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**Comptroller General
of the United States**

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

Decision

Matter of: American Government Services, LLC--Costs

File: B-413636.2

Date: April 21, 2017

Joseph C. Steady for the protester.
Heather M. Self, Esq., Department of Agriculture, for the agency.
Alexander O. Levine, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the
General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's request for a recommendation that it be reimbursed its costs of filing and pursuing its protest is denied, where the record shows that the agency did not unduly delay implementing its proposed corrective action after the earlier, and clearly meritorious, protest was dismissed.

DECISION

American Government Services, LLC (AGS), a small business located in Clarksburg, New Jersey, requests that our Office recommend it be reimbursed the costs associated with filing and pursuing its protest of the award of contract No. AG-3151-C-16-0026 to Na Ali'i Consulting and Sales, LLC, an 8(a) small business located in Honolulu, Hawaii, by the Department of Agriculture (USDA) for project management support. The protester argues that the agency unduly delayed the implementation of its proposed corrective action.

We deny the request.

BACKGROUND

On May 8, 2014, AGS was awarded contract No. D14PC00147 to acquire management consultancy services to assist the USDA Farm Service Agency's (FSA) Office of the Chief Information Officer (CIO) in the planning and managing of multiple information technology projects. The awarded contract had a base period of 1-year with four 1-year option periods.

On August 22, 2016, the USDA awarded contract No. AG-3151-C-16-0026 as an 8(a) sole-source to Na Ali'i for project management support for the FSA CIO. On August 26, AGS filed a protest with our Office of the award to Na Ali'i. The protester asserted, among other arguments, that AGS was performing the same requirement that had been awarded to Na Ali'i and that the agency had improperly offered the requirement into the Small Business Administration's (SBA) 8(a) business development program without following the procedures required under Federal Acquisition Regulation (FAR) § 19.804-2.¹ Protest at 5.² The protester contended that had the USDA properly followed these procedures, the SBA would not have accepted the requirement into the 8(a) program due to the adverse impact such an acceptance would have on AGS, a small business.³

On September 21, the agency notified our Office that it intended to take corrective action in response to the protest. Specifically, the USDA represented that it would submit a revised letter to the SBA that would state that AGS had previously performed the requirement. On September 22, the protester objected to the adequacy of the corrective action and argued that the agency should terminate the award to Na Ali'i prior to submitting the revised letter to the SBA. In response to the protester's objection, the agency noted that a stop work order had been issued for Na Ali'i's contract, which would remain in place until the SBA had performed its adverse impact analysis. The agency additionally stated that if the SBA determined that the requirement was not appropriate for admission into the 8(a) program, the USDA would terminate the contract to Na Ali'i for the convenience of the government and reassess its available options. On September 27, our Office

¹ Under FAR §19.804-2, when offering a requirement into the 8(a) program, the agency must provide a notification to the SBA containing, among other items, an acquisition history of the requirement, including the names and addresses of any small business contractors that performed the requirement during the previous 24 months.

² Neither the underlying protest filed by the protester nor the contracting officer's statement (COS) submitted by the agency to our Office contain page numbers. Our Office assigned consecutively numbered pages to the unnumbered pages in both documents. The citations in these documents are to the page numbers assigned by our Office.

³ Under the Small Business Act's implementing regulations, the SBA may not accept any procurement for award as an 8(a) contract if doing so would have an adverse impact on an individual small business, a group of small businesses in a specific geographical location, or other small business programs. 13 C.F.R. § 124.504(c); see also Alpa Techs. and Servs., Inc., B-408762.2, Feb. 12, 2014, 2014 CPD ¶ 66 at 6. The adverse impact review process is designed to protect small business concerns that are performing government contracts awarded outside the 8(a) program. Id.

dismissed AGS's protest as academic based on the agency's proposed corrective action.

On October 6, the contracting officer submitted a revised offering letter to the SBA. Contracting Officer's Statement at 5. On October 18, the SBA verbally notified the contracting officer that the SBA would not accept the work into the 8(a) program. Id. On January 5, 2017, the agency verbally notified Na Ali'i that its contract was being terminated for convenience. See id. This verbal notification was confirmed by the agency in an email sent to Na Ali'i on January 19, 2017. On February 7, 2017, the agency sent Na Ali'i a formal notice of termination letter. Email from Agency Counsel, Feb. 8, 2017.

The instant request for costs was filed by the protester on January 6, following AGS's unsuccessful attempts to confirm that the agency had implemented the corrective action proposed in response to its earlier protest.

DISCUSSION

AGS requests that the agency reimburse AGS the costs associated with filing and pursuing its protest. The protester argues that the agency unduly delayed the implementation of its proposed corrective action despite AGS's clearly meritorious protest.⁴ For the reasons discussed below, we deny the protester's request.

Our Office may recommend that a protester be reimbursed the costs of filing and pursuing a protest where the contracting agency decides to take corrective action in response to the protest. Bid Protest Regulations, 4 C.F.R. § 21.8(e). Such recommendations are generally based upon a concern that an agency has taken longer than necessary to initiate corrective action in the face of a clearly meritorious protest, thereby causing protesters to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. QuanTech, Inc.-- Costs, B-278380.3, June 17, 1998, 98-1 CPD ¶ 165 at 2-3. This basis for the award of costs does not exist in the instant protest, since the agency initiated corrective action promptly, i.e., prior to the agency report due date. See Veda Inc.-- Entitlement to Costs, B-265809.2, July 19, 1996, 96-2 CPD ¶ 27 at 2.

We may also recommend recovery of protest costs, however, where an agency unduly delays, without adequate and reasonable explanation, the implementation of the promised corrective action that led to the dismissal of the earlier protest. AdaRose Inc.--Protest & Costs, B-299091.2, Jan. 14, 2008, 2008 CPD ¶ 18 at 4. In

⁴ The agency did not challenge AGS's contention that its underlying protest was clearly meritorious. For this reason, the question before us is whether the agency unduly delayed the implementation of its promised corrective action.

assessing whether an agency has unduly delayed the implementation of corrective action, we do not examine the length of elapsed time in a vacuum; instead we consider the reasonableness of the agency's actions during that time period, the agency's explanation for the delay, and whether performance of the requirement continued during the delay. See Pemco Aeroplex, Inc.--Recon. & Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 7-8 (recommending the reimbursement of costs where the agency provided no meaningful explanation for its failure to take the first step in its promised corrective action, and where performance of the requirement continued during the four-month delay); Commercial Energies, Inc.--Recon. & Declaration of Entitlement to Costs, B-243718.2, Dec. 3, 1991, 91-2 CPD ¶ 499 at 6 (recommending the reimbursement of costs where the agency provided no explanation for waiting five months to implement its promised corrective action, while performance was permitted to continue on the protested contract).

Similarly, we may recommend the recovery of protest costs, where an agency's failure to promptly implement its promised corrective action circumvents the goal of the bid protest system established by the Competition in Contracting Act, 31 U.S.C. § 3553 et seq.--that is, the economic and expeditious resolution of bid protests. Louisiana Clearwater, Inc.--Recon. & Costs, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209 at 6; see also SCB Solutions, Inc.--Recon., B-410450.2, Aug. 12, 2015, 2015 CPD ¶ 255 at 4-5 (granting reconsideration and recommending the reimbursement of costs where the agency's actions resulted in the promised corrective action failing to remedy the concerns raised in the protest). This is particularly the case where the delay results in the protester being put through the expense of subsequently protesting the same protest issue again. See EnviroSolve LLC, B-294974.4, June 8, 2005, 2005 CPD ¶ 106 at 9 (recommending the reimbursement of costs where the agency did little to implement its promised corrective action, effectively requiring the protester to file a second protest); Chase Supply, Inc.--Costs, B-411849.3, May 17, 2016, 2016 CPD ¶ 134 at 6 (recommending the reimbursement of costs where the agency's failure to promptly implement its promised corrective action resulted in the protester being forced to pursue the issue again through two agency-level protests and two protests with our Office).

Here, we conclude that the agency did not unduly delay the implementation of its promised corrective action. In this regard, we note that the USDA sent a revised offering letter to the SBA within nine days of our dismissal of the underlying protest. Within a week of the SBA telling the agency that it would not accept the requirement into the 8(a) program, the agency took additional steps in furtherance of the corrective action. On October 26, an FSA contracting officer emailed an agency attorney to ask how the agency could preserve its fiscal year funding if it decided to procure the requirement through a competition amongst small businesses rather than as an 8(a) set-aside. Contracting Officer Email to Agency Counsel, Oct. 25, 2016. The agency attorney replied the next day, stating that the funds would be

available for 100 days and could “only be used in furtherance of entering into a valid replacement contract for the Na Ali’i contract.” Email from Agency Attorney to Contracting Officer, Oct. 26, 2016.⁵ The agency attorney further stated that “[i]f the contracting officer determines that the 8(a) contract was not appropriate, then the FY16 funding may be used to allow for [a] small business competition for a replacement contract.” Id.

At this point, however, the FSA contracting staff incorrectly interpreted the attorney’s email to mean that the Na Ali’i contract had to remain open for 100 days in order for the funds to remain available for re-use. See Agency Resp. to GAO Req. for Supp. Info., Mar. 13, 2017. Due to this mistaken belief, the FSA contracting staff kept the Na Ali’i contract open until January 5, 2017. While the agency’s mistaken interpretation led to an additional delay of two and a half months before the agency began the process of terminating the contract awarded to Na Ali’i, the delay was not the result of any bad faith on the part of the agency and ultimately did not substantially affect the implementation of the corrective action. Indeed, during this time period, the agency kept the stay in place of Na Ali’i’s contract and did not restart performance of the requirement. These actions are largely consistent with the agency’s proposed corrective action, which promised to stay performance of Na Ali’i’s contract, submit a revised letter to the SBA, and, if the SBA did not approve the requirement into the 8(a) program, terminate the contract and reassess the agency’s available procurement options. See Agency Resp. to Objection to Corrective Action, Sept. 26, 2016, at 2.

AGS additionally argues that the USDA attempted to circumvent the promised corrective action by procuring the requirement through a modification of another contract.⁶ In our view, the record does not support this contention. In this regard, we note that the challenged modification involved the addition of one mid-level management analyst, while the Na Ali’i contract involved the provision of an entire “management consultancy,” consisting of various management consultants, analysts, and administrative assistants. Compare B-413912.1 Agency Report,

⁵ Under 31 U.S.C. § 1558, if the funds available to an agency for a contract, at the time a protest is filed, would otherwise expire, such funds remain available for obligation for 100 days after the date on which a final ruling is made on the protest.

⁶ AGS filed a protest of this modification, which our Office docketed as B-413912.1, in which AGS argued that the modification was outside the scope of the original contract and was otherwise improper. During an alternative dispute resolution teleconference with the parties, our Office advised the parties that we were likely to sustain this protest. Subsequent to the call, the agency agreed to take corrective action by terminating the contract at issue. We dismissed the protest as academic based on the agency’s actions. Following the dismissal of the protest, the agency agreed to pay AGS’s protest costs.

Tab 17, Contract Modification, at 1 with B-413636.1 Protest, at 8. Thus, the size and scope of work for the instant requirement is fundamentally different from the size and scope of the challenged modification. Moreover, the record does not contain any indication that the modification was intended by the agency to circumvent the corrective action here.⁷

The request that GAO recommend that AGS be reimbursed its protest costs is denied.

Susan A. Poling
General Counsel

⁷ In any event, we note that the corrective action proposed here would not prohibit the agency procuring the requirement through a modification to an existing contract. In this regard, as discussed above, the agency's promised corrective action consisted of submitting a revised letter to the SBA, terminating Na Ali'i's contract for convenience if the SBA did not accept the requirement for the 8(a) program, and "reassess[ing] its available procurement options." Agency Resp. to Objection to Corrective Action, Sept. 26, 2016, at 2. The proposed corrective action therefore did not contain any representation that the agency would recomplete the requirement.