



Decision

Matter of: The VISN Group, LLC--Reconsideration

File: B-420916.3

Date: November 23, 2022

Joey Grismore, for the protester.
Kathleen Ramos, Esq., Department of Veterans Affairs, for the agency.
Nathaniel S. Canfield, Esq., and Evan D. Wesser, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration of prior decision dismissing a request that GAO recommend reimbursement of the protester's reasonable protest costs is denied where the requesting party has not shown that our decision contains either errors of fact or law or information not previously considered that warrants reversal or modification of the decision.

DECISION

The VISN Group, LLC, a small business of Jacksonville, Florida, requests reconsideration of our decision in *The VISN Group, LLC--Costs*, B-420916.2, Oct. 20, 2022 (unpublished decision), in which we dismissed its request that our Office recommend that the Department of Veterans Affairs (VA) reimburse the firm the reasonable costs of filing and pursuing its protest (*The VISN Group, LLC*, B-420916) with respect to request for quotations (RFQ) No. 36C26122Q0513. The protester contends that our Office erred in dismissing its request for a recommendation the agency reimburse the firm its reasonable costs for pursuing its underlying protest on the basis that the agency had not unduly delayed taking corrective action in response to the underlying protest. See Req. for Recon. at 1-4.

We deny the request for reconsideration.

BACKGROUND

On July 27, 2022, the protester filed a protest with our Office challenging the VA's award of a contract under the RFQ to Spearpoint Logistics LLC, of Newark, Delaware, for quality assurance specialist services for the VA Palo Alto Health Care System. See

The VISN Group, LLC, B-420916, Aug. 17, 2022 (unpublished decision). The protester contended that the agency's selection decision deviated from the best-value selection methodology stated in the RFQ or alternatively, that the RFQ contained a latent ambiguity regarding the agency's actual requirements. *See id.*

On August 3, 2022, seven days after the protest was filed, the agency advised that it intended to take corrective action in response to the protest. *See id.* Specifically, the agency stated that it would reevaluate the quotations submitted in response to the RFQ and make a new award decision. *See id.* As the agency's corrective action rendered the protest academic, we dismissed the protest on August 17. *See id.*

Thereafter, on August 18, the protester requested that our Office recommend that the agency reimburse the protester its costs of filing and pursuing its protest. *See The VISN Group, LLC--Costs*, B-420916.2, Oct. 20, 2022 (unpublished decision). On October 20, we dismissed the request because the agency had taken corrective action prior to the due date for the agency report, and therefore did not unduly delay taking corrective action. *See id.*

On October 26, the protester filed this request for reconsideration of our decision dismissing its request for a recommendation of reimbursement of costs.

DISCUSSION

To obtain reconsideration, our Bid Protest Regulations require that the requesting party 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. 4 C.F.R. § 21.14(a). The repetition of arguments made during our consideration of the original protest and disagreement with our decision do not meet this standard. 4 C.F.R. § 21.14(c); *Epsilon Sys. Solutions, Inc.*, B-414410.3, Sept. 20, 2017, 2017 CPD ¶ 292 at 3.

Here, the protester's request does not demonstrate that our decision contains an error of fact or law, and does not present new information warranting reversal or modification. For the reasons discussed below, we conclude that the request does not meet our standard for reconsideration.

The protester's request for reconsideration is grounded in the contention that, by declining to recommend the reimbursement of costs because the agency did not unduly delay taking corrective action, our Office has relied upon a standard that deviates from our Bid Protest Regulations at 4 C.F.R. § 21.8(e). *See* Req. for Recon. at 1-4. In the protester's view, because that regulation provides that our Office may recommend reimbursement of costs "[i]f the agency decides to take corrective action in response to a protest," conditioning a recommendation for reimbursement on whether the agency unduly delayed taking corrective action improperly imposes an additional requirement not found in the regulation. *See id.* The protester maintains that the sole requirement for a recommendation of reimbursement of costs under 4 C.F.R. § 21.8(e) is that the

agency has taken corrective action. See *id.* at 3. Consequently, the protester contends, GAO has engaged in an “illegal confiscation” of the protester’s \$350 protest filing fee by not recommending the reimbursement of protest costs. See *id.* at 3, 4.

The authority of our Office to recommend that an agency reimburse a protester’s costs of filing and pursuing a protest is established by 31 U.S.C. § 3554(c)(1), which provides that “[i]f the Comptroller General determines that a solicitation for a contract or a proposed award or the award of a contract does not comply with a statute or regulation, the Comptroller General may recommend that the Federal agency conducting the procurement pay to an appropriate interested party the costs of . . . filing and pursuing the protest, including reasonable attorneys’ fees and consultant and expert witness fees; and . . . bid and proposal preparation.” Congress initially provided for this remedy as part of the Competition in Contracting Act of 1984 (CICA), which stated that “the Comptroller General may declare an appropriate interested party to be entitled to the costs of” pursuing a protest. See Pub. L. No. 98-369, div. B, title VII, subtitle D, § 2741(a), 98 Stat. 1201 (1984).

The conference report accompanying CICA described our Office’s authority regarding protest costs in similarly permissive terms, stating that “[t]he Comptroller General may grant to a successful protesting party reimbursement for expenses of preparing bids or proposals related to the disputed contracting action and for costs incurred in making the protest.” H.R. Rep. No. 98-861, at 1436. The conferees further expressed their expectation that “the Comptroller General will declare monetary awards only in cases where the agencies have unfairly excluded vendors from procurements, and not in cases involving minor technicalities.” *Id.* at 1437. Congress later amended this authority as part of the Federal Acquisition Streamlining Act of 1994 (FASA), making clear that GAO may recommend, rather than grant, the payment of the protester’s costs.¹ See Pub. L. No. 103-355, title I, subtitle D, § 1403(b)(2), 108 Stat. 3243, 3289 (1994).

Additionally, as part of the procurement protest system fashioned in CICA, Congress directed our Office to “prescribe such procedures as may be necessary” to the resolution of protests under the procedures authorized by CICA. See Pub. L. No. 98-369, § 2741(a). That direction is codified at 31 U.S.C. § 3555(a).

As relevant here and in consequence of the provisions of CICA discussed above, GAO has promulgated its Bid Protest Regulations, which state in part that “[i]f the agency decides to take corrective action in response to a protest, GAO may recommend that the agency pay the protester the reasonable costs of filing and pursuing the protest, including attorneys’ fees and consultant and expert witness fees.” 4 C.F.R. § 21.8(e). This provision largely took its current form as part of a 1991 amendment to our

¹ As stated in the conference report accompanying FASA, this change was made to address questions about the constitutionality of CICA’s apparent direction that the Comptroller General could direct agencies to pay fees and costs in bid protests. See H.R. Rep. No. 103-712, at 191.

regulations to improve the effectiveness of the protest process. See 56 Fed. Reg. 3759 (Jan. 31, 1991). As GAO noted, a survey of protesters, counsel for protesters, government protest counsel, and procurement officials contained a recommendation that we amend our regulations to allow for the awarding of costs where the agency takes voluntary corrective action. See 55 Fed. Reg. 12,834 (Apr. 6, 1990). In response to that recommendation, GAO initially proposed amending our Bid Protest Regulations to provide that our Office may recommend the reimbursement of costs where the agency decides to take corrective action but does not notify our Office until after the date for submission of the agency report. See *id.* at 12,835, 12,836; see also *id.* at 12,838 (proposed rule that “[i]f the contracting agency decides to take corrective action in response to a protest and so notifies [GAO] after the date for submission of the [agency report], [GAO] may declare the protester to be entitled to recover reasonable costs of filing and pursuing the protest, including attorneys’ fees”). In doing so, GAO expressed that our aim was to encourage prompt corrective action by agencies where they were presented with a meritorious protest:

GAO believes that some agencies may have taken longer than necessary to initiate corrective action in some meritorious cases, so that protesters expending time and resources had to make significant use of the protest process before obtaining relief. The new provision should encourage contracting agencies to recognize and respond to meritorious protests early in the protest process.

Id. at 12,836.

Following receipt of comments on the proposed rule, GAO revised the final rule in order to provide for flexibility:

GAO has always been of the view that the award of costs in all cases where corrective action is taken may not be appropriate. There may be circumstances where the award of costs, even after submission of the report, is not justified; similarly, there may be cases where the award of costs is proper even where the decision to take corrective action is made before submission of the agency report on the protest. For that reason, [the final rule] states that GAO “may” award costs when corrective action is taken. This determination will be made taking into account all the circumstances of each case, including the nature of the protester’s allegations, when in the protest process the decision to take corrective action was made and communicated to GAO and the protester, and type of corrective action planned. To clarify that the agency report due date is not a dispositive factor, [the final rule] is revised to delete the reference to the due date.

56 Fed. Reg. 3759, 3762 (Jan. 31, 1991).² Thus, in prescribing a rule that our Office may recommend the reimbursement of costs if an agency decides to take corrective action in response to a protest, GAO sought to encourage agencies to take prompt corrective action in response to meritorious protests, and made clear that it would consider the timing of that corrective action in determining whether to recommend the reimbursement of costs.

As we have explained, prior to the 1991 amendments described above, our Office did not recommend the reimbursement of protest costs where an agency took corrective action prior to our issuing a decision on the merits of the protest. See *Oklahoma Indian Corporation--Claim for Costs*, B-243785.2, June 10, 1991, 91-1 CPD ¶ 558 at 2. Thus, under the prior rule, the remedy of cost reimbursement was substantially more limited in application. In reviewing the history of those 1991 amendments, we further have expressed that it was not our intention in adopting the revised provision to recommend reimbursement of protest costs in every case in which the agency takes corrective action in response to a protest.³ *Id.* Because GAO's concern in amending our regulations was that some agencies were not taking corrective action in response to

² In relevant part, the final rule stated that "[i]f the contracting agency decides to take corrective action in response to a protest, [GAO] may declare the protester to be entitled to recover reasonable costs of filing and pursuing the protest, including attorneys' fees." 56 Fed. Reg. at 3764. GAO amended this language as part of regulatory changes implementing FASA, making clear that GAO "may recommend that the agency pay the protester the costs of filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees." See 60 Fed. Reg. 5871, 5875 (Jan. 31, 1995) (proposed rule); 60 Fed. Reg. 40,737, 40,743 (Aug. 10, 1995) (final rule). GAO further amended the rule in 2002, providing that our Office may recommend reimbursement of the "reasonable" costs of the protester. See 67 Fed. Reg. 79,833, 79,836 (Dec. 31, 2002). The most recent amendments to our Bid Protest Regulations left the relevant language of 4 C.F.R. § 21.8(e) unchanged. See 83 Fed. Reg. 13,817, 13,825 (Apr. 2, 2018).

³ Indeed, consistent with the stated intent of Congress that our Office not recommend reimbursement of costs in every case, see H.R. Rep. No. 98-861, at 1437, our concern that agencies were not acting expeditiously in response to meritorious protests, see 55 Fed. Reg. at 12,836, and our expressed intention to consider all circumstances when determining whether a recommendation of reimbursement is appropriate, see 56 Fed. Reg. at 3762, our decisions require that a protest be clearly meritorious to warrant a recommendation for the reimbursement of a protester's costs. See, e.g., *Southern Aire Contracting, Inc.--Costs*, B-418070.3, Feb. 21, 2020, 2020 CPD ¶ 73 at 3 (citing *Synchron, LLC--Costs*, B-412622.4, Aug. 31, 2016, 2016 CPD ¶ 250 at 4-5; *The Sandi-Sterling Consortium--Costs*, B-296246.2, Sept. 20, 2005, 2005 CPD ¶ 173 at 2). The protester's contention that agency corrective action alone is sufficient to warrant a recommendation of reimbursement is not in keeping with that well-established principle. See *id.* at 4 ("[O]ur Office has consistently stated the mere fact that an agency decides to take corrective action does not establish that a protest is clearly meritorious.").

meritorious protests in a reasonably prompt fashion, we have noted that our intent was to allow for a recommendation of cost reimbursement where, based on the circumstances of the case, we find that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. *Id.*

Consistent with that regulatory aim, in determining whether an agency has unduly delayed taking corrective action for purposes of recommending reimbursement of costs, our Office has long stated that, as a general rule, so long as an agency takes corrective action by the due date of its protest report, we regard the action as prompt, and will not recommend reimbursement of protest costs. See, e.g., *Southern Aire Contracting, Inc.--Costs*, *supra* at 3; *AeroSage, LLC--Costs*, B-417803.2, Oct. 29, 2019, 2019 CPD ¶ 368 at 3; *Livanta, LLC--Costs*, B-404215.2, Apr. 5, 2011, 2011 CPD ¶ 82 at 2; *Security Consultants Group, Inc.--Costs*, B-293344.6, Nov. 4, 2004, 2004 CPD ¶ 228 at 3-4; *CDIC, Inc.--Entitlement to Costs*, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 2. Indeed, such action, taken early in the protest process, is precisely the kind of prompt reaction to a protest that our regulation is designed to encourage. *Oklahoma Indian Corp.*, *supra* at 2-3. Thus, contrary to the protester's request for reconsideration, conditioning a recommendation for reimbursement on undue delay by the agency in taking corrective action is consistent with both the text and history of our Bid Protest Regulations, and moreover, advances the intention with which they were promulgated.

Here, in keeping with our regulations and decisions, the agency promptly took corrective action well before the due date for the agency report, notifying our Office of its intention to take corrective action a week after the protester filed its protest. Consistent with the text and history of our Bid Protest Regulations, as well as numerous decisions of our Office that are similarly consistent, we found that the agency did not unduly delay taking corrective action. We therefore appropriately dismissed the protester's request for a recommendation that the agency reimburse the protester's costs. Accordingly, the protester's request for reconsideration fails to present information not previously

considered and does not demonstrate an error of fact or law in our prior decision dismissing the protester's request that our Office recommend the reimbursement of the protester's costs.⁴

The request for reconsideration is denied.

Edda Emmanuelli Perez
General Counsel

⁴ The protester also faults our decision for not citing to court decisions--as opposed to GAO decisions--supporting the proposition that an agency must have unduly delayed taking corrective action as a prerequisite for a recommendation of cost reimbursement. See Req. for Recon. at 2-3. This argument, however, ignores that the relevant provisions of CICA apply only to bid protest proceedings before our Office. While the U.S. Court of Federal Claims may, in bid protest cases brought under the court's applicable jurisdiction of 28 U.S.C. § 1491(b), award costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, that authority is materially different from the applicable CICA provisions with respect to proceedings before our Office.