



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Express Medical Transporters, Inc.--Reconsideration

File: B-412692.2

Date: March 6, 2017

Jordan Miller, Esq., Mills Paskert Divers, for the requester.
Neil S. Deol, Esq., Department of Veterans Affairs, for the agency.
Matthew T. Crosby, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration of a prior decision denying a protest concerning the awardee's compliance with a solicitation's limitations on subcontracting terms is denied where the requester does not show that the prior decision contains errors of fact or law that warrant reversal or modification of our decision.

DECISION

Express Medical Transporters, Inc. (EMT), of St. Louis, Missouri, requests reconsideration of our decision in Express Medical Transporters, Inc., B-412692, Apr. 20, 2016, 2016 CPD ¶ 108, in which we denied the firm's protest of the award of a contract to Wheelchair Transport Service, Inc. (WTS), of Clearwater, Florida, by the Department of Veterans Affairs (VA) under request for proposals (RFP) No. VA248-15-R-0828 for transportation services at the James A. Haley Veterans' Hospital in Tampa, Florida. EMT argues that our decision included errors of fact and law.

We deny the request for reconsideration.

BACKGROUND

The VA issued the solicitation on July 21, 2015, as a total small business set-aside. RFP at 1. Consistent with its set-aside status, the solicitation incorporated by reference the clause at Federal Acquisition Regulation (FAR) § 52.219-14, Limitations on Subcontracting (Nov., 2011). Id. at 48. This clause provides, in relevant part:

(c) By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for—

* * *

(1) *Services (except construction)*. At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.

FAR § 52.219-14(c)(1) (emphasis in original). In addition, the solicitation, at section 16.1, included a term providing that “the prime contractor must ensure that their employees are providing 51% [or] more of the effort at all times under the contract.” RFP at 42.

After evaluating the proposals submitted in response to the solicitation, the agency selected WTS for award. EMT subsequently filed a protest with the agency alleging, among other things, that WTS’s proposal should have been eliminated from the competition because it failed to comply with the solicitation’s limitations on subcontracting terms. The agency dismissed EMT’s protest. The firm then filed a protest with our Office. This protest renewed the allegations in the agency-level protest, including the allegation that WTS’s proposal should have been eliminated from the competition for a failure to comply with the solicitation’s limitations on subcontracting terms.

In support of this allegation, EMT argued, among other things, that WTS’s proposal showed WTS would rely almost exclusively on independent contractors, rather than its own employees, to perform the work. EMT based this argument primarily on references to “independent contract drivers” in attachments to WTS’s proposal.

In considering EMT’s arguments, we observed that our Office will review an allegation that an offeror does not intend to comply with a subcontracting limitation only where there is evidence on the face of the proposal that should lead the agency to conclude that the offeror has not agreed to comply with the limitation. See Express Med. Trans., Inc., supra, at 5-6. Otherwise, an agency’s judgment as to whether an offeror will comply presents a question of responsibility that is not subject to our review. See id. In addition, where an offeror submits a proposal in response to a solicitation that incorporates the clause at FAR § 52.219-14, the offeror agrees to comply with the limitation, and in the absence of any contradictory language, the agency may presume that the offeror agrees to comply with the limitation. See id.

After reviewing the record, we found that while EMT had identified several instances where WTS’s proposal included references to independent contract drivers, EMT failed to show that WTS’s proposal indicated that the firm intended to rely “almost exclusively on independent contract drivers for the work,” as EMT alleged. We also

found that there was nothing on the face of WTS's proposal that should have led the agency to conclude that the firm had not agreed to comply with the subcontracting limitation. Based on these findings, we denied EMT's protest claim that WTS's proposal should have been eliminated from the competition for a failure to comply with the solicitation's limitations on subcontracting terms.

DISCUSSION

In its request for reconsideration, EMT argues that our decision on the above-discussed protest claim "must be reversed" on several grounds. First, EMT argues that the decision improperly "downplay[ed] the numerous references [in WTS's proposal] to independent contractor drivers merely because these references are contained in 'internal training manuals and safety plans that were attached to WTS's proposal.'" Request for Recon. at 1 (quoting Express Med. Trans., Inc., supra, at 7). In connection with this argument, EMT also claims that "the consistent distinction [in WTS's proposal] between 'employees' and 'independent contractor drivers' should have led the agency to conclude that the contract 'effort' will be performed by WTS'[s] independent contractor drivers." Id.

Under our Bid Protest Regulations, to obtain reconsideration the requesting party must set out 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), (c). The repetition of arguments made during our consideration of the original protest, and disagreement with our decision, do not meet this standard. Id.; Veda, Inc.--Recon., B-278516.3, B-278516.4, July 8, 1998, 98-2 CPD ¶ 12 at 4.

As an initial matter, most of the arguments raised in EMT's request for reconsideration mirror arguments that EMT previously raised and our Office previously considered in the protest. As established above, the repetition of arguments fails to provide an adequate basis for reconsideration of our decision. 4 C.F.R. § 21.14(c). In any event, we find that EMT's arguments have no merit.

Our decision did not "downplay" the references in EMT's proposal to independent contract drivers. Rather, we expressly acknowledged the references, but found that even if they reflected that WTS had relied heavily on independent contract drivers in the past (as EMT apparently was alleging), the references did not demonstrate noncompliance with the solicitation's limitations on subcontracting terms. Express Med. Trans., Inc., supra, at 7-8. We found this to be the case for two principal reasons. First, WTS's proposal indicated that at the time of its submission, the firm had staffed only 25 percent of the drivers who would perform the contract. Id. at 8. Second, WTS's proposal provided no indication that the firm intended to rely almost exclusively on independent contract drivers to perform the work. Express Med. Trans., Inc., supra, at 7-8. Accordingly, EMT's arguments do not show an error of fact or law and thus provide no basis on which to reconsider our decision.

Next, EMT argues that the decision was in error because it included a footnote commenting that overcoming the presumption of compliance with a limitations on subcontracting clause is more challenging where, as in the procurement here, a solicitation does not require offerors to submit cost data. Request for Recon. at 2 (referencing Express Med. Trans., Inc., supra, at 7 n.7). On this point, EMT contends that “[t]he fact that a labor cost breakdown is not included in the WTS Proposal does not negate the numerous indications in the WTS Proposal that it will not use employees for 51% of the effort under the contract.” Id. This argument fails to demonstrate an error in our decision.

First, we observe that the comment in the footnote was only dicta and, as such, had no bearing on the outcome of the protest. Second, regarding EMT’s argument that there were “numerous indications in the WTS Proposal that it will not use employees for 51% of the effort,”¹ our Office already considered this argument and found there was nothing in the proposal that should have led the agency to conclude that WTS had not agreed to comply with solicitation’s limitations on subcontracting terms.

Finally, EMT argues that the decision “improperly minimizes” the distinction between the two limitations on subcontracting terms in the solicitation. As stated above, the solicitation included the clause at FAR § 52.219-14, which provides that “[a]t least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.” It also included a term providing that “the prime contractor must ensure that their employees are providing 51% [or] more of the effort at all times under the contract.” RFP at 42. Thus, one solicitation term implicates “cost,” while the other implicates “effort.”

EMT argues that “WTS[’s] Proposal is noncompliant because it clearly indicates that independent contractors will provide more than 51% of the ‘effort’ under the contract regardless of whether they comprise less than 50% of the cost of performance.” Request for Recon. at 2. This also fails to meet our standard for reconsideration.

EMT’s argument concerns a footnote in the decision that expressly recognized that the solicitation’s two limitations on subcontracting terms were ambiguous as to how compliance with the subcontracting limitation would be measured. Express Medical Trans., Inc., supra at 2 n.1. The footnote also stated that the “potential conflict” between the two terms had no effect on the outcome of the decision. Id. In other words, we found that regardless of whether compliance with the solicitation’s

¹ EMT does not provide a citation to WTS’s proposal or otherwise explain its references to “numerous indications” of WTS’s alleged noncompliance; we assume EMT is referring to the instances in WTS’s proposal where independent contract drivers are mentioned.

limitations on subcontracting terms is measured by 51 percent of the effort or 51 percent of the cost, nothing in WTS's proposal should have led the agency to conclude that WTS would not comply with the limitation.

The request for reconsideration is denied.

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General Counsel