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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Alaska Structures, Inc.—Costs

File: B-298575.4

Date: January 22, 2007

Richard J. Conway, Esq., and Robert J. Moss, Esq., Dickstein Shapiro LLP, for the protester.

Peter F. Pontzer, Esq., Department of the Army, for the agency.

Louis A. Chiarella, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester is not entitled to reimbursement of the costs of filing and pursuing its protest where the agency decides to take corrective action in response to the protest, and the protest was not clearly meritorious.

2. Request for recommendation for reimbursement of protest costs relating to earlier protest which led to corrective action is denied where the record provides no support for protester's allegation that the issue which the agency's corrective action did not address was clearly meritorious.

DECISION

Alaska Structures, Inc. requests that we recommend that it be reimbursed the costs of filing and pursuing its protest challenging the terms of request for quotations (RFQ) No. W81XWH-06-T-0219, issued by the Army Medical Research Acquisition Activity, Army Medical Materiel Agency, Department of the Army, for a mobile field hospital (MFH) system. We dismissed the protest after the agency advised our Office that it would take corrective action by canceling, and subsequently revising and reissuing, the RFQ. Alaska Structures argues that the agency's corrective action was unduly delayed and its protest was clearly meritorious. The protester also argues that it was forced to file its most recent protest, and incur the associated costs, because the agency failed to properly implement the corrective action promised in response to a prior protest filed by Alaska Structures raising the same alleged solicitation defects.

We deny the request.

BACKGROUND

The history of the relationship between the Army and Alaska Structures regarding the agency's MFH system procurement is a long and difficult one (see Alaska Structures, Inc.--Costs, B-298156.2, July 17, 2006, 2006 CPD ¶ 109 for additional details).¹ As relevant here, on March 1, 2006, the Army issued RFQ No. 129731 for a 150-bed portable hospital system. On March 31, Alaska Structures protested to our Office, arguing that various terms of the RFQ were defective.² Specifically, the protester alleged that the agency improperly intended to purchase non-Federal Supply Schedule (FSS) items using FSS procedures; the solicitation's functional characteristics were vague and ambiguous; the RFQ failed to provide vendors with equal information concerning mandatory compatibility requirements; the solicitation contained internally inconsistent evaluation criteria; and the evaluation criteria improperly contained requirements that were not also contained in the functional characteristics. Protest (B-298156), Mar. 31, 2006, at 10-19.

On April 26, the Army notified our Office of its intent to cancel the RFQ here, and to revise and reissue the solicitation. While not agreeing with all of the protester's arguments and allegations, the agency stated that it would address, in whole or in part, four of the five issues raised by Alaska Structures (i.e., all but the assertion that the RFQ's functional characteristics were improperly vague and ambiguous by failing to provide sufficient detail). Letter from Army to GAO, Apr. 26, 2006, at 3. Cancellation of the RFQ rendered Alaska Structures' protest of that solicitation

¹ The Army is conducting this procurement on behalf of the Federal Emergency Management Agency (FEMA), the user activity.

² Alaska Structures' protest here was not its first challenge to the MFH system procurement. On August 4, 2005, Alaska Structures filed an agency-level protest with FEMA challenging the agency's intent to conduct a sole-source procurement. On September 26, Alaska Structures protested to our Office, arguing that the solicitation issued by the Army failed to provide vendors with sufficient time to prepare and submit quotations (B-297286). On October 12, we dismissed this protest without a decision on the merits after the Army decided to resolicit the requirement and allow more time for vendors to respond to the solicitation. Alaska Structures again protested to our Office on December 15, arguing that the agency's "brand name or equal"-type specification contained various requirements that were vague, ambiguous, and/or internally inconsistent (B-297743). On January 19, 2006, we dismissed that protest without a decision on the merits after the Army decided to cancel the solicitation and prepare a new one that would utilize performance or functionality-based specifications that would avoid reference to any particular manufacturer's products.

academic, and since it is not our practice to consider academic protests, we dismissed the protest on May 3.³

On May 27, the Army issued a revised solicitation, RFQ No. W81XWH-06-T-0219, for a 150-bed MFH system. The RFQ stated that the Army was procuring a commercial item in accordance with Federal Acquisition Regulation (FAR) Part 12. The solicitation included a performance-type specification that described the agency's requirement for the MFH system, as well as instructions to vendors regarding the submission of quotations and the evaluation factors for award.

On August 3, Alaska Structures again protested to our Office, arguing that the RFQ was defective. Alaska Structures alleged that the solicitation lacked certain critical information regarding the MFH system's functional characteristics (*i.e.*, the minimum requirements for wind load, rain load, snow load, ambient temperature, humidity levels, field life, system durability, etc.). The protester argued that this information was required in order for it to determine the proper structural requirements, and the heating, ventilation, and air conditioning requirements, for the MFH system. Alaska Structures also contended that the absence of the information made the solicitation improperly vague and ambiguous so as to preclude vendors from competing intelligently. Protest, Aug. 3, 2006, at 7-12.

The Army then filed its report addressing the issues raised by Alaska Structures. The Army acknowledged that the RFQ did not contain any performance requirements or evaluation criteria regarding the wind, rain, or snow loads, or ambient temperature and humidity ranges for the MFH system. The agency contended, however, that FEMA did not possess the information that Alaska Structures alleged was missing from the RFQ. Specifically, the Army stated that while FEMA intended that the MFH system be deployable to any region of the United States, FEMA did not know, nor could it predict, where the MFH system would actually be used. Thus, the agency argued, the wind speeds and/or ambient environments that would be encountered in future deployments of the MFH system were also not known. The Army also argued that because it was procuring a commercial item in accordance with FAR Part 12, the RFQ did contain sufficient detail for potential vendors to prepare their quotations. Agency Report, Sept. 5, 2006, at 6-15.

In its comments on the agency report, Alaska Structures accepted the factual premise that FEMA intended the MFH system to be capable of being deployed anywhere in the United States that a disaster strikes. Thus, Alaska Structures argued, FEMA knew that it needed to have performance standards regarding wind, rain, and snow loads, as well as ambient temperature extremes and humidity levels,

³ We subsequently denied the protester's request for reconsideration of our dismissal decision on June 1, 2006, and later (on July 17) denied its request for reimbursement of the costs incurred in filing the protest. Alaska Structures, Inc.—Costs, *supra*.

such that the MFH system would be operational anywhere in the United States. The fact that FEMA could not predict in advance where the MFH system would actually be used, the protester contended, simply did not preclude FEMA from providing performance criteria reflecting the conditions under which it wanted the MFH system to work, or relieve the contracting agency from providing vendors with sufficient information to allow them to compete intelligently. Comments, Sept. 15, 2006, at 6-15.

We subsequently convened a status conference with the parties in order to discuss various procedural and substantive issues involved in the protest. At this conference the GAO attorney informed the Army that he had serious concerns about the protester's allegations; that he needed the Army to respond to certain arguments raised by Alaska Structures in its comments; and that a hearing--with witnesses from FEMA regarding the RFQ's lack of various functional requirements--was likely. At no time did the GAO attorney inform the parties that the status conference constituted "outcome prediction" alternative dispute resolution (ADR),⁴ or that the protest here was likely to be sustained. Further, when expressly asked by the agency whether GAO viewed the protest as "clearly meritorious," the GAO attorney informed the parties that he did not consider the protest to be clearly meritorious.⁵ The GAO attorney also specifically asked the protester's counsel whether he understood what was meant by saying that the protest was not considered to be clearly meritorious, and the protester's counsel stated that he did.

On October 3, the Army notified our Office of its intent to cancel the RFQ here, and to revise and reissue the solicitation. Specifically, the Army agreed to further define the government's needs, and to provide vendors with certain load requirements, environmental conditions, and durability requirements for the agency's MFH system. Letter from Army to GAO, Oct. 3, 2006, at 2. We concluded that the cancellation of the RFQ rendered Alaska Structures' protest of that solicitation academic, and on October 5, we dismissed the protest.

⁴ In outcome prediction ADR, the GAO attorney handling a protest convenes the parties, at their request or at GAO's initiative, and explains what the GAO attorney believes the likely outcome will be and the reasons for that belief. A GAO attorney will engage in this form of ADR only if she or he has a high degree of confidence regarding the outcome. Where the party predicted to lose the protest takes action obviating the need for a written decision (either the agency taking corrective action or the protester withdrawing the protest), our Office closes the case.

⁵ All of the statements in this decision regarding what transpired in the status conference are reflected in written contemporaneous notes made by the GAO attorney.

Alaska Structures now requests that our Office recommend that the agency reimburse the protester's costs of filing and pursuing its August 3 protest. Alaska Structures argues that the Army unduly delayed taking corrective action, as evidenced by its failure to do so until after filing of the agency report and submission of comments by the protester, and that its protest was clearly meritorious. In support of its position, the protester asserts that the GAO attorney indicated to the parties that the protest was likely to be sustained. Request for Costs, Oct. 19, 2006, at 1-2, 5-6. The agency opposes Alaska Structures' request, arguing that the protest here was not clearly meritorious.

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) (2000). 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) (2006). 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.⁶ Information Ventures, Inc.—Costs, B-294580.2 *et al.*, Dec. 6, 2004, 2004 CPD ¶ 244 at 2; Oklahoma Indian Corp.—Claim for Costs, B-243785.2, June 10, 1991, 91-1 CPD ¶ 558 at 2. 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 ¶ __ at 6. The mere fact that an agency decides to take corrective action does not also establish that a statute or regulation clearly has been violated. *Id.*

We conclude that reimbursement is not appropriate in this case since Alaska Structures' protest was not clearly meritorious. As a preliminary matter, the protester misrepresents what transpired at the status conference held by our Office. At no time did the GAO attorney inform the parties that the status conference

⁶ As a general rule, so long as an agency takes corrective action in response to a protest by the due date of its protest report, we regard such action as prompt and decline to consider favorably a request to recommend reimbursement of protests costs. The Sandi-Sterling Consortium—Costs, B-296246.2, Sept. 20, 2005, 2005 CPD ¶ 173 at 2-3; Envirosolve—Costs, B-294420.3, Feb. 17, 2005, 2005 CPD ¶ 35 at 3. Here, as noted above, the agency did not advise our Office of its intent to take corrective action until after it had filed its report on the protest.

constituted outcome prediction ADR or that the protest was likely to be sustained. In fact, when expressly asked, the GAO attorney informed the parties that he did not consider the protest to be clearly meritorious. The GAO attorney also specifically asked the protester's counsel whether he understood what was meant here (*i.e.*, that any subsequent request to be reimbursed its protest costs would not meet the GAO prerequisites), and the protester's counsel answered that he did.

Regarding the issues raised in the protest, the Army maintained that it could not provide performance requirements for the MFH system that end-user FEMA did not have, and that because the Army was procuring a commercial item, the RFQ's description of the agency's needs here did contain sufficient detail for potential vendors to prepare their quotations. Alaska Structures argued that the fact that FEMA did not know where the MFH system would be used did not preclude FEMA from developing minimum performance criteria or relieve the contracting agency from providing vendors with sufficient information to compete intelligently. Because our Office could not determine which party's position was correct from the existing record, we requested that the agency respond to the protester's comments and we also contemplated holding a hearing to more fully develop the matter. Since the ultimate resolution of this matter required substantial further development and analysis as indicated, in part, by our Office's request that the agency respond to the protester's comments and consideration of a hearing to more fully develop the protest record regarding this issue, the protest, in our view, presented a close question, and therefore was not clearly meritorious. See *Overlook Sys. Techs., Inc.--Costs*, supra; *Honeywell Tech. Solutions, Inc.--Costs*, B-296860.3, Dec. 27, 2005, 2005 CPD ¶ 226 at 4 n.3.

Alaska Structures also argues that it should be reimbursed the costs of filing and pursuing its prior protest (B-298156, filed March 31, 2006) because the Army failed to implement the promised corrective action that prompted the dismissal of that protest. The protester contends that its March 31 protest asserted that the RFQ's functional characteristics for the MFH system (specifically, the lack of minimum requirements for wind, rain, or snow loads, ambient temperature, and humidity levels) were improperly vague and ambiguous. Alaska Structures also argues that the Army, in response to the March 31 protest, promised to correct those defects. Despite that promise, the protester maintains, the agency failed to do so, thereby requiring Alaska Structures to file its August 3 protest and raise the very same procurement deficiencies. The protester also argues that the record, including the Army's October 3 corrective action notice that conceded the agency's responsibility to provide further clarity and detail in the specifications, reflects that Alaska Structures' March 31 protest was clearly meritorious. Request for Costs, Oct. 19, 2006, at 7-8. We disagree.

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; *East Bay Elevator Co., Inc.--*

Costs, B-286315.2, July 26, 2001, 2001 CPD ¶ 128 at 2. As we have noted, the mere promise of corrective action, without reasonably prompt implementation, has the obvious effect of circumventing the goal of the bid protest system of effecting 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; Pemco Aeroplex, Inc.--Recon. and Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 7-8. 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. See Louisiana Clearwater, Inc.--Recon. and Costs, *supra*; Envirosolve LLC, B-294974.4, June 8, 2005, 2005 CPD ¶ 106 at 7.

In this case, we conclude that recovery of protest costs is not warranted because, while Alaska Structures raised the same issue of vague and ambiguous specifications in more than one protest, the issue was neither the subject of the agency's promised corrective action nor clearly meritorious.

As set forth above, Alaska Structures' March 31 protest alleged, among other things, that the Army's specification was improperly vague and ambiguous by failing to provide sufficient detail. While the Army then agreed to again take corrective action in response to the protest, it was with regard to the other issues that had been raised, and expressly not with regard to the assertion that the specification was improperly vague and ambiguous. Letter from Army to GAO, Apr. 26, 2006, at 3. Contrary to the protester's representations, see Request for Costs, Oct. 19, 2006, at 8, the agency's corrective action memorandum did not promise to correct the defects that became the subject of Alaska Structures' August 3 protest, and the fact that Alaska Structures later raised the same protest issue again does not establish that the agency failed to implement promised corrective action.⁷

We also conclude that Alaska Structures' recovery of protest costs here is not appropriate since Alaska Structures' March 31 protest was not clearly meritorious. The protester's argument that its March 31 protest was clearly meritorious is premised upon an essential but unproven assumption--that its subsequent August 3 protest which raised the very same procurement deficiency was also clearly

⁷ It was the remaining issues raised by Alaska Structures in its March 31 protest--that the agency improperly intended to purchase non-FSS items using FSS procedures; the RFQ failed to provide vendors with equal information concerning mandatory compatibility requirements; the solicitation contained internally inconsistent evaluation criteria; and the evaluation criteria improperly contained requirements that were not also contained in the functional characteristics--that were the subject of the Army's promised corrective action.

meritorious.⁸ As explained above, however, we have determined that the August 3 protest—in which we received the agency report and protester’s comments but still required substantial further development and analysis regarding the issue—was not clearly meritorious. The mere fact that the Army decided to take corrective action in response to Alaska Structures’ August 3 protest does not also establish that the protest was clearly meritorious. Overlook Sys. Techs., Inc.—Costs, *supra*, at 6. Thus, we have no basis to conclude that the Army’s earlier corrective action failed to address a clearly meritorious issue.

The request for a recommendation that the agency reimburse Alaska Structures’ protest costs is denied.

Gary L. Kepplinger
General Counsel

⁸ The Army took corrective action with regard to the March 31 protest prior to preparation of an agency response on the merits and, therefore, there is insufficient support in the March 31 protest record for a determination that the protest was clearly meritorious. See Alaska Structures, Inc.—Costs, *supra*, at 4 n.7.