proposals under the past performance evaluation factor and maintains that it properly made award to a higher-rated and lower-priced offeror. With respect to the evaluation of Contrack's past performance, the agency maintains that its rating of "marginal" was reasonable given Contrack's past performance record, together with its record of non-cooperation, lack of responsiveness and frequent use of the contract disputes process. The agency also contends that its evaluation of Zafer as "excellent" under the past performance evaluation factor was reasonably based on Zafer's outstanding performance of two recent contracts in Afghanistan.

Contrack argues that the agency unfairly focused on the most negative aspects of its performance history. Contrack also contends that despite Zafer's favorable past performance reviews, the agency overlooked Zafer's poor performance of other projects in Afghanistan.

Our Office reviews challenges to an agency's evaluation of proposals only to determine whether the agency acted reasonably and in accord with the solicitation's evaluation criteria and applicable procurement statutes and regulations. Marine Animal Prods. Int'l, Inc., B-247150.2, July 13, 1992, 92-2 CPD ¶ 16 at 5. A protester's mere disagreement with the agency's judgment is not sufficient to establish that an agency acted unreasonably. Entz Aerodyne, Inc., B-293531, Mar. 9, 2004, 2004 CPD ¶ 70 at 3.

While the protester disagrees with the agency's assessments, we cannot say that the agency's evaluation of the proposals under the past performance evaluation factor was unreasonable, or that the agency should have viewed this argument as clearly

meritorious when responding to the initial protest. The agency based its evaluation on information contained in the CCASS that showed that while Contrack received an overall rating of satisfactory on several contracts, there were numerous instances where Contrack was rated marginal or unsatisfactory for several of the underlying elements of performance. The record also confirms that the CCASS showed that Zafer had outstanding performance on several contracts.

While we agree that the agency's evaluation of the project management plan was unreasonable—and agree that the agency should have noticed that it ignored the solicitation's page limitation for such plans when preparing its report on the initial protest—we conclude that reimbursement is not appropriate in this case since Contrack's protest overall cannot be termed clearly meritorious. In addition, we note for the record that Contrack is getting an opportunity to submit a revised proposal, and is receiving this opportunity over Zafer's objections—which were the subject of another protest decision involving this procurement. See ZAFER Constr. Co., B-401871.4, Feb. 1, 2010, 2010 CPD ¶ \_\_\_\_.

In conclusion, Contrack's request that we recommend that it be reimbursed its protest costs is denied.

Lynn H. Gibson  
Acting General Counsel