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**Comptroller General  
of the United States**

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

## Decision

**Matter of:** PB&A, Inc.; Environmental Synectics, Inc.--Costs

**File:** B-410074.3, B-410074.4

**Date:** September 15, 2015

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Neil H. O'Donnell, Esq., Rogers Joseph O'Donnell, PC, for the protesters.  
Christine C. Piper, Esq., and Capt. Heather N. Corrothers, Department of the Air Force, for the agency.  
Noah B. Bleicher, Esq., and Nora K. Adkins, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Request that GAO recommend reimbursement of costs of filing and pursuing protests is granted in part, where the primary issue presented was clearly meritorious, yet the agency did not take corrective action until after the parties were informed through alternative dispute resolution procedures that the protest ground would likely be sustained; reimbursement is not recommended with regard to the protesters' other protest grounds because the agency either took corrective action prior to issuing the report or the protest ground was not clearly meritorious and the grounds are severable from the clearly meritorious issue.

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### DECISION

PB&A, Inc., of Austin, Texas, and Environmental Synectics, Inc. (ESI), of Sacramento, California, both small businesses, request that our Office recommend that they be reimbursed the costs of filing and pursuing their protests of the terms of task order request for proposals (TORFP) No. FA8903-13-R-9999/R038, issued by the Department of the Air Force for environmental restoration program support under the Air Force's Global Engineering, Integration, and Technical Assistance 2011 (GEITA 11) multiple-award contract (MAC).

We grant, in part, the protesters' requests.

### BACKGROUND

To fulfill agency-wide requirements for global engineering, integration, and technical assistance work, the Air Force awarded the GEITA 11 indefinite-delivery,

indefinite-quantity multiple award contracts (MAC) to 11 small businesses, including the protesters. Agency Report (AR) (B-410074) at 1-2. The solicitation here, issued on June 19, 2014, to the GEITA 11 contract holders, sought task order proposals for a full range of advisory and assistance services to support environmental restoration programs at multiple Air Force installations. TORFP at 1. The TORFP contemplated a fixed-price task order valued at approximately \$20 million with a 10-month base period and a 12-month option period. Id.; AR at 2.

In their protests, PB&A and ESI argued that the task order reflected the consolidation of multiple Air Force requirements and that the agency failed to conduct a required consolidation analysis before issuing the TORFP. The protesters also alleged that the agency failed to properly investigate whether GEITA 11 contract holders were violating the MAC's organizational conflict of interest (OCI) provisions. Separately, PB&A argued that certain terms of the solicitation were overly restrictive.

With respect to the consolidation challenge, the crux of the protesters' complaints was that the Air Force failed to comply with provisions of the Small Business Jobs Act of 2010 that require agencies to consider the effect on small businesses of the consolidation of agency contract requirements over \$2 million. Pub. L. No. 111-240, § 1313, 124 Stat. 2538 (Sept. 2010); 15 U.S.C. § 657q. Prior to issuing a solicitation that involves consolidated contract requirements, agencies are required to conduct market research, assess and identify the impact of contract consolidation on small businesses, and make a written determination that the consolidation is "necessary and justified" and that "the benefits of the acquisition strategy substantially exceed the benefits of each of the possible alternative contracting approaches" identified by the agency. 15 U.S.C. § 657q(c)(1), (2).

This section, as amended, also defines the consolidation of contract requirements as the "use of a solicitation to obtain offers for a single contract or a multiple award contract . . . to satisfy 2 or more requirements of the Federal agency for goods or services that have been provided to or performed for the Federal agency under 2 or more separate contracts lower in cost than the total cost of the contract for which the offers are solicited." Id. § 657q(a)(2) (underline added).

In response to the protests, the Air Force did not dispute the protesters' assertion that the task order reflected the consolidation of multiple requirements and was valued at more than \$2 million.<sup>1</sup> See Contracting Officer's (CO) Statement (B-410074) at 7; AR at 2. Instead, the Air Force maintained that it did nothing improper because it was not required to perform a consolidation analysis prior to

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<sup>1</sup> Moreover, the record was clear that the Air Force issued the TORFP without conducting market research or making the written determination contemplated by 15 U.S.C. § 657q.

issuing the TORFP. In support of this position, the agency cited to the definition of “consolidation of contract requirements,” stated above, and argued that the task order was not a “single contract” because the Federal Acquisition Regulation (FAR) definition of “single contract,” with respect to task orders under indefinite quantity contracts, encompasses only orders placed against contracts “awarded by another agency.” See FAR § 2.101. Since the Air Force--not another agency--awarded the underlying MAC, the agency argued that a consolidation analysis was not required. AR at 7.

At the request of the Air Force, the GAO attorney assigned to the protests conducted an alternative dispute resolution (ADR) conference and informed the parties in a detailed discussion that our Office was likely to sustain in part and deny in part the protests.<sup>2</sup> See 4 C.F.R. § 21.10(e). Specifically, the GAO attorney indicated that our Office likely would sustain the protests because the procurement involved the consolidation of contract requirements, and the agency had failed to perform a consolidation analysis, as required by the Small Business Jobs Act, prior to issuing the TORFP. The GAO attorney explained that the applicable definition of a single contract for the purposes of contract consolidation is found not in the FAR’s definition of bundling<sup>3</sup> (as the Air Force argued), but in the regulations that implement the Small Business Jobs Act’s limitation on the use of consolidated contracts.<sup>4</sup> In this regard, the regulations define a single contract as “any contract or order (including those placed against . . . an indefinite delivery, indefinite quantity contract) resulting in one or more awardee(s).” 13 C.F.R. § 125.1(t). Significantly, the definition is not qualified by which agency awarded the underlying contract.

Applying this definition to the task order at issue, the GAO attorney advised the agency that the task order qualified as a single contract. Consequently, the GAO attorney determined that, consistent with the requirements of the Small Business Jobs Act, the agency was precluded from issuing the TORFP without first performing a consolidation analysis. Thus, the GAO attorney advised the parties

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<sup>2</sup> In its pleadings to our Office, the Air Force requested ADR on this issue. See Air Force Response to Small Business Administration (SBA) Comments at 18.

<sup>3</sup> We note that, notwithstanding some lack of precision in the record, because the GEITA 11 MAC was set aside exclusively for small businesses, bundling had not occurred here and was not at issue. See Homecare Products, Inc., B-408898.2, Mar. 12, 2014, 2014 CPD ¶ 98 at 4 (finding no possible violation of the Small Business Act’s restrictions on bundling where the solicitation had been issued as a total small business set-aside).

<sup>4</sup> Our Office sought the input of the SBA during the development of the protests. The SBA agreed that the applicable definition of a single contract for contract consolidation purposes was in the Small Business Jobs Act’s implementing regulations.

that the Air Force's failure to comply with the Act's consolidation requirements likely would provide a basis for our Office to sustain the protest.

The GAO attorney also advised the parties that our Office likely would deny PB&A's claim that certain solicitation terms were unduly restrictive of competition because the agency sufficiently established that the challenged provisions were necessary and specifically tailored to meet the Air Force's needs. Lastly, the GAO attorney informed the parties that our Office would be dismissing the parties' OCI allegations in light of a prior representation by the agency that it would investigate the allegations and ensure compliance with the MAC's OCI provisions; these corrective actions rendered the OCI protest grounds academic. See Notice of Corrective Action, Aug. 15, 2014, at 1-2.

In response to the ADR, the agency informed our Office that it planned to take corrective action in response to the challenge to the consolidation requirements.<sup>5</sup> Notice of Corrective Action, Oct. 3, 2014, at 1-2. That same day, PB&A withdrew its protest of unduly restrictive solicitation requirements. PB&A Partial Withdrawal, Email of 4:50 p.m., Oct. 3, 2014, at 1. As a result of the agency's corrective action (and PB&A's partial withdrawal), GAO ultimately dismissed the protests as academic. PB&A, Inc.; Envtl. Synectics, Inc., B-410074, B-410074.2, Oct. 8, 2014.

Thereupon, PB&A and ESI timely requested, pursuant to 4 C.F.R. § 21.8(e), that our Office recommend that the Air Force reimburse the protesters their reasonable costs of filing and pursuing the protests.

## DISCUSSION

In their requests, PB&A and ESI contend that they should be reimbursed the costs of pursuing their protests. Specifically, the protesters assert that their consolidation challenges were clearly meritorious because the agency failed to perform a consolidation analysis prior to issuing the TORFP, in accordance with the Small Business Act and the applicable regulations. PB&A & ESI Request for Entitlement, at 2. The firms further maintain that their OCI allegations are "unquestionably intertwined" with their primary consolidation challenge and, as a result, costs should not be severed. Id. at 4. PB&A also contends that "there would be no unjust enrichment" if the firm were reimbursed the costs of pursuing its challenge to alleged restrictive solicitation terms because the protest ground did not contribute

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<sup>5</sup> Specifically, the Air Force advised that it would conduct a thorough review of the task order's scope of work to determine if it was appropriately tailored to meet the agency's needs. Notice of Corrective Action, Oct. 3, 2014, at 1-2. The Air Force explained that if it determined that the task order's scope was appropriate, it would conduct a consolidation review and approval in accordance with 15 U.S.C. § 657q. Id. at 2.

substantially to the firm's costs. Id. As explained below, we recommend reimbursement of the protesters' costs for only their challenges to the consolidation requirements.

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. 4 C.F.R. § 21.8(e); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. A protest is clearly meritorious where a reasonable agency inquiry into the protest allegations would have shown facts disclosing the absence of a defensible legal position. Triple Canopy, Inc.--Costs, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 3. With respect to the promptness of the agency's corrective action under the circumstances, we review the record to determine whether the agency took appropriate and timely steps to investigate and resolve the impropriety. See Chant Eng'g Co., Inc.--Request for Costs, B-274871.2, Aug. 25, 1997, 97-2 CPD ¶ 58 at 4. While we consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest, we generally do not consider it to be prompt where it is taken after that date. See CDIC, Inc.--Entitlement to Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 2.

The Small Business Jobs Act's limitation on the use of consolidated contracts is unambiguous. As explained above, agencies are precluded from carrying out an acquisition strategy that includes consolidated contract requirements unless the agency makes a determination, after market research and analysis, that the consolidation is necessary and justified. 15 U.S.C. § 657q. Here, the record is clear that the program support being solicited reflected the consolidation of contract requirements, and that the Air Force failed to perform any consolidation analysis or make the requisite determination prior to issuing the TORFP. Moreover, as previously discussed, the agency's sole defense based on the fact that it, and not another agency, awarded the underlying MAC was misplaced; the applicable regulatory definitions include no such qualifier.

Thus, we find clearly meritorious the protesters' complaint that the Air Force erred when it issued the TORFP without first assessing the consolidation of requirements and determining that the consolidation was necessary and justified. Moreover, we find that the agency unduly delayed taking corrective action because the agency's corrective action came after it submitted its agency report and only after GAO conducted ADR. See Marine Design Dynamics, Inc.--Costs, B-407816.2, 2013 CPD ¶ 168 at 5.

We, however, find that that the protesters are not entitled to reimbursement of their costs with respect to the other allegations. Although as a general rule we may

recommend that a successful protester be reimbursed its incurred costs with respect to all issues pursued and not merely those upon which it prevails, in appropriate cases we have limited our recommendation for the award of protest costs where a part of those costs is allocable to an unsuccessful protest issue that is so clearly severable from the successful issues as to essentially constitute a separate protest. BAE Tech. Servs., Inc.--Costs, B-296699.3, Aug. 11, 2006, 2006 CPD ¶ 122 at 3; Sodexho Mgmt., Inc.--Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 29. In determining whether protest issues are so clearly severable as to essentially constitute separate protests, we consider, among other things, the extent to which the issues are interrelated or intertwined, *i.e.*, whether the successful and unsuccessful arguments share a common set of facts, are based on related legal theories, or are otherwise not readily severable. BAE Tech. Servs., Inc.--Costs, *supra*.

First, with respect to the protesters' OCI complaint, we disagree with the protesters that the OCI allegations are intertwined with the consolidation challenge such that costs cannot or should not be severed. More specifically, the OCI challenges focused on compliance with the GEITA 11 MAC OCI provisions, which restricted contract holders (and subcontractors) from participating in other Air Force Civil Engineering Center contracts. Compliance with these restrictions, and the agency's assessment thereof, involve different facts and separate laws and regulations than those necessarily reviewed for resolution of the consolidation challenge. Thus, the OCI allegations are clearly severable from the protesters' consolidation challenge.

Moreover, because the agency took corrective action in response to the OCI allegations prior to issuing its report, the corrective action on these protest grounds was not unduly delayed, a necessary prerequisite for entitlement of costs. See Info. Ventures, Inc.--Costs, B-294580.2 *et al.*, Dec. 6, 2004, 2004 CPD ¶ 244 at 2. Accordingly, we decline to recommend reimbursement of PB&A's and ESI's costs related to the OCI complaints.

Finally, we similarly conclude that PB&A's allegation of unduly restrictive solicitation terms is severable from the consolidation challenge. The record confirmed that the allegation was not clearly meritorious, the parties were advised during ADR that the protest ground likely would be denied, and PB&A subsequently withdrew this allegation. As such, PB&A's request for costs for pursuing this protest complaint is denied. See Sodexho Mgmt., Inc.--Costs, *supra*.

## RECOMMENDATION

We recommend that PB&A and ESI be reimbursed their reasonable costs of filing and pursuing their protests challenging the agency's consolidation of requirements, including reasonable attorneys' fees. However, because these allegations are severable from the protesters' OCI complaints, and because the agency did not delay taking corrective action in response to the OCI complaints, we do not

recommend that the protesters be reimbursed for costs related to the OCI protest grounds. Likewise, we do not recommend that PB&A be reimbursed for its costs associated with its withdrawn challenge to restrictive solicitation terms. PB&A and ESI should file their claims for costs, detailing and certifying the time expended and costs incurred, with the agency within 60 days of receipt of this recommendation. 4 C.F.R. § 21.8(f).

The request for a recommendation for reimbursement of protest costs is granted in part.

Susan A. Poling  
General Counsel