

Decision

Matter of: TEN21 Capital, LLC--Reconsideration

File: B-418906.4

Date: June 23, 2021

Roger Denny, Esq., Spencer Fane LLP, for the protester.
Natica Chapman Neely, Esq., Department of Veterans Affairs, for the agency.
Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration of prior decision dismissing as academic a protest of the agency's evaluation of proposals and award of a lease is denied where the agency agreed to reevaluate the lease proposals, make a new selection decision, and terminate the prior lease award, if appropriate, and where the requester has not shown that the prior decision to dismiss the pending protest contains errors of fact or law that warrant reversal or modification of the decision.

DECISION

TEN21 Capital, LLC, of Creve Coeur, Missouri, asks that we reconsider our January 22, 2021 decision in *TEN21 Capital*, B-418906.2 (unpublished decision), in which we dismissed TEN21's protest of the award of a contract to Highlands Development, LLC, of Kansas City, Kansas, under solicitation No. VA255-18-R-0517, issued by the Department of Veterans Affairs (VA) for a lease of clinic space located in St. Charles County, Missouri.

We deny the request for reconsideration.

In its protest, TEN21 challenged the VA's decision not to set aside the procurement for service-disabled veteran-owned small business (SDVOSB) concerns; the agency's evaluation of proposals; and its delay in providing the protester with notice that its offer was unsuccessful.¹ Prior to the due date for submitting the agency's report, the VA

¹ During the development of the protest record, in response to a request for dismissal, we advised the parties that we intended to dismiss as untimely TEN21's protest of the agency's decision not to set aside the procurement for SDVOSBs. That protest ground is not at issue here, and will not be discussed further.

advised our Office that it would reevaluate proposals and make a new award decision, and that it would terminate the previously awarded lease if the reevaluation resulted in a different award decision. Request for Recon., exh. 1, Notice of Corrective Action, at 2. The agency asserted that the proposed corrective action rendered the protest academic, and asked that it be dismissed on that basis. The protester objected to the request for dismissal, arguing that the corrective action was not reasonably tailored to address all the procurement errors alleged in the protest and that, in the absence of a detailed corrective action plan to which TEN21 claimed it was “entitled,” the protest was not dismissible. We concluded that the actions proposed by the agency rendered the protest academic, and dismissed that protest.²

In its request for reconsideration, TEN21 argues that our dismissal of its protest as academic was based on legal error. In addition to repeating arguments it raised in opposing the agency’s request for dismissal, TEN21 argues that the agency’s corrective action notice was too “vague and noncommittal” to meet “the demanding standard the GAO established under *Mythics*,” citing our decision in *Mythics, Inc.; Oracle America, Inc.*, B-418785; B-418785.2, Sept. 9, 2020 CPD ¶ 295.

Under our Bid Protest Regulations, to obtain reconsideration the requesting party must show that our prior decision contains either errors of fact or law, or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.14(a); *Waterfront Techs., Inc.--Recon.*, B-403638.4, June 29, 2011, 2011 CPD ¶ 126 at 3. Further, errors of fact warranting reversal must be ones crucial to the outcome of the protest. *Richards Painting Co.--Recon.*, B-232678.2, May 19, 1989, 89-1 CPD ¶ 481. TEN21’s request does not meet this standard.

TEN2’s request for reconsideration argues that the circumstances of its protest were not different from the circumstances in the *Mythics* decision. However, TEN21 ignores important differences between the two protests.

The fundamental difference between our decision in *Mythics* and the dismissal at issue here--and the key to understanding the *Mythics* decision--is the fact that *Mythics* involved a pre-closing challenge to the terms of a solicitation, not a post-award challenge to an agency’s evaluation of proposals and source selection decision. As we noted in *Mythics*, the agency’s attempts to take corrective action there were inadequate because they failed for one reason or another to render the protest academic.³ *Mythics, supra*, at 5.

² TEN21 also filed a separate protest to challenge the scope of the proposed corrective action, arguing that it was overly broad. Our Office dismissed that protest as untimely, since it was filed more than 10 days after the agency filed its notice describing the corrective action it would take. *TEN21 Capital, LLC*, B-418906.3, Mar. 29, 2021 (unpublished decision).

³ For example, the agency proposed to eliminate certain challenged requirements, but failed to propose the elimination of other challenged requirements found elsewhere in

In contrast to *Mythics* (or any other pre-closing protest), TEN21's protest involved a post-award challenge to the agency's evaluation of proposals and selection decision. TEN21's protest was rendered academic because the agency committed to conduct a reevaluation and make a new selection decision. Notwithstanding TEN21's insistence to the contrary, an agency's corrective action need not resolve every protest issue or provide the precise remedy sought by the protester; rather, it must only render the protest academic. See *Quotient, Inc.*, B-416473.4, B-416473.5, Mar. 12, 2019, 2019 CPD ¶ 106 at 3.

The discussion set out in *Mythics* involved the question of whether actions taken in response to a pending protest rendered that protest academic. The proposed actions discussed in *Mythics* did not render the protest academic, for the simple reason that the solicitation remained open, the procurement was ongoing, and there were unresolved issues concerning the terms of the solicitation that precluded offerors from competing intelligently and on a relatively common basis. (We note for the record, there is little dispute that an agency may render a protest academic simply by cancelling the underlying solicitation, without actually addressing any of the issues raised by the protest, or providing the remedy sought by the protester. *RCG of North Carolina, LLC*, B-418824, B-418824.3, Sept. 17, 2020, 2020 CPD ¶ 298 at 1 n.1.)

TEN21 argues that we erred in concluding that the agency's proposed corrective action here rendered the protest academic because, according to TEN21, it did not provide the relief TEN21 was seeking. However, the protester's satisfaction with the agency's actions is not the correct standard. As we noted in our dismissal decision, where an agency undertakes corrective action that will supersede and potentially alter its earlier selection decision, our Office will generally decline to answer a protest challenging the agency's prior selection on the basis that the protest is rendered academic. See *Dyna-Air Eng'g Corp.*, B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132. Put simply, when an agency decides to reevaluate proposals and make a new selection decision, continuing to resolve a dispute about the prior selection decision (which could change) serves no purpose--essentially, the decision would be gratuitous. Notwithstanding its disagreement with our conclusion that the agency's commitment to make a new selection decision has rendered academic our continued consideration of the prior

the solicitation. This proposed partial corrective action did not render the protest academic because it left unresolved at least some of the specifications challenged in the protest, and that lack of resolution meant that some issues advanced in the protest were not moot.

award decision, TEN21 has shown no error warranting reversal or modification of our prior decision to dismiss its protest as academic.⁴

The request for reconsideration is denied.

Thomas H. Armstrong
General Counsel

⁴ We note, in any event, that in many cases where GAO sustains a protest challenging an evaluation, the recommendation reflects the same action that the agency has proposed here. Moreover, to the extent the agency's corrective action, when executed, gives rise to new objections from TEN21, it may file a new protest in accordance with our Regulations at that time.