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# Decision

**Matter of:** American Commercial Group, Inc.

**File:** B-410157.4

**Date:** May 16, 2017

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Eric S. Galler, Esq., Galler Law Corporate Group, for the protester.  
Jason Blindauer, Esq., Food and Drug Administration, for the agency.  
Lois Hanshaw, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Request for recommendation that an agency reimburse the protester its costs of filing and pursuing protests is denied where the record does not establish that the grounds in the first protest were clearly meritorious, and the agency did not unduly delay taking corrective action in response to a second protest.

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## DECISION

American Commercial Group (ACG) requests that we recommend that it be reimbursed the costs of filing and pursuing its protest challenging the award of contract No. HHSF223201510167C to Laboratory Equipment Service, LLC (LES) by the Department of Health and Human Services, Food and Drug Administration (FDA) for operations and maintenance support of laboratory equipment at FDA's White Oak campus. The protester also requests reimbursement of its costs for filing and pursuing a prior protest based on the agency's alleged failure to implement the corrective action the agency promised to take in response to that protest.

We deny the request.

## BACKGROUND

On March 10, 2014, the agency issued solicitation No. 14-223-SOL-00021 as a set-aside for service-disabled veteran-owned small businesses (SDVOSB). The agency

selected ACG for award, and another offeror, LES, protested to our Office (B-410157).<sup>1</sup> The agency proposed to take corrective action by reevaluating proposals and making a new best-value decision, and we dismissed LES's protest as academic.<sup>2</sup> See Laboratory Equipment Services, LLC, B-410157, Aug. 19, 2014 (unpublished decision).

After completing the corrective action proposed in response to the B-410157 protest, FDA notified ACG on August 18, 2015, that award had been made to LES. On August 28, ACG protested to our Office (first protest) contending that: (1) the agency improperly determined that its revised proposal was not timely submitted; (2) the agency did not engage in meaningful discussions with ACG; (3) the agency engaged in significant improprieties after the initial contract award in July 2014;<sup>3</sup> and (4) LES was not a qualified SDVOSB and could not perform the work as required. Prior to the due date for filing the agency report, the agency stated that it was again "undertaking voluntary corrective action under [the solicitation] due to issues with the [a]gency's determination that ACG's proposal did not adequately demonstrate [a] willingness to adhere to limitations on subcontracting." Notice of Corrective Action, September 2, 2015. Specifically, the agency proposed to, at a minimum, re-open discussions, subsequently evaluate the revised proposals, and make a new best value determination.<sup>4</sup> Based on the agency's proposed corrective action, we dismissed that protest as academic. See American Commercial Group, B-410157.2, Sept. 3, 2015 (unpublished decision).

On September 28, FDA awarded a "bridge services contract" to LES in connection with contract No. HHSF223201510167C for operations, maintenance, and repair-related services of laboratory equipment at FDA's White Oak campus. Revised Notice of Corrective Action, November 10, 2015, Attach. 1, at 15.

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<sup>1</sup> LES's protest asserted that the agency improperly evaluated ACG's technical and past performance proposals, and that ACG's proposal failed to comply with the terms of the solicitation and the requirement regarding limiting subcontracting.

<sup>2</sup> The agency also proposed to make any other changes deemed necessary to adjust the scope of the voluntary corrective action. Notice of Corrective Action, August 12, 2014.

<sup>3</sup> In this regard, ACG asserted that it was improper for the FDA to assert in its debriefing that ACG's proposal failed to demonstrate an adherence to the limitation on subcontracting because ACG had presented information on this issue multiple times during the agency's implementation of the corrective action contemplated under B-410157. Protest (B-410157.2) at 9. Specifically, ACG alleged that "[t]his presentation was obviously sufficient for FDA's purposes because the FDA, using the [a]warded [c]ontract as its guide, actually retained ACG to begin performing under the [a]warded [c]ontract." Id. at 8.

<sup>4</sup> FDA also stated that it would make any other changes deemed necessary to adjust the scope of the voluntary corrective action.

On October 8, prior to the agency's completion of the corrective action proposed under the first protest, ACG protested to our Office (second protest) challenging the award of a contract to LES, and, in alleging that the agency failed to conduct the corrective action promised under the first protest, ACG reasserted the protest grounds from its first protest.

Prior to the due date for filing the agency report, the agency filed, and supplemented, various requests for dismissal and notices of corrective action.<sup>5</sup> As relevant here, in the FDA's revised dismissal request, the agency acknowledged that the "bridge services contract" was improperly awarded, and advised that it had been terminated.<sup>6</sup> Revised Notice of Corrective Action, November 10, 2015, at 2; Attach. 1, at 17. In response to the dismissal request, the protester stated that it did not object to dismissal of the protest based on the agency's representations. Protester's Response to Revised Dismissal Request, November 12, 2015, at 1. In this filing, the protester also requested reimbursement of its costs, including attorneys' fees, in connection with the first and second protests. Based on the agency's proposed corrective action, we dismissed that protest as academic. See American Commercial Group, B-410157.3, Nov. 13, 2015 (unpublished decision).

## DISCUSSION

The protester requests reimbursement of its costs in connection with its first and second protests. ACG contends that both protests were clearly meritorious because the FDA took corrective action. ACG also contends that if the FDA had taken the corrective action promised under the first protest, instead of improperly awarding a "bridge services contract" to LES, ACG would not have been put to the expense of bringing the second protest.

Where a procuring agency takes corrective action in response to a protest, we may recommend that it reimburse the protester its 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. 31 U.S.C. § 3554(c)(1); 4 C.F.R. § 21.8(e); Re-Engineered Bus. Solutions--Costs, B-404214.4, July 14, 2011, 2011 CPD ¶ 135 at 2.

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<sup>5</sup> The agency report would have been due on November 9; however, our Office suspended the requirement to submit the agency report for B-410157.3 while we resolved the dismissal request. GAO Email to the Parties, November 6, 2016.

<sup>6</sup> The agency asserted that the protester was premature in challenging the agency's implementation of the corrective action promised under the first protest because the agency had not yet completed that corrective action. Revised Notice of Corrective Action, November 10, 2015, at 2-3.

As a general rule, so long as an agency takes corrective action in response to a protest by the due date for filing its agency report, we regard such action as prompt and decline to consider favorably a request to recommend reimbursement of protest costs. Alaska Structures, Inc.--Costs, B-298156.2, July 17, 2006, 2006 CPD ¶ 109 at 4. We have recognized, however, that the mere promise of corrective action, without reasonably prompt implementation, has the obvious effect of circumventing the goal of the bid protest system for the economic and expeditious resolution of bid protests. See Louisiana Clearwater, Inc.--Recon. and Costs, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209 at 6. Thus, where an agency fails to implement the promised corrective action, or implements corrective action that fails to address a clearly meritorious issue raised in an initial protest, such that the protester is put to the expense of subsequently protesting the very same procurement deficiency, the agency's action has precluded the timely, economical resolution of the protest. MEC Development, LLC--Costs, B-403295.2, October 18, 2010, 2010 CPD ¶ 264 at 3.

Here, there is no basis to conclude that the agency unduly delayed taking corrective action in response to a clearly meritorious protest. With regard to the first protest, ACG maintains that although the agency proposed to take corrective action prior to the due date for the agency report, the FDA nonetheless failed to meet the general standard for no undue delay because the FDA failed to implement that promised corrective action. The record does not establish that ACG's first protest was clearly meritorious. In this regard, the FDA took corrective action in response to the protest prior to submitting its report, and thus our Office was not provided with a record of the agency's response to the protest grounds. Further record development would have been necessary to determine whether ACG's protest grounds had merit. Additionally, although ACG assumes that its protests had merit because the agency took corrective action, an agency's decision to take corrective action, by itself, does not establish that a protest was clearly meritorious. See MEC Development, LLC--Costs, supra. Because we cannot conclude that ACG's allegations were clearly meritorious, it follows that there is no basis for recommending that ACG be reimbursed the protest costs for its first protest.

With regard to the second protest, in accordance with our general rule on prompt agency action, because the agency took corrective action prior to the deadline for submitting its report, we conclude there is no question that the agency's corrective action was prompt. See Alaska Structures, Inc.--Costs, supra.

Finally, to the extent ACG contends that it should be reimbursed its costs for both protests because the agency's alleged failure to properly implement the first corrective action put ACG to the expense of filing the second protest, we disagree. The record shows that the agency took corrective action in response to the second protest for reasons wholly unrelated to the allegations raised in ACG's first protest.

The request for a recommendation for reimbursement of protest costs is denied.

Susan A. Poling  
General Counsel