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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Career Quest, a division of Syllan Careers, Inc.--Costs

File: B-293435.5

Date: April 13, 2005

Darcy V. Hennessy, Esq., Moore Hennessy & Freeman, PC, for the protester.
John E. Cornell, Esq., General Services Administration, for the agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Request for reimbursement of protest costs incurred in connection with filing of an initial protest, in response to which agency took corrective action, is denied where corrective action was prompt and protest was not clearly meritorious.

DECISION

Career Quest, a division of Syllan Careers, Inc. (CQ) requests that we recommend that the General Services Administration (GSA) reimburse it certain costs associated with filing and pursuing a protest in our Office relating to request for proposals (RFP) No. TFTP-MN-03-R-0001, issued by GSA pursuant to a cost comparison study under Office of Management and Budget Circular A-76.

We deny the request.

The agency announced in August 2002 that it would perform an A-76 study in connection with the operation of its National Customer Support Center for Federal Supply Schedule users and, pursuant to that announcement, issued the RFP in April 2003. CQ was selected as the private-sector concern whose proposed cost would be compared to that of the agency's most efficient organization (MEO) in the cost comparison. The agency performed its cost comparison and determined that performance in-house by the MEO would be less expensive than contracting out for the requirement. CQ appealed the matter to the agency appeal authority (AAA), which affirmed GSA's decision. By letter dated December 5, 2003, CQ filed a protest in our Office (B-293435) objecting to GSA's determination that it would be less expensive to retain the requirement in-house. Shortly thereafter, prior to GSA's filing of its report in our Office, the agency advised that it intended to take corrective

action by reopening the agency appeal process; accordingly, by decision dated December 30, we dismissed CQ's protest as academic.

On April 14, 2004, GSA advised CQ that it had again determined, during the reopened AAA procedure, that performance in-house would be less expensive than contracting for the requirement. By letter dated April 23, CQ filed a second protest in our Office (B-293435.2), again challenging the agency's decision. Subsequently, on June 7, CQ filed a supplemental protest (B-293435.3). By decision dated August 2, we sustained CQ's protest and recommended, among other things, that CQ be reimbursed the costs of filing and pursuing the protest, including reasonable attorneys' fees. CQ submitted its certified claim to the agency in a timely manner, requesting a total of \$19,699 in protest costs--\$17,214 in attorneys' fees and \$2,485 in company-incurred expenses.¹ GSA has agreed to reimburse \$5,215 in attorneys' fees, and \$2,006 in company-incurred expenses, incurred in connection with the filing of CQ's second (and supplemental) protest--the protest that our Office sustained--for a total of \$7,221.

CQ claims an additional \$11,969 in attorneys' fees and \$479 in company expenses incurred in connection with CQ's administrative appeal to the AAA and CQ's initial protest that led to corrective action. In this latter regard, CQ asserts that the agency's initial corrective action was inadequate, necessitating its repeating the same arguments in its second protest.

We note at the outset that, of the \$11,969 in attorneys' fees claimed by CQ, the record shows that \$10,709 of the fees were incurred prior to GSA's issuance of its initial AAA decision on November 28, 2003, that is, in connection with CQ's pursuit of its administrative appeal. Our Office lacks authority to recommend reimbursement of these fees, since they were not incurred in pursuit of a protest filed in our Office. Rice Servs., Ltd.--Costs, B-284997.2, May 18, 2001, 2001 CPD ¶ 88 at 2-3. Thus, remaining at issue for our purposes are the claimed attorneys' fees of \$1,260 incurred subsequent to the issuance of the AAA decision, and company expenses of \$479, for a total of \$1,739.

Our Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2004), provide that, where an agency takes corrective action in response to a protest, we may recommend that the agency pay protest costs; however, we generally will make such a recommendation only where the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Georgia Power Co.; Savannah Elec. and Power Co.--Costs, B-289211.5, B-289211.6, May 2, 2002, 2002 CPD ¶ 81 at 5. Here, the agency promptly (*i.e.*, prior to the agency report due date) proposed corrective action in response to the initial protest and, moreover, the protest grounds were not clearly meritorious. In this regard, we consider a protest to be clearly meritorious when a reasonable

¹ All figures have been rounded to the nearest dollar.

agency inquiry into the protester's allegations would show that the agency lacked a defensible legal position, that is, that the protest does not involve a close question. Information Ventures, Inc.--Costs, B-294567.2, Nov. 16, 2004, 2004 CPD ¶ 234 at 2. This was not the situation here.²

CQ has neither argued nor demonstrated that its initial protest was clearly meritorious in the sense that it presented a prima facie case that, without more, demonstrated a valid basis for our Office to sustain its protest. Rather, in order for us to reach a decision about CQ's initial protest allegations, we would have had to further develop the record--due to the agency's corrective action, neither its report nor the protester's comments were filed--and would have needed to conduct substantial further legal analysis. In short, we cannot say that CQ's initial protest presented what could reasonably be described as clearly meritorious issues; it follows that there is no basis for recommending reimbursement of CQ's protest costs. Information Ventures, Inc.--Costs, supra. at 3.

The request is denied.

Anthony H. Gamboa
General Counsel

² We also have recommended reimbursement of protest costs where, although the agency promptly proposed corrective action, a subsequent protest was necessitated by the agency's failure to implement the promised corrective action. Louisiana Clearwater, Inc.--Recon. and Costs, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209 at 5. However, in this circumstance too, the record must show that the protest was clearly meritorious.