U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Martin AIJS, LLC

File: B-422764

Date: September 20, 2024

Luke Martin for the protester.
Brian R. Reed, Esq., Department of Veterans Affairs, for the agency.
Sarah T. Zaffina, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of the remedy recommended for a sustained agency-level protest is dismissed where protester seeks lost profits, which may not be recovered even in the face of government error, and where our Office can recommend no greater remedy than what the agency has recommended.

DECISION

Martin AIJS, LLC (Martin), a service-disabled veteran-owned small business (SDVOSB) of Wadsworth, Ohio, protests the remedy that the Department of Veterans Affairs (VA) recommended in a decision sustaining Martin's agency-level protest of a sole-source award to Censis Technologies, Inc. (Censis), of Franklin, Tennessee. The VA issued the award under solicitation No. 36C26324Q0646 for laser marking equipment and training. Martin contends that the VA's remedy is insufficient to address the harm it suffered from the agency's improper award to Censis.

We dismiss the protest.

BACKGROUND

In February 2024, the VA posted request for information (RFI)/sources sought notice No. 36C26324Q0358 to www.sam.gov for a brand name or equal laser marking unit and training for the Fargo VA Medical Center. Protest at 2.[1] Under solicitation

[1] Citations to the record use the Adobe PDF pagination of documents. The parties did not use naming conventions for their exhibits; we have renamed exhibits when necessary to alleviate confusion.

No. 36C26324Q0358, the VA was seeking a brand name or equal item--CensiMark Laser Marking Equipment CTO206. Protest exh. 36C26324Q0358-1 Responses from Martin AIJS, LLC at 6. Martin timely responded to the RFI stating it could provide equipment meeting the desired specifications. Protest at 2.

In March, pursuant to Federal Acquisition Regulation part 12, Acquisition of Commercial Products and Commercial Services, the agency issued request for quotations (RFQ) No. 36C26324Q0388 as an SDVOSB set-aside for the brand name or equal laser marking unit, CensiMark Laser Marking Equipment CTO206, and training. *Id.*; Protest exh. RFQ 36C26324Q0388 Martin AIJS LLC 03112024 at 1, 6. Martin timely submitted a quotation. Protest at 2.

In April, the VA posted a notice of intent to award a sole-source award to Censis under RFQ No. 36C26324Q0646. Martin contacted the VA on April 17, requesting information about the solicitation and asking whether the solicitation was related to RFQ No. 36C26324Q0388. Protest exh. Martin AIJS Mail - Re_ [EXTERNAL] 36C26324Q0646. Martin also asked whether the VA had made an award under RFQ No. 36C26324Q0388. *Id.* The VA responded that RFQ No. 36C26324Q0388 had been canceled and that the laser needed is "Brand Name Only." *Id.* On April 19, Martin responded to the VA with information about its capability to provide the brand name or equal equipment and stated that the sole-source award "prevents competition." *Id.* Although Martin sent follow-up emails in May and June seeking answers from the VA about the procurement, it received no substantive responses from the VA. *Id.*

The VA awarded the sole-source contract for the equipment and training to Censis on May 15. Censis delivered the equipment on May 20 and the only remaining work to be performed is the installation of the equipment and training. Contracting Officer's Statement (COS), July 25, 2024 at 1; Resp. to Protester, exh. Contract No. 36C26324P0739 (hereinafter Contract No. 36C26324P0739) at 1. Martin filed a protest with the agency on June 17 challenging the sole-source award to Censis and arguing the agency should have competed the procurement. Protest at 1-3; *see also* Protest exh. ED Response_Martin AIJS LLC Protest (1) (hereinafter VA Protest Decision).

On July 10, the VA sustained Martin's protest. *Id.* In this connection, the executive director (ED) of the VA's Office of Acquisition and Logistics reviewed the procurement record and identified some "irregularities." *Id.* The ED found that despite Martin's response to the notice of intent to award a sole-source contract to Censis, the VA failed to properly consider or give Martin a meaningful opportunity to demonstrate its ability to fulfill the requirement. *Id.* Notwithstanding the agency's errors, the ED "determined corrective action, *i.e.*, cancellation of award and resolicitation, [was] not feasible because the purchase order had been substantially performed when the protest was filed." *Id.* Consequently, the ED concluded, "any corrective action would result in the contracting activity incurring unreasonable additional costs and would not be in the best interests of the Government." *Id.* The ED recommended Martin be reimbursed for its quotation preparation costs and reasonable costs for filing and pursuing its protest. *Id.*

This protest followed.

DISCUSSION

Martin challenges the VA's recommendation for relief in its decision sustaining Martin's agency-level protest. First, the protester requests additional relief beyond the payment of quotation preparation and protest costs, asserting that due to the agency's improper conduct, it will lose out on future opportunities to service and maintain the laser marking equipment, as well as training opportunities. Protest at 1. Second, the protester requests that the VA notify all VA medical centers that Censis is not the sole source for laser marking equipment that can apply markings on instruments for tracking using the agency's current Censis software, as required by the agency.[2] *Id.*

In response to the protest, the VA requests dismissal because the protest does not state factual and legal grounds of protest, and in the agency's view, the protester is seeking an "ambiguous remedy." Req. for Dismissal at 1-3 (citing Bid Protest Regulations 4 C.F.R. § 21.1(c)(4) and § 21.1(f)). Specifically, the VA contends that the protester cannot recover lost profits. *Id.* at 2. Additionally, the VA asserts that GAO does not usually recommend broadcasting information about the capabilities of specific firms throughout an agency as a form of relief and that the agency "has already prescribed the remedy GAO normally recommends in these unfortunate situations." *Id.* at 3.

Here, the VA concedes that the acquisition of the laser marking equipment was flawed and states that the contract had been substantially performed, *i.e.*, the equipment was delivered to the VA, before Martin filed its protest. COS, July 25, 2024 at 1. The record reflects that the contract included two items: (1) CensiMark Laser Marking Equipment CTO206 for $44,500 and (2) CensiMark Laser Installation and Training CTO203 for $7,125. Contract No. 36C26324P0739 at 6. The record also reflects that the agency suspended contract performance of the training when Martin filed its agency-level protest. COS, July 18, 2024; COS, July 25, 2024 at 1. The record further reflects that the VA questioned Censis about returning the laser marking equipment and Censis informed the VA that the equipment could not be returned because the equipment was

[2] The protester also contends that VA employees were aware of its capabilities but acted to avoid competing this requirement. Protest at 1. Government officials are presumed to act in good faith, and a protester's contention that procurement officials are motivated by bias or bad faith must be supported by convincing proof; our Office will not consider allegations based on mere inference, supposition, or unsupported speculation. *Career Innovations, LLC*, B-404377.4, May 24, 2011, 2011 CPD ¶ 111 at 7-8. The protester has not provided evidence of such bias and we will not infer improper conduct without convincing proof. Accordingly, we find this allegation to be without merit.

custom-made for Censis by a manufacturing firm that does not accept returns and has already been paid in full.[3] COS, July 25, 2024 at 1.

There is no legal authority that permits the recovery of "lost" or anticipated profits, even in the presence of wrongful government action. *Consolidated Devices, Inc.*, B-228065, Aug. 24, 1987, 87-2 CPD ¶ 201; *see also AdaRose Inc.--Protest & Costs*, B-299091.2, Jan. 14, 2008, 2008 CPD ¶ 18 at 2 n.1 (GAO will not recommend payment of monetary damages based on lost or anticipated profits). Accordingly, even though the VA has admitted government error in the sole-source award to Censis, we have no authority to recommend payment to Martin for lost opportunities, and we dismiss this argument.

Moreover, the VA has recommended payment of the protester's quotation preparation costs, as well as the reasonable costs of filing and pursuing the agency-level protest. Under these circumstances, the VA's recommendation provides the maximum relief our Office could recommend were we to issue a decision sustaining the protest. *See e.g.*, *SCB Sols., Inc.--Recon.*, B-410450.2, Aug. 12, 2015, 2015 CPD ¶ 255 at 5 (recommending the VA reimburse protester's quotation preparation costs and reasonable costs of filing and pursuing a protest where the challenged delivery order was performed while the protest was pending and the VA did not plan to resolicit for the requirement). Because the VA is already proposing to provide the protester with the maximum relief our Office could recommend, we consider Martin's protest to our Office to be academic.

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557. Our role in resolving bid protests is to ensure that the statutory requirements for full and open competition are met. *Honeywell Tech. Sols, Inc.*, B-407159.4, May 2, 2013, 2013 CPD ¶ 110 at 3. Our Office will not consider a protest where the issue presented has no practical consequences with regard to an existing federal government procurement and, thus, is of purely academic interest. We do not consider academic protests because to do so would serve no useful public policy purpose.[4] *Government & Military Certification Sys., Inc.*, B-412005, Nov. 30, 2015, 2015 CPD ¶ 374 at 3 n.2 (citing *Dyna-Air Eng'g Corp.*, B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132).

The protest is dismissed.

Edda Emmanuelli Perez
General Counsel

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[3] We note that while the protester questions the bespoke nature of the equipment where the specifications in the solicitation are the standard specifications for the CensiMark Laser Marking Equipment CTO206, as discussed below, this issue is irrelevant to our analysis. Resp. to Agency, Aug. 5, 2024.

[4] The protester should submit its request for costs as instructed by the VA in its decision. VA Protest Decision ("Any request should be submitted directly to the contracting activity.").