



Decision

Matter of: Bluehorse Corporation--Reconsideration

File: B-414383.3

Date: August 28, 2017

Akenaten Bluehorse, Bluehorse Corporation, for the protester.
Brian A. Quint, Esq., Department of the Interior, for the agency
Joshua R. Gillerman, Esq., and Tania Calhoun, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration is denied where the requesting party has not shown that our decision contains either errors of fact or law that warrant reversal or modification of the decision.

DECISION

Bluehorse Corporation, a small business of Reno, Nevada, requests that we reconsider our decision denying its request for reimbursement of costs incurred in pursuing its protest against the terms of several brand-name-only solicitations issued by the Department of Interior, Bureau of Indian Affairs, for Taser-brand, non-lethal, electric-shock weaponry and accessories.

We deny the request for reconsideration.

On September 10, 2016, the Bureau of Indian Affairs, Office of Justice Services, issued a brand-name-only request for quotations (RFQ) for various Taser-branded equipment. RFQ at 1. Bluehorse protested the terms of the RFQ on September 14, alleging that it lacked adequate justification for its brand-name-only requirements and was therefore unduly restrictive of competition. On September 15, the agency cancelled the solicitation and our Office dismissed the protest as academic on September 26. Bluehorse Corp., B-413726, Sept. 26, 2016 (unpublished decision).

On February 21, 2017, the Office of Justice Services issued a brand-name-only invitation for bids (IFB) via the FedBid online system, again, for various Taser-branded equipment. IFB at 1-2. The list of equipment to be acquired was identical to the prior procurement, except for a slight variation in the quantity for certain parts. Id. On that

same day, Bluehorse protested the new procurement making similar allegations concerning the inadequacy of the agency's brand-name-only justification. On February 23, the agency again cancelled the solicitation, and our Office dismissed the protest as academic on March 16. Bluehorse Corp., B-414383, Mar. 16, 2017 (unpublished decision).

On March 20, Bluehorse filed a request that it be reimbursed its costs of pursuing the above-referenced protests. Bluehorse asserted that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest because the agency resolicited the requirement without correcting the errors that led it to cancel the first solicitation. On July 13, our Office denied Bluehorse's request for reimbursement of costs, finding that reimbursement was not appropriate because the protest was not clearly meritorious. Bluehorse Corp.--Costs, B-414383.2, July 13, 2017, 2017 CPD ¶ 223 at 3. We stated that the corrective action was taken before the agency report was filed and it was not clear on the face of the solicitation that the agency's justifications and supporting market research were inadequate. Id. Further, we explained that at the time the agency elected to take corrective action, our Office did not have a complete record sufficient to make a final decision regarding the merits of the protest and we would have had to develop the record significantly further. Id. Bluehorse then requested reconsideration of that decision.

Under our Bid Protest Regulations, to prevail in its request for reconsideration the requesting party must set out the factual and legal grounds upon which reversal or modification of the decision is deemed warranted, specifying any errors of law made or information not previously considered. Bid Protest Regulations, 4 C.F.R. § 21.14(a); Waterfront Techs., Inc.--Recon., B-403638.4, June 29, 2011, 2011 CPD ¶ 126 at 3. We have reviewed Bluehorse's request for reconsideration and conclude that it does not meet this standard.

Bluehorse argues that we erred in our decision denying its claim for costs because we failed to consider whether its initial protest was clearly meritorious, and only concluded that its subsequent protest was not clearly meritorious. Request for Reconsideration at 1. Bluehorse does not dispute that the agency took corrective action prior to the time for filing the agency reports in response to its protests. Instead, the protester argues that the agency's corrective action in response to the first protest failed to address the issues raised by the protester, thereby requiring the protester to challenge the same grounds in its second protest. Request for Reconsideration at 1-3. The protester further argues that, because its initial protest was clearly meritorious, under Louisiana Clearwater, Inc.--Recon. & Costs, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209, it is entitled to the costs of pursuing its protests. Id. For the reasons discussed below, we do not agree that the circumstances involved in Louisiana Clearwater are present here.

When 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); AAR Aircraft Servs.--Costs,

B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. As a general rule, we do not regard a protest as clearly meritorious where resolution of the protest required further record development to complete and clarify the record. See Boston Harbor Dev. Partners, LLC--Costs, B-404614.5, Feb. 17, 2012, 2012 CPD ¶ 74 at 2-3.

In Louisiana Clearwater, we addressed a protester's argument that the agency had failed to implement the corrective action it proposed to resolve the initial protest, thereby requiring the protester to file a second protest based on the same arguments. The protester initially argued, among other issues, that the agency failed to apply the evaluation factors based on the weighting specified in the solicitation. Louisiana Clearwater, supra, at 2. In response to the first protest, the agency proposed corrective action to reevaluate offerors' proposals in a manner consistent with the solicitation. Id. Following the corrective action, the agency affirmed the award. Id. at 3. The protester filed a second protest, arguing that the new award had again failed to weight the evaluation factors in the manner specified in the solicitation. Id. at 3-4. In response to the second protest, the agency advised our Office that it would take corrective action because the second award had not correctly applied the evaluation factors. Id. at 4.

Our decision in Louisiana Clearwater explained that "[w]hen 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. at 6. We concluded, based on the agency's concession that it did not apply the evaluation factors in the manner specified in the solicitation, that the protester's argument was "meritorious on its face." Id. at 6 (emphasis added). We recommended that the agency reimburse the protester's costs of pursuing its initial protest because the agency did not act in good faith to implement the proposed corrective action, which had the effect of requiring the protester to file its second protest. Id. at 5. We also recommended that the agency reimburse the protester's costs of pursuing the second protest, even though the agency proposed the second corrective action prior to filing its report on the protest, because the agency's second corrective action could not be considered prompt in light of the fact that it was the same corrective action that the agency previously failed to implement. Id.

Our Office has explained in several decisions, however, that the principles set forth in Louisiana Clearwater 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. See, e.g., Xcellent Tech.Solutions, LLC--Costs, B-412591.3, Nov. 14, 2016, 2016 CPD ¶ 332 at 5. The issue raised by the protester in Louisiana Clearwater was clearly meritorious because the agency did not dispute that it failed to apply the evaluation factors based on the weights specified by the solicitation. Louisiana Clearwater, supra at 6. The issue there--weighting the evaluation factors on an equal basis or in descending order of importance--was plain on the face of the limited record provided and thus susceptible to resolution without the full record.

In contrast to the circumstances involved in Louisiana Clearwater, Bluehorse's initial protest was not "meritorious on its face." While Bluehorse attempts to draw a distinction

between its initial protest, and its subsequent protest, neither protest was clearly meritorious because, at the time the agency elected to take corrective action, our Office did not have a complete record sufficient to make a final decision regarding the merits of the protest. See, e.g., SpectrumS4, LLC--Costs, B-408227.4, Aug. 26, 2013, 2013 CPD ¶ 200 (protest is not clearly meritorious where resolution of the protest required further record development to complete and clarify the record). It would be not apparent on the face of the solicitation that the agency's justifications and supporting market research were inadequate for the solicitations' brand-name only requirement. Bluehorse Corp.--Costs, supra, at 3. Such a determination could only be made after further development of the record, including, at minimum, a review of the agency's market research. Moreover, as our Office has frequently stated, the mere fact that an agency decides to take corrective action does not necessarily establish the absence of a defensible legal position, nor that a statute or regulation has clearly been violated. Diligent Consulting, Inc.--Costs, B-299556.3, June 26, 2007, 2007 CPD ¶ 125 at 5. Accordingly, as Bluehorse's request for reconsideration is based on our decision being at odds with Louisiana Clearwater, and because, as we have detailed above, Louisiana Clearwater is inapplicable here, Bluehorse has not identified an error of fact or law in our denial of its request for reimbursement of costs.

The request for reconsideration is denied.

Susan A. Poling
General Counsel