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Decision

Matter of: String King Lacrosse, LLC--Costs

File: B-420935.12

Date: August 16, 2024

Eric S. Crusius, Esq., Amy L. Fuentes, Esq., and Richard J. Ariel, Esq., Holland & Knight LLP, for the requester.

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DIGEST

Request for reimbursement of protest costs associated with multiple protests is denied where the agency took corrective action prior to the deadline for the agency report in each protest.

DECISION

String King Lacrosse, LLC, a small business of Gardena, California, requests that our Office recommend that the Department of Health and Human Services (HHS) reimburse the firm the reasonable costs of filing and pursuing its protests with respect to request for proposals (RFP) No. 75A50322R00008. The solicitation sought proposals for disposable medical isolation gowns for use during public national emergencies and pandemic events. We dismissed String King's most recent protest--its second protest with our Office concerning this solicitation--as academic on April 9, 2024, prior to the submission of the agency's report, based upon the agency's notice of corrective action. The requester argues that it should be reimbursed the costs of pursuing both of its protests because, in each instance, the agency unduly delayed taking corrective action in the face of a clearly meritorious protest.

We deny the request.

BACKGROUND

This request primarily concerns two protests filed with our Office by String King, one in October 2023, and the other in February 2024. As background, we explain the

solicitation, and provide a summary and procedural history for each of the protests, as well as a discussion of certain procurement activity that occurred in between the protests.

The Solicitation

HHS issued the solicitation on June 28, 2022, pursuant to the procedures of Federal Acquisition Regulation part 12, seeking proposals for disposable medical isolation gowns for use during public national emergencies and pandemic events. Req. for Costs at 3. The solicitation advised that the agency intended to award a contract on a best-value tradeoff basis to “the responsible offeror whose offer demonstrates that it can meet the mandatory criteria and will be most advantageous to the [g]overnment considering both price and other factors,” including technical compliance, technical capability, and similar experience. Prior Protest, B-420935.11, Feb. 26, 2024, exh. A, RFP at 46, 51.

As relevant to both protests, under the price evaluation factor, the RFP advised that HHS’s “overall best value determination will consider the cost of the product as it relates to the shelf life at time of delivery and the best value determination will also consider the time, effort, and cost to sustain product with lesser shelf life.” *Id.* at 50.

String King submitted its proposal on November 22 and, on September 27, 2023, HHS informed String King that it was not selected for award. Req. for Costs at 4. String King’s first protest followed. *Id.*

October 2023 Protest

String King’s initial protest challenged in multiple respects HHS’s award of the contract to New York Embroidery Studio, a women-owned small business of New York, New York, pursuant to this solicitation. The requester alleged that the agency’s evaluation of proposals was unreasonable under the technical capability, similar experience, and price evaluation criteria. *See String King Lacrosse, LLC*, B-420935.2, B-420935.3, Nov. 3, 2023 (unpublished decision) at 1. The requester also argued that the agency failed to consider the shelf life of offerors’ proposed isolation gowns in the evaluation of proposals, as required by the terms of the solicitation under the price factor. *Id.* The requester further maintained that the agency engaged in unequal discussions with the awardee, where it allowed the awardee to amend its proposal, while not affording String King the same opportunity. *Id.* Finally, the requester argued the agency’s source selection decision was flawed because the agency had in effect improperly awarded the contract on a lowest-price, technically acceptable basis, as opposed to the best-value tradeoff basis prescribed by the solicitation, and because the source selection decision was inadequately documented. *Id.*

On October 27, 2023, prior to the deadline for the submission of the agency’s report, HHS filed a notice of corrective action and request for dismissal. In the request, the agency stated its corrective action would consist of a reconsideration of the technical

evaluation of proposals, a determination as to whether additional discussions or clarifications were necessary, a new source selection decision, and “other actions, as deemed necessary and appropriate by the agency.” *Id.* Our Office found the proposed corrective action rendered the protest academic, and we dismissed the protest on November 3. *Id.*

Agency-Level Protest and Implementation of Corrective Action

On November 13, 10 days after our Office dismissed the initial protest, String King filed an agency-level protest with HHS. Prior Protest, B-420935.11, Feb. 26, 2024, exh. I, Agency-Level Protest at 1. In this protest, String King alleged that HHS had failed to take the corrective action HHS proposed in response to the October 2023 GAO protest and asked the agency to “state its intent” to evaluate proposals in a manner consistent with the terms of the solicitation, specifically with respect to considerations of shelf life, among other things. *Id.* at 2. Between November 2023 and February 2024, the requester made multiple attempts to contact the agency regarding the status of its agency-level protest and implementation of the corrective action; the agency acknowledged receipt of the status requests in January 2024 and informed the requester that it anticipated an update concerning the procurement that same month. Prior Protest, B-420935.11, Feb. 26, 2024, exh. B, String King Emails with HHS at 2-8.

For its part, HHS represents that in the time between dismissal of the initial protest and February 2024, it began the process of implementing its proposed corrective action from the initial protest. In this regard, the agency explains that it reconvened its technical evaluation panel (TEP), and the TEP reconsidered its evaluation of proposals and prepared a new TEP report by January 3, 2024. Contracting Officer Decl. at 1; see Resp. to Req. for Costs, attach. 4, Corrective Action TEP Report. The agency also states it began the process of establishing a new competitive range. Contracting Officer Decl. at 1; see Resp. to Req. for Costs, attach. 5, Corrective Action Competitive Range.

In implementing its initial corrective action, the contracting officer states that the agency also attempted to reevaluate proposals under the price factor, however, multiple issues complicated this evaluation. Contracting Officer Decl. at 1. The contracting officer explains that because this procurement was initiated in response to [DELETED] and had [DELETED], and that the agency was going to [DELETED] regardless of [DELETED], it was necessary to review “whether [the agency’s] consideration of shelf life as part of the price evaluation factor in the solicitation reflected the [a]gency’s requirements.” *Id.*

After undertaking this review, in February 2024, HHS elected to issue amendment 0008 to the solicitation. The amendment removed consideration of shelf life from the evaluation criteria under the price factor; this action also removed shelf life considerations from the best-value determination. *Id.* at 1-2; Prior Protest, B-420935.11, Feb. 26, 2024, exh. C.2, Amendment 0008. In issuing the amendment, the agency established a deadline for receipt of revised proposals of February 28. *Id.*

In response, String King filed its second protest with our Office challenging this procurement.

February 2024 Protest

String King's February 2024 protest primarily challenged HHS's issuance of amendment 0008 to the solicitation. In this regard, the requester argued that the agency unreasonably amended the solicitation by removing terms requiring the agency to consider the shelf life of the medical isolation gowns under the price evaluation factor and in the best-value determination, and that as a result, the solicitation as amended was inconsistent with the solicitation's stated purpose and actual agency requirements. *String King Lacrosse, LLC*, B-420935.11, Apr. 9, 2024 (unpublished decision) at 1. The requester also alleged that in the time since the agency announced the previous corrective action in response to the October 2023 protest, the agency had "communicated repeatedly with the other offerors that remain in the competitive range for the procurement and has not communicated with String King in the same manner," resulting in improper, unequal exchanges. Prior Protest, B-420935.11, Feb. 26, 2024, at 20. The requester further argued that the agency had failed to implement the corrective action announced in October 2023. *Id.* at 22-23.

On March 26, HHS filed a notice of corrective action and request for dismissal of the entire protest, one day before the agency report was due. Prior Protest, B-420935.11, Mar. 26, 2024, Notice of Corrective Action and Req. for Dismissal. In this second notice of corrective action relating to this solicitation, the agency pledged to:

(1) cancel RFP No. 75A50322R00008; (2) terminate contract No. 75A50323C00013, the award made under the prior award decision which has been under a stop work order since October 2023; (3) review and reconsider the agency's requirements for medical isolation gowns, to include shelf life considerations, which may include additional or updated market research and a new or revised acquisition plan for a new solicitation; and (4) take other actions, as deemed necessary and appropriate by the agency.

String King Lacrosse, LLC, B-420935.11, Apr. 9, 2024 (unpublished decision) at 1. After concluding the proposed corrective action again rendered the protest academic, our Office subsequently dismissed String King's protest.¹ *Id.*

¹ After our Office issued the decision dismissing as academic the February 2024 protest, the agency notified GAO and String King that it intended to revise its proposed corrective action. The agency explained that instead of canceling the underlying solicitation and contract award, it would "[r]eview and reconsider the [a]gency's requirement for isolation gowns, including shelf life considerations, and fully document the [a]gency's conclusions," issue a solicitation amendment concerning the changes, and make a new award decision, among other actions. Revised Corrective Action
(continued...)

String King then timely filed this request for a recommendation of costs. Req. for Costs at 1, 7.

DISCUSSION

String King requests that our Office recommend that HHS reimburse String King the reasonable costs of filing and pursuing both its October 2023 and February 2024 protests. The requester argues that both of its protests were clearly meritorious, and that the agency “has unduly delayed taking corrective actions it committed to before GAO and the unduly delayed corrective actions it has taken failed to resolve String King’s initial protest in October 2023 and second GAO protest in February 2024 as academic.” Req. for Costs at 7.

With respect to the October 2023 protest, the requester argues its protest was clearly meritorious “as evidenced by the [a]gency taking corrective action” that specifically focused on the agency’s evaluation of proposals and conduct of discussions. *Id.* at 8. The requester also argues that the agency unduly delayed in taking corrective action, resulting in the requester expending unnecessary time and resources because the agency: (1) failed to address the requester’s agency-level protest; (2) failed to implement corrective action from the first protest; and (3) instead made the decision to unreasonably amend the solicitation. *Id.* at 12. With respect to the February 2024 protest, String King argues that had the agency “conducted a reasonable inquiry and investigation into these allegations [relating to the issuance of amendment 0008], it would have found them meritorious.” *Id.* at 9.

HHS objects to the request, arguing that the protests were not clearly meritorious and that it had taken “prompt corrective action” in response to each of the protests. Resp. to Req. for Costs at 7. Further, the agency argues that it has not yet completed its corrective action in response to the first protest, meaning several of the requester’s arguments were premature, including the argument that the agency failed to implement corrective action. *Id.* Additionally, the agency argues that the mere fact that it took corrective action in both protests does not mean that either protest was clearly meritorious, and that it had taken “timely, concrete steps to implement” corrective action from the initial protest. *Id.* at 16.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs, if, 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. 4 C.F.R. § 21.8(e); *Federal Contracting, Inc., DBA*

Notice at 1. In effect, the agency’s amended corrective action no longer pledged to cancel the solicitation and previous award, but rather, reconsider the agency’s requirements, document its determination and findings, and amend the solicitation as necessary. As of the time of this decision, the requester has not challenged the agency’s proposed corrective action of the February 2024 protest, either as initially proposed, or as revised.

Bryan Construction, Inc.--Costs, B-416454.2, Dec. 4, 2018, 2019 CPD ¶ 43 at 5. As a general rule, we will not find undue delay when an agency takes corrective action prior to the deadline for the agency report, however, 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 of affecting the economic and expeditious resolution of bid protests. *Federal Contracting, 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 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 an agency takes corrective action prior to the deadline for the agency report because the circumstances present here demonstrate that the agency has not unduly delayed taking corrective action. In both the October 2023 and February 2024 protests, HHS took corrective action prior to the deadline for the agency reports, thus meeting the general standard required by our Office in determining whether an agency has unduly delayed in taking corrective action.

Further, with respect to implementation of the initial corrective action, we find the agency has taken reasonably prompt implementation actions. In this regard, and consistent with the initially proposed corrective action, the agency's TEP reconvened in December 2023--one month after our Office's decision dismissing the initial protest as academic--and "conducted a reevaluation of the technical aspects of proposals." Resp. to Req. for Costs, attach. 5, Corrective Action Competitive Range at 5. The TEP subsequently prepared a consensus summary report to "supersede[] prior evaluation documents" by January 3, 2024. Resp. to Req. for Costs, attach. 4, Corrective Action TEP Report at 1.

HHS also explains that it attempted to reevaluate proposals under the price factor, but the contracting officer was advised of additional considerations that prompted a reconsideration of whether the price factor evaluation criterion, and particularly the shelf life requirement, accurately reflected the agency's requirements. Contracting Officer Decl. at 1. In light of these new considerations, the agency determined it was necessary to issue amendment 0008 in February 2024, which removed consideration of shelf life from the price evaluation factor. *Id.* at 1-2. We find no basis to question the agency's discretion in this regard, and further note that this action was consistent with

the initially proposed corrective action, where the agency pledged to take other actions, as deemed necessary and appropriate. Given the agency's efforts to implement its initial corrective action in a reasonable time frame, we find the agency's actions do not represent undue delay.

Finally, we do not find that the narrow circumstances that existed in our *Louisiana Clearwater* decision are present in the current procurement, and therefore do not find that the agency's actions have otherwise precluded the timely economical resolution of the protest, warranting a recommendation for reimbursement of protest costs. The principles set forth in our *Louisiana Clearwater* decision address a narrow range of circumstances, namely, those where an agency fails to implement corrective action in good faith in response to a clearly meritorious protest. *Bluehorse Corp.--Recon.*, B-414383.3, Aug. 28, 2017, 2017 CPD ¶ 267 at 3. As we stated in that decision, and as stated above, 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 economical resolution of the protest. *Louisiana Clearwater, supra*.

Here, String King has not endured the expense of protesting "the very same procurement deficiency" from its initial protest. As explained above, String King's October 2023 post-award protest primarily challenged the agency's evaluation of proposals under the technical, experience, and price factors (including challenges to the agency's failure to consider shelf life in its evaluation), as well as the agency's conduct of discussions with the awardee, among other challenges. The February 2024 protest, by contrast, was primarily a challenge to the issuance of amendment 0008, including specifically the removal of shelf life considerations from HHS's evaluation of medical gowns, and the subsequent effects on the procurement of the removal of shelf life considerations. Indeed, at the time of String King's February 2024 protest, the due date for receipt of revised proposals had not passed, and HHS had not made a new source selection decision--it was thus not possible for the requester to have challenged the same procurement deficiencies as the initial protest, that is, a flawed evaluation and source selection determination.

String King also alleged HHS engaged in unequal exchanges with other offerors, however, the requester's challenge in this regard pertains to exchanges that purportedly occurred after the initial protest and during the pendency of the agency's corrective action. The alleged procurement deficiencies from the October 2023 and February 2024 protests are thus distinct from one another, and the agency's actions have not precluded the timely, economical resolution of the protest.

Accordingly, we find HHS has taken prompt corrective action with respect to both protests filed with our Office by String King, and that it has taken reasonably prompt steps to implement its initial corrective action that do not constitute undue delay. Because we find there was no undue delay in HHS's corrective action and the requester has not otherwise had to protest the same procurement deficiency multiple times, we

need not address whether either protest was clearly meritorious to resolve the question of whether we should recommend reimbursement of protest costs.² See *Singleton Enters.-GMT Mech., JV--Costs*, B-310454.3, Mar. 27, 2008, 2008 CPD ¶ 61 at 3-4 (denying request for costs, even though the protester presented a clearly meritorious protest, where the agency did not unduly delay taking corrective action).

The request is denied.

Edda Emmanuelli Perez
General Counsel

² Regarding the requester's arguments that its protests were clearly meritorious based on the agency's decision to take corrective action, we emphasize that an agency's decision to take corrective action does not establish that a protest was clearly meritorious, let alone that a statute or regulation has been violated. *Innovative Techs., Inc.--Costs*, B-415810.3, Mar. 12, 2018, 2018 CPD ¶ 107 at 3.