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**Comptroller General
of the United States**

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

Decision

Matter of: Information Ventures, Inc.--Costs

File: B-294567.2

Date: November 16, 2004

Bruce H. Kleinstein for the protester.

Scott C. Briles, Esq., Department of Health and Human Services, for the agency.

Peter D. Verchinski, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation that agency reimburse protest costs for second protest of an allegedly inadequate synopsis because agency failed to implement corrective action proposed in response to first protest, is denied where agency promptly proposed corrective action in response to second protest and first protest was not clearly meritorious.

DECISION

Information Ventures, Inc. (IVI) requests that we recommend that the agency reimburse its costs associated with its protest of the Department of Health and Human Services, Centers for Disease Control and Prevention's (CDC) posting of a sole-source synopsis for educational and awareness materials regarding hemochromatosis.

We deny the request.

The agency originally issued a notice through its Atlanta, Georgia office, on March 17, 2004, announcing its intent to issue a purchase order to Iron Disorders Institute (IDI), for the "purpose of continuing the establishment of a partnership between IDI and CDC to reach the common goal of helping create a healthier nation by facilitating IDI's national iron out-of-balance disorders education, information and training programs." IVI Protest, attach. 1. On March 19, IVI filed a protest in our Office, alleging that the notice was improper in several respects, including that it lacked necessary information, and that the requirement should be set aside for small businesses. The agency informed our Office on April 6 that it was taking corrective action by canceling the synopsis and that it would, rather than conduct an

acquisition, meet its requirement by awarding a grant to IDI. The protester subsequently withdrew its protest. Approximately 4 months later, on August 9, CDC issued a notice through its Morgantown, West Virginia office announcing its intent to make a sole-source award to IDI for the same requirement (this is undisputed by the agency).¹ IVI again protested to our Office, alleging that the notice was inadequate. In response to IVI's protest, the agency again canceled the solicitation, and we dismissed the protest as academic.

IVI requests that we recommend that the agency pay the protest costs associated with its second protest since that protest was necessary only because the agency again published a sole-source notice that not only allegedly was inadequate, but also was contrary to its proposed corrective action in connection with IVI's first protest. IVI asserts that the agency's prompt corrective actions in both instances show its protests had merit.

Where a procuring agency takes corrective action in response to a protest, we may recommend that it reimburse the protester its 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 a protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Georgia Power Co.; Savannah Elec. and Power Co., B-289211.5, B-289211.6, May 2, 2002, 2002 CPD ¶ 81 at 5. We consider a protest to be clearly meritorious when a reasonable agency inquiry into the protester's allegations would show that the agency lacked a defensible legal position, id., that is, that the protest does not involve a close question. East Penn Mfg. Co., Inc.--Costs, B-291503.4, Apr. 10, 2003, 2003 CPD ¶ 83 at 3. The mere fact that an agency decided to take corrective action does not establish that a statute or regulation has been violated. Id.

The corrective action in response to IVI's second protest was prompt; the agency advised us that it was taking corrective action on August 26, well before the agency report due date of September 22. We generally consider corrective action to be prompt where, as here, proposed by the agency prior to the due date for its agency report. Mapp Building Servs.--Costs, B-289160.2, Mar. 13, 2002, 2002 CPD ¶ 60 at 2.

We have also recommended reimbursement of protest costs where an agency proposes corrective action in response to an initial protest, and a subsequent protest was necessitated by the agency's failure to implement the promised corrective

¹ The record establishes that CDC's Morgantown contracting office was unaware of the earlier actions taken by the Atlanta contracting office. IVI's Request for Costs at 2; CDC's Letter of Oct. 13, 2004, at 1.

action. See Louisiana Clearwater, Inc.–Recon. and Costs, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209; Pemco Aeroplex, Inc.–Recon. and Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 5. However, we will recommend reimbursement in these cases only where the initial protest was clearly meritorious. Louisiana Clearwater, Inc.–Recon. and Costs, *supra*. This is not the situation here.

IVI asserted in its original protest that the March 17 notice was deficient for failing to provide the required “accurate description” of the property or services to be purchased, sufficient to allow a prospective contractor to make an informed business judgment as to whether to request a copy of the solicitation. See Federal Acquisition Regulation (FAR) § 5.207(c). However, the synopsis included the following description of the services being procured:

[t]his order will complete phase two update of the IDI website which includes a resource center that includes an initial physician registry which is continuously reviewed, evaluated and updated regularly and a state by state (where available) treatment centers, hospitals, clinical trials, local support, calendar of events and breaking news, a glossary of terms, links to resources such as alliances and recommended sites (CDC, NIH, NLM, etc.) including a link to CDC’s online healthcare provider hemochromatosis training website, down-loadable forms and info sheets for patients about diet, therapy, genetics, treatment journals and access to IDI subject matter and links to information regarding activity in the private sector that supports treatment and management of disorders of iron.

This statement of the agency’s requirement gave potential offerors a general idea of the type of services being provided, and we cannot find that it was inadequate on its face. Rather, in order for us to reach a decision as to whether the synopsis was legally sufficient to permit potential offerors to decide whether to request a copy of the solicitation, we would need to further develop the record—due to the agency’s corrective action, neither its report, nor the protester’s comments, was filed—and would need to conduct substantial further legal analysis. This being the case, there is no basis for finding that IVI’s initial protest was clearly meritorious; it follows that there is no basis for recommending reimbursement of IVI’s protest costs. Baine Clark–Costs, B-290675.3, Sept. 23, 2002, 2002 CPD ¶ 166 at 3.

The request is denied.

Anthony H. Gamboa
General Counsel