



United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** InfraMap Corporation--Costs

**File:** B-405167.3

**Date:** March 26, 2012

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David T. Ralston, Jr., Esq., and Frank S. Murray, Esq., Foley & Lardner LLP, for the protester.

Tina Marie Pixler, Esq., Department of the Army, for the agency.

Paul E. Jordan, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest was not clearly meritorious, and reimbursement of protest costs following agency corrective action therefore is not warranted, where additional record development and substantial further analysis would have been required to resolve protest.

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### DECISION

InfraMap Corporation, of Glen Allen, Virginia, requests that we recommend that it be reimbursed the costs of filing and pursuing its protest challenging the Department of the Army's award of a contract to Accumark, Inc., of Ashland, Virginia, under request for proposals (RFP) No. W91ZLK-11-R-0003, for underground utilities location (UUL) services at Aberdeen Proving Ground, Maryland.

We deny the request.

The RFP provided for the award of a fixed-price requirements contract for a base year, with 4 option years, to perform UUL services and surveys at Aberdeen in accordance with the RFP's statement of work (SOW). Offerors were required to propose a fixed annual price for performing all UUL work. In this regard, the SOW included a listing of the average number of excavation permits processed in calendar year 2010, and advised offerors to anticipate an annual 10% increase in permits. The RFP provided that proposals "unrealistically high or low in price" could be rejected because they would "be deemed reflective of an inherent lack of technical competence or indicative of failure to comprehend the . . . requirement."

RFP at 95. Award was to be made to the offeror with the lowest-priced, technically acceptable proposal.

When the agency initially awarded a contract to Accumark, InfraMap protested, asserting that the awardee's price was unrealistically low and showed that the awardee had no knowledge of the effort needed to perform. Protest at 3. Specifically, it noted that Accumark's price was lower than InfraMap's incumbent contract, awarded 6 years ago, which was priced based on half the current workload; that the agency anticipated a 10% workload increase each year; and that InfraMap's higher price was supported by years of accounting data which the agency allegedly ignored.<sup>1</sup> Id.

In response, the contracting officer explained that the agency's price analysis relied on an agency engineer's independent government estimate (IGE) of \$1.6 million. According to the engineer, the IGE, which included 3 full time employees (FTE), reflected the SOW, the engineer's experience with the previous contract, conversations with UUL firms on and off the installation, and the prevailing wage determination. Contracting Officer's Statement (COS) at 3. Although Accumark's price was 1.6% lower than the IGE, the engineer observed that the difference could be attributable to Accumark's indication that it would have fewer than 3 FTEs on site at all times, and the possibility that Accumark's pay scale was lower than that used by the engineer. Engineer Email, May 2, 2011. The contracting officer concluded that there was no basis to find that Accumark's price was unrealistically low. COS at 3-4.

Based on its review of the agency report, InfraMap challenged the agency's price realism evaluation on various grounds not included in its initial protest. For example, InfraMap challenged the accuracy of the IGE, noting that it did not account for the 10% expected annual increase in workload; contained inconsistencies in the calculation of UUL work; and was lower than the incumbent staffing level and pricing. InfraMap also challenged the engineer's rationales to account for differences between Accumark's price and the IGE. In the protester's view, lower wages would violate the applicable Service Contract Act wage determination, and Accumark's proposal could be read as including 3 FTEs. InfraMap also noted that the engineer's opinion was made prior to submission of final proposal revisions and thus, was not based on Accumark's lower final price. In addition, InfraMap

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<sup>1</sup> InfraMap also asserted that the Army improperly decided to award the contract on the basis of the low-priced, technically acceptable proposal, and that it failed to properly consider the architectural and engineering component of the RFP's services. Since these issues amounted to challenges to the terms of the solicitation, but were filed after the closing date for receipt of proposals, our Office determined that they were untimely, 4 C.F.R. § 21(a)(1) (2011), and therefore did not require the agency to respond to them.

challenged the agency's technical evaluation of Accumark's proposal under the quality control, organization, and contract execution elements under the technical acceptability factor.

Before our Office obtained an agency report responding to InfraMap's supplemental protest and comments, the agency announced that it was taking corrective action. Specifically, the agency indicated that it intended to amend the RFP to clarify its price analysis requirements, request final proposal revisions, and re-evaluate proposals to ensure there were no deficiencies. We dismissed the protests as academic (B-405167, B-405167.2, July 29, 2011).<sup>2</sup>

InfraMap requests that we recommend that it be reimbursed the reasonable costs of filing and pursuing its protests, including attorneys' fees. InfraMap asserts that its protest grounds were clearly meritorious and that the agency unduly delayed taking corrective action, as evidenced by its failure to do so until after it filed the agency report on the original protest and InfraMap had filed its supplemental protest.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs 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. Bid Protest Regulations, 4 C.F.R. § 21.8(e); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. Thus, as a prerequisite to our recommending that costs be reimbursed 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. J.F. Taylor, Inc.--Entitlement to Costs, B-266039.3, July 5, 1996, 96-2 CPD ¶ 5 at 3; Baxter Healthcare Corp.--Entitlement to Costs, B-259811.3, Oct. 16, 1995, 95-2 CPD ¶ 174 at 4-5; GVC Cos.--Entitlement to Costs, B-254670.4, May 3, 1994, 94-1 CPD ¶ 292 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.

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<sup>2</sup> Subsequent to InfraMap's filing its cost request, the agency awarded the contract to Accumark. When InfraMap then protested the new award, the agency again took corrective action, prompting our dismissal of the new protest (B-405167.4, Sept. 23, 2011). When InfraMap later challenged the agency's estimated workload, we sustained its protest. InfraMap Corp., B-405167.6, Feb. 6, 2012, 2012 CPD ¶ 66.

We find that reimbursement is not appropriate in this case. With regard to InfraMap's supplemental protest, the agency took corrective action promptly because it acted prior to the deadline for submitting its supplemental report. When an agency takes corrective action before the due date set for receipt of the agency report, our Office views such action as prompt and will not recommend the reimbursement of costs. The Sandi-Sterling Consortium--Costs, B-296246.2, Sept. 20, 2005, 2005 CPD ¶ 173 at 2-3. Thus, we have no basis to recommend reimbursement of costs associated with the supplemental protest.

With regard to InfraMap's initial protest, even if we agreed that the agency's corrective action was not prompt, the protest was not clearly meritorious. In this regard, InfraMap's initial protest was based on its assertion that the price realism evaluation was flawed, as evidenced by the fact that Accumark's price was lower than InfraMap's price based on its incumbent experience. Even though the agency's corrective action addressed the price analysis by deleting the requirement for a price realism analysis, the agency does not concede that its analysis was unreasonable; instead, it maintains that the impetus for the corrective action was InfraMap's supplemental protest. Response to Cost Request. Further, based on the record here, it was not clear which party's position was correct regarding the realism of the agency's price realism analysis. In this regard, InfraMap's specific, detailed challenges to the IGE and price analysis did not appear until its comments; in order to reach a decision on the matter, we would have required, at a minimum (as was requested prior to being notified of the corrective action), a supplemental report from the agency and comments on that report by InfraMap. Following this further development of the record, we would have had to conduct substantial further analysis of the parties' positions. In such cases, we do not consider the protest grounds to be clearly meritorious. New England Radiation Therapy Mgmt. Servs., Inc.--Costs, B-297397.3, Feb. 2, 2006, 2006 CPD ¶ 30 at 4; LENS, JV--Costs, B-295952.4, Dec. 12, 2005, 2006 CPD ¶ 9 at 5; East Penn Mfg. Co., Inc.--Costs, B-291503.4, Apr. 10, 2003, 2003 CPD ¶ 83 at 2-3 (protest not clearly meritorious where decision would have required further steps to complete and clarify the record). We therefore decline to recommend reimbursement of InfraMap's protest costs.

The request for costs is denied.

Lynn H. Gibson  
General Counsel