



Decision

Matter of: RBVetCo, LLC d/b/a Rocky Bleier Construction Group--Costs

File: B-420698.2

Date: July 13, 2022

D. Matthew Jameson, III, Esq., Burns White LLC, for the protester.
Steven E. Devine, Esq., Department of Veterans Affairs, for the agency.
Elizabeth R. Walsh, Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the
General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation that protester be reimbursed costs associated with filing and pursuing protest is denied where record shows that agency took prompt corrective action before the deadline for submitting its agency report.

DECISION

RBVetCo, LLC d/b/a Rocky Bleier Construction Group, of Carnegie, Pennsylvania, requests that we recommend it be reimbursed the costs of filing and pursuing its protest challenging the award of a contract to PerformanceEPC, LLC, of Independence, Ohio, under solicitation No. 36C24421R0006, issued by the Department of Veterans Affairs (VA) for a boiler plant renovation project at the Lebanon VA Medical Center. In its protest, RBVetCo alleged the agency engaged in certain improper actions in connection with the award of the contract.

We deny the request.

In its protest, RBVetCo alleged that the agency issued amendment No. 0007 to the solicitation in an attempt to favor PerformanceEPC over other offerors. RBVetCo alleged that this impropriety was admitted by a former contracting officer from the agency during a meeting with RBVetCo on April 11, 2022, well after the contract had been awarded in February.

In response to the protest, the agency filed a preliminary request for summary dismissal, arguing that the protest was untimely and lacked a legal and factual basis. The agency also denied the allegations of impropriety in RBVetCo's protest. RBVetCo

filed a response to the agency's request for summary dismissal. Based on a review of the pleadings that had been filed to date, we declined to dismiss the protest in response to the agency's request at that juncture.

Subsequently, and before any agency report was due, the agency notified our Office that it was taking corrective action by terminating the award and advising that it would resolicit the project after reviewing its requirements. Based on the agency's proposed corrective action, we dismissed the protest as academic. *RBVetCo LLC d/b/a Rocky Bleier Construction Group*, B-420698, May 23, 2022 (unpublished decision). After receiving our decision dismissing its protest, RBVetCo timely filed a request that we recommend that it be reimbursed the costs of filing and pursuing its protest.

We deny RBVetCo's request. 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, thereby causing the protester to expend unnecessary time and resources to make further use of the protest process to obtain relief. 4 C.F.R. § 21.8(e); *MacroUSA Corp.-Costs*, B-408444.2, Feb. 11, 2014, 2014 CPD ¶ 65 at 2. Where an agency takes corrective action by the due date for submission of its report, we generally regard the action as prompt, and will not recommend reimbursement of protest costs. *Id.* Here, the agency took corrective action prior to the deadline for submitting its report. Accordingly, the agency's corrective action was prompt.

RBVetCo alleges that it incurred costs for what it describes as a "successful defense" against the agency's request for dismissal. However, the fact that our Office declined to dismiss the protest in response to the agency's preliminary request does not show that the preliminary request lacked merit, or that the protester had successfully defended against the agency's request. Rather, it shows no more than that we required further development of the record before conclusively ruling on the agency's request.

As we noted in our docket entry, we did no more than decline to dismiss the protest at that time, and request that the agency file its report to develop the record further. B-420698, Electronic Protest Docketing System No. 16. An agency's submission of a colorable but unsuccessful dismissal request does not constitute undue delay, or provide a basis for our Office to find a protester entitled to protest costs when the agency ultimately takes corrective action before its report is filed. *Abhe & Svoboda, Inc.-Costs*, B-412504.2, Apr. 11, 2016, 2016 CPD ¶ 99; *Livanta, LLC-Costs*, B-404215.2, Apr. 5, 2011, 2011 CPD ¶ 82 at 2.

The protester argues alternatively that the agency's decision to take corrective action in terminating the award and cancelling the solicitation was no more than a pretext to avoid responding to the merits of the protest. RBVetCo argues that this shows its protest was meritorious.

The protester did not timely object to the agency's proposed corrective action, or to our dismissal of its protest. The agency filed its corrective action letter on May 20, and our Office dismissed the protest on May 23. RBVetCo did not file its request for protest costs until June 3, more than 10 days after the date we dismissed its protest. Any challenge now to the agency's corrective action therefore is untimely. 4 C.F.R. § 21.2(a)(2). In any event, the mere fact that the agency took 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.

Finally, the protester suggests that the agency's corrective action was not "prompt" because it was taken almost five months after the agency issued amendment No. 0007 to the solicitation.

Although RBVetCo suggests that its protest objected to the substance of amendment No. 0007, in fact its protest was not focused on the terms of the amendment *per se*, but, rather, on the allegedly improper motive underlying the issuance of the amendment.¹ As noted, RBVetCo argued that the agency improperly issued amendment No. 0007 in an alleged effort to steer the contract to PerformanceEPC. The adverse agency action that allegedly prompted that protest was RBVetCo's claim that a former agency contracting official told a company official of the agency's allegedly improper motive. The agency's corrective action was taken promptly in response to that allegation, and not, as RBVetCo now claims, in response to a challenge to the terms of amendment No. 0007.

The request is denied.

Edda Emmanuelli Perez
General Counsel

¹ RBVetCo did not timely challenge the terms of amendment No. 0007. RBVet's protest was filed on April 21, well after the deadline for submitting proposals, and also well after the agency made award of the subject contract in February. See 4 C.F.R. § 21.2(a)(1) (protests alleging an impropriety in a solicitation must be filed no later than the deadline for submitting proposals).