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# Decision

**Matter of:** GovSmart, Inc.--Protest and Costs

**File:** B-415871.3; B-415871.4

**Date:** April 19, 2018

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Jerry A. Miles, Esq., and Lan Jin, Esq., Deale Services, LLC, for the protester.  
Christine M. Choi, Esq., and Eric D. Flores, Esq., Department of the Navy, for the agency.  
Noah B. Bleicher, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

1. Protest challenging scope of agency's corrective action taken in response to protester's prior protest is denied where agency's decision to cancel the unperformed portion of the purchase order at issue was unobjectionable under the circumstances.
  2. Protester's request that our Office recommend it be reimbursed the costs of filing and pursuing its protests is denied where the agency did not unduly delay taking corrective action and the protest grounds were not clearly meritorious.
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## DECISION

GovSmart, Inc., a small business of Charlottesville, Virginia, protests the scope of the agency's corrective action following its prior protest of the issuance of purchase order No. N66001-18-P-0066, which was issued by the Department of the Navy, Space and Naval Warfare Systems Command (SPAWAR), to Cypher Analytics, Inc., d/b/a Crown Point Systems, a section 8(a) small business of San Diego, California, for software and firmware annual maintenance and license renewals. GovSmart contends that the agency's corrective action was inadequate because only one of the line items was cancelled. The protester also requests that our Office recommend that it be reimbursed the costs of filing and pursuing its protests.

We dismiss the protest in part, deny the protest in part, and deny the request for costs.

## BACKGROUND

The procurement here involves the renewal of various firmware/software licenses and hardware maintenance subscriptions for SPAWAR Systems Center Pacific (SSC Pacific). Memorandum of Law/Contracting Officer's Statement (MOL/COS) at 6. Specifically, the purchase order identified 38 line items for licenses and subscriptions covering calendar year 2018 from a broad array of vendors, including for Adobe, Cisco, Dell, and IBM products, to name a few. Agency Report (AR), attach. 4, Crown Point Purchase Order (P.O.), at 2-20. Crown Point was to provide SSC Pacific with the renewals to allow for immediate access to the software, firmware, and maintenance support (i.e., warranties).<sup>1</sup> MOL/COS at 5-6. The licenses and subscriptions were agreements between the OEMs and the end user, SSC Pacific; Crown Point did not provide any maintenance or other services under the purchase order.<sup>2</sup> Id. at 6.

GovSmart previously sold the licenses and subscriptions to SSC Pacific under a direct award issued pursuant to the Small Business Administration's (SBA) section 8(a) business development program.<sup>3</sup> Protest (B-415871.1), Dec. 29, 2017, at 1. According to GovSmart, the company began negotiating with the agency for a follow-on section 8(a) sole-source contract in late 2017. Id. at 4. By late December 2017, however, SSC Pacific was negotiating with a different 8(a) vendor, Crown Point, for the annual renewals.<sup>4</sup> See id. at 5. On December 23, 2017, GovSmart filed an agency-level protest with the Navy alleging that SSC Pacific contracting officials had violated the Procurement Integrity Act (PIA) by providing GovSmart's pricing for the renewals to Crown Point and acted in bad faith in its negotiations with GovSmart. AR, attach. 1, Agency-Level Protest, at 1-10.

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<sup>1</sup> Many larger original equipment manufacturers (OEMs) often do not sell their products directly to the end user. Instead, the OEMs sell their products through authorized distributors or resellers. AR, attach. 8, Dec. of Crown Point President, at 1.

<sup>2</sup> For instance, purchase order line items 0009, 0018, and 0026 refer to "SUPPORT/SOFTWARE RENEWALS," for F5, IBM, and Palo Alto OEMs, respectively. P.O. at 6, 10, and 14. Those support agreements contemplate that the customer or end user (i.e., SSC Pacific) would contact or receive support from F5, IBM, or Palo Alto directly; Crown Point's only role pursuant to the purchase order was to sell the OEM renewals to the government. MOL/COS at 6; see AR, attach. 8, Dec. of Crown Point President, at 1; see also AR, attach. 9, F5 Terms and Conditions; attach. 10, IBM Appliance Handbook; attach. 11, Palo Alto User Agreement.

<sup>3</sup> Section 8(a) of the Small Business Act authorizes the SBA to contract with other government agencies and to arrange for the performance of those contracts via subcontracts awarded to socially and economically disadvantaged small businesses. 15 U.S.C. § 637(a); Federal Acquisition Regulation (FAR) § 19.800(a).

<sup>4</sup> According to GovSmart, the agency would have needed to [DELETED]. Protest (B-415871.1) at 4-5; see [DELETED].

By email on Friday, December 29, the agency issued a decision dismissing GovSmart's agency-level protest for lack of standing.<sup>5</sup> AR, attach. 2, Agency-Level Protest Decision, at 1-4. A few minutes later, the contracting officer issued the purchase order to Crown Point.<sup>6</sup> AR, attach. 3, Dec. of Contracting Officer, at 2. Later that same afternoon, GovSmart filed a protest with our Office raising the same protest grounds as alleged in its agency-level protest.<sup>7</sup> See Protest (B-415871.1) at 1-12. Days later, GovSmart filed a supplemental protest asserting that the contract with Crown Point violated the FAR's limitations on subcontracting rule.<sup>8</sup> See Protest (B-415871.2), Jan. 5, 2018, at 1-8.

Thereafter, on January 12, the agency advised our Office that it intended to take corrective action. Notice of Corrective Action at 1-2. Specifically, SSC Pacific explained as follows:

Based on a review of the process associated with this procurement, the Agency has decided to undertake corrective action by terminating the unperformed portion of the Purchase Order which consists of Item No. 0038.

Id. at 2. In this regard, the agency elaborated as follows:

Crown Point reported that they had already placed orders for almost all of the required renewals of firmware/software licenses and hardware maintenance subscriptions which had since been confirmed and activated by the providers consistent with the Purchase Order's period of performance commencement date of January 1, 2018. The only item for which an order was not yet confirmed and executed pertained to the Item No. 0038, "Tektronix," which the Government estimate valued at approximately \$5,000.

Id.

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<sup>5</sup> The chief of the contracting office also concluded that GovSmart's allegations lacked merit and should be denied. AR, attach. 2, Agency-Level Protest Decision, at 2.

<sup>6</sup> The purchase order had a value of \$5,769,443. P.O. at 25.

<sup>7</sup> Our Office takes no position as to whether GovSmart's initial protest raised valid bases of protest.

<sup>8</sup> Our Office takes no position as to whether GovSmart's supplemental protest was timely filed, given that the allegations were not raised in its agency-level protest.

In light of the corrective action, our Office dismissed as academic GovSmart's initial and supplemental protests.<sup>9</sup> GovSmart, Inc., B-415871, B-451871.2, Jan. 31, 2018 (unpublished decision). Prior to our Office's decision, GovSmart protested the corrective action and requested that our Office recommend that it be reimbursed the costs of filing and pursuing its protests.

## DISCUSSION

GovSmart protests the scope of the agency's corrective action, contending that the cancellation of one line item is unreasonable and unduly narrow. Specifically, GovSmart contends that the agency should "stop all orders for continuing maintenance/warranty services and suspend the contract performance. . . ." Protest (B-415871.3), Jan. 17, 2018, at 4. GovSmart also complains that it was improper for SSC Pacific not to have immediately stopped or discontinued any order that was processed upon receipt of GovSmart's protest. Id. The firm also maintains that it should be reimbursed the costs of filing its protests because the agency delayed staying Crown Point from processing the renewals. Id. at 6. We have considered all of the protester's arguments and find them to be without merit.

### Statutory Stay of Performance

As an initial matter, much of the protester's frustration appears to be focused on the agency's actions surrounding the implementation of a stay of performance following GovSmart's filing of its protest. By way of additional background, as noted above, within minutes of dismissing GovSmart's agency-level protest, SSC Pacific issued the purchase order to Crown Point at 11:05 a.m. (Pacific Time (PT)) on Friday, December 29. AR, attach. 3, Dec. of Contracting Officer, at 1-2. At 2:15 p.m. (PT) that day, GovSmart filed its protest with GAO via email, and included SSC Pacific contracting officials as recipients on the email. See Email from GovSmart Counsel to GAO and SSC Pacific Officials, Dec. 29, 2017 (2:15 p.m. PT). That afternoon, after receiving the courtesy copy of the protest, the branch chief of the SSC Pacific contracting office contacted Crown Point to discuss suspending performance on the purchase order. AR, attach. 7, Dec. of SSC Pacific Contracting Office Branch Chief, at 1. Crown Point advised that it fulfilled most of the order within an hour of being awarded the contract; because everything was provided by electronic delivery, the renewals were processed very quickly and the licenses and subscriptions were active immediately thereafter.<sup>10</sup> Id.; see AR, attach. 8, Dec. of Crown Point President, at 2.

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<sup>9</sup> GovSmart did not object to the dismissal of its initial protests. Email from Counsel for GovSmart to Parties, Jan. 24, 2018, (7:43 a.m.).

<sup>10</sup> According to Crown Point, OEMs will often charge "significant" reinstatement fees if there is a lapse in continuity of a license or subscription. AR, attach. 8, Dec. of Crown Point President, at 3. For instance, Crown Point represents that the reinstatement fees for IBM alone would be "[DELETED]." Id.

Following the holiday weekend, and after receipt of official notice of GovSmart's protest from GAO, SSC Pacific formally instructed Crown Point to suspend performance on items of the purchase order that had not been renewed or activated. AR, attach. 12, Dec. of Acting Branch Chief, at 1. By that time, however, the only remaining item that had not been activated was the Tektronix subscription. Id.; AR, attach. 8, Dec. of Crown Point President, at 2.

In its protest submission, GovSmart complains that it was improper for the agency not to have done more to implement the statutory stay of performance required by the Competition in Contracting Act of 1984 (CICA). See 31 U.S.C. § 3553(d)(1). Under CICA, a contracting agency is required to suspend contract performance if it receives notice of a protest from our Office within 10 calendar days of the date of contract award. 31 U.S.C. § 3553(d)(3), (d)(4)(A). However, an agency's failure to adhere to the stay requirement in 31 U.S.C. § 3553(d)(3)(A) is not a valid basis of protest. 4 C.F.R. § 21.6 ("GAO does not administer the requirements to stay award or suspend contract performance under CICA"); Precise Mgmt., LLC--Recon., B-410912.2, June 30, 2015, 2015 CPD ¶ 193 at 6-7; Serco Inc., B-410676.2, Dec. 12, 2014, 2014 CPD ¶ 371 at 2-3 (whether the agency failed to comply with the stay of performance is not a matter for consideration by GAO).

Thus, GovSmart's complaints regarding the agency's implementation of the CICA stay of performance are outside of our Office's jurisdiction and will not be considered further.

#### Scope of Corrective Action

Crown Point next protests the agency's corrective action. The protester contends that SSC Pacific should cancel additional aspects of the purchase order beyond the Tektronix line item.

Contracting officers in negotiated procurements have broad discretion to take corrective action where the agency determines that such action is necessary to ensure a fair and impartial competition. The Matthews Group, Inc. t/a TMG Constr. Corp., B-408003.2, B-408004.2, June 17, 2013, 2013 CPD ¶ 148 at 5. As a general matter, the details of a corrective action are within the sound discretion and judgment of the contracting agency. Evergreen Helicopters of Alaska, Inc., B-409327.3, Apr. 14, 2014, 2014 CPD ¶ 128 at 8. We generally will not object to the specific corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. Networks Elec. Corp., B-290666.3, Sept. 30, 2002, 2002 CPD ¶ 173 at 3.

Here, we have no basis to object to SPAWAR's corrective action. The agency represents that GovSmart's supplemental protest (alleging limitations on subcontracting violations) "raised questions" regarding the purchase order placed with Crown Point. AR, attach. 3, Dec. of Contracting Officer, at 2. Consequently, the agency determined that corrective action was warranted. By that juncture, though, as explained above,

Crown Point had already processed nearly all of the subscriptions, which were promptly activated to avoid reinstatement fees.<sup>11</sup> AR, attach. 7, Dec. of SSC Pacific Contracting Office Branch Chief, at 1-2. So, the agency took the corrective action that was available, which was to terminate the unperformed portion of the purchase order, the Tektronix subscription.<sup>12</sup> Notice of Corrective Action at 1-2; see also Ferris Optical, B-403012.2, B-403012.3, Oct. 21, 2010, 2010 CPD ¶ 265 at 1-2 (cancellation of purchase order renders protest of issuance of order academic).

GovSmart argues that the agency should do more. Specifically, the protester wants the agency to somehow reverse the delivery of the licenses and subscriptions that have already been activated (and which have now been in effect for several months), and then conduct a new competition for the renewals (or award the firm a sole-source contract). See Comments at 5. The agency explains, however, that to cancel the already activated renewals, many of the OEMs would have to retroactively cancel and reverse the reinstatement of the licenses and subscriptions which, if even possible or agreeable by the OEMs, would “most certainly incur significant penalties.” See MOL/COS at 2; AR, attach. 8, Dec. of Crown Point President, at 2.

Thus, the record establishes that the protester’s preferred recourse is simply impractical, does not withstand scrutiny, and would likely waste taxpayer dollars. In this regard, depending on the circumstances of the situation, our Office will not recommend that an agency reverse performance as part of its correction action where such reversal would be impractical or otherwise unfeasible.<sup>13</sup> See Landmark Constr. Corp., B-281957.3, Oct. 22, 1999, 99-2 CPD ¶ 75 at 3 (finding agency’s corrective action to be appropriate and consistent with GAO decisions, where the corrective action included allowing the awardee to complete performance of the delivery orders already issued pending a recompetition and new award). Here, the scope of SPAWAR’s corrective action is within its sound discretion and judgment, and we find nothing objectionable about the agency’s decision to focus on the unperformed portion of the purchase order, rather than attempt to reverse the renewals.

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<sup>11</sup> Indeed, Crown Point submitted invoices for the full price of the renewed licenses and subscriptions once they were purchased from the OEMs. AR, attach. 7, Dec. of SSC Pacific Contracting Office Branch Chief, at 1-2. The awardee’s performance as it relates to those line items is complete. See id.

<sup>12</sup> Because GovSmart did not submit a proposal for the purchase order, which had been awarded on a sole-source basis, the firm did not incur any bid or proposal costs, which could have been reimbursed as part of the corrective action. See generally, e.g., FitNet Purchasing Alliance, B-410263, Nov. 26, 2014, 2014 CPD ¶ 344 at 11.

<sup>13</sup> As the agency notes, the protester has not pointed to any decision by our Office that contemplates the reversal of performance or return of supplies as a form of corrective action. See MOL/COS at 7.

## Reimbursement of Protest Costs

Lastly, GovSmart requests that our Office recommend that the firm be reimbursed the costs of filing and pursuing its protests. In support of its request, GovSmart argues that the agency “knew GovSmart’s protests presented clearly meritorious concerns but instead denied GovSmart’s right under [CICA] of [an] automatic stay of performance.” Protest (B-415871.3) at 6.

Our Bid Protest Regulations provide we may recommend that an agency pay protest costs where the agency decides to take corrective action in response to the protest. 4 C.F.R. § 21.8(e). We will make such a recommendation, however, only where the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. E.g., Inland Power Group, B-410470.2, Feb. 3, 2015, 2015 CPD ¶ 69 at 1. As a general rule, so long as an agency takes corrective action by the due date of its agency report, we regard the action as prompt, and will not consider a request to recommend reimbursement of protest costs. LGS Innovations LLC, B-405932.3, Apr. 26, 2012, 2012 CPD ¶ 147 at 2.

Here, we have no basis to recommend the reimbursement of protest costs. First, to the extent GovSmart’s request for costs stems from the agency’s actions surrounding implementing the CICA stay of performance, as explained above, such concerns are not for our Office’s consideration and do not factor into whether a protester should be reimbursed protest costs.

In addition, the agency did not unduly delay deciding to take corrective action, regardless of the merits of the protests. In this respect, SPAWAR’s agency report in response to GovSmart’s December 29 protest (B-415871) and January 5 supplemental protest (B-415871.2) was due no later than January 29, 2018. As noted above, in lieu of filing a report, the agency elected to take its corrective action on January 12, more than two weeks prior to the due date for the agency report. As such, the agency did not unduly delay taking its corrective action. See LGS Innovations, LLC, supra.

Moreover, and regardless of the timing of the agency’s corrective action, our Office does not view GovSmart’s initial or supplemental protests as clearly meritorious. Indeed, it remains unclear whether GovSmart’s initial protest even alleged valid bases of protest, and we have concerns with respect to the timeliness of GovSmart’s supplemental protest. Consequently, GovSmart’s request that we recommend it be reimbursed the costs of filing and pursuing its protests is unavailing.

The protest is dismissed in part and denied in part, and the request is denied.

Thomas H. Armstrong  
General Counsel