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**Comptroller General
of the United States**

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

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Decision

Matter of: TRAX International Corporation--Costs

File: B-410441.5

Date: August 26, 2015

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Heather Weiner, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Reimbursement of protest grounds is not recommended where agency did not unduly delay taking corrective action in the face of a clearly meritorious protest.

DECISION

TRAX International Corp., Inc., of Las Vegas, Nevada, requests that our Office recommend that it be reimbursed the reasonable costs of filing and pursuing its protest of the award of a contract to Jacobs Technology, Inc., of Tullahoma, Tennessee, under request for proposals (RFP) No. W9124R-13-R-0001, which was issued by the Department of the Army, for mission test support services at the Army Yuma Proving Ground.

We deny the request.

BACKGROUND

On May 16, 2013, the Army issued the RFP for a cost-plus-award-fee contract, with fixed-price and cost-reimbursable line items, for a base year and three 1-year options. RFP at 6-13. The agency received proposals from four offerors, including TRAX and Jacobs. Agency Report (AR), Tab 45, Source Selection Decision Document, at 3. After evaluating proposals, the agency concluded that Jacobs' proposal represented the best value to the government, and on September 10,

2014, the agency awarded the contract to Jacobs. Contracting Officer Statement at 3.

On September 22, TRAX filed an initial protest with our Office. TRAX's protest raised numerous challenges to the agency's technical and cost evaluation of its and the awardee's proposals.¹ In addition, TRAX argued that the nature of the agency's exchanges with TRAX during the procurement constituted discussions, and that the agency failed to conduct meaningful discussions. TRAX also asserted that the agency failed to resolve an organizational conflict of interest (OCI) concern relating to the awardee.

On October 17, in accordance with our Bid Protest Regulations, 4 C.F.R. § 21.3(c), the Army provided the protester with a list of the documents which the agency intended to produce and withhold from its agency report. Specifically, with regard to TRAX's allegations regarding the agency's evaluation of the awardee's proposal, the agency stated that it planned to produce the awardee's technical and cost proposals, but would not produce the agency's clarification questions to the awardee. The protester objected to the agency's refusal to provide the agency's clarification questions to the awardee, arguing that the clarification questions were relevant to TRAX's challenge to the agency's evaluation of the awardee's technical and cost proposals, and therefore, should be provided with the agency report. Our Office agreed that the agency's clarification questions to the awardee were relevant to the agency's technical and cost evaluation, and concluded that the Army was required to provide the protester with both the agency's clarification questions to the awardee, as well the awardee's responses thereto.

In its report responding to the protest, the Army specifically responded to each of TRAX's protest allegations. With regard to TRAX's assertion that the agency's exchanges with TRAX constituted discussions, the agency argued that its exchanges with TRAX were clarifications, not discussions, because TRAX was not provided with any opportunity to revise its proposal in response to the communications. AR at 17-18. In addition, as instructed, the Army provided the agency's clarifications with the awardee. AR, Tabs 77, 78, 80, 82.

On November 3, TRAX filed its comments in response to the agency report, as well as supplemental protest allegations. As relevant here, TRAX's supplemental protest alleged that the agency's clarifications with the awardee permitted the awardee to materially revise its proposal, and therefore, constituted discussions.

Our Office asked the Army to submit a supplemental agency report by November 14. On the supplemental report due date, the Army advised our Office

¹ Specifically, TRAX challenged the agency's evaluation of the solicitation's following factors: mission capability, past performance, small business, and cost.

that it intended to take corrective action in light of TRAX's supplemental protest. Specifically, the agency stated that it intended to "open discussions with all offerors and render a new Source Selection Decision after evaluation of revised proposals." Agency Notice of Corrective Action (Nov. 14, 2014), at 1. On November 18, our Office dismissed the protest as academic. Thereafter, TRAX filed its request for protest costs.

DISCUSSION

TRAX contends that it should be reimbursed the costs of pursuing its protest because the Army failed to take prompt corrective action in response to its clearly meritorious protest grounds. Specifically, TRAX asserts that its initial protest allegations were clearly meritorious, and that the Army's corrective action was unduly delayed because it was filed after the due date for the initial agency report and after comments and the supplemental protest were filed. The protester also contends that its supplemental protest allegations regarding the agency's exchanges with the awardee were so intertwined with its initial protest allegations regarding the agency's exchanges with TRAX that investigation by the Army of TRAX's initial protest grounds should have revealed the flaws later identified by the supplemental protest. TRAX argues that, by waiting until after the agency report to take corrective action, the agency unduly delayed taking corrective action with regard to the supplemental protest grounds. For the reasons discussed below, we deny the protester's request for reimbursement of its protest costs with regard to both its initial and supplemental 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); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. 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. First Fed. Corp.--Costs, B-293373.2, Apr. 21, 2004, 2004 CPD ¶ 94 at 2. This imposition of costs 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. See Takota Corp.--Costs, B-299600.2, Sept. 18, 2007, 2007 CPD ¶ 171 at 3.

First, TRAX requests that we recommend that it be reimbursed the reasonable costs of filing and pursuing its initial protest, including attorneys' fees. In this regard, TRAX asserts that all of its initial protest allegations were clearly meritorious, and that the Army's corrective action was unduly delayed because it took action filed after the due date for the initial agency report and after comments

and the supplemental protest were filed. Based upon our review of the record, we find no basis to recommend reimbursement for TRAX's initial protest costs. For illustrative purposes, we discuss a few of these allegations below.

With regard to the OCI issue raised in TRAX's initial protest, TRAX asserted that the awardee either failed to disclose a potential OCI issue, or that the Army failed to consider the issue, as required by the RFP. In response to the protest, the agency provided contemporaneous documentation demonstrating that the contracting officer considered the potential OCI issue and concluded that the risk of a potential OCI was low. AR at 16-22. Although TRAX disagreed in its comments regarding whether the contracting officer's OCI analysis was reasonable, based on this record, it is clear that the contracting officer was aware of, and considered, the OCI issue. Thus, we do not find that the protest was clearly meritorious, or that the agency lacked a defensible legal position with respect to TRAX's OCI allegations since the record demonstrates that the contracting officer did, in fact, consider the OCI issue contrary to TRAX's assertions.²

TRAX's initial protest also raised numerous challenges to the agency's evaluation of TRAX's and the awardee's proposals. For example, TRAX asserted that the agency evaluated the offerors' staffing levels unequally in the cost evaluation, arguing that the awardee improperly deviated from the RFP's labor hour baseline. Protest at 27-29. In response, the agency pointed to the provisions in the RFP that permitted offerors to propose deviations from the RFP's labor hour baseline, based on the offeror's unique management approach and promised efficiencies, as long as such efficiencies and management approach are fully explained and justified in the offeror's proposal. See RFP at 102. In addition, the agency provided documentation of the awardee's proposed staffing levels, and the agency's evaluation thereof. On this record, we see no basis to conclude that the agency failed to comply with the RFP's terms or that the agency evaluated the proposals unequally, as argued by the protester.

The protester also contends that its supplemental protest allegations regarding the agency's exchanges with Jacobs were so intertwined with its initial protest allegations regarding the agency's exchanges with TRAX that investigation by the

² We also note that TRAX raised a supplemental OCI allegation, which TRAX asserts was "completely intertwined" with its preexisting OCI allegations. Request for Entitlement at 15. Our Office, however, requested a supplemental report from the agency in response to TRAX's supplemental protest allegations in recognition of the different nature of the supplemental protest allegations. While the agency took corrective action in response to TRAX's supplemental filing, the agency maintains that the impetus for its corrective action was TRAX's supplemental discussions regarding the awardee. Based on the record here, we conclude that TRAX's OCI allegations were not clearly meritorious.

Army of TRAX's initial protest grounds should have revealed the flaws later identified by the supplemental protest. TRAX argues that, by waiting until after the agency report to take corrective action, the agency unduly delayed taking corrective action with regard to the supplemental protest grounds. For the reasons discussed below, we disagree.

With respect to the promptness of the agency's corrective action under the circumstances, we review the record to determine whether the agency took appropriate and timely steps to investigate and resolve the impropriety. See Chant Eng'g Co., Inc.--Costs, B-274871.2, Aug. 25, 1997, 97-2 CPD ¶ 58 at 4; Carl Zeiss, Inc.--Costs, B-247207.2, Oct. 23, 1992, 92-2 CPD ¶ 274 at 4. In general, if an agency takes corrective action in response to a protest by the due date for its report in response to the protest, we consider such action to be prompt and will not recommend reimbursement of protest costs, even where the protest is clearly meritorious. See The Sandi-Sterling Consortium--Costs, B-296246.2, Sept. 20, 2005, 2005 CPD ¶ 173 at 3; HSQ Tech.--Costs, B-276050.2, June 25, 1997, 97-1 CPD ¶ 228 at 2; see also Metalcraft, Inc.--Costs, B-402181.3, May 17, 2010, 2010 CPD ¶ 116 at 3 (finding that the agency promptly took corrective action prior to the supplemental agency report where the allegations raised in the supplemental protest were not related to the initial protest such that the agency's investigation of the initial protest should have revealed the asserted evaluation flaws).

Based on the record, we cannot conclude that the protester's supplemental protest allegations were related to the initial protest such that the agency's investigation of the initial protest should have revealed the asserted flaws in TRAX's supplemental protest. The protester points to the following footnote in its initial protest to support its position that the initial protest raised concerns regarding the agency's exchanges with the awardee: "[T]o the extent the Army engaged in discussions with Jacobs but not TRAX, that disparate treatment would constitute unlawfully unequal discussions" Protest at 25 n.8. In the absence of the documentation provided in the agency report, however, this allegation was speculative, and did not require a response by the agency. Rather, as discussed above, our Office requested that the agency provide documentation of its clarifications with the awardee in response to the protester's allegations challenging the agency's technical and cost evaluation of the awardee's proposal, not based on the protester's allegation regarding discussions. This is the documentation that prompted TRAX's supplemental protest ground regarding the propriety of the agency's exchanges with the awardee. Our Office then requested a separate report in response to the supplemental protest in recognition of the different nature of the supplemental protest allegations. Accordingly, because the protester's supplemental protest allegations were not related to the initial protest such that the agency's investigation of the initial protest should have revealed the asserted evaluation flaws, TRAX has not met the

standard required by our Office for a recommendation to reimburse its protest costs.
Metalcraft, Inc.--Costs, supra.

The request is denied.

Susan A. Poling
General Counsel