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## Decision

**Matter of:** CDS Services, Inc.--Costs

**File:** B-422005.6; B-422005.7

**Date:** September 5, 2024

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GAO, participated in the preparation of the decision.

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### DIGEST

Requests for reimbursement of the costs of filing and pursuing multiple protests and for preparing a quotation are denied where the agency did not unduly delay taking corrective action in response to each protest and where the protest allegations were not clearly meritorious.

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### DECISION

CDS Services, Inc., a service-disabled veteran-owned small business (SDVOSB) located in Murrieta, California, requests that our Office recommend that it be reimbursed the reasonable costs of filing and pursuing its protests with respect to request for quotations (RFQ) No. 36C26223Q1082, issued by the Department of Veterans Affairs (VA). In addition, CDS requests that we recommend reimbursement of its quotation preparation costs. The requester argues that its three previous protests of the agency's evaluation of quotations and subsequent award decisions, and fourth protest challenging the agency's proposed cancellation of the solicitation were clearly meritorious and the agency unduly delayed taking corrective action in response to each of the protests.

We deny the requests.

### BACKGROUND

The RFQ was issued on July 21, 2023, as a set-aside for SDVOSB concerns under Federal Acquisition Regulation (FAR) part 12, Acquisition of Commercial Items and

Commercial Services, and FAR part 13, Simplified Acquisition Procedures.<sup>1</sup> VA Resp. to Req. for Costs, B-422005.6, at 1. The RFQ sought pest control and management services for the Phoenix VA Health Care System to include the development and implementation of a comprehensive integrated pest management program. *Id.*

The solicitation anticipated issuance of a fixed-price purchase order for a 1-year base period and four 1-year options to the vendor whose quotation offered the best value to the government based on the evaluation of the following factors: technical/quality; past performance; price; and evaluation of monitor and surveillance proposal for tracking/monitoring pests in the facilities. *Id.* at 2.

CDS was one of five vendors that submitted timely quotations. After evaluating quotations, the VA issued the purchase order to Apex Contract Solutions, LLC (Apex) on September 12, 2023. *Id.* at 3. On September 25, CDS filed an initial protest challenging the award decision, which was docketed by our Office as B-422005.1. The protest challenged various aspects of the agency's evaluation of Apex's quotation and the subsequent award decision. We dismissed the protest as academic based on the agency's prompt decision before the due date for the agency report to take voluntary corrective action by reevaluating quotations and making a new award decision. *CDS Servs., Inc.*, B-422005.1, Sept. 29, 2023 (unpublished decision).

The VA completed its corrective action and again issued the purchase order to Apex on December 22. CDS filed a second protest (B-422005.2) on January 2, 2024, again realleging that the agency's reevaluation of quotations was unreasonable. The protester also challenged the agency's affirmative determination of responsibility for Apex. Following notice on January 25, again before the due date for the agency report, that the agency elected to take corrective action to include reevaluation of all quotations and a new award decision, we dismissed the protest as academic. *CDS Servs., Inc.*, B-422005.2, Jan. 26, 2024 (unpublished decision).

The VA again reevaluated quotations and issued the purchase order to Go Easy Contracting, LLC (Go Easy) on April 1, 2024. CDS filed its third protest challenging the agency's award decision on April 17, which we docketed as B-422005.4. On May 10, prior to the May 17 due date for the agency report, the VA notified our Office that it would take voluntary corrective action in response to the protest. In the notice, the agency represented that it had determined the RFQ failed to accurately reflect the agency's requirements and, therefore, the agency would terminate the purchase order issued to Go Easy, cancel the RFQ, reassess its requirements, and resolicit for its revised requirements at a later time. VA Resp. to Req. for Costs, B-422005.6, at 6. We dismissed this protest as academic based on the agency's proposed corrective action. *CDS Servs., Inc.*, B-422005.4, May 15, 2024 (unpublished decision).

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<sup>1</sup> The solicitation was amended twice. Amendment No. 1 was issued to revise the statement of work and to answer vendors' questions. VA Resp. to Req. for Costs, B-422005.6, at 2 n.1. Amendment No. 2 was issued to add a technical evaluation factor under which quotations would be evaluated. *Id.*

On May 16, CDS filed its fourth protest, which we docketed as B-422005.5. CDS argued that the VA's decision to cancel and resolicit its revised requirements as part of its corrective action in response to its earlier protest, B-422005.4, was unreasonable and violated applicable procurement laws. See Req. for Costs, B-422005.6, at 1-4.

On June 17, the deadline set for receipt of the agency report, the VA responded to the protester's objections to its decision to cancel and resolicit the agency's revised requirements. In its report, the agency represented that instead of canceling the RFQ--as announced in its notice of voluntary corrective action in response to CDS's B-422005.4 protest--the VA would amend the RFQ to include the solicitation revisions. Memorandum of Law (B-422005.5). On this basis, the VA asked our Office to dismiss the protest as academic. *Id.* at 7; VA Resp. to Req. for Costs, B-422005.7, at 5-6. In its comments, CDS did not object to the agency's decision to amend rather than cancel the RFQ. Comments (B-422005.5). We dismissed the protest as academic. *CDS Servs., Inc.*, B-422005.5, July 11, 2024 (unpublished decision).

## DISCUSSION

CDS requests that we recommend it be reimbursed for the costs of filing and pursuing its protests and its quotation preparation costs because the agency unduly delayed taking corrective action in response to its clearly meritorious protest allegations. See *generally*, Req. for Costs, B-422005.6 (May 16, 2024) and B-422005.7 (July 13, 2024). In response, the VA asserts that reimbursement of costs is not warranted because the agency did not unduly delay taking corrective action in the face of clearly meritorious protests. See *generally*, VA Resp. to Req. for Costs, B-422005.6, at 7-11; VA Resp. to Req. for Costs, B-422005.7, at 6-11. For the reasons that follow, we find no basis to recommend that the protester be reimbursed for any of its protest or quotation preparation related costs.

When a procuring agency takes corrective action in response to a protest, our Office may recommend that the agency reimburse the protester its reasonable 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. Bid Protest Regulations, 4 C.F.R. § 21.8(e); *CloudFirstJV--Costs*, B-416872.4, May 10, 2019, 2019 CPD ¶ 177 at 3; *Federal Contracting, Inc., DBA Bryan Construction, Inc.--Costs*, B-416454.2, Dec. 4, 2018, 2019 CPD ¶ 43 at 5.

With respect to the promptness of the agency's corrective action, we review the record to determine whether the agency took appropriate and timely steps to investigate and resolve the impropriety. *Cooper/Ports Am., LLC*, B-419000.3, Feb. 18, 2021, 2021 CPD ¶ 327 at 4. Generally, we consider corrective action to be prompt if it is proposed by the due date for the agency report responding to the protest. See *Apex Transit Sols.--Costs*, B-418631.4, Feb. 8, 2021, 2021 CPD ¶ 102; *Abhe & Svoboda, Inc.--Costs*,

B-412504.2, Apr. 1, 2016, 2016 CPD ¶ 99 at 3. The imposition of costs is not intended to reward the protester or as a penalty to the agency, but rather, is designed to encourage agencies to take prompt action to correct apparent defects in a competitive procurement. See *Takota Corp.--Costs*, B-299600.2, Sept. 18, 2007, 2007 CPD ¶ 171 at 3.

As a prerequisite to recommending that costs be reimbursed where a protest has been rendered academic 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. *Sumaria Sys., Inc.--Costs*, B-418440.3, July 16, 2020, 2020 CPD ¶ 240 at 5. A protest is clearly meritorious where a reasonable agency inquiry into the protest allegations would have shown facts disclosing the absence of a defensible legal position. *Harley Marine Servs., Inc.--Costs*, B-416033.4, Mar. 15, 2019, 2019 CPD ¶ 121 at 4; *Deque Sys., Inc.--Costs*, B-415965.5, Aug. 23, 2018, 2018 CPD ¶ 304 at 4. The existence of any defensible legal position or close question is sufficient to show that a protest allegation was not clearly meritorious so as to warrant a recommendation for the reimbursement of protest costs. *Sumaria Sys., supra*.

While our Office will, as a general rule, not find undue delay when an agency takes corrective action by the due date for the agency report, 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. In this regard, the mere promise of corrective action, without reasonably prompt implementation, has the obvious effect of circumventing the goal of the bid protest system affecting the economic and expeditious resolution of bid protests. *Federal Contracting, Inc., DBA Bryan Constr., Inc.--Costs, supra*.

Where an agency implements corrective action that fails to address a 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 action, even though promptly proposed, has precluded the timely and economical resolution of the protest. *Louisiana Clearwater, Inc.--Recon. and Costs*, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209 at 6. When an agency proposes corrective action, we consider it implicit that it will undertake a good faith effort to address all issues raised by the protester that are meritorious. *Id.*

Here, we find no basis to depart from our general practice to not recommend reimbursement of protest costs where, as here, an agency takes corrective action by the due date for the agency report, thus meeting the general standard required by our Office in determining whether an agency has unduly delayed in taking corrective action. *Abhe & Svoboda, Inc.--Costs, supra; CDIC, Inc.--Entitlement to Costs*, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52. As addressed above, the agency promptly took corrective action by the due dates for the agency reports in response to each of CDS's four protests, thus meeting the general standard required by our Office in determining whether an agency has unduly delayed taking corrective action.

Based on the record presented, we also conclude that the protester's multiple protest allegations were not clearly meritorious. CDS contends, for example, that its various challenges to the agency's evaluation of Apex's quotation and resultant award decision, as articulated in its first and second protests, were clearly meritorious. CDS Reply to VA Resp. to Req. for Costs, B-422005.6, at 1-6. However, the protester does not meaningfully argue that the allegations raised in these protests were clearly meritorious. Req. for Costs, B-422005.6, at 1-4. Instead, CDS simply points to our decision in *Telesynetics Corp.*, B-228916.4, B-228916.5, Aug. 2, 1988, 88-2 CPD ¶ 106, to support its claim for reimbursement of its costs. *Id.*

CDS's reliance on our decision in *Telesynetics Corp.*, *supra*, is misplaced. In *Programatics, Inc.; Telesynetics Corp.*, B-228916.2; B-228916.3, Jan. 14, 1988, 88-1 CPD ¶ 35, we sustained the protests filed by Telesynetics and another unsuccessful offeror challenging the award to Touche Ross & Company. In that decision, we found that the award was not supported by, or rationally related to, the stated RFP evaluation criteria. We recommended that the Army should reevaluate the best and final offers consistent with the stated evaluation criteria, document the reevaluation results, and terminate the award, if necessary, based on the results of the reevaluation. Rather than following our recommendations, the Army canceled the solicitation and its underlying requirements. Thus, in *Telesynetics Corp.*, *supra*, our Office found that the protester was deprived of the substantial chance of receiving the award because of the agency's decision to cancel the solicitation and its underlying requirements. We concluded that the protester was entitled to the costs of filing and pursuing its initial protest and its proposal preparation costs. Here, contrary to the circumstances in *Telesynetics Corp.*, CDS will have an opportunity to compete under the amended RFQ for the VA's revised requirements.

In our view, CDS's protests challenging the initial and reaffirmed agency decision to issue the purchase order to Apex, and its subsequent protest challenging the award to Go Easy, were not clearly meritorious because further analysis and record development of the parties' positions would be needed to fully consider and decide the protest grounds. We typically do not regard a protest as clearly meritorious where resolution of the protest requires further record development to complete and clarify the record. See *American Sys. Corp.; BAE Sys. Info. Solutions, Inc.--Costs*, B-408386.5, B-408386.7, Dec. 9, 2015, 2015 CPD ¶ 387 at 3; *Boston Harbor Dev. Partners, LLC--Costs*, B-404614.5, Feb. 17, 2012, 2012 CPD ¶ 74 at 2-3. Since the agency elected to take corrective action by the due dates for submitting its respective agency reports, we have not been provided with a record of the agency's evaluations and selection decisions. Thus, we would need further record development to assess the merits of the protester's allegations, at least some of which are contested by the agency in response to the protester's entitlement requests. See, e.g., VA Resp. to Req. for Costs, B-422005.7, at 10 n.8; Memorandum of Law, B-422005.5, at 8-9. Under these circumstances, we would not recommend reimbursement of the protester's costs. See *Re-Engineered Bus. Solutions, Inc.--Costs*, B-404214.4, July 14, 2011, 2011 CPD ¶ 135 at 2-3.

We also find no basis to conclude that CDS's protest challenging the subsequently rescinded cancellation of the solicitation was clearly meritorious. The agency's response to the protest demonstrated material changes in the government's requirements; to the extent the agency opted to amend, in lieu of cancelling, the solicitation this does not reflect that the agency's assertion that its requirements have changed were unreasonable or improper.

We also do not find that the agency failed to promptly take responsive corrective actions in response to meritorious protest allegations such that CDS should be reimbursed its costs within the narrow exception of *Louisiana Clearwater, Inc.--Recon. and Costs, supra*. The agency explains that after examining the procurement record in response to CDS's first protest, the contracting officer determined that corrective action was necessary because the technical evaluation record did not sufficiently support her award decision and the award decision did not "mirror" the comparative evaluation approach as described in the RFQ's basis for award. VA Resp. to Req. for Costs, B-422005.6, at 8-9. As stated above, the VA announced its decision to take corrective action in response to the initial protest on September 28, three days after CDS had filed its protest on September 25, which we dismissed as academic. *CDS Servs., Inc.*, B-422005.1, Sept. 29, 2023 (unpublished decision). Similarly, in response to CDS's second protest, B-422005.2, the contracting officer again reviewed Apex's quotation and discovered that Apex had not acknowledged either of the two RFQ amendments, as required by the amended RFQ. This issue was independent of any of CDS's protest allegations. Consequently, the contracting officer determined that Apex was ineligible for award and terminated its purchase order. VA Resp. to Req. for Costs, B-422005.6, at 9. The agency again elected to take voluntary corrective action and we dismissed the second protest as academic. *CDS Servs., Inc.*, B-422005.2, Jan. 26, 2024 (unpublished decision).

CDS's third protest then challenged issuance of the purchase order to a different, unrelated vendor following the agency's reevaluation of quotations. See *generally*, Protest, B-422005.3. This protest, therefore, did not involve the very same procurement deficiency involving the agency's evaluation of Apex's quotation that was the subject of CDS's earlier two protests; rather, it involved a challenge to the agency's new evaluation and award decision made to a different vendor. The agency again promptly took corrective action in response to this third protest, determining that the solicitation did not reasonably reflect the agency's actual requirements, and, thus, that cancellation of the solicitation was warranted. VA Resp. to Req. for Costs, B-422005.7, at 8-9. CDS's fourth protest challenged the agency's cancellation decision, which again did not present the very same procurement deficiency challenged in the earlier three protests, but, rather, involved entirely distinct legal and factual bases. The agency subsequently took prompt corrective action by rescinding the cancellation and, instead, amending the RFQ. Thus, since the protests and associated bases for the agency's prompt corrective actions taken by the due dates for the agency reports did not put CDS to the expense of subsequently protesting the very same procurement deficiencies, we find no basis to deviate from our general rule not to recommend reimbursement of costs where the agency's corrective actions were not unduly delayed.

As to CDS's request for a recommendation that it be reimbursed its quotation preparation costs, we find no merit to the request. An unsuccessful offeror may be entitled to recover proposal preparation costs where the agency has acted arbitrarily or capriciously in evaluating either the claimant's or another offeror's proposal and the claimant would have had a substantial chance of receiving the award but for the agency's improper action. *Centennial Computer Prods., Inc.--Recon. and Claim for Proposal Preparation Costs*, B-212979.3, Apr. 22, 1986, 86-1 CPD ¶ 389 at 6. As we have explained, however, a firm is not entitled to its claimed proposal preparation costs where it will have the opportunity to compete for the government's requirements. See, e.g., *Ogden Gov't Servs.--Protest & Req. for Modification of Remedy*, B-253350.3 *et al.*, Apr. 4, 1994, 94-1 CPD ¶ 226 at 4 n.1; *Microlog Corp.*, B-237486, Feb. 26, 1990, 90-1 CPD ¶ 227 at 6. Where CDS will have the opportunity to compete for the agency's amended requirements, we find no basis to recommend that it be reimbursed its quotation preparation costs.

The request for a recommendation for reimbursement of costs is denied.

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