



Decision

Matter of: BluePath Labs, LLC--Reconsideration

File: B-417960.6

Date: July 10, 2020

Wayne A. Keup, Esq., Wayne Keup, PLLC, for the protester.
Kathleen Ellis, Esq., Department of Veterans Affairs, for the agency.
Todd C. Culliton, 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 protester does not demonstrate that our decision contained legal or factual error.

DECISION

BluePath Labs, LLC, of Washington, D.C., requests reconsideration of our decision, *BluePath Labs, LLC--Costs*, B-417960.4, May 19, 2020, 2020 CPD ¶ 175, wherein our Office denied the firm's request for reimbursement of its costs for filing and pursuing its protest.¹ BluePath Labs had previously challenged the award of a contract to Rios Partners, LLC, of Arlington, Virginia, under request for quotations (RFQ) No. 36C24E19Q0127, issued by the Department of Veterans Affairs (VA) for research analysis services.

We deny the request for reconsideration.

BACKGROUND

On July 30, 2019, the VA issued the RFQ to procure research services in order to produce scientific portfolio analyses of chronic diseases prevalent in the American veteran population. RFQ at 4. The RFQ contemplated the award of a fixed-price

¹ For the purposes of this decision, we refer to the protester's request that it be reimbursed the costs of filing and pursuing its protest, pursuant to 4 C.F.R. § 21.8(e), as the protester's request for reimbursement.

contract to be performed over a 1-year base period and four 1-year option periods. *Id.* at 4, 34.

The RFQ advised that award would be made on a best-value tradeoff basis, considering technical, price, and past performance factors. RFQ at 33. The RFQ instructed vendors to include technical, past performance, and cost volumes in their quotations. *Id.* at 26. The technical volume was required to demonstrate an understanding of the work to be performed and the agency's requirement. *Id.* at 26. The past performance volume was required to identify up to five referenced contracts of similar size, scope, and complexity. *Id.*

Four vendors, including BluePath and Rios Partners, submitted quotations prior to the August 14, 2019, close of the solicitation period. Contracting Officer's Statement of Fact (COS), Nov. 20, 2019, at 2. On August 30, the agency made award to Rios Partners. *Id.*

On September 9, 2020, BluePath filed a protest with our Office challenging that award. Protest, B-417960. BluePath alleged that the agency unreasonably evaluated both its and Rios Partners's past performance. *Id.* at 3. Specifically, BluePath argued that "Rios Partners has no past performance experience with contracts similar to the one at issue here." *Id.* BluePath further argued that it had superior past performance experience. *Id.* On September 23, the VA informed our Office that it would terminate the award to Rios Partners and reevaluate quotations, and requested dismissal of the protest. Req. for Dismissal, Sept. 23, 2019, at 2. Shortly thereafter, our Office dismissed the protest allegations as academic. *BluePath Labs, LLC*, B-417960, Sept. 27, 2019 (unpublished decision).

On October 30, 2019, the VA completed its reevaluation, and re-awarded the contract to Rios Partners. COS, Nov. 20, 2019, at 2. On November 12, BluePath filed a protest with our Office, arguing again that Rios Partners lacked relevant past performance, and that the agency unreasonably evaluated its quotation and improperly made a tradeoff analysis. Protest, B-417960.2, at 2-8.

The agency submitted its report responding to the allegations on November 25, 2019. The VA responded by showing that Rios Partners submitted three highly relevant past performance references. Memorandum of Law (MOL), B-417960.2, B-417960.3, Nov. 25, 2019, at 6-7. The agency also responded to BluePath's allegations regarding the evaluation of its technical and past performance quotations, and tradeoff analysis. *Id.* at 5-16.

On December 3, BluePath filed a supplemental protest, arguing that Rios Partners was provided an opportunity to revise its proposal but that the protester was not afforded the same opportunity. Supp. Protest, B-417960.2, B-417960.3, at 1-2. The protester also requested an extension of its time to file comments on the agency report. Protester's Request for an Extension, Dec. 3, 2019, at 1. Our Office revised the due date for the

protester's comments from December 5 until December 9. Electronic Protest Docketing System (EPDS), Docket Entry No. 13, B-417960.2, B-417960.3.

On December 9, 2019, BluePath filed its comments. Comments, B-417960.2, B-417960.3. BluePath primarily argued that the agency unreasonably evaluated Rios Partners's past performance because the firm did not identify a single contract demonstrating its own, independent past performance; rather, BluePath argues that the "the past performance submitted by Rios was that of 'Team Rios,' which is comprised of Rios partners, [its subcontractor], and likely others." *Id.* at 3. BluePath also maintained its positions that the agency unreasonably evaluated its quotation and improperly made its tradeoff analysis. *Id.* at 5-15.

On December 11, the VA filed a supplemental report responding to the protester's allegation concerning the agency's conduct of discussions. Supp. MOL, B-417960.2, B-417960.3. On December 16, BluePath filed its supplemental comments. Supp. Comments, B-417960.2, B-417960.3.

Following the development of the protest record, the GAO attorney assigned to the protest conducted an "outcome prediction" alternative dispute resolution (ADR) conference. GAO Notice, B-417960.2, B-417960.3, Jan. 21, 2020. During the ADR conference, the GAO attorney advised that he would likely draft a decision sustaining the protest based on the agency's failure to conduct equal discussions. *BluePath Labs*, B-417960.4, *supra* at 3. The GAO attorney also advised that his review did not identify any merit with regard to the protester's remaining allegations, including the allegation concerning Rios Partner's past performance. *Id.*

On January 29, 2020, the VA informed our Office that it would terminate the award to Rios Partners, conduct meaningful discussions, reevaluate quotations, and make a new award decision. Req. for Dismissal, B-417960.2, B-417960.3, at 1-2. The protester objected, arguing that the VA's proposed reevaluation was unlikely to ameliorate the firm's concerns with the technical and past performance evaluations. Protester's Objection to Proposed Corrective Action, B-417960.2, B-417960.3, at 1-2. On February 4, our Office dismissed the protest as academic over the protester's objections, noting that the protester was free to file a new protest challenging the scope of the agency's corrective action. *BluePath Labs*, B-417960.2, B-417940.3, Feb. 4, 2020 (unpublished decision), at 1-2.²

On February 6, 2020, BluePath filed its request for reimbursement with our Office. Req. for Reimbursement of Costs, B-417960.4. The protester argued that it was entitled to reimbursement of costs because the agency unreasonably delayed taking corrective

² BluePath filed a protest challenging the agency's reevaluation on March 2. Protest, B-417960.5. Our Office dismissed that protest as premature because the agency had not yet completed its final evaluation or made a new source selection decision. *BluePath Labs, LLC*, B-417960.5, May 21, 2020 (unpublished decision).

action. *Id.* at 1. Without any support, the protester argued that its allegations concerning the VA's evaluation of Rios Partners's past performance and its technical approach were clearly meritorious, and that the agency unduly delayed taking corrective action following dismissal of the firm's September 9 protest. *Id.* at 1-2.

The agency conceded that the protester was entitled to its reasonable costs associated with its allegation that the agency conducted unequal discussions; however, the VA disagreed that the protester was entitled to costs associated with either its initial protest filing dated September 9, or its second protest filing dated November 12. Regarding the allegations contained in the protest filing dated September 9, the agency argued that it did not unduly delay taking corrective action because it identified procurement irregularities and proposed corrective action prior to the agency report due date. Agency Response, B-417960.4, at 3-4. For the allegations contained in the protest filing dated November 12, the agency asserted that the allegations were not clearly meritorious because it articulated legally defensible positions in response to each of the allegations. *Id.* at 5-9. In answer, the protester disagreed that its allegations were not "clearly meritorious." Protester's Response, B-417960.4.

On May 19, 2020, our Office denied the protester's request for reimbursement. *BluePath Labs, LLC--Costs*, B-417960.4, *supra*. First, we reasoned that BluePath's allegation related to unequal discussions was severable (*i.e.*, not intertwined) from the allegations related to the agency's evaluation of the vendors' quotations or the source selection decision. *Id.* at 4. As a result, we concluded that BluePath was not entitled to reimbursement for all of its protest costs merely because it was entitled for costs related to its allegation of unequal discussions. *Id.*

Next, we determined that BluePath's other allegations did not warrant reimbursement on their own under the applicable legal standard. *Id.* at 5 (GAO will recommend reimbursement of protest costs when the agency unduly delays taking corrective action in response to clearly meritorious protest allegations). With respect to the allegations raised in the protest dated September 9, we concluded that they did not warrant reimbursement because the VA did not unduly delay taking corrective action. *Id.* at 5, n.3.

As for the allegations raised in the protest dated November 12, we concluded that they were not clearly meritorious. *BluePath Labs, LLC--Costs*, B-417960.4, *supra* at 5. We agreed that the agency articulated legally defensible positions to the protest allegations. As an example, we noted that the VA argued that its evaluation of BluePath's past performance was consistent with the terms of the solicitation. *Id.* at 5-6. We also noted that BluePath's allegation that the agency unreasonably considered the past performance of "Team Rios" was not clearly meritorious because the allegation was untimely raised; BluePath did not raise this allegation until more than 10 days after the firm received the agency report. *Id.* at 6.

On May 29, 2020, the protester requested reconsideration of our decision, arguing that our decision contained factual and legal errors. The firm asserted that our decision

mistakenly concluded that its allegation concerning Rios Partners's past performance was untimely. Req. for Recon. at 2. BluePath argues that it first raised this allegation in its protest filing dated September 9, and again in its protest filing dated November 12, when asserting that Rios Partners lacked any relevant past performance. *Id.* at 2-3. BluePath also argues that the agency did not take meaningful corrective action in response to its protest filing dated September 9. *Id.* at 3. Finally, BluePath argues that our Office did not consider whether its remaining protest allegations were clearly meritorious. *Id.* at 4.

Under our Bid Protest Regulations, to obtain reconsideration, a requesting party either must demonstrate that our prior decision contains errors of fact or law, or present new information not previously considered that would warrant reversal or modification of our earlier standard. 4 C.F.R. § 21.14(a); *Bluehorse Corp.--Recon.*, B-413929.2, B-413929.4, May 16, 2017, 2017 CPD ¶ 149 at 4. Here, we conclude that BluePath's request does not meet this standard.

First, we do not find that our decision contained legal error when we concluded that BluePath's allegation concerning Rios Partners' past performance was untimely. Contrary to the protester's position, the argument raised in its comments dated December 9, constituted a new and independent protest ground. To illustrate, both protests alleged that Rios Partners has no past performance experience with contracts similar to the instant acquisition. Protest, B-417960, at 3 ("Simply stated, Rios Partners has no past performance experience with contracts similar to one at issue here."); Protest, B-417960.2, at 3 ("Simply stated, Rios Partners has no past performance experience with contracts similar to that procured here."). In contrast, in its comments dated December 9, BluePath argued that the agency unreasonably attributed relevant contracts belonging to "Team Rios" to Rios Partners. Comments at 3 ("Rios Partners did not submit its own past performance information. The past performance information submitted by Rios was that of 'Team Rios'").

BluePath's argument constitutes a new and independent protest ground because arguing that the agency unreasonably considered the referenced contracts as attributable to Team Rios does not provide additional support to the original allegation that the awardee itself did not have any relevant contract experience. *See Ti Hu, Inc.*, B-284360, Mar. 31, 2000, 2000 CPD ¶ 62 at 4 ("Where the later-raised bases present new and independent grounds for protest, they must independently satisfy our timeliness requirements; conversely, where the later-raised bases merely provide additional support for an earlier, timely raised protest bases, we will consider the later-raised arguments."). Indeed, our focus in determining if an agency has reasonably concluded that a firm has relevant past performance involves analyzing whether the agency reasonably viewed the referenced contracts to be similar in size, scope, and complexity. In contrast, BluePath's new allegation requires us to examine whether the agency reasonably determined that the referenced contracts were predictive of Rios Partners's likely quality of performance.

In this way, the new allegation changes our focus and necessitates additional briefing by the parties, including a separate explanation from the agency. See *University of Maryland*, B-416682, Oct. 24, 2018, 2018 CPD ¶ 366 at 7 (“Supplemental protest grounds that amount to ‘examples’ of an initial--general--challenge to the agency’s evaluation must independently satisfy our timeliness requirements where such ‘examples’ involve different factual circumstances and require a separate explanation from the agency.”); cf. *Medical Staffing Solutions USA*, B-415571, B-415571.2, Dec. 13, 2017, 2017 CPD ¶ at 3-4 (protest allegation dismissed as untimely when “the original allegations were predicated on the assertion that [the awardee] lacked any relevant past performance, [and] the allegations raised in the comments are predicated on the agency allegedly incorrectly evaluating [the awardee’s] past performance”). Thus, our Office properly dismissed this allegation as untimely because it constituted a new and independent protest ground and was filed more than 10 days after the firm received the agency report.³ See 4 C.F.R. § 21.2(a)(2). Accordingly, we deny this request for reconsideration.

Next, BluePath’s argument that the agency unduly delayed taking corrective action in response to its protest filing dated September 9, does not provide us with a basis to grant the request for reconsideration. Our Office will recommend reimbursement of protest costs where an agency implements corrective action that fails to address a clearly meritorious issue raised in the protest that prompted the corrective action, such that the protester is put to the expense of subsequently protesting the very same procurement deficiency. In these cases, the agency’s action, even though promptly proposed, has precluded the timely, economical resolution of the protest. See *Federal Contracting, Inc., d/b/a Bryan Construction, Inc.--Costs*, B-416454.2, Dec. 4, 2018, 2019 CPD ¶ 43 at 5. Here, our decision did not commit any error because we concluded that BluePath’s general allegation (*i.e.*, that Rios Partners lacked relevant past performance) was not clearly meritorious, and therefore did not warrant reimbursement under the applicable standard. *BluePath Labs, LLC*, B-417960.4, *supra* at 5-6. Accordingly, we deny the request for reconsideration.

Finally, we see no support for BluePath’s argument that we failed to consider whether all of its protest allegations were clearly meritorious. Our decision expressly stated that “BluePath’s remaining protest grounds were not independently clearly meritorious, and thus provide no basis on which to recommend reimbursement of protest costs.” *BluePath Labs, LLC*, B-417960.4, *supra* at 5. We also explained that “none of the allegations raised by BluePath in its initial protest meet the high bar set by the clearly meritorious standard.” *Id.* While our decision did not discuss each allegation in depth, the decision nevertheless shows that we considered each of the protester’s allegations

³ As noted above, the EPDS docket for B-417960.2 shows that the protester received the agency report on November 25, and did not file its comments until 14 days later on December 9.

and concluded that none of them merit reimbursement under the applicable standard. Thus, our decision does not contain any error in this regard. Accordingly, we deny the request for reconsideration.

The request for reconsideration is denied.

Thomas H. Armstrong
General Counsel