



Decision

Matter of: Walker Development & Trading Group, Inc.--Recon.

File: B-414258.4

Date: September 13, 2017

Terrance Walker, for the protester.
Jennifer L. Hedge, Esq., Department of Veterans Affairs, for the agency.
Kenneth Kilgour, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Request for reconsideration of a decision in a prior cost claim is denied where the request sets forth no errors of law or fact upon which reversal of the decision is warranted.

DECISION

Walker Development & Trading Group, Inc., of Reno, Nevada, requests that we reconsider our decision denying Walker's request for the reimbursement of costs incurred in pursuing its protest of the terms of request for quotations (RFQ) No. VA69D-17-Q-0262, issued by the Department of Veterans Affairs (VA) for cardiac arrhythmia monitoring services.

We deny the request for reconsideration.

BACKGROUND

On January 2, 2017, Walker filed its protest arguing that the agency, pursuant to Federal Acquisition Regulation (FAR) § 19.502-2(b), should have set the requirement aside for small businesses.¹ Protest at 2-3. The agency filed its report on January 31.

¹ Under FAR § 19.502-2(b), a procurement with an anticipated dollar value of more than \$150,000 must be set aside for exclusive small business participation when there is a reasonable expectation that offers will be received from at least two responsible small business concerns, and award will be made at a fair market price. See also 13 C.F.R. § 125.2(f)(2).

The contracting officer stated that, after performing market research, she did not have a reasonable expectation that two or more capable small businesses would submit offers, and that these offers would be at a fair price. Contracting Officer's Statement (COS) for B-414258.1, at 3. On February 10, Walker submitted its comments on the agency report. After our review of the agency's report and the protester's comments, we asked the agency to file a supplemental report. In particular, we requested additional information on two potentially capable small businesses. We also asked the Small Business Administration (SBA) to file comments on the propriety of the VA's decision to procure this requirement on an unrestricted basis. The supplemental report was due on March 1.

On February 28, before filing the supplemental agency report, the VA advised our Office that it intended to take corrective action by "cancelling the solicitation, reviewing market research and re-examining the set-aside determination." Agency Notice of Corrective Action for B-414258.1, Feb. 28, 2017, at 1. The VA further advised that following these actions, it "may determine that a different set-aside determination is warranted." Id. Based on the notice of corrective action, we dismissed the protest as academic. Walker Dev. & Trading Group, Inc., B-414258, March 14, 2017 (unpublished decision).

On March 14, Walker filed a request that it be reimbursed its costs of pursuing its protest. Walker asserted that its protest was clearly meritorious and that the agency unduly delayed taking corrective action. Req. for Costs at 2. The agency argued that the protest allegation was not clearly meritorious, the agency's corrective action was not in response to Walker's protest allegation, and therefore, the agency took timely corrective action. Agency Response to Req. for Costs at 3-6. In response, Walker argued that the documents presented by the VA identified three small businesses capable of providing the required services and therefore the VA failed to act promptly in responding to the initial protest allegations. Response to Req. for Costs at 2-4.

On June 8, our Office denied Walker's request for reimbursement of costs, finding that the protest allegation was not clearly meritorious where the resolution of the protest required further record development. Walker Dev. & Trading Group, Inc.--Costs, B-414258.3, June 8, 2017, 2017 CPD ¶ 184. We did not make a finding as to whether the corrective action was unduly delayed. See id. Walker has requested reconsideration of that decision.

DISCUSSION

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

Walker asserts that our decision denying its request for reimbursement contained several errors of fact and law. We address each of those assertions in turn.

Walker argues that the decision contained a legal error because it failed to consider whether the agency unduly delayed in taking corrective action. Req. for Reconsideration at 2. As noted above, our denial of the request for reimbursement of costs did not reach the issue of whether the agency's corrective action was prompt. To prevail in a request for reimbursement, a protester must show both that its protest was clearly meritorious and that the agency unduly delayed in taking corrective action. 4 C.F.R. § 21.8(e); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. Our decision, which found Walker's allegation was not clearly meritorious, did not need to reach a decision as to the timeliness of the agency's corrective action.

In addition, Walker asserts that our decision contained a legal error because it incorrectly implied that a contracting officer must identify three, not two, small businesses before setting aside a requirement for small businesses. Req. for Reconsideration at 3. The decision did not imply such a standard. Rather, we explicitly stated the correct standard. See Walker Dev. & Trading Group, Inc.--Costs, *supra* at 2 (noting that the contracting officer decided to pursue an unrestricted competition because "she did not have a reasonable expectation of receiving responses from two or more capable small business[es]" and stating that under FAR § 19.502-2(b) a procurement exceeding \$150,000 must be set aside when there is a reasonable expectation that offers will be received from at least two responsible small businesses).

Walker also argues that our Office made an error of fact when it stated that Walker, not the agency, "identified" a third small business for the procurement. Req. for Reconsideration at 1. This assertion is based on a misreading of our decision, which stated that Walker's comments on the agency report "identified a third firm, in addition to the two identified in its protest, that was potentially capable of satisfying the requirements of the RFQ. Comments for B-414258 at 2, 7." Walker Dev. & Trading Group, Inc.--Costs, *supra* at 2. Walker's comments, at pages 2 and 7, cite directly to the agency report. See Comments for B-414258 at 2, 7. The protester's comments, by way of citations to the agency report, identified market research with the potential to support the protest allegations. Thus, the decision did not contain any error of fact. Further, it was after a review of Walker's comments and the agency report that the GAO attorney requested additional record development from the agency. See Walker Dev. & Trading Group, Inc.--Costs, *supra*.

Walker also argues that the decision improperly considered the need for further record development in determining whether the protest allegations were clearly meritorious. Req. for Reconsideration at 3. Walker has provided no support for its contention that, when further record development is the result of agency action or inaction, the need for a more complete record should not be considered when assessing whether a protest is clearly meritorious. We thus find no error where GAO requested a supplemental agency report responsive to the comments on the agency report, and, because

resolution of the protest required further record development, we determined that the protest allegation was not clearly meritorious.

Finally, Walker asserts that our Office made a “conclusory determination that this protest was a close question,” after “simply accept[ing] the VA’s bare conclusion that this was a close question.” Req. for Reconsideration at 3. While the protester characterizes this allegation as an error of fact, Walker offers nothing but disagreement with the GAO’s independent conclusion about whether the protest allegations were clearly meritorious. See Req. for Reconsideration at 3-4.

The request for reconsideration is denied.

Susan A. Poling
General Counsel