



United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** McConnell, Jones, Lanier & Murphy LLC--Costs

**File:** B-407706.3

**Date:** May 28, 2013

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David Z. Bodenheimer, Esq., and Gordon Griffin, Esq., Crowell & Moring LLP, for the protester.

Dennis Adelson, Esq., Department of Labor, for the agency.

Cherie J. Owen, Esq., and Sharon L. Larkin, 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 is denied where GAO granted an extension to the original agency report due date to allow the agency to file a consolidated response to the initial and supplemental protests, and the agency took corrective action prior to the newly-established due date.

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### DECISION

McConnell, Jones, Lanier & Murphy LLC (MJLM), of Houston, Texas, requests that our Office recommend that it be reimbursed the costs of filing and pursuing its protest against the award of a contract by the Department of Labor under solicitation No. 11-JC-REG2-WOOD for operation of the Woodland Job Corps Center in Anne Arundel County, Maryland.

We deny the request.

The agency issued the solicitation on June 1, 2011, seeking offers to perform the operation and management of the Woodland Job Corps center. Seven offerors responded to the RFP, including MJLM and Chugach Education Services. After performing a tradeoff analysis, the agency selected Chugach for award on September 26, 2012. MJLM received a debriefing on October 17, and filed its protest on October 22.

In its initial protest, as relevant here, MJLM claimed that Chugach had engaged in an improper bait and switch of proposed employees by offering certain employees in its proposal, but later attempting to hire MJLM's higher quality, incumbent

employees and “switch” its staff after award. MJLM’s initial protest also alleged that the agency failed to properly evaluate the awardee’s past performance because the Department of Labor did not downgrade Chugach for its poor past performance in operating three Job Corps centers: Potomac Center, Oneonta Center, and a center in New Mexico. Protest at 26.

Pursuant to 4 C.F.R. § 21.10(e), GAO established a briefing schedule which called for early production of documents by November 13, followed by a consolidated agency legal memorandum and contracting officer’s statement addressing both the initial and any supplemental protest grounds by December 3.

After the agency’s early document production, MJLM filed supplemental protests on November 19 alleging new protest grounds with regard to the agency’s evaluation of Chugach’s staffing and past performance, among other things. On November 30, the agency notified our Office that it was taking corrective action, stating that the protester had raised a number of new issues in its supplemental protest that the agency wanted to review in order to ensure the integrity of the procurement. Therefore, the agency stated that it would cancel the award to Chugach and make a new award decision. Accordingly, we dismissed MJLM’s protest as academic. McConnell, Jones, Lanier & Murphy LLC, B-407706.3, B-407706.2, Dec. 5, 2012. On December 19, MJLM submitted a request for our recommendation that the agency reimburse MJLM’s costs of filing and pursuing its protests, claiming that the agency unduly delayed taking corrective action in the face of clearly meritorious protests.

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) (2013); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. When an agency takes corrective action before the due date set for receipt of the agency report, our Office views such action as prompt and will not recommend the reimbursement of costs. The Sandi-Sterling Consortium--Costs, B-296246.2, Sept. 20, 2005, 2005 CPD ¶ 173 at 2-3.

Here, the due date set for the agency report, which consisted of the consolidated legal memorandum and contracting officer’s statement, was December 3. On November 30, the agency notified our Office of its intent to take corrective action. Because the agency’s corrective action was prompt, we deny the protester’s request that we recommend costs.

Moreover, we find no basis to conclude that MJLM’s initial protest grounds were clearly meritorious. As a prerequisite to our recommending that costs be

reimbursed 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. Apptis Inc.--Costs, B-402146.3, Mar. 31, 2010, 2010 CPD ¶ 123 at 4; Triple Canopy, Inc.--Costs, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 3. MJLM's initial protest alleged an improper bait and switch of staff, and of the center director; MJLM alleged the switch was evidenced by the awardee's attempt to hire MJLM's superior incumbent personnel after award. Protest at 3, 24-25. Generally, however, it is neither unusual nor inherently improper for an awardee to recruit and hire personnel previously employed by an incumbent contractor. Lifecare Mgmt. Partners, B-297078, B-297078.2, Nov. 21, 2005, 2006 CPD ¶ 8 at 6 n.11; see also AT&T Gov't Solutions, Inc., B-406926 et al., Oct. 20, 2012, 2013 CPD ¶ 88 at 15 (even if there was evidence of an intent to switch, allegation of an impermissible "bait and switch" is not meritorious where there was no evidence of baiting). Accordingly, we are unable to conclude that the protest ground was clearly meritorious with respect to the protester's claims of a flawed staffing evaluation.

Similarly, we do not find that the protester's initial allegations with regard to the past performance evaluation were clearly meritorious. In its initial protest, MJLM alleged that the agency failed to appropriately consider Chugach's poor past performance in operating three Job Corps centers: Potomac Center, Oneonta Center, and a center in New Mexico. Protest at 26. Although the agency took corrective action prior to submitting its legal memorandum, the agency advised our Office and the parties, in a letter submitted five days prior to its report (in which the agency identified relevant documents, pursuant to 4 C.F.R. § 21.3(c)), that these three Job Corps centers were not even operated by the awardee. Agency Five-Day Letter at 4. Because the ultimate resolution of this claim required further development, we do not find that the initial protest was clearly meritorious.

The request is denied.

Susan A. Poling  
General Counsel