



Decision

Matter of: Bluehorse Corporation--Costs

File: B-414383.2

Date: July 13, 2017

Akenaten Bluehorse, for the protester.
Brian A. Quint, Esq., Department of the Interior, for the agency.
Michael Willems, Esq., and Edward Goldstein, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation that agency reimburse costs of two sequential protests because agency failed to address issues alleged in first protest is denied where agency promptly proposed corrective action in response to the second protest and the first protest was not clearly meritorious

DECISION

Bluehorse Corporation, a small business of Reno, NV, requests that our Office recommend that it be reimbursed the costs of filing and pursuing its protest against the terms of several brand-name-only solicitations issued by the Bureau of Indian Affairs, within the Department of the Interior, for Taser-brand, non-lethal, electric-shock weaponry and accessories.

We deny the request.

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

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 order quantities for certain parts. Id. On February 21, Bluehorse protested the new procurement making similar allegations concerning the inadequacy of the agency's brand-name-only justification. IFB Protest at 1. On February 23, the agency, again, cancelled the solicitation, and our Office dismissed the protest as academic on March 16.

DISCUSSION

Bluehorse now requests that we recommend the agency reimburse its costs for filing and pursuing these protests.¹ Request for Protest Costs at 1-2. Bluehorse argues that it is entitled to costs because the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. In this regard, Bluehorse contends the agency resolicited the requirement without correcting the errors that lead it to cancel the first solicitation. Id. According to Bluehorse, it is irrelevant that the agency's corrective action was taken within 48 hours of the second protest being filed, because the agency had already withdrawn a similarly defective procurement. Comments on Agency Response at 1-2. Bluehorse further contends that its protest was clearly meritorious because the justification supporting the decision to solicit for brand name goods contained factual inaccuracies, and the agency conducted inadequate market research in support of its justification. Id. Finally, Bluehorse contends the speed with which the agency undertook corrective action reinforces that its protests were clearly meritorious. Id. at 3.

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) (2013); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 5. As a prerequisite to our recommending that costs be 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. Apptis Inc.--Costs, B-402146.3, Mar. 31, 2010, 2010 CPD ¶ 123 at 4; 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

¹ Bluehorse additionally seeks reimbursement for several other similar protests against brand-name-only procurements undertaken by the National Park Service, also a component of the Department of the Interior. While the two BIA procurements referenced above appear to reflect an attempt to procure the same requirements by the same activity, and therefore arguably represent a continuation of the same procurement, the National Park Service procurements reflect entirely different requirements in unrelated procurements. We concur with the agency that those procurements are not relevant, as, in general, each procurement stands alone, and actions taken in a different procurement are not relevant to our consideration of the agency's actions. See, e.g., Genesis Design and Development, Inc., B-414254, Feb. 28, 2017, 2017 CPD ¶ 79 at 3 n.2.

protester's allegations would reveal facts showing the absence of a defensible legal position. Yardney Technical Prods., Inc.--Costs, B-297648.3, Mar. 28, 2006, 2006 CPD ¶ 65 at 4. The fact that an agency takes corrective action does not establish that the protest was clearly meritorious. Diligent Consulting, Inc.--Costs, B-299556.3, June 26, 2007, 2007 CPD ¶ 125 at 5.

Reimbursement is not appropriate in this case because the protest was not clearly meritorious.² Here, 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. In order for us to have reached a decision about the merits of Bluehorse's protest, we would have had to develop the record significantly further, including the submission of an agency report and the protester's comments, to allow us to weigh the merits of both parties' arguments. Ordinarily, we do not regard a protest as clearly meritorious where, as here, resolution of the protest required further record development to complete and clarify the record. See e.g., SpectrumS4, LLC--Costs, B-408227.4, Aug. 26, 2013, 2013 CPD ¶ 200 (request for reimbursement of protest costs is denied where protest grounds cannot be determined to be clearly meritorious because record was not fully developed due to agency's corrective action in related protest); and MEC Development, LLC--Costs, B-403295.2, Oct. 18, 2010, 2010 CPD ¶ 264 at 4-5 (request for reimbursement of protest costs in second protest because agency failed to address issues alleged in prior protest is denied partly because additional development was needed to establish whether certain allegations were clearly meritorious).

The request is denied.

Susan A. Poling
General Counsel

² We do not reach the question of whether the agency unduly delayed taking corrective action in this case. However, we note that the underlying IFB in this case appears to be a solicitation of the same requirement by the same activity as in the RFQ issued in September of 2016. In this connection, we have previously concluded that where an agency fails to implement a promised corrective action, or implements a corrective action that fails to address a clearly meritorious issue raised in an initial protest, such that a protester is put to the expense of subsequently protesting the very same procurement deficiency, the agency's action has precluded the timely and economical resolution of the protest. Louisiana Clearwater, Inc.--Recon. and Costs, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209.