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## Decision

**Matter of:** ANAMAR Environmental Consulting, Inc.--Costs

**File:** B-411854.4; B-411854.7

**Date:** November 9, 2016

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Alan I. Saltman, Esq., and Stephen J. Kelleher, Esq., Smith, Currie & Hancock, LLP, for the protester.

Susan E. Symanski, Esq., Department of the Army, Corps of Engineers, for the agency.

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### DIGEST

Protester's request that GAO recommend reimbursement of the costs of filing and pursuing protests is granted where the agency's failure to implement corrective action after the first protest put the protester to the expense of a second protest asserting the same clearly meritorious allegations, and where, in a third protest, the agency unduly delayed in taking corrective action in response to a clearly meritorious protest.

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### DECISION

ANAMAR Environmental Consulting, Inc., of Gainesville, Florida, requests that our Office recommend that it be reimbursed the reasonable costs of filing and pursuing its protests of the award of a contract under request for proposals (RFP) No. W912EP-15-R-0006, issued by the Department of the Army, Corps of Engineers (Corps) for specialized professional services. We dismissed ANAMAR's first and supplemental protests, its second protest, and its third protest after the agency advised our Office, following each protest, that it would take corrective action. ANAMAR Env'tl. Consulting, Inc., B-411854, B-411854.2, Sept. 9, 2015 (unpublished decision); ANAMAR Env'tl. Consulting, Inc., B-411854.3, Jan. 19, 2016 (unpublished decision); ANAMAR Env'tl. Consulting, Inc., B-411854.5, June 9, 2016 (unpublished decision). ANAMAR argues that its protests were clearly meritorious and that it was forced to file its second and third protests--alleging the same procurement errors as those set forth in the first protest--and incur the associated costs, because the agency failed to properly implement the promised

corrective action in response to the first and supplemental protests and unduly delayed taking corrective action in response to the third protest.

We grant the request and recommend that ANAMAR be reimbursed its protest costs.

## BACKGROUND

The Corps issued the solicitation on January 27, 2015, as a set-aside for small businesses. The RFP contemplated the award of a single fixed-price, indefinite-delivery/indefinite-quantity contract to the offeror whose proposal represented the best value to the government considering the following three evaluation factors: technical merit, past performance and price. RFP at 3-7, 194; Amend. 1, at 1. As relevant to this protest, the RFP required proposals to contain: “Past Performance information for all relevant contracts and subcontracts started or completed within the past ten (10) years (measured from the date of this solicitation). . . . For each project submitted, explain why it is relevant to this project and provide information on problems encountered and actions taken to correct such problems.” RFP, Amend. 2, at 8.

On July 31, 2015, ANAMAR filed its first protest challenging the award of a contract to Water & Air Research, Inc. (WAR); ANAMAR filed a supplemental protest on August 10. Specifically, ANAMAR challenged the agency’s evaluation of substantial confidence for WAR’s past performance and its evaluation of WAR’s key personnel under the technical merit factor.<sup>1</sup> Protest at 21-24; Supplemental Protest at 2. ANAMAR also alleged that WAR’s proposal failed to provide all of its relevant past performance, as required by the RFP. *Id.* On September 8, just prior to the extended due date for the agency’s report, the Corps filed a corrective action notice, which stated, in part:

The Contracting Officer [who was also the Source Selection Authority (SSA)] has determined to take corrective action following subsequent analysis of his trade-off analysis in the Source Selection Decision Document [(SSDD)]. The Contracting Officer intends to reevaluate proposals and conduct a trade-off analysis based on that re-evaluation. Ultimately, a new Source Selection Decision Document will be issued.

First Request for Costs, Attach. A, Corrective Action Notice, Sept. 8, 2015, at 1 (emphasis added). As a result, our Office dismissed the first and supplemental

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<sup>1</sup> ANAMAR had also protested the agency’s evaluation of WAR’s ability to meet the subcontracting limitation requirements, but withdrew the allegation. Comments, May 31, 2016, at 7 n.8.

protests as academic. ANAMAR Envtl. Consulting, Inc., B-411854, B-411854.2, supra.

On December 9, 2015, the Corps notified ANAMAR that it had completed its corrective action and that it had again made award to WAR. First Request for Costs, Attach. F, Letter from Contracting Officer to ANAMAR, Dec. 9, 2015. Specifically, the Contracting Officer informed the protester that, “as the Source Selection Authority, I took corrective action in the form of re-conducting the trade-off analysis of the proposals of the two firms which remained in the final competitive range.” Id. (emphasis added). The letter made no mention of the agency having conducted a reevaluation of proposals. See id. ANAMAR requested and was denied a debriefing. First Request for Costs at 3-4. On December 16, ANAMAR filed its second protest, asserting that the Corps had failed to implement its promised corrective action and, in doing so, had failed to address the issues raised in ANAMAR’s first protest. Protest, Dec. 16, 2015, at 5-9.

Prior to the due date for the agency report, the Corps again provided notice that it would take corrective action. First Request for Costs, Attach. G, Notice of Corrective Action, Jan. 14, 2016. The agency’s second corrective action notice stated the following:

After the protest team’s thorough review of the corrective action taken as it has been documented prior to the filing of the instant protest, it is unclear to the team to what extent the SSA actually reevaluated the proposals, and conducted a trade-off analysis based on that re-evaluation. The three documents describing the corrective action taken are vague and appear to conflict with what was promised to the GAO and Protester as corrective action. Upon review of the protest and the most recent corrective action, the Agency deems that corrective action to be inadequate to uphold the integrity of the procurement system.

Therefore, the Chief, Contracting Division has determined, in a good faith effort in fairness to Protester, Intervener and the Corps, to take corrective action once again and intends to appoint the Deputy, Contracting Division as the new Source Selection Authority, and assign him to evaluate de novo the existing Source Selection Evaluation Board’s (SSEB) report and the remaining proposals in the competitive range and conduct a trade-off analysis based on that evaluation. The newly appointed SSA will memorialize his findings, analysis and award decision in his own Source Selection Decision Document.

Id. at 2 (emphasis added).

The agency's corrective action notice rendered ANAMAR's second protest academic, and we dismissed the protest. ANAMAR Envtl. Consulting, Inc., B-411854.3, supra. ANAMAR filed its first request for costs.

After re-evaluation, the agency again made award to WAR, and ANAMAR again protested the award, alleging, for the third time, that the awardee failed to provide past performance information for all relevant contracts and subcontracts started or completed within the past 10 years in violation of the terms of the RFP. Protest, April 18, 2016, at 16-20. The agency filed its report on May 18, 2016, which contained the revised SSDD dated April 1, 2016. This SSDD set forth the basis for the original selection of WAR and the agency's subsequent selection of WAR again, after corrective action. WAR's proposal contained three past performance references; according to the SSDD, each offeror was allowed to submit past performance references relevant to the solicitation requirement, and those past performance references were evaluated against the submitted questionnaires and information in the Past Performance Information Retrieval System (PPIRS). SSDD, April 1, 2016, at 12-16. In the initial evaluation, WAR received a substantial confidence rating for past performance. Id. at 16.

In the re-evaluation conducted after the first corrective action, the SSDD acknowledges that, in the course of the procurement, ANAMAR alleged poor past performance about WAR and its subcontractor. SSDD, April 1, 2016, at 26-27. The agency's re-evaluation concluded that these allegations were unfounded and unsolicited and did not consider them; the agency also noted there was no negative information on PPIRS. Id. at 26-27, 31. WAR again received a substantial confidence rating for past performance. Id. at 27. In addition, in the agency report, the contracting officer stated:

[ ]WAR submitted past performance information on projects that they determined were relevant to the work being performed. It is not the intent of the solicitation to require every offeror to provide every contract they performed and note every problem or deficiency; it was a business decision of each offeror to choose and provide relevant past performance information on previous contracts. Additionally, not all issues on contracts are indicators of poor performance. . . . The past performance of each offeror was fully evaluated along with CPARS/PPIRS to determine the overall rating.

Contracting Officer's Statement of Facts (COSF) at 9.

ANAMAR's comments on the agency report, filed May 31, 2016, stressed again that the awardee made material misrepresentations of its past performance by failing to adhere to the RFP's requirements to provide past performance information for all relevant contracts over the past 10 years. Comments at 7. ANAMAR provided specific examples of such past performance and contends that they were omitted by

WAR due to poor performance. Id. at 12. ANAMAR also challenged several aspects of the agency's evaluation of proposals, including the agency's evaluation of the awardee's past performance relevancy ratings given the failure of the awardee to comply with the requirements of the RFP with respect to past performance. Comments at 38.

This Office requested that the agency respond to the protester's comments on the agency report, specifically, whether the contracting officer's interpretation of the solicitation--that offerors were not required to provide past performance information for every contract performed--resulted in an unreasonable evaluation of past performance that was prejudicial to the protester. GAO Email to Parties, June 1, 2016. Rather than respond to the protester's comments on the agency report or GAO's request for further information, the agency issued a notice of corrective action. The notice stated that the agency "recognize[d] that there were anomalies in the source selection process, especially related to source selection criteria and evaluation of past performance as solicited, which go against federal procurement principles and may have prejudiced the offerors and the integrity of the system." Notification of Corrective Action, June 8, 2016 (emphasis added). The agency further stated that it would therefore cancel the award and solicitation and re-solicit the requirement based on the agency's current needs. Id. We dismissed the protest. ANAMAR Envtl. Consulting, Inc., B-411854.5, supra. ANAMAR filed a second request for costs that included a request to be reimbursed proposal preparation costs.

## DISCUSSION

The protester requests that our Office recommend that the agency reimburse ANAMAR the reasonable costs of filing and pursuing its first (including its supplemental), second, and third protest, as well as its costs of proposal preparation. ANAMAR argues that its first and supplemental protests were clearly meritorious and that, because the agency failed to conduct the corrective action promised in response to those protests, it was forced to incur the expense of filing and pursuing its second protest, which states the same grounds as the first and supplemental protests. First Request for Costs at 6-12. Therefore, ANAMAR contends that it should be reimbursed the costs of pursuing all of those protests. Id. at 1. ANAMAR also requests that it be reimbursed the costs of pursuing its third protest, where the agency unduly delayed taking corrective action in response to a clearly meritorious protest. Second Request for Costs at 2. The agency objects to the requests, asserting that the first and second protests were not clearly meritorious and that the agency did not unduly delay taking corrective action, and asserting that the third protest was not clearly meritorious. First Agency Response at 2-5; Second Agency Response at 2.

Under the Competition in Contracting Act of 1984, 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). Our Bid Protest Regulations further provide that where the contracting agency decides to take corrective action in response to a protest, we may recommend that the protester be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(e). Our Regulations do not contemplate a recommendation for the reimbursement of protest costs in every case in which an agency takes corrective action, but rather only where an agency unduly delays 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. Chase Supply, Inc.--Costs, B-411849.3, May 17, 2016, 2016 CPD ¶ 134 at 4-5; AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6.

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. Overlook Sys. Techs., Inc.--Costs, B-298099.3, Oct. 5, 2006, 2006 CPD ¶ 184 at 6. 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. Chant Eng'g Co., Inc.--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. CDIC, Inc.--Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 2.

### Clearly Meritorious

ANAMAR argues that its protests concerning the agency's evaluation of offerors in the competitive range and the resulting trade-off analysis were clearly meritorious, and that the agency's corrective actions in each instance, which specifically addressed the issues raised in the protests, were essentially admissions by the agency that its evaluation was flawed. Request for Costs at 10-12; Second Request for Costs at 13, 14, 16. One of the protester's allegations was that the awardee failed to provide comprehensive past performance information required by the solicitation, and that the agency therefore failed to evaluate past performance according to the terms of the solicitation. According to the protester, the agency informed ANAMAR during its debriefing that negative, relevant past performance information was not included in the agency's evaluation of the awardee's past performance. See Protest at 16-17.

We view as clearly meritorious the protest allegation that the agency unreasonably evaluated the awardee's past performance. Here, the RFP required offerors to submit past performance "information for all relevant contracts and subcontracts started or completed within the past ten (10) years (measured from the date of this solicitation). . . . For each project submitted, explain why it is relevant to this project and provide information on problems encountered and actions taken to correct such problems." RFP, Amend. 2, at 8 (emphasis added). The contracting officer incorrectly stated that offerors were not required to submit all past performance information completed within the past ten years or note every problem or deficiency; rather, according to the contracting officer, an offeror was allowed to pick and choose what relevant past performance information on previous contracts they wanted to provide. COSF at 9; SSDD, April 1, 2016, at 1. The agency's assertion that the RFP permitted offerors to make a business decision regarding the past performance information to be included in proposals is contradicted by the plain language of the RFP, and the agency should have known its defense was legally insufficient upon review of the RFP requirements, which the protest recounted.

Further, the protester alerted the agency to past performance information that the awardee failed to submit. SSDD, April 1, 2016, at 26-27. Nonetheless, the agency failed to consider it in the SSDD in the first evaluation and subsequent re-evaluation. SSDD, July 14, 2015; SSDD, Dec. 8, 2015. The agency then concluded in the second re-evaluation that this information and the allegations concerning WAR's past performance were unfounded and unsolicited and therefore did not consider them, but instead noted there was no negative information on WAR in PPIRS. SSDD, April 1, 2016, at 26-27, 31. Ultimately, the agency conceded that such information should have been considered. Specifically, in response to the third protest, the agency "recognize[d] that there were anomalies in the source selection process, especially related to source selection criteria and evaluation of past performance as solicited, which go against federal procurement principles and may have prejudiced the offerors and the integrity of the system." Notification of Corrective Action, June 8, 2016. On this record, we conclude that the protests were clearly meritorious.

#### Undue Delay

The agency also contends that ANAMAR's request for reimbursement should be denied because the agency did not unduly delay taking corrective action. The agency notes that, in the first two protests, it took corrective action prior to the due date for the agency report. Agency Response at 2, 4. The agency acknowledges that it only took corrective action after submission of comments in response to an agency report in the third protest.

Although corrective action is considered prompt if taken before the due date for the agency report, reimbursement of protest costs may be appropriate where an agency does not timely implement the promised corrective action that prompted the

dismissal of a clearly meritorious protest. See Career Quest, a division of Syllan Careers, Inc.--Costs, B-293435.5, Apr. 13, 2005, 2005 CPD ¶ 79 at 3 n.2. The mere promise of corrective action, without reasonably prompt implementation, has the obvious effect of circumventing the goal of the bid protest system of affecting the economic and expeditious resolution of bid protests. Louisiana Clearwater, Inc.--Recon. and Costs, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209 at 6. Where an agency fails to implement the promised corrective action, or implements corrective action that fails to address a clearly meritorious issue raised in the protest that prompted the corrective action, such that the protester is put to the expense of subsequently protesting the very same procurement deficiency, the agency's action, even though promptly proposed, has precluded the timely, economical resolution of the protest. Id.

As discussed above, prior to the due date for the agency report in the first protest, the agency took corrective action, stating that it would reevaluate proposals and conduct a new trade-off analysis. First Request for Costs, Attach. A, Corrective Action Notice, Sept. 8, 2015, at 1. In its second protest, ANAMAR alleged that the agency failed to implement its intended corrective action and reevaluate proposals and that, as a result, the second trade-off analysis was based on the original flawed evaluation. Protest, B-411854.3, Dec. 16, 2015, at 5-10. The Corps' corrective action notice, filed the day before the due date for the agency report, stated "it is unclear to the team to what extent the SSA actually reevaluated the proposals, and conducted a trade-off analysis based on that re-evaluation," and that the "three documents describing the corrective action taken are vague and appear to conflict with what was promised to the GAO and Protester as corrective action." First Request for Costs, Attach. G, Notice of Corrective Action, Jan. 14, 2016, at 2. The agency announced that it would again take corrective action because it deemed the prior "corrective action to be inadequate to uphold the integrity of the procurement system." Id.

The protester argues that a GAO recommendation that the protester be reimbursed the reasonable cost of filing and pursuing both protests is proper where the agency's failure to implement corrective action to address a meritorious issue raised in ANAMAR's first and supplemental protests caused the protester to incur the expense of protesting again the same procurement deficiency. First Request for Costs at 6, citing Louisiana Clearwater, Inc.--Recon. and Costs. We agree.

The agency attempts to distinguish the facts in this case from those in Louisiana Clearwater by arguing that in this case, ANAMAR's protests were not clearly meritorious. Agency Response at 2, 4. We have already concluded that the protests were in fact meritorious. Moreover, here, as in Louisiana Clearwater, the agency's failure to properly implement corrective action necessitated the protester's time and expense to file and pursue its second protest, defeating our goal of resolving protests economically and expeditiously. For that reason, we conclude that the agency unduly delayed taking corrective action, where the first protest was



filed on July 31, 2015, and the second corrective action notice--intended to address allegations from the first protest--was not issued until January 14, 2016. See Louisiana Clearwater, supra (noting that "promptness" must consider the time elapsed due to an agency's failure to implement in a prior protest the same remedy it offers as a means to resolve a subsequent allegation).

Further, the protester asserted its clearly meritorious ground of protest in the third protest, and the agency, rather than take prompt corrective action, filed an agency report in response to the protest allegations. Because the corrective action was taken after the due date for the agency report, which contained the clearly meritorious protest, we view the corrective action for the third protest as having been unduly delayed.

#### Proposal Preparation Costs

ANAMAR also requests we recommend that it be reimbursed the costs of proposal preparation, in light of the RFP cancellation.<sup>2</sup> However, the expenses ANAMAR incurred in preparing its proposal are typical costs of doing business and competing for government contracts. Under the circumstances here, where we have found that the cancellation of the solicitation was unobjectionable, there is no basis for us to recommend reimbursement of those costs. KAES Enters., LLC--Protest and Costs, B-402050.4, Feb. 12, 2010, 2010 CPD ¶ 49 at 4-5.

#### RECOMMENDATION

We recommend that the agency reimburse ANAMAR's costs of filing and pursuing its protests at GAO, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester's certified claim for costs, detailing the time spent and costs incurred, must be submitted to the agency within 60 days of receiving this decision. Id. § 21.8(f)(1).

The request that GAO recommend reimbursement of protest costs is granted.

Susan A. Poling  
General Counsel

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<sup>2</sup> In an earlier decision, we denied the protest that the agency unreasonably cancelled the solicitation. ANAMAR Envtl. Consulting, Inc., B-411854.6, B-413286, Sept. 14, 2016, 2016 CPD ¶ 258.