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Decision

Matter of: Corps Medical Supply, LLC

File: B-422516.2

Date: September 23, 2024

William A. Shook, Esq., The Law Offices of William A. Shook PLLC, for the requester. Shawn Larson, Esq., and Laura B. Reass, Esq., Department of Veterans Affairs, for the agency. Emily R. O'Hara, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Request for recommendation that protest costs be reimbursed is denied where the allegation that the solicitation terms created a *de facto* sole-source procurement is not clearly meritorious and is severable from the clearly meritorious challenge.
 2. Request for recommendation that protest costs be reimbursed is granted where the agency unduly delayed taking corrective action in response to a clearly meritorious allegation that a solicitation term was ambiguous.
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DECISION

Corps Medical Supply, LLC, of Janesville, Wisconsin, requests that we recommend the reimbursement of costs it incurred in filing and pursuing its protest challenging the terms of the solicitation, under request for quotations (RFQ) No. 36C10G24Q0092, issued by the Department of Veterans Affairs (VA), for binocular indirect ophthalmoscope equipment and accessories. Corps Medical argues that its protest was clearly meritorious and that the agency unduly delayed taking corrective action.

We grant the request in part and deny it in part.

BACKGROUND

The agency issued the RFQ on March 20, 2024, seeking award of a single requirements contract to provide Keeler (or equal) binocular indirect ophthalmoscope

related equipment and accessories.¹ AR, Tab 2, Contracting Officer's Statement (COS) at 3; RFQ at 3.² The agency conducted the procurement using the procedures of Federal Acquisition Regulation (FAR) subparts 12.6 and 16.5 and anticipated an ordering period for one 12-month base year with four 12-month options. RFQ at 2-3. The RFQ provided for award to the responsible vendor that provided the best value to the government, considering technical capability and price. AR, Tab 7, RFQ amend. 2 at 2. Relevant here, the solicitation listed six salient characteristics that vendors were required to meet to be considered "equal" to the listed brand name item. RFQ at 6-7. Vendors were free to quote any solution or configuration, so long as the quotation met the salient characteristics. *Id.* at 7.

On April 10, 2024, prior to the deadline for receipt of quotations, Corps Medical filed a protest with our Office challenging the terms of the solicitation. Corps Medical argued the solicitation, as issued, would result in a *de facto* sole-source award, and that specific terms of the solicitation were ambiguous and unduly restrictive of competition. Protest at 4-6. The agency filed its report responding to the protest on May 10, in which the VA defended its market research and the terms of the solicitation. See AR, Tab 1, Memorandum of Law (MOL). On May 20, Corps Medical submitted comments responding to the agency report.

On June 11, the agency informed our Office that it intended to take corrective action. The VA explained it had found an error within the language of salient characteristic (SC) No. 2, which, according to the agency, was unrelated to Corps Medical's protest grounds. Notice of Corrective Action at 1. The agency advised that it would amend the RFQ to address that error "and address Protester's allegations in this same amendment." *Id.* Specifically, the VA stated that it would clarify terms that the protester alleged were ambiguous. *Id.* Accordingly, we dismissed the protest as academic on June 17. *Corps Med. Supply, LLC*, B-422516, June 17, 2024 (unpublished decision). Thereafter, Corps Medical filed this request for our recommendation that it be reimbursed its protest costs.

DISCUSSION

Corps Medical seeks a recommendation that it be reimbursed its reasonable costs of filing and pursuing its protest. Corps Medical contends that reimbursement is warranted

¹ An indirect ophthalmoscope is a device that produces reversed or inverted direct images with two to five times magnification. Agency Report (AR), Tab 5, RFQ at 5. In comparing direct and indirect ophthalmoscopes, an indirect ophthalmoscope delivers a stronger source of light, greater opportunity for stereoscopic inspection of the eyeball interior, and a specifically designed objective lens. *Id.* Indirect ophthalmoscopes aid in diagnosing and treating detachments, holes, and retinal tears. *Id.*

² Unless otherwise noted, references to the record are to the documents in the agency report provided in the initial protest (B-422516). Citations are to the Adobe PDF pagination of documents.

because its protest included clearly meritorious grounds, and because the agency's corrective action, which was taken after the agency filed its report, was unduly delayed. Req. for Costs at 1-3. The agency objects to the request, arguing that the protest grounds were not clearly meritorious, and that the agency's decision to take corrective action was unrelated to Corps Medical's protest. Opp. to Req. for Costs at 3-9.

Where a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of 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. 4 C.F.R. § 21.8(e); *JDD, Inc.--Costs*, B-417545.5, June 9, 2020, 2020 CPD ¶ 209 at 3. As a prerequisite to our recommendation that protest costs be reimbursed, the protest must not only have been meritorious, but it must have been clearly meritorious, *i.e.*, not a close question. *Triple Canopy, Inc.--Costs*, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 3. A protest is clearly meritorious where a reasonable agency inquiry into the protester's allegations would reveal facts showing the absence of a defensible legal position. *Apex Transit Sols., LLC--Costs*, B-418631.4, Feb. 8, 2021, 2021 CPD ¶ 102 at 5. Further, while we consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest, we generally do not consider it to be prompt where it is taken after that date. *JDD, Inc.--Costs, supra*.

Here, there is no dispute that the agency took corrective action after the submission of the agency report and the protester's comments to the report. *Corps Med. Supply, LLC, supra* at 1; Opp. to Req. for Costs at 8. Thus, the remaining question to be addressed is whether Corps Medical's protest was clearly meritorious. *Triple Canopy, Inc.--Costs, supra*. In its initial protest, Corps Medical essentially alleged that the solicitation (1) reflects a *de facto* sole-source procurement; (2) is unduly restrictive of competition; and (3) is ambiguous. We address these arguments below.

De Facto Sole-Source Acquisition

Corps Medical argued that the VA created a *de facto* sole-source procurement that the agency was required to justify because, according to Corps Medical, only one firm could meet the solicitation requirements. Protest at 4. Specifically, Corps Medical alleged that the agency's answer to a question posed in a solicitation amendment converted the description of Keeler's brand name ophthalmoscope with "hi mag lens" product into a salient characteristic that other vendors were required to quote. *Id.* Corps Medical contended that it could not quote this feature, and thus, the contract would essentially be awarded on a sole-source basis. *Id.*

Relevant here, the solicitation included several contract line item numbers (CLINs) detailing the specific equipment to be provided. Each CLIN listed the Keeler brand

name item, the associated part number, and a description of the part.³ RFQ at 6. The descriptions for three of the CLINs (CLINs 1, 4, and 6) referenced parts with “hi mag lens.” *Id.* After providing the table of CLINs, the RFQ advised vendors of the following:

The [VA] is seeking vendors who can provide Keeler Vantage Plus LED Binocular Indirect Ophthalmoscope listed above or equal commodities which *meet all the following salient characteristics*. Vendors may quote any product solution or configuration so long as they *meet the salient characteristics*. . . . Additionally, responses can include any additional product and other product-related services necessary to obtain the supplies as required that may be beneficial and essential to the functionality of the proposed solution.

Id. (emphasis added).

The RFQ then provided a table of the salient characteristics that alternative (“equal”) solutions to the Keeler brand name equipment must meet. For example, the solicitation identified the first two salient characteristics as follows:

SC No.	Salient Characteristics	Method of Evaluation	Applicable CLINs	Page No. Where SC Is Found in Technical Literature
SC 1	Must have minimum of Red Free and Blue Filters	Literature Review	0001	
SC 2	Must have a minimum Interpupillary distance or range of 46-74 mm	Literature Review	0001	

Id. at 7. In total, the RFQ listed six salient characteristics. Notably, “hi mag lens” was not listed anywhere. *See id.* In response to vendor questions, the agency issued amendment 3 to answer the questions posed. AR, Tab 8, RFQ amend. 3. When asked whether the VA will “eliminate the Hi Mag Lens requirement in CLIN 0001, CLIN 0004, and CLIN 0006,” the VA responded, “No, the clinical Subject Matter Expert (SME) finds these to be important. Vendor should submit whatever solution they have available.”

Id. at 3. Corps Medical’s protest argued, by answering the question in that manner, the

³ For example, the RFQ provided:

CLIN No.	Brand	Part Number	Description
0001	Keeler	1205-P-1020	Vantage Plus LED Convertible Slimline Wireless Binocular Indirect Ophthalmoscope with Charger and two (2) Batteries (with Hi Mag Lens and Cord, LED Module, and dim)

RFQ at 6.

VA tacitly acknowledged that the “hi mag lens” was required, which, according to the requester, transformed the product description into a salient characteristic. Protest at 4.

As noted above, the RFQ advised that the VA was seeking “vendors who can provide Keeler Vantage Plus LED Binocular Indirect Ophthalmoscope listed above or equal commodities which meet all the following salient characteristics.” RFQ at 6. If vendors could not offer the Keeler brand name parts associated with each CLIN, then vendors were instructed to quote “any product solution or configuration so long as they meet the salient characteristics.” *Id.*

As our Office has explained, in a brand name or equal procurement, an equal product need only meet the item’s salient characteristics listed in the solicitation, not unstated features of the brand name item. *Datacomm Mgmt. Scis., Inc.*, B-261089, Aug. 8, 1995, 95-2 CPD ¶ 259 at 3. When a salient characteristic is stated in general terms, the equal product need not meet the characteristics exactly as the brand name does; it need only be functionally equivalent to the brand name. *Id.* Thus, the listing of a manufacturer’s stock number or part number does not transform all of the equipment’s design features into salient characteristics that an alternative source must address in order to meet the agency’s minimum needs. *Id.* In this procurement, the VA explained that although it found the brand name parts and their descriptions to be important in describing the agency’s needs--and thus refused to remove the brand name descriptions from the solicitation--the VA’s answer reinforced the agency’s desire that a vendor quote any solution it had available. MOL at 5-6; see AR, Tab 8, RFQ amend. 3 at 3.

Where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions. *CACI, Inc-Fed.*, B-421626.6, B-421626.9, Dec. 13, 2023, 2024 CPD ¶ 6 at 9. During the protest, the VA argued that, neither the RFQ nor the agency’s answer to the question referenced above, elevated the “hi mag lens” description for the Keeler brand name product to a salient characteristic that had to be met in order for a quoted item to be considered technically acceptable. MOL at 4. The agency explained that reading the RFQ, in its entirety, made clear only six salient characteristics were required to be met to be considered “equal” to the Keeler products, and the RFQ was unambiguous that a “hi mag lens” was not a salient characteristic. *Id.* at 5-6. Thus, according to the agency, vendors were not required to offer parts with “hi mag lens.” *Id.* at 5. On this record, we find the agency’s conclusion to be legally defensible. Therefore, we do not find this protest ground to be clearly meritorious. *Apex Transit Sols., LLC--Costs, supra.*

With regards to Core Medical’s argument that the agency’s response to the question posed in amendment 3 converted the solicitation to a *de facto* sole-source procurement, we find no support for this assertion. Where the record shows that the agency has a reasonable expectation of competition, we will not find that the agency’s acquisition strategy unduly restricted competition or resulted in a *de facto* sole-source acquisition. *Tel-Instrument Elecs. Corp.*, B-419529, B-419529.2, Apr. 19, 2021, 2021 CPD ¶ 175 at 4-5. Here, to be considered technically acceptable, a vendor needed to meet the six

salient characteristics in the solicitation. AR, Tab 7, RFQ amend. 2 at 3 (“To receive a rating of Acceptable, the quote must demonstrate the vendor’s ability to meet the Salient Characteristics.”); RFQ at 7 (“Vendors may quote any product solution or configuration so long as they meet the salient characteristics.”). The VA explains--and the market research demonstrates--that the agency had a reasonable expectation that more than one vendor was able to meet the solicitation’s salient characteristics. AR, Tab 4, Market Research at 3-4, 6 (“Based on the market research data collected the following is a list of manufacturers capable of meeting or exceeding the salient characteristics:”). As such, we find the VA’s position that it had a reasonable expectation of competition to be legally defensible, and we do not find the protester’s allegation to be clearly meritorious, in this respect. *JDD, Inc.--Costs, supra*.

Unduly Restrictive Term - Charging Solution for Extra Battery

Next, Corps Medical’s protest argued that the VA’s requirement, under salient characteristic No. 6 (SC 6), was unduly restrictive of competition. Protest at 5. Relevant here, SC 6, as amended, required the following: “Must have a wall mounted charger for the Binocular Indirect Ophthalmoscope with an integrated or separate charging solution for extra battery.” AR, Tab 8, RFQ amend. 3 at 2. Corps Medical contended that devices with higher capacity batteries did not need a charging solution for a second battery because one battery would be sufficient for exams, and that the requirement increased costs. Protest at 6. The agency responded that the requirement was not unduly restrictive, because the ability to charge an extra battery was necessary to meet the agency’s needs. MOL at 7.

Where a protester challenges a specification or requirement as unduly restrictive of competition, the procuring agency has the responsibility of establishing that the specification or requirement is reasonably necessary to meet the agency’s needs. *JRS Staffing Servs., B-410098 et al.*, Oct. 22, 2014, 2014 CPD ¶ 312 at 6. Our Office will examine the adequacy of the agency’s justification for a restrictive solicitation provision to ensure that it is rational and can withstand logical scrutiny. *Id.* A protester’s disagreement with the agency’s judgment concerning the agency’s needs and how to accommodate them does not show that the agency’s judgment is unreasonable. *TransAtlantic Lines, LLC, B-411846.2*, Dec. 16, 2015, 2015 CPD ¶ 396 at 9.

The VA explains that the battery life of an ophthalmoscope depends on the intensity of illumination at which the device is used. COS at 9. According to the contracting officer, while some batteries are capable of lasting 8 to 10 hours, battery life varies greatly, and “may be reduced to a mere 1.5 hours.” *Id.* at 9-10. Here, we find the agency has articulated a reasonable basis for requiring vendors to quote a charging solution with the ability to charge an extra battery. To mitigate the risk associated with a battery potentially draining in as little as one and a half hours, the VA thought it was necessary that the wall mounted charger have an integrated or separate charging solution for an extra battery in order to ensure that ophthalmoscopes were operable throughout the day and avoid unacceptable delays in patient examinations. *Id.*; MOL at 7. On this record,

we have no basis to find the agency's justification unreasonable, and consequently, we do not find Corps Medical's argument to be clearly meritorious. *JDD, Inc.--Costs, supra*.

Ambiguous Term - Charging Solution

Lastly, Corps Medical alleged that the terms of SC 6 were ambiguous because the solicitation was unclear as to whether an extra battery was required, or whether only a charger with the ability to charge an extra battery was required. Protest at 6.

As stated, where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions. *CTIS, Inc.*, B-414852, Oct. 3, 2017, 2017 CPD ¶ 309 at 3. An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible. *General Dynamics Info. Tech., Inc.*, B-421525, May 26, 2023, 2023 CPD ¶ 131 at 6.

According to the VA, a plain reading of SC 6 "requires (1) a wall mounted charger for the ophthalmoscope and (2) a charging solution for an extra battery." MOL at 8. In the agency's view, the requester "is searching for ambiguity where none exists," because "[c]learly the requirement is to have the ability to charge an extra battery." *Id.* The contracting officer adds that "[u]nder the terms of the Solicitation the vendor is free to include an extra battery as part of its solution either as a standard feature or as an available accessory." COS at 10.

Based on these explanations, it appears that the VA interpreted the provision to require a charging solution for an extra battery, rather than the provision of an extra battery itself. However, when addressing the need for an extra charging solution, the contracting officer adds that "a separate charging solution for an extra battery is a necessary requirement to allow for continuous use of the Ophthalmoscope," and "[e]nsuring that one battery is always fully charged allows the doctor to use the Ophthalmoscope as clinically indicated regardless of intensity level." *Id.* Such statement appears to contemplate the use of more than one battery with the ophthalmoscope. Moreover, in responding to the protest, the VA fails to directly address the issue of whether the provision of an extra battery was required by the solicitation. *See id.* In this respect, we agree with Corps Medical's observation that the contracting officer's response to this allegation was "itself ambiguous without ever answering the question of whether two batteries were required." Comments at 7.

As a result, we do not find that the agency provided a legally defensible position to address the requester's ambiguity challenge. The agency's response not only failed to take a clear position on whether one or two batteries were required by the terms of the solicitation, but also failed to explain how Corps Medical's interpretation of the requirement is unreasonable. *General Dynamics Info. Tech., Inc., supra* at 7; see *CWTSatoTravel*, B-404479.2, Apr. 22, 2011, 2011 CPD ¶ 87 at 14. Based on the record before us, we agree with the requester that SC 6 was ambiguous because it was susceptible to two or more reasonable interpretations of whether the provision of an

extra battery was required. As such, for the purposes of our recommendation for reimbursement of costs, we find this protest ground to be clearly meritorious.⁴ *JRS Staffing Servs.--Costs*, B-410098.6 *et al.*, Aug. 21, 2015, 2015 CPD ¶ 262 at 4-5.

⁴ The agency also argues that the request for a recommendation for reimbursement of costs should be denied because the agency's decision to take corrective action and amend the solicitation was unrelated to allegations raised in Corps Medical's protest. *Opp. to Req. for Costs* at 7. The VA argues that it had found a "typographical error" in salient characteristic No. 2 (SC 2)--which Corps Medical did not challenge--and the VA intended to amend the RFQ to address the error found in SC 2, and at the same time, amend the language in SC 6 to address the alleged ambiguity raised by Corps Medical. *Id.* The agency argues, however, that but for the error found in SC 2, the VA never would have amended the language in other parts of the solicitation that related to Medical Corps's protest grounds. *Id.* at 8. According to the VA, its decision to amend the language of SC 6, as part of the corrective action, did not equate to the agency's taking corrective action in the face of a clearly meritorious protest allegation. *See id.* at 7-8. The requester responds, arguing that there was no error in SC 2, and amending the language in SC 2 only served as a means to which the agency could amend the ambiguous language in SC 6, through delayed corrective action, while avoiding the payment of protest costs. *Resp. to Agency Opp.* at 2.

We find that even if the agency had a valid independent basis for taking corrective action, the record still shows that Corp Medical's allegation concerning the ambiguous language in SC 6 was clearly meritorious. *Hewlett Packard Enter. Co.--Costs*, B-413444.3, Mar. 3, 2017, 2017 CPD ¶ 85 at 8 (granting request for reimbursement for costs where our Office found undue delay and clearly meritorious protest ground, even where agency asserted it had an independent basis for taking corrective action). The agency's basis for taking corrective action does not affect our conclusion that the agency failed to take timely corrective action in response to the requester's clearly meritorious argument. *Id.*; *see also Career Sys. Dev. Corp.*, B-411346.10, July 18, 2018, 2018 CPD ¶ 249 at 5 n. 4 ("[E]ven if the agency had a valid independent basis for cancelling a solicitation, the focus of our analysis remains on the merits of the protest grounds actually asserted.").

As such, we decline to find that a request for a recommendation for reimbursement of costs related to a clearly meritorious protest ground be denied simply because the agency's reasons for taking corrective action were allegedly unrelated to that clearly meritorious protest ground. Finally, while we express no view on the agency's proffer that its decision to take corrective action was wholly unrelated to the protest allegations, we note that the VA's own notice of corrective action stated, "it is in the best interest of the Agency to take corrective action and address Protester's allegations in this same amendment . . . to clarify that the Hi Mag lens is not a requirement . . . and that an extra battery is required." Notice of Corrective Action at 1.

Severability of Protest Grounds

Finally, we turn to whether Corps Medical's unsuccessful protest grounds are severable from the clearly meritorious protest ground. As discussed below, we find that the allegations related to the "hi mag lens" are severable from the charging solution (extra battery) ambiguity allegation. We do not find, however, that the ambiguity allegation can be severed from the unduly restrictive term allegation.

In considering whether to recommend the reimbursement of protest costs, we generally consider all issues concerning the evaluation of proposals to be intertwined and thus not severable; therefore, we will generally recommend reimbursement of the costs associated with both successful and unsuccessful protest challenges. *Ruchman & Assocs.--Costs*, B-419968.3, Mar. 10, 2022, 2022 CPD ¶ 76 at 8. We have, in appropriate cases, limited our recommendation where a part of a successful requester's costs is allocable to a protest issue that is so clearly severable as to essentially constitute a separate protest. See, e.g., *BAE Tech. Servs., Inc.--Costs*, B-296699.3, Aug. 11, 2006, 2006 CPD ¶ 122 at 3. However, limiting recovery of protest costs in all cases to only those issues on which the protester prevailed would be inconsistent with the broad, remedial Congressional purpose behind the cost reimbursement provisions of the Competition in Contracting Act. 31 U.S.C. § 3554(c)(1)(A); *Fluor Energy Tech. Servs., LLC--Costs*, B-411466.3, June 7, 2016, 2016 CPD ¶ 160 at 3. In determining whether protest issues are so clearly severable as to constitute separate protests, our Office considers, among other things, whether the successful and unsuccessful arguments share a common core set of facts, are based on related legal theories, or are otherwise not readily severable. *Deque Sys., Inc.--Costs*, B-415965.5, Aug. 23, 2018, 2018 CPD ¶ 304 at 5.

First, we find the allegation that the language of SC 6 was ambiguous, concerns legal theories and facts that are distinct and severable from those relevant to resolving whether solutions with "hi mag lens" were required by the solicitation. *Marine Design Dynamics, Inc.--Costs*, B-407816.2, July 3, 2013, 2013 CPD ¶ 168 at 5. The challenge to the "hi mag lens" concerned core facts related to the brand name description of the CLINs and the agency's market research, while the core facts of the ambiguity allegation centered on the specific wording of SC 6. In responding to whether the wording of SC 6 required the quotation of a second battery, the agency would not be led to review whether a solution with a "hi mag lens" was required to be quoted by vendors. *Ruchman & Assocs.--Costs*, *supra* at 9. Thus, in view of these considerations, reimbursement of protest costs associated with the "hi mag lens" allegation--and its related *de-facto* sole source acquisition allegation--would not be proper. *Intercon Assocs.*, B-296697.2, June 14, 2006, 2006 CPD ¶ 95 at 3.

In contrast, we find the protest allegations related to the ambiguity and undue restrictiveness of SC 6 to be intertwined and not severable. The core facts of the two allegations are shared, as the agency was required to review the language of salient characteristic 6 to respond to both protest allegations. Further, in responding to whether the charging solution requirement was unduly restrictive of competition, the

agency was led to discuss and review whether a second battery would be required to be quoted by vendors. COS at 10 (“[A] separate charging solution for an extra battery is a necessary requirement to allow for continuous use of the Ophthalmoscope. Ensuring that one battery is always fully charged allows the doctor to use the Ophthalmoscope as clinically indicated regardless of intensity level.”). Both Corps Medical and the VA discussed the allegations in conjunction with one another in the protest, memorandum of law, and in responding to this request. Because we find there to be an interrelationship between the issues presented, and the allegations share a core set of common facts, we find the ambiguity and unduly restrictive protest allegations cannot be severed. *Ruchman & Assocs.--Costs, supra* at 9.

RECOMMENDATION

We recommend that the requester be reimbursed its reasonable protest costs, including attorneys’ fees, related to filing and pursuing its protest in connection with the challenge to the ambiguous term in salient characteristic No. 6. We also recommend reimbursement of Corps Medical’s reasonable protest costs in connection to the allegation that the terms of salient characteristic No. 6 were unduly restrictive of competition, because the allegations share a core set of common facts and are not readily severable. 4 C.F.R. § 21.8(d)(1). We do not recommend reimbursement of costs related to any other allegations raised in the protest. Corps Medical should submit its claim for costs associated with the protest grounds recommended for reimbursement, detailing and certifying the time expended and costs incurred, directly to the agency within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The request is granted in part and denied in part.

Edda Emmanuelli Perez
General Counsel