



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Trilogy Secured Services, LLC--Costs

File: B-422661.2

Date: November 8, 2024

Camille Chambers, Esq., Ryan C. Bradel, Esq., and Chelsea A. Padgett, Esq., Ward & Berry, PLLC, for the requester.
Douglas Kornreich, Esq., and Eno-Obong Essien, Esq., Department of Health and Human Services, 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

Request for recommendation that protest costs be reimbursed is denied where the challenge to the award of a sole-source contract is not clearly meritorious.

DECISION

Trilogy Secured Services, LLC, of Springfield, Virginia, requests that we recommend the reimbursement of costs it incurred in filing and pursuing its protest challenging the award of a sole-source contract to Birdi Systems, Inc., of Pasadena, California, under solicitation No. 75F40124C00054, issued by the Department of Health and Human Services, Food and Drug Administration (FDA), for security installation and maintenance services. Trilogy argues that its protest was clearly meritorious, and that the agency unduly delayed taking corrective action.

We deny the request.

BACKGROUND

On October 25, 2021, the FDA issued a request for proposals (RFP) for support services to secure FDA facilities nationwide. The solicitation sought to award an indefinite-delivery, indefinite-quantity (IDIQ) fixed-price contract to provide the complete range of technical services to support the maintenance of existing hardware as well as the installation of new security systems. *Trilogy Secured Servs., LLC*, B 420833.9,

B-420833.10, July 18, 2024, 2024 CPD ¶ 152 at 1-2; Memorandum of Law (MOL) at 2.¹ The procurement was subject to multiple rounds of protest and corrective action taken by the agency. *Trilogy Secured Servs., LLC*, B-420833.9, B-420833.10, *supra*. As a result of the most recent evaluation, the agency awarded the IDIQ contract to Birdi Systems, Inc. *Id.* at 3. On April 22, 2024, Trilogy protested the award at our Office, which was docketed as B-420833.9. *Id.* Because performance on the newly awarded contract was stayed pending resolution of the protest and the existing contract was due to expire, the FDA awarded Birdi a sole-source interim (bridge) contract on May 20 to maintain continuity of needed services. MOL at 3. Trilogy subsequently protested the award of the sole-source bridge contract on June 17, arguing that the agency's justification for the sole-source award was inadequate. *Trilogy Secured Servs., LLC*, B-422661, July 31, 2024 (unpublished decision). In response to the protest of the sole-source award (B-422661), the agency submitted its memorandum of law and agency report to our Office on July 17.

On July 18, our Office issued a decision denying Trilogy's protest challenging the award of the IDIQ contract to Birdi. *Trilogy Secured Servs., LLC*, B-420833.9, B-420833.10, *supra*. On July 24, the FDA requested that our Office dismiss, as academic, Trilogy's protest (B-422661) challenging the award of the sole-source bridge contract. Req. for Dismissal at 2. The agency explained that because performance could now continue under the recently awarded IDIQ contract, there was no longer a need for the bridge contract, and the FDA advised that it intended to terminate the bridge contract for convenience of the government. *Id.* We dismissed the protest as academic on July 31. *Trilogy Secured Servs., LLC*, B-422661, *supra*. Thereafter, on August 15, Trilogy filed this request for our recommendation that it be reimbursed its protest costs in pursuing the challenge to the award of the sole-source bridge contract.

DISCUSSION

Trilogy contends that reimbursement is warranted 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 3. The agency objects to the request, arguing that the protest grounds were not clearly meritorious. Opp. to Req. for Costs at 4.

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, thereby causing the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. 4 C.F.R. § 21.8(e); *Career Sys. Dev. Corp.--Costs*, B-411346.10, July 18, 2018, 2018 CPD ¶ 249 at 3. Thus, as a prerequisite to recommending that costs be

¹ Unless otherwise noted, references to the record are to the documents in the agency report provided in the initial protest (B-422661). Citations are to the Adobe PDF pagination of documents.

reimbursed where a protest has been settled by corrective action, not only must the protest have been meritorious, but it also 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. *Firetrace Aerospace, LLC--Costs*, B-403193.4, Dec. 17, 2010, 2010 CPD ¶ 300 at 6. The mere fact that an agency decides to take corrective action does not establish that a statute or regulation clearly has been violated. *Diligent Consulting, Inc.--Costs*, B-299556.3, June 26, 2007, 2007 CPD ¶ 125 at 4. 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*, B-417545.5, June 9, 2020, 2020 CPD ¶ 209 at 3.

Here, there is no dispute that the FDA took corrective action after the submission of the agency report. Opp. to Req. for Costs at 1. Thus, the remaining question to be addressed is whether Trilogy's protest was clearly meritorious. *Triple Canopy, Inc.--Costs, supra*. In its protest, Trilogy alleged that the agency's justification for its sole-source award to Birdi was "insufficient." Supp. Protest at 3. Specifically, Trilogy contended that (1) the justification did not provide a reasonable explanation for why the need for the bridge contract was urgent; and (2) the FDA failed to consider other sources that were available to perform the work, including Trilogy. *Id.* at 6-7. We address these arguments below.

Urgency

The gravamen of Trilogy's challenge to the award of the sole-source contract was that the agency's Justification for Other than Full and Open Competition (JOFOC) failed to reasonably explain why the need for the security installation and maintenance services were urgent. Supp. Protest at 4-5. In response, the agency asserts that its justification was adequately supported and reasonably explained why the award of a sole-source bridge contract to Birdi was urgent. MOL at 4.

The Competition in Contracting Act, 41 U.S.C. § 3304(a)(2), permits an agency to use other than competitive procedures in acquiring goods or services where the agency's requirement is of such an unusual and compelling urgency that the government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits proposals. When using noncompetitive procedures pursuant to 41 U.S.C. § 3304(a)(2), such as here, agencies are required to execute a written justification with sufficient facts and rationale to support the use of the cited authority. See 41 U.S.C. § 3304(e)(1)(A); FAR 6.302-2(c)(1), 6.303, 6.304; *Panasonic I-PRO Sensing Sols Corp. of Am.*, B-419260, Jan. 12, 2021, 2021 CPD ¶ 98 at 5. Our review of an agency's decision to conduct a noncompetitive procurement focuses on the adequacy of the rationale and conclusions set forth in the justification; where the justification sets forth a reasonable explanation for the agency's actions, we will not

object to the award. *American Sys. Corp.*, B-412501.2, B-412501.3, Mar. 18, 2016, 2016 CPD ¶ 91 at 9.

As discussed above, the record reflects that the FDA's existing contract to provide security maintenance services was due to expire in May 2024, and performance on the newly awarded IDIQ contract had been stayed as a result of the B-420833.9 protest. MOL at 6, 9; Agency Report (AR) Tab 3.1, Contract No. 066. According to the agency, an interim bridge contract was needed because the agency "could not afford to stay performance of the required services during the pendency of the protest, as the services were urgently needed." Contracting Officer's Statement (COS) at 1. On May 20, the agency awarded Birdi a sole-source contract under the authority of Federal Acquisition Regulation (FAR) section 6.302-2, Unusual and Compelling Urgency. *Id.*; AR, Tab 4.1, Bridge Contract.

In its justification, the FDA explained that the agency had a critical need for security installation and maintenance services within FDA's White Oak location and nationwide. AR, Tab 6.1, JOFOC at 9. Specifically, the FDA noted:

The extent and nature of the harm that the FDA (and the nation) would incur if these critical services cannot be obtained immediately is substantial in terms of dollars and abundantly clear in terms of national security, and public safety and property concerns. As a result of the various protests submitted on the requirement, there have been severe delays with performing new security installations to replace older, aging equipment at FDA sites nationwide.

* * * * *

FDA's Office of Security and Emergency Management (OSEM) requires the services to assist in ensuring the protection of people and property at all FDA facilities nationwide. . . . The Office of Security Operations (OSO), through OSEM's Physical Security Office (PSO), is charged with securing all FDA facilities nationwide for the protection of people and property. Systems utilized by the PSO include: access control systems (ACS), video imaging systems, closed circuit television (CCTV), various security detection and initiating devices, perimeter detection, and others. All Electronic Security Systems utilized by the PSO must be maintained to 100 [percent] efficiency, 24 hours per day, 365 days per year. As the FDA mission grows, new installations and modifications to existing facilities will be required to meet the FDA's security needs. If the FDA cannot procure a short-term bridge contract, it would severely hamper our nationwide electronic security system, which consists of the intrusion detection system, access control system, camera systems, emergency radio system at the White Oak campus, visitor management system, emergency call stations, radiation detection security and other devices.

* * * * *

Moreover, there is an urgent and compelling need to commence with the installation of new equipment nationwide, as the current equipment being utilized has become old, outdated, and increasingly prone to mechanical failures. As just a few examples, the Closed-Circuit Television (CCTV) security surveillance systems at a number of FDA nationwide locations urgently require new installations, as all the CCTV cameras are currently down at such locations. . . . Because of these many critical security risks, the security installation and maintenance requirement must be met immediately through this contract, which fulfills a critical agency mission need.

Id. at 9-10.

Further, the FDA articulated the specific risks to the agency, should the security maintenance services not be made available:

Additionally, not having a security maintenance and installation contractor in place puts the FDA at risk nationwide for intrusion into office spaces without having a working security alarm system. The access control system may cause doors not to secure, permitting unwanted intruders to enter FDA space, both while occupied (threatening to harm FDA employees) and after hours (to vandalism and theft). The access control system could prevent employees from being able to enter buildings to conduct FDA critical mission functions. The radio system at FDA's White Oak campus is the means of communication for the guard force to respond to emergencies and call for help when needed. In the event of an emergency, not having a working radio system would delay critical help when needed most. A non-working visitor management system would permit banned people to enter our facilities and they could cause harm to former employees or supervisors. Non-working emergency call stations could lead to people who require emergency response to not receive the necessary help and support. Non-working cameras would limit the ability of the government to respond to intervention of crimes. A non-working radiation system could lead to a catastrophic radiological crisis event within the National Capital Region.

Id.

We find that the agency provided a reasonable justification for the urgency of the requirement. The record demonstrates the agency adequately detailed the security risks faced by the outdated surveillance systems and the need to immediately resolve those security risks through the award of the interim sole-source bridge contract, pending resolution of the protest to the IDIQ contract. *Medfinity, LLC*, B-412068, Dec. 2, 2015, 2015 CPD ¶ 378 at 3 (finding agency's explanation of urgent need to be

reasonable). While Trilogy may disagree with the agency's assessment that the FDA's needs must be met urgently, that disagreement, without more, is not a reason to find the agency's justification objectionable. *SSI Tech., Inc.*, B-417917, Dec. 4, 2019, 2019 CPD ¶ 418 at 7. As such, on this record, we have no basis to find the agency's justification regarding the urgency of the requirement unreasonable, and consequently, we do not find Trilogy's argument to be clearly meritorious. *Career Sys. Dev. Corp.-- Costs*, *supra*.

Consideration of Other Sources

Trilogy also alleged that the agency failed to consider other sources, including Trilogy, before making the sole-source award to Birdi. Supp. Protest at 3, 5-7. The agency responds that its decision to award the sole-source bridge contract to Birdi was reasonable and supported. MOL at 5-6.

We have reviewed all of Trilogy's arguments in this connection, and we find none to be meritorious. For example, Trilogy challenged the agency's failure to solicit interest from as many sources as practicable, and particularly, the agency's failure to consider Trilogy before awarding an interim sole-source bridge contract to Birdi. Supp. Protest at 5-7. Although FAR section 6.302-2(c)(2) requires agencies to solicit offers from as many sources as practicable when seeking to award a sole-source contract under the urgent and compelling exception to full and open competition, an agency nonetheless may limit a procurement to the only firm it reasonably believes can properly perform the work in the time available. FAR 6.302(c)(2); *eAlliant, LLC*, B-407332.4, B-407332.7, Dec. 23, 2015, 2014 CPD ¶ 58 at 4; *Camden Shipping Corp.*, B-406171, B-406323, Feb. 27, 2012, 2012 CPD ¶ 76 at 6.

Here, to prevent an immediate break in necessary services required to keep employees, visitors, and property safe, the agency concluded that it needed to award a short-term sole-source contract to Birdi--the only firm it believed could properly perform the work in the time available. MOL at 6; AR, Tab 6.1, JOFOC at 9-10. The agency explained that, based on the market research performed for the competitive IDIQ procurement as well as the evaluation of proposals conducted during that procurement, the FDA reasonably knew which firms were interested and capable of performing the needed services. MOL at 7. The agency determined that Birdi, as awardee of the competitive IDIQ procurement, was capable of performing the work, and in fact, had staff ready to begin performance. AR, Tab 6.1, JOFOC at 10 ("Birdi Systems' staff is organized and ready to commence with performance immediately.").

Further, contrary to Trilogy's contention, the agency explained that it did consider Trilogy when deciding to award the sole-source bridge contract. MOL at 5. According to the agency, Trilogy was the incumbent performing on the FDA's expiring security maintenance contract, and the agency had "experienced issues with Trilogy's performance" on that contract. COS at 1. Among the number of issues was the following concern: "Security Technicians do not have the required MDI certifications and Bosch CCTV certifications, which has led to the lack of technical experience and

troubleshooting skills in the field.” *Id.* at 2; AR Tab 3.3, Notice of Performance Deficiencies at 1. According to the contracting officer, this concern was prompted by a letter the agency had received from MDI Security Systems on July 2, 2024, which stated:

[DELETED]. . . . As of today, Trilogy still does not possess a dealer agreement, is not a reseller of our products, and does not have any certified or experienced technicians or engineers for our products.
[DELETED].

AR, Tab 7.1, Letter from MDI Security Systems LLC. Because of that and the other identified performance issues, the agency asserted that “it was not unreasonable for the Agency to conclude that [Trilogy was] not capable of performing the services under [the bridge contract].” MOL at 5.

Trilogy has not provided any information demonstrating that the agency’s concerns about Trilogy’s past performance or certification were unreasonable or unfounded. As such, we find no basis to question the agency’s decision not to solicit a competing proposal from Trilogy, or consider other sources, before awarding the interim bridge contract to Birdi for the agency’s urgent needs.² *Chronos Sols., LLC*, B-418865, Sept. 29, 2020, 2020 CPD ¶ 319 at 5.

In sum, Trilogy has failed to demonstrate that any of the challenges raised in its earlier protest had merit--let alone, were clearly meritorious. Consequently, we have no basis

² Trilogy also contends that the agency failed to adequately plan for the procurement. Supp. Protest at 6. A contracting officer may not properly use noncompetitive procedures if the procuring agency created the need to use such procedures through a lack of advance planning. *Innotion Enters., Inc.*, B-419907, Sept. 14, 2021, 2021 CPD ¶ 315 at 4. An agency’s procurement planning, however, need not be error-free or successful, and the fact that an agency encounters delays or exigencies does not demonstrate that the agency failed to meet its obligation for advance planning. See *eAlliant, LLC*, B-407332.4, B-407332.7, *supra* at 5.

The FDA originally issued its solicitation for the security installation and maintenance IDIQ contract on October 25, 2021. COS at 1. That award decision was subject to various protests and corrective actions. See *Trilogy Secured Servs., LLC*, B-420833.9, B-420833.10, *supra* at 1-2. Trilogy was notified of the most recent IDIQ award to Birdi on April 3, 2024, and filed a protest of that IDIQ award decision on April 22. *Id.* The record shows that the agency anticipated award of the competitive IDIQ contract prior to the expiration of the incumbent contract in May 2024. The protest filed by Trilogy prompted the FDA’s need to award a sole-source contract. Given the nature and circumstances surrounding this procurement, we find no basis to conclude that delays to performance of this requirement were the result of a lack of advanced planning by the agency. *Trailboss Enters., Inc.*, B-415812.2 *et al.*, May 7, 2018, 2018 CPD ¶ 171 at 14. Accordingly, we find no merit to this argument.

to grant Trilogy's request for a recommendation for reimbursement of costs it incurred in filing and pursuing its protest. *Triple Canopy, Inc.--Costs, supra.*

The request is denied.

Edda Emmanuelli Perez
General Counsel