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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Department of Veterans Affairs--Reconsideration

File: B-409705.6

Date: December 5, 2016

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DIGEST

Agency's request that our Office reconsider a prior decision sustaining a protest challenging whether an agency conducted a price realism review, and conclude instead that the protest was untimely, is denied where the record shows that the protest was timely filed within 10 days of the date the agency publicly released the awardee's price.

DECISION

The Department of Veterans Affairs (VA) requests that we reconsider our decision in B&B Medical Services, Inc.; Ed Medical, Inc., B-409705.4, B-409705.5, June 29, 2015, 2015 CPD ¶ 198. In that decision, we sustained the protests of B&B Medical Services, Inc., and Ed Medical, Inc., filed in connection with the award of a contract for home oxygen supply to First Community Care, LLC (FCC) under solicitation No. VA249-14-R-0173. We found that the VA failed to perform an adequate price realism evaluation of the proposals. The VA's request contends that we erred in finding the protest of B&B Medical timely.

We deny the request for reconsideration.

BACKGROUND

The original protest arose from a small business set-aside procurement conducted by the VA to obtain home oxygen supply services in six different locations in Veterans Integrated Service Network 9 (VISN 9). At the conclusion of the competition, the agency selected two concerns for contract awards, FCC for three

of the six locations, and Greene Respiratory, for the other three locations. By letter dated October 24, 2014, the agency advised all of the unsuccessful offerors that these two concerns were the apparent successful offerors; that the agency intended to make award to them; and that the unsuccessful offerors had an opportunity to file a size, or small-business-status protest with the Small Business Administration (SBA). FCC Agency Report (AR), exh. U. Although the October 24 notice advised the unsuccessful offerors of the identity of the two apparently successful offerors, it did not include their proposed prices.

After being advised of the agency's selection, five of the unsuccessful offerors, including the protester, filed size status challenges with the SBA alleging that FCC was other than small. In response to those size status challenges, SBA's Regional Office concluded that FCC was small. FCC Legal Memorandum, at 5. On December 5 and 12, two of the unsuccessful offerors, including B&B, filed appeals with SBA's Office of Hearings and Appeals (OHA) challenging the SBA Regional Office's determination regarding FCC's size status. Id.

On December 31, the VA published a notice of the award of three regions to Greene on the Federal Business Opportunities (FBO) website; this award to Greene is not the subject of this reconsideration request, but is nonetheless relevant to this decision. Greene AR, exh. B, FBO Announcement of Award to Greene. After that announcement was published, B&B and another firm, SS Medical, Inc., filed protests in our Office alleging, among other things, that Greene's proposed prices were unrealistically low. The agency filed separate reports in those cases. The report filed in connection with B&B's protest of the award to Greene, submitted on February 9, 2015, included a copy of all of the offerors' price proposals submitted in response to this solicitation, including FCC's price proposal. Greene AR, exh. Q, FCC Price Proposal. B&B was represented by counsel who was provided a copy of the FCC price proposal under a protective order.

On February 18, SBA's OHA denied the appeals relating to FCC's size and concluded that FCC was small for purposes of the acquisition. FCC Legal Memorandum, at 8. Thereafter, on March 13, the VA published notice of the award to FCC on the FBO website. FCC AR, exhs. A, B.¹ This notice included FCC's prices. Id. This was the first time FCC's prices were released publicly. Thereafter, on March 20, B&B filed a protest in our Office alleging that FCC's prices were unrealistically low. Ed Medical also filed a protest on March 23, alleging that FCC's prices were unrealistically low.

¹ The VA's initial notice, FCC AR, exh. A, incorrectly identified the locations that had been awarded to FCC. VA corrected the FBO notice. FCC AR, exh. B.

We sustained these protests, concluding that the agency failed to perform and document an adequate price realism evaluation.² B&B Med. Servs., Inc.; Ed Med., Inc., supra. We recommended that the agency evaluate and document its evaluation of the price realism of the offerors' proposals and make a new source selection decision. Id. at 11. We also recommended that the protesters be reimbursed the costs associated with filing and pursuing their respective protests, including reasonable attorneys' fees. Id.

DISCUSSION

In this request for reconsideration, the VA does not challenge the substantive conclusion of our earlier decision--i.e., that the agency failed to perform the price realism review promised in the solicitation. Instead, the VA argues that our Office should not have viewed B&B's protest to be timely filed.³ In support of its timeliness challenge, the agency argued during the initial protest that because B&B's counsel was provided a copy of FCC's price proposal on February 9, 2015--during B&B's challenge to the award to Greene for the other three locations covered by this solicitation--B&B was required to initiate a new protest challenging the award to FCC within 10 days of receiving FCC's price proposal as part of the agency report submitted to respond to B&B's protest of the award to Greene. In the alternative, VA alleges that B&B should have filed no later than 10 days after the SBA's OHA found that FCC was small on February 18. The VA maintains that, measured by either of these dates, the B&B protest was untimely and should not have been considered.⁴

² Both B&B and Ed Medical also raised challenges to the agency's evaluation of technical proposals. B&B's challenge essentially was that the agency's consensus technical evaluation findings appeared inconsistent with the findings of the individual evaluators. We denied this aspect of B&B's protest. B&B Med. Servs., Inc.; Ed Med., Inc., supra at 11, n.2.

³ The VA's request also complains that our June 29 decision sustaining the protests of B&B and Ed Medical should have addressed more fully the dispute over B&B's timeliness. We agree. While the June 29 decision contains an extended discussion of timeliness issues, the decision does not address, in detail, the agency's timeliness challenges that are unique to B&B. Hence, we will now address the specifics of the VA's timeliness arguments related to the protest of B&B.

⁴ The VA has not requested, and this decision does not reconsider, our holding sustaining the protest of Ed Medical, which is also included in our June 29 decision sustaining the protests of B&B and Ed Medical. In addition, the VA has completed the reevaluation recommended in the earlier decision, and again selected FCC for award. Subsequently, our Office denied a challenge by these same protesters to the reevaluation. B&B Med. Servs., Inc.; Ed Medical, Inc., B-409705.7, B-409705.8, Dec. 8, 2015, 2016 CPD ¶ 4. While this reconsideration request has no impact on the underlying procurement, the VA seeks a decision concluding that B&B's initial

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In response to the agency's timeliness argument, B&B's counsel argued that he could not have used the information obtained during the Greene protest to file a new protest challenging the realism of FCC's prices, because the information was subject to a GAO protective order issued in the Greene protest that restricted him from using the information in any matter outside the protest without the consent of our Office. B&B's counsel also maintained that he could not have initiated a new protest against FCC without the informed consent of his client, which he could not obtain because of the protective order restriction on disclosure of information provided to him during the Greene protest.

In order to prevail on a request for reconsideration, the requesting party either must show that our prior decision contains errors of fact or law, or present information not previously considered that would warrant reversal or modification of the prior decision. 4 C.F.R. § 21.14(a); Department of Veterans Affairs--Recon., B-405771.2, Feb. 15, 2012, 2012 CPD ¶ 73 at 3. We conclude that the VA's request does not meet this standard.

Under our Bid Protest Regulations, a protest based on other than alleged improprieties in a solicitation must be filed no later than 10 days after the protester knew, or should have known, of the basis of protest. 4 C.F.R. § 21.2(a)(2). We resolve doubts regarding timeliness in favor of protesters. Sigmattech, Inc., B-296401, Aug. 10, 2005, 2005 CPD ¶ 156 at 5.

As an initial matter, we point out that there is no dispute that protester's counsel was provided a copy of FCC's price proposal on February 9, 2015. There also is no dispute that when B&B's counsel received FCC's proposal in the agency's report answering B&B's protest of the award to Greene, counsel could have, and perhaps even should have, recognized that FCC's proposed pricing regarding the award locations that were not covered by Greene's award were significantly lower than B&B's proposed pricing for those other locations. However, these facts do not lead to a conclusion that B&B was required to file a protest challenging the award to FCC before the agency released FCC's prices publicly.

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protest should not have been viewed as timely. While we do not consider academic questions--for protesters or for agencies--it appears, at this juncture, that the only impact of this decision will be whether B&B should be reimbursed its protest costs associated with the June 29 decision sustaining the protests of B&B and Ed Medical. As a result, we conclude that the reconsideration request has not been rendered academic by the reevaluation, and subsequent decision.

The agency contends that our Office was required to dismiss B&B's original protest as untimely because the situation here is "virtually identical" to another case where GAO dismissed a protest as untimely. VA Recon. Req., at 4. In that case, Columbia Research Corp., B-247073.4, Sept. 17, 1992, 92-2 CPD ¶ 184, counsel for the protester filed an initial protest in our Office challenging the agency's technical evaluation. In connection with that protest, counsel requested, and was provided, a copy of the awardee's entire proposal, including its price proposal. Thereafter, we denied the challenge to the evaluation of technical proposals in a decision that revealed the awardee's price. Upon receiving our decision, the protester filed a second protest challenging the evaluation of price, maintaining that the awardee's price was unrealistically low.

We dismissed Columbia Research's second protest as untimely, despite the fact that the protester (as opposed to its counsel) maintained that it did not know the awardee's price until after receiving our decision. We found that protester's counsel had adequate knowledge to file the price challenge allegation once he received the awardee's price proposal. We stated:

Although CRC [Columbia Research Corporation] contends that its counsel was precluded by the protective order from even telling his client that TERI's [the awardee's] price was significantly lower than CRC's, and thereby gaining CRC's expertise on the question of how realistic TERI's price was, such a communication in fact was not necessary. Since the record already included CRC's view that a lower price than its own could not be realistic, the only piece of information CRC's counsel was missing to raise this protest ground was TERI's price. When counsel received this price information, therefore, we consider him to have been on notice of the basis for protest, and measure timeliness from this point.

Columbia Research Corp., supra, at 4.

A crucial distinction between Columbia Research Corp. and the instant dispute lies in the fact that the information provided to counsel in Columbia involved the same award and awardee as the earlier protest. In essence, the information simply provided a supplemental ground of protest to challenge the same award, which the counsel did not pursue. In contrast, the VA argues that counsel for B&B, while pursuing a protest for B&B against an award to Greene (at other locations), was required to use information learned in that protest to initiate a new protest against a different awardee (FCC), involving different award locations. We conclude that the outcome urged by the VA here extends our analysis in Columbia a step too far.

In fairness, the VA makes strong arguments to support its contention. For example, counsel knew that B&B regarded Greene's prices--on average 4.7 percent lower than B&B's prices--as unrealistically low. It follows that B&B also would have

regarded FCC's prices--on average 31.6 percent lower than B&B's--as unrealistically low as well. Thus, the VA argues that there would have been no need for B&B's counsel to convey any details about FCC's prices in order to obtain his client's informed consent to file the protest with our Office. In addition, the VA points out that, at the time this information was revealed to B&B's counsel, he already was engaged in a size protest against FCC at SBA, and there is nothing in the record to suggest that B&B also would not be interested in pursuing a protest at GAO if advised by counsel that such a course of action could prove fruitful. Finally, the VA points out that counsel for B&B made no effort to obtain authorization from our Office to use the information revealed in the Greene protest to file a protest against FCC.

As stated above, we acknowledge that counsel for B&B possibly could have deduced that B&B would elect to retain him to pursue a protest of a different award to a different company involving different locations. That said, we do not think this level of deduction should establish the rule for filing a timely protest. Instead, we measure the timeliness of this protest from the time the agency announced the awardee's price in its March 13 FedBizOpps notice.

The request for reconsideration is denied.

Susan A. Poling
General Counsel