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# Decision

**Matter of:** Evergreen Flying Services, Inc.--Costs

**File:** B-414238.10

**Date:** October 2, 2017

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## DIGEST

Request for reimbursement of protest costs is denied where the agency did not unduly delay taking corrective action in the face of a clearly meritorious protest.

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## DECISION

Evergreen Flying Services, Inc., a small business of Rayville, Louisiana, requests that it be reimbursed the reasonable costs of filing and pursuing its protest of the award of six contracts under request for proposals (RFP) No. D16PS00182, which was issued by the Department of the Interior (DOI), Interior Business Center, for single engine air tanker (SEAT) flight services for the Bureau of Land Management (BLM) to support fire suppression operations in the contiguous 48 states.<sup>1</sup> Evergreen maintains that reimbursement is warranted because the firm had to file subsequent protests due to the agency's failure to implement corrective action following the firm's initial protest.

We deny the request.

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<sup>1</sup> The agency awarded contracts to the following firms: Western Pilot Service, Inc.; Henry's Aerial Service, Inc.; Queen Bee Air Specialties, Inc.; Aerial Timber Applicators, Inc.; New Frontier Aviation, Inc.; and G.B. Aerial Applications, Inc.

## BACKGROUND

On September 12, 2016, DOI issued the RFP for the award of multiple indefinite-delivery, indefinite-quantity (IDIQ) contracts for up to 33 SEAT aircraft for a base year, four option years, and an optional 6-month extension. Agency Report (AR), exh. 5, RFP amend. 2, at 6, 35-36.<sup>2</sup> The aircraft were to be used to transport fire retardant materials or suppressants or both to wildland fires, and were being procured for the exclusive use of BLM during one of three 100-day periods that covered the 2017 fire season. RFP at 8, 43; AR, exh. 1, Acquisition Plan, at 1.

Pursuant to the RFP, awards were to be made on a best-value basis, considering demonstrated technical/management capability, past performance, and evaluated price. RFP at 66. The demonstrated technical/management capability factor was comprised of two subfactors: aircraft capability (payload) and continuity of operations. Id. Of relevance here, under the aircraft capability subfactor, the agency was to evaluate how well each offered aircraft met or exceeded the solicitation's minimum aircraft requirements of payload. Id. at 67. In this respect, the RFP identified numerous minimum aircraft requirements, including the requirement that proposed aircraft have a payload minimum capacity of 7,360 pounds, and offerors were instructed to complete an aircraft questionnaire that detailed the aircraft's performance characteristics and provide supporting documentation. Id. at 6, 64.

In October 2016, the agency received timely proposals from 15 firms, including Evergreen.<sup>3</sup> Contracting Officer's Statement (COS) at 2. Following its evaluation of proposals, in December 2016, DOI awarded IDIQ contracts to six offerors for 33 aircraft. Id. at 2-3; see, supra, at 1 n.1. Evergreen filed a protest and, a few days later, a supplemental protest with our Office challenging the awards (docketed as B-414238 and B-414283.2).<sup>4</sup> In its initial protest, Evergreen first alleged that the agency's evaluation of its proposal under the demonstrated technical/management capability factor was unreasonable because DOI failed to assign the proposal strengths under the continuity of operations subfactor and "failed entirely" to take the aircraft capability factor into consideration. Protest, Dec. 26, 2016, at 18-24. Evergreen also challenged the agency's best-value award determinations. Id. at 24-28. In its supplemental protest, Evergreen raised additional objections to the agency's best-value tradeoff analysis and specifically alleged that awardee, Aerial Timber, misrepresented the availability of its proposed aircraft. Protest, Dec. 30, 2016, at 1-10.

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<sup>2</sup> Unless indicated otherwise, citations herein to the agency report are to the AR submitted in response to Evergreen's March 6, 2017, protest, docketed as B-414238.5

<sup>3</sup> Under the solicitation, firms were permitted to propose multiple aircraft, and the agency could make awards for "any combination of aircraft offered." RFP at 8.

<sup>4</sup> Another disappointed offeror also filed a protest challenging the awards (B-414283.3).

Prior to the submission of an agency report, and without conceding the merits of any protest grounds, DOI advised our Office that it intended to reevaluate proposals and make a new best-value award determination. AR, exh. 8, Notice of Corrective Action, Jan. 10, 2017, at 1-2. On January 17, 2017, our Office dismissed Evergreen's protests as academic. Evergreen Flying Servs., Inc., B-414238.1, B-414238.2, Jan. 17, 2017 (unpublished decision).

Although the reevaluation resulted in an improved rating for Evergreen under the demonstrated technical/management capability factor--acceptable to good--the firm's proposal still was not selected for award. Response to Request for Costs at 2. Ultimately, the agency determined that the same proposals still represented the best value to the agency and awarded contracts to those offerors again. AR, exh. 18, Award Summary, at 1-35. Following its receipt of a written debriefing, Evergreen again protested to our Office on March 3 (B-414238.5).<sup>5</sup>

In its March protest, Evergreen raised several protest grounds, including an objection to the methodology used to evaluate proposals under the aircraft capability subfactor. More specifically, Evergreen protested the agency's consideration of an average payload capacity for each offeror's fleet of aircraft, as opposed to assessing capacity only on an aircraft-by-aircraft basis. Protest, Mar. 3, 2017, at 20-25. Evergreen also protested that DOI misevaluated Evergreen's proposal under the continuity of operations subfactor; objected to the award of nine aircraft to one offeror (given that the RFP's schedule of supplies only included eight lines); and asserted various arguments challenging the best-value determinations. Id. at 25-39.

Following our Office's denial of the agency's request that our Office dismiss the entirety of Evergreen's protest, on April 5, the agency filed its report countering each of the remaining protest grounds.<sup>6</sup> The agency also submitted a record that included each awardee's complete schedule of services/supplies and aircraft questionnaires (including

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<sup>5</sup> Another disappointed offeror also filed a protest with our Office (B-414238.4), which was dismissed on the basis that the protester was not an interested party. See Fletcher Flying Serv., Inc., B-414238.4, Apr. 7, 2017 (unpublished decision).

<sup>6</sup> DOI requested that our Office dismiss the entirety of Evergreen's protest because, according to the agency, certain protest grounds were untimely filed and others were either legally or factually insufficient. Dismissal Request, Mar. 17, 2017, at 1-9. After considering responses by Evergreen and the intervenors, our Office agreed with DOI that certain protest grounds and arguments were untimely raised. Most significantly, Evergreen's objection to one awardee's contract for nine aircraft was determined to be untimely because Evergreen failed to raise this allegation in its December 2016 protest, despite having sufficient information to make the argument at that time. Email from GAO to Parties, Mar. 30, 2017. Our Office disagreed with the agency that the remaining protest allegations were legally or factually insufficient, and requested that DOI submit an agency report responding to the remaining issues.

supporting information), as well as the agency's evaluation rating sheets for each awardee. Thereafter, on April 17, Evergreen filed its comments and a supplemental protest (B-414238.6) in response to the agency's report.

In its lengthy supplemental filing, Evergreen highlighted various, specific alleged flaws with respect to the awardees' aircraft questionnaire submissions and the agency's evaluation thereof. Comments/Supp. Protest, Apr. 17, 2017, at 3-56. For instance, Evergreen complained that certain aircraft should have been rejected because some awardees submitted unsigned aircraft questionnaires (or relied on typewritten names instead of signatures), while others submitted supporting documentation from outside of the 5-year window contemplated by the solicitation. Id. at 10-26; see AR, exh. 3, Solicitation Questions and Answers, at 7. Among other challenges, Evergreen also raised supplemental objections to the source selection decision and the agency's consideration of spare aircraft, as well DOI's evaluation under the continuity of operations subfactor and price factor. Comments/Supp. Protest, Apr. 17, 2017, at 26-56.

Our Office requested that DOI submit a supplemental agency report by April 28. On April 26, prior to submitting a supplemental report, the agency advised our Office that it "concluded that corrective action [was] warranted based on the new allegations and information provided in the supplemental protest." Notice of Corrective Action, Apr. 26, 2017, at 1. At the request of an intervenor, the agency provided additional rationale for its decision to take corrective action. Response to Request for Costs, exh. 5, Agency Counsel Email to Parties, May 2, 2017. First, agency counsel explained that the supplemental protest highlighted a concern regarding whether one awardee's aircraft contained a compliant fire gate system. Agency counsel further explained that while Evergreen challenged numerous strengths assigned to the awardees' proposals, in one instance DOI had improperly assigned a strength where the feature should have only been considered a benefit. Id. Agency counsel pointed to two other risks that influenced the decision to take action as well, including with respect to one awardee's continuity of operations rating and two of its aircrafts' weights. Id.

Ultimately, the agency explained that it did not have sufficient time prior to fire season to reevaluate proposals, make new award decisions, award contracts, and issue task orders thereunder. Consequently, the agency decided to cancel the solicitation, and requested that our Office dismiss the protest as academic. In light of the solicitation cancellation, our Office dismissed Evergreen's protests as academic on May 4.<sup>7</sup> Evergreen Flying Servs., Inc., B-414238.5, B-414238.6, May 4, 2017 (unpublished decision). Thereafter, Evergreen filed its request for the reimbursement of protest costs.

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<sup>7</sup> Evergreen and another offeror protested the agency's decision to cancel the solicitation, which our Office denied. See Henry's Aerial Serv., Inc.; Evergreen Flying Servs., Inc., B-414238.7, B-414238.9, Aug. 10, 2017, 2017 CPD ¶ 257.

## DISCUSSION

Evergreen requests that we recommend that it be reimbursed the reasonable costs of filing and pursuing its protests--its December, March, and April protests--including attorneys' fees. Evergreen asserts that the "glaring aircraft documentation deficiencies" it highlighted in its April supplemental protest should have been "impossible for the agency to miss" had DOI conducted a reasonable inquiry into the merits of its assessments under the aircraft capability subfactor. Request for Reimbursement of Costs at 2. According to Evergreen, because the agency failed to reasonably reevaluate proposals following the firm's December protests, Evergreen was forced to file a subsequent protest and supplemental protest challenging the aircraft capability evaluation, and, consequently the reimbursement of protest costs is warranted. Id. at 16-22. For the reasons discussed below, we deny the protester's request for reimbursement of its protest costs.

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. Thus, as a prerequisite to our recommending the reimbursement of costs where a protest has been settled by corrective action, the protest must not only have been meritorious, but it also must have been clearly meritorious, *i.e.*, not a close question. InfraMap Corp.--Costs, B-405167.3, Mar. 26, 2012, 2012 CPD ¶ 123 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. With respect to the promptness of the agency's corrective action, we review the record to determine whether the agency took appropriate and timely steps to investigate and resolve the impropriety. Remote Diagnostics Techs., LLC, B-413375.3, Feb. 6, 2017, 2017 CPD ¶ 52 at 3. This imposition of costs is not intended as an award to prevailing protesters or as a penalty to the agency, but rather, is designed to encourage agencies to take prompt action to correct apparent defects in competitive procurements. See Takota Corp.--Costs, B-299600.2, Sept. 18, 2007, 2007 CPD ¶ 171 at 3.

Evergreen relies on our decision in ANAMAR Environmental Consulting to argue that reimbursement is warranted here because the agency's corrective action allegedly failed to address a meritorious issue raised in Evergreen's December protests, which caused the protester to incur the expense of protesting again the same procurement deficiency. Request for Reimbursement of Costs at 18-19, citing ANAMAR Envntl. Consulting, Inc.--Costs, B-411854.4, B-411854.7, Nov. 9, 2016, 2016 CPD ¶ 327. In this respect, Evergreen maintains that the alleged evaluation errors highlighted in its April supplemental protest were "glaring, impossible-to-miss deficiencies" that should

have been rectified by the agency during the reevaluation of proposals it undertook in response to Evergreen's initial protests. See id. at 18.

The agency responds that reimbursement should be denied because each of Evergreen's protests challenged "vastly different aspects" of the agency's aircraft capability evaluation. Response to Request for Costs at 10. DOI further asserts that the specific arguments that formed the basis of DOI's decision to cancel the solicitation were first raised by Evergreen in its April filing, and the agency promptly announced its decision to take corrective action.

Ultimately, as presented by Evergreen, the central consideration here is whether Evergreen's December protests included clearly meritorious protest grounds that the agency expressly committed to rectify, but failed to, such that the protester was forced to continue its bid protest litigation to get relief. In this regard, the promise of corrective action, without reasonably prompt implementation, circumvents the goals of the bid protest system and warrants the reimbursement of protest costs. See Louisiana Clearwater, Inc.--Recon. & Costs, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209 at 6.

Here, we conclude that the reimbursement of costs is not warranted. As outlined below, Evergreen's December protests did not include any protest grounds that were clearly meritorious on their face, and the record does not support Evergreen's position that the agency failed to implement its initial corrective action of reevaluating proposals and making new best-value award determinations. Likewise, the specific concerns that ultimately prompted the agency's decision to cancel the solicitation were not sufficiently related to Evergreen's initial allegations to merit a recommendation for the reimbursement of protest costs.

In ANAMAR Environmental Consulting, our Office granted a protester's request for a recommendation that the agency reimburse its protest costs where the protester's initial protest included a specific, clearly meritorious protest allegation that the agency expressly committed to addressing, yet the agency failed to actually rectify the procurement error despite multiple rounds of protests and corrective action. See ANAMAR Env'tl. Consulting, Inc.--Costs, supra. The circumstances here are distinguishable from the facts in ANAMAR Environmental Consulting.

First, with respect to Evergreen's December protests, we disagree with the protester that its filings included any protest grounds that we consider clearly meritorious on their face. The protest ground relevant to the aircraft capability subfactor evaluation--Evergreen's supposition that DOI "failed entirely" to take the subfactor into account--was based solely on the protester's representation that the agency did not mention the subfactor during its debriefing. See Protest, Dec. 26, 2016, at 23. In our view, this allegation did not contain sufficient facts or evidence to show the absence of a defensible legal position. See First Fed. Corp.--Cost, supra. In this respect, merely because the subfactor was supposedly not mentioned by the agency in its debriefing in no way definitively demonstrated that the subfactor was entirely disregarded by DOI in

its evaluation and rating of technical proposals, such that the allegation was clearly meritorious.<sup>8</sup> Likewise, that the agency took corrective action in response to the protest, without more, does not evidence that the allegation was meritorious, contrary to Evergreen's argument. See Request for Reimbursement of Costs at 16. The fact that an agency decides to take corrective action does not establish that a statute or regulation has been violated. Information Ventures, Inc.--Costs, B-407478.3, Apr. 5, 2013, 2013 CPD ¶ 95 at 3.

In addition, the record does not support Evergreen's position that the agency failed to implement its January corrective action. On the contrary, the record demonstrates that DOI performed a reevaluation of proposals, as it committed to do, which resulted in an improved technical factor rating for Evergreen. The fact that aspects of the reevaluation may have been objectionable to Evergreen does not automatically provide a basis for the reimbursement of costs.

Next, we also disagree with the protester that its March protest contained any clearly meritorious protest allegations such that the agency's cancellation was unduly delayed corrective action. In this respect, the aircraft capability protest ground in Evergreen's March filing focused primarily on the agency's evaluation methodology--DOI's use of an average payload capacity for each offeror's fleet of aircraft--and was not, on its face, clearly meritorious. Instead, Evergreen's argument required further record development and response from the agency for our Office to determine whether the protest ground had merit. Indeed, regardless of whether the methodology was proper, the issue of whether the protester suffered any competitive prejudice remains an open question. See Memorandum of Law at 6. On this record, we do not consider the relevant protest ground in Evergreen's March filing to have been clearly meritorious. Hence, the agency's decision to submit a response to the March protest does not automatically compel the reimbursement of protest costs.

Ultimately, as noted above, DOI chose to cancel the solicitation only after Evergreen highlighted, in its April supplemental protest, specific concerns with respect to several of the awardees' aircraft questionnaire responses and supporting documents. Indeed, the agency concedes that a few of the cited issues may have had merit (while most of Evergreen's concerns were unavailing, in the agency's view). See Response to Request for Costs, exh. 5, Agency Counsel Email to Parties, May 2, 2017. Regardless, we need not determine whether these pointed allegations were clearly meritorious because the agency advised of its decision to cancel the solicitation prior to the due date for the submission of a supplemental report.<sup>9</sup> In such situations, the

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<sup>8</sup> In fact, the agency counters that it had calculated payloads and assigned ratings as part of its evaluation under the aircraft capability subfactor, despite the protester's allegation otherwise. Response to Request for Costs at 11 n.12.

<sup>9</sup> Indeed, we agree with the agency that many of the alleged deficiencies were "minor and non-material" and that the RFP afforded the agency with discretion regarding  
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reimbursement of costs generally is not warranted. See TRAX Int'l Corp.--Costs, B-410441.5, Aug. 26, 2015, 2015 CPD ¶ 276 at 5 (corrective action not unduly delayed when taken prior to the submission of an agency report). Moreover, and to the point, we disagree with Evergreen that the supplemental protest allegations that prompted the cancellation were sufficiently related to Evergreen's prior protest grounds such that the agency's investigation of the December or March protests should have revealed the flaws asserted in the protester's April supplemental filing.

Lastly, Evergreen argues that the agency still has yet to undertake "appropriate" corrective action to remedy the specific issues it identified in its April supplemental protest. Request for Reimbursement of Costs at 22-24. Specifically, Evergreen maintains that the proper corrective action should have been a reevaluation of proposals rather than the cancellation of the solicitation, and requests that we recommend it be reimbursed its protest costs on this basis. This argument, as it relates to the reimbursement of costs, is unavailing and more accurately reflects the protester's disagreement with the agency's chosen corrective action. Our Office has previously decided that the cancellation was unobjectionable under the unique circumstances here. See Henry's Aerial Serv., Inc.; Evergreen Flying Servs., Inc., B-414238.7, B-414238.9, Aug. 10, 2017, 2017 CPD ¶ 257.

In conclusion, we acknowledge that the protester filed two rounds of protests that raised allegations related generally to DOI's evaluation under the aircraft capability factor. Nevertheless, the arguments were unique. That is, the allegations that prompted corrective action were not tied to the initial protest grounds, and the agency had not previously committed to rectifying the alleged improprieties highlighted by Evergreen in April. Under these circumstances, we disagree with Evergreen that the situation here is sufficiently similar to what transpired in ANAMAR Environmental Consulting or Louisiana Clearwater such that the agency, in essence, failed to implement promised corrective action to address a specific, meritorious issue.

The request is denied.

Susan A. Poling  
General Counsel

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disqualifying offerors due to concerns with documentation. See Response to Request for Costs at 5.