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# Decision

**Matter of:** Optimize Consulting, Inc.--Costs

**File:** B-419212.2

**Date:** February 25, 2021

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Lee Dougherty, Esq., Effectus, PLLC, for the requester.  
Elan Taylor, Esq., Defense Logistics Agency, for the agency.  
Young H. Cho, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Request for recommendation that protest costs be reimbursed after our Office dismissed a protest as premature in light of an ongoing investigation into the allegation of an organizational conflict of interest is dismissed where the agency did not take corrective action in the prior protest.

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## DECISION

Optimize Consulting, Inc., of Palatka, Florida, requests that our Office recommend that the Defense Logistics Agency (DLA) reimburse the firm the reasonable costs of filing and pursuing its protest challenging the award of a contract to VC Solutions JV, LLC, of Lutz, Florida, under request for proposals (RFP) No. SP4703-20-R-0002, issued by the DLA, for continuous process improvement (CPI) deployment; growth and sustainment; and coaching and execution of CPI project support services. Optimize argues that reimbursement is warranted because the agency's actions in the face of a clearly meritorious protest ground were unreasonable and caused the firm to expend substantial investment of time and resources pursuing its protest.

We dismiss the request.

## BACKGROUND

The solicitation, issued on May 6, 2020, under Federal Acquisition Regulation (FAR) parts 12 and 15, was set aside for 8(a) small businesses and sought support services for CPI deployment; growth and sustainment at the enterprise and organizational levels; and coaching and execution of CPI projects at all levels. Agency Report (AR), exh. B,

Final Amended RFP at 3.<sup>1</sup> The solicitation contemplated the award of a single indefinite-delivery, indefinite-quantity (IDIQ) contract with a 1-year base period and four 1-year option periods. *Id.* at 2. Award was to be made on a best-value tradeoff basis considering price and the following evaluation factors in descending order of importance: technical approach, key personnel, management approach, and past performance. *Id.* at 70. The non-price factors, when combined were more important than price. *Id.*

On September 28, Optimize filed a protest with our Office challenging the award of a contract to VC Solutions.<sup>2</sup> The protest was docketed as B-419212.1. Optimize argued that a substantial unequal access to information organizational conflict of interest (OCI) “permeated” VC Solutions’s proposal. Protest at 10-11. Specifically, Optimize alleged that one of the awardee’s joint venture (JV) members, Calibre, had access to proposals submitted to the agency for over five years as a result of performing on a support services contract for DLA’s acquisition office.<sup>3</sup> *Id.* In support of this argument, Optimize provided a declaration from its chief executive officer (CEO) who stated that in 2015 two former and/or current Calibre employees that provided support to the acquisition office “bragged” about seeing competitive bids that came through the acquisition office. *Id.*, exh. 2, Decl. of Optimize CEO. In its protest, Optimize also challenged the agency’s evaluation of proposals under the technical approach, management approach, and past performance evaluation factors. *Id.* at 12-13.

On October 1, the agency notified our Office that, in response to the protest, DLA had issued a stop work order and initiated an investigation into Optimize’s OCI allegation; the results of which, the agency explained, could affect the award decision. Agency Oct. 1 Email to GAO. The agency submitted its agency report on October 27. In its report, the agency represented that it started the investigation on September 30, and that the investigation was still ongoing at the time of the agency report filing. COS/MOL at 5, 7 n.2. Notwithstanding DLA’s representation that the OCI investigation was ongoing, the agency argued that Optimize’s OCI allegation (1) was unsubstantiated, (2) failed to state a valid basis of protest, and (3) was untimely. *Id.* at 6-7. Optimize filed its comments on the agency report on November 9. After receipt of the protester’s

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<sup>1</sup> The solicitation was amended seven times. Unless otherwise noted, citations are to the record provided to our Office for the prior protest (B-419212.1). Citations to the RFP are to the Adobe PDF pages of the conformed solicitation provided at exhibit B of the agency report.

<sup>2</sup> VC Solutions is a joint venture between Vistra and Calibre. Contracting Officer’s Statement and Memorandum of Law (COS/MOL) at 3.

<sup>3</sup> Optimize identifies the contract as the “J7 COI/CPI Program Management Lean Six Sigma MBB Support” services contract. The DLA Acquisition (J7) Directorate manages the establishment and operations of procurement policy and oversight for DLA’s 5.2 million items managed. DLA Acquisition Home, *available at* <https://www.dla.mil/HQ/Acquisition/> (last visited Feb. 8, 2021).

comments, at the request of GAO, the parties provided additional briefing addressing the protester's challenges to the agency's evaluation under the past performance factor. See *generally* Supp. MOL; Supp. Comments.

On November 23, our Office issued a request for information (RFI) regarding the agency's expected timeline for completion of the OCI investigation. Electronic Protest Docketing System (Dkt.) No. 35, GAO RFI. On November 24, the agency responded to the RFI, representing that the OCI investigation was ongoing, and explaining that the agency could not provide an expected completion date for the investigation. Dkt. No. 37, Agency Resp. to GAO RFI.

On December 2, our Office conducted a conference call with the parties to discuss the agency's response to GAO's inquiry. During the call, GAO expressed its view that in light of the ongoing OCI investigation, the protester's OCI allegations appeared to be premature. *Optimize Consulting, Inc.*, B-419212.1, Dec. 7, 2020 (unpublished decision). GAO also expressed its view that Optimize's remaining protest allegations were also premature given the unknown impact of the agency's OCI investigation, including any potential actions that might be taken by the agency in response to the outcome of the investigation. *Id.* at 1-2. Further, during the conference call, DLA committed to (1) continuing to stay performance of the contract; (2) notifying the parties upon completion of the investigation; and (3) sharing the results of the investigation with the parties. *Id.* at 2. As a result, our Office dismissed the protest on December 7, as premature. *Id.* On December 22, Optimize filed this request for a recommendation for reimbursement of costs.

## DISCUSSION

Optimize argues that reimbursement of its protest costs is warranted as a matter of fundamental fairness because DLA's actions were unreasonable and clearly amounted to undue delay in taking corrective action in the face of a clearly meritorious protest. Req. at 4. The agency objects to the request, arguing that DLA has not taken corrective action in response to the protest. Agency Resp. to Req. at 1-2.

Under the Competition in Contracting Act (CICA), 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). We may also recommend that the agency reimburse the protester its protest costs when a procuring agency takes corrective action in response to a protest and 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 a 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); *Information Ventures, Inc.--Costs*, B-294580.2 *et al.*, Dec. 6, 2004, 2004 CPD ¶ 244 at 2. The imposition of costs when our Office determines that an agency unduly delayed taking corrective action in the face of a clearly meritorious protest 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. *TRAX Int'l Corp.--Costs*, B-410441.5, Aug. 26, 2015, 2015 CPD ¶ 276 at 3.

On this record, Optimize's request does not establish a valid basis for our Office to recommend that DLA reimburse Optimize its reasonable costs of filing and pursuing its protest. As a threshold matter, we disagree with Optimize's characterization of the agency's actions here as corrective action. The facts here show that in the face of the allegation that the agency had failed to mitigate or avoid an unequal access to information OCI, the agency initiated an investigation almost immediately. Despite beginning an investigation, however, DLA elected to submit an agency report that argued that Optimize's OCI allegation was untimely and legally insufficient. In the agency report, DLA also substantively responded to Optimize's remaining protest allegations, defending its evaluation and selection decision.

The FAR requires contracting officials to avoid, neutralize, or mitigate potential significant conflicts of interest so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR 9.504(a), 9.505. The primary responsibility for determining whether a conflict is likely to arise, and the resulting appropriate action, rests with the contracting agency. FAR 9.504; *RMG Sys., Ltd.*, B-281006, Dec. 18, 1998, 98-2 CPD ¶ 153 at 4. We review OCI investigations for reasonableness, and where an agency has given meaningful consideration to whether a significant conflict of interest exists; we will not substitute our judgment for the agency's absent clear evidence the agency's conclusion is unreasonable or unsupported by the record. *XL Assocs., Inc. d/b/a XLA*, B-417426.3, Jan. 16, 2020, 2020 CPD ¶ 33 at 12; *TISTA Sci. & Tech. Corp., Inc.*, B-408175.4, Dec. 30, 2013, 2014 CPD ¶ 17 at 6.

We recognize that agencies often elect to take corrective action prior to the submission of the agency report in order to perform a more fulsome OCI investigation free from the constraints of having to complete this investigation within a compressed timeline during the protest process. See, e.g., *Technology, Automation & Mgmt., Inc.*, B-418063.3, B-418063.4, Oct. 2, 2020, 2020 CPD ¶ 343; *Mortgage Contracting Servs., LLC*, B-418483.2, B-418483.3, Sept. 10, 2020, 2020 CPD ¶ 340. An agency, however, may also properly investigate potential OCIs following receipt of a protest that raises this issue or investigate newly alleged OCIs during the pendency of the protest process. *XTec, Inc.*, B-418619 *et al.*, July 2, 2020, 2020 CPD ¶ 253 at 25 n.14; *Inquiries, Inc.*, B-418486 *et al.*, May 27, 2020, 2020 CPD ¶ 182 at 12; *Q2 Adm'rs., LLC*, B-410028, Oct. 14, 2014, 2014 CPD ¶ 305 at 9 n.12.

As stated in our decision dismissing the protest, "[w]here an agency has initiated an investigation into allegations of an OCI that may have affected the conduct of a procurement, challenges to the agency's actions resulting from the alleged OCI are premature when the agency has not yet completed its investigation." *Optimize Consulting, Inc.*, *supra* at 2 (citing *McKissack-URS Partners, JV*, B-406489.2 *et al.*, May 22, 2012, 2012 CPD 162 at 7 n.10; *Government Bus. Servs. Grp.*, B-287052, Mar. 27, 2001, 2001 CPD ¶ 58 at 12). Because the agency had not yet completed its OCI

investigation, and represented that the results of the investigation could have an impact on the award decision, we concluded that further consideration of any of Optimize's protest allegations was premature and we dismissed the protest. *Id.*

The actions taken by the agency here cannot be construed to be corrective action because the protester here did not obtain any form of relief from the agency. Rather, the agency's actions rendered the protest allegations premature, given the unknown impact of the agency's OCI investigation, including any potential action the agency could take as a result. Accordingly, Optimize's arguments provide no basis for us to recommend reimbursement of its protest costs.

The request that we recommend reimbursement of protest costs is dismissed.

Thomas H. Armstrong  
General Counsel