



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

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

Decision

Matter of: Information Ventures, Inc.--Costs

File: B-294580.2, B-294586.2, B-294617.2, B-294632.2, B-294706.2, B-294707.2,
B-294741.2, B-294760.2, B-294762.2

Date: December 6, 2004

Bruce H. Kleinstein, Esq., for the protester.
Doris Gibson, Department of Health and Human Services, for the agency.
Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General
Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation for reimbursement of protest costs in a series of protests is denied where, in each case, agency took prompt corrective action that rendered protests academic, and where the record, in any event, provides no support for protester's allegation that agency corrective action indicates a pattern of improper agency conduct of procurements.

DECISION

Information Ventures, Inc., requests that we recommend that the Department of Health and Human Services (HHS) reimburse its costs associated with nine protests it recently filed. HHS canceled the challenged procurements soon after the protests were filed; consequently, the protests were dismissed as academic. Each protest primarily challenged the sufficiency of a published synopsis of a proposed sole-source contract award and a determination by HHS that only one supplier could meet its needs; Information Ventures also generally contended that the agency improperly limited competition and failed to assess whether the requirements should have been set aside for small business concerns. The protester now argues that in light of the agency's cancellation of these nine procurements, and several other proposed sole-source procurements also protested by the firm, our Office should recommend reimbursement of Information Ventures' costs related to its pursuit of these nine protests, because, according to Information Ventures, the post-protest cancellations demonstrate a pattern of improper procurement actions due to a lack of adequate agency-wide policies regarding sole-source streamlined acquisitions.

We deny the request for costs.

HHS reports that in response to each protest, it promptly canceled the procurements in order to allow it time to reassess its needs and the best method to meet those needs, including further consideration of whether additional sources were available to compete for the work.¹ HHS states, however, that it did not make a determination that the protests were meritorious. To the extent that Information Ventures contends that HHS lacks adequate acquisition policies, HHS asserts that it would be more appropriate for the firm to present its concerns to agency procurement officials rather than for it to pursue such concerns by filing numerous bid protests of individual procurements. In this regard, the agency recently confirmed that it will review Information Ventures' concerns and that the firm may provide further input for that review. The agency emphasizes, however, that its corrective action was not in response to an agency determination that the protests were meritorious, and that, in any event, the corrective action was taken without undue delay.

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, 4 C.F.R. § 21.8(e) (2004), further provide that where an agency takes corrective action in response to a protest, our Office may recommend that the agency pay the protester its costs of filing and pursuing the protest. 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. American Lawn Serv., Inc.--Entitlement to Costs, B-271039.2, May 15, 1996, 96-1 CPD ¶ 228 at 2. Here, there is no question that the agency's corrective action was prompt, as cancellation occurred within several days of when each protest was filed.² Accordingly, there is no basis to recommend recovery of costs.

¹ The agency reports that it did not know of the protester's apparent interest in any of the work until it received notice of the protests. HHS adds that although Information Ventures filed 19 protests within a 2-month period against HHS proposed sole-source procurements, the firm failed to submit statements of interest or capability to the agency for consideration as an alternate source for any of the work. The agency also reports that in instances where the agency has taken corrective action and converted sole-source acquisitions to competitive procurements, Information Ventures has not participated in the competitions.

² Because the agency's action was prompt, we need not reach the second prong of our test--whether the protests were clearly meritorious. As noted below, however, there is insufficient support in the record for a determination that any of the nine protests in question were clearly meritorious. Each protest was dismissed early in the development of the record and prior to preparation of an agency response on the merits of each.

In requesting reimbursement of its protest costs, the protester asks us to create an exception to our existing rule regarding reimbursement in cases where the agency takes prompt corrective action. The protester argues that, since it filed numerous protests, and since the agency canceled many of the procurements, our Office should infer a “recurrent pattern” of improper issuance of sole-source acquisitions, warranting recovery of protest costs. In this regard, our rule limiting recovery of protest costs to those cases where agency corrective action is unduly delayed was intended not as an award to prevailing protesters or as a penalty to agencies, but rather to encourage agencies to take prompt action where warranted, and thereby save protesters from expending additional costs in pursuing their protests. See Wall Comonoy Corp.—Entitlement to Costs, B-257183.3, Nov. 16, 1994, 94-2 CPD ¶ 189 at 2. That is precisely what HHS did here, and we see no reason to consider abandoning that principle to allow recovery despite the fact that corrective action was promptly taken. Moreover, the protester’s argument derives from its assumption that the series of corrective action decisions by HHS indicates an underlying procurement impropriety. We do not have a basis to draw that same conclusion based on the record here. Information Ventures has not established, and the record otherwise does not show, that any of the nine protests in fact was meritorious; the agency maintains that the corrective action was not based on any determination that the protests had merit; and, as noted above, because the corrective action was taken so early in development of the protests, no agency responses on the merits were prepared. Without a basis to find the protests clearly meritorious, we have no ground to recommend reimbursement of costs.

The request is denied.

Anthony H. Gamboa
General Counsel