



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: AeroSage, LLC--Reconsideration

File: B-417247.2

Date: April 5, 2019

David M. Snyder, for the protester.

Matthew Vasquez, Esq., and May Sena, Esq., Defense Logistics Agency, for the agency.

Alexander O. Levine, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration of prior decision is denied where the requesting party has not shown that our decision contains either errors of fact or law or information not previously considered that warrants reversal or modification of the decision.

DECISION

AeroSage, LLC, of Tampa, Florida, a service-disabled veteran-owned small business, requests reconsideration of our decision in [AeroSage, LLC](#), B-417247, Feb. 27, 2019 (unpublished decision), regarding request for proposals (RFP) No. SPE605-18-R-0231, issued by the Defense Logistics Agency (DLA) to supply ground fuel to various locations in Puerto Rico. In the protest, AeroSage argued that DLA violated veteran-owned small business set-aside provisions, improperly failed to set aside the procurement for small businesses or service-disabled veteran-owned small businesses (SDVOSBs), did not comply with DLA's congressionally mandated SDVOSB set-aside goals, and engaged in improper negotiations. Our Office dismissed the protest.

We dismiss the request for reconsideration.

DLA issued the RFP dated August 6, 2018, for various types of fuel to be delivered to different locations in Puerto Rico. RFP at 1. Under amendment 5 to the solicitation, offerors were required to submit a transportation agreement, an offeror's submission packet, a supply commitment letter, and a certificate of analysis for each product being offered. RFP amend. 5 at 2. Amendment 7 established the due date for initial proposals as October 26 at 4:30 p.m. RFP, amend. 7 at 1.

On October 26, at 4:26 p.m., AeroSage sent an email to the agency objecting to “improprieties” in the solicitation, specifically asserting that the procurement was improperly bundled and also that it should have been set aside for SVDOSBs or small businesses. Request for Dismissal, Exh. 2, AeroSage Email. Aero Sage also submitted a proposal in response to the RFP. On November 20, the agency sent a letter to AeroSage containing negotiation issues. The letter set a response date of November 27. Negotiation Email, Nov. 20, 2018. AeroSage did not respond to the negotiation letter and instead, on November 29, submitted a protest to the agency in which it asserted that DLA had not conducted meaningful negotiations. Request for Dismissal, Exh. 3, AeroSage Protest, Nov. 29, 2018, at 2. AeroSage also asserted that the agency added improper requirements to the solicitation, including the requirement for certificates of analysis and letters of commitment. Id. In addition, AeroSage repeated the challenges to the terms of the solicitation that it raised in its October 26 email to the agency. Id.

On January 4, 2019, the agency dismissed both of AeroSage’s agency-level protests. On January 7, AeroSage filed an additional agency-level protest in which it disagreed with the agency’s January 4 response regarding the solicitation improprieties, and requested that the protest be reviewed at a level above the contracting officer. Request for Dismissal, Exh. 5, AeroSage Email to DLA. On January 10, the agency notified AeroSage that it had awarded five contracts under the solicitation.

On January 15, AeroSage filed its protest with our Office, raising the same arguments that it raised in its October 26, and November 29 agency-level protests. On January 18, DLA wrote to AeroSage concerning its January 7 protest and explained that AeroSage had already received a decision on its agency-level protests and the matter was closed. Request for Dismissal, Exh. 6, DLA Letter to AeroSage.

On February 27, our Office dismissed the protest. Our Office explained that AeroSage’s challenges to the solicitation terms, which were first raised in the October 26 agency-level protest, should have been filed with our Office within 10 days of “actual or constructive knowledge of initial adverse agency action,” in this case, DLA’s proceeding with accepting offers on October 26. AeroSage, LLC, supra, at 2-3 (quoting 4 C.F.R. § 21.2(a)(3)); see also Zapata Gulf Marine Corp., B-235249, July 27, 1989, 89-2 CPD ¶ 85 at 3-4. Our Office additionally found AeroSage’s November 29 challenge to the requirements for certificates of analysis and commitment letters to be untimely since the protest ground concerned an impropriety that was apparent from the face of the solicitation, but the protest was not filed with the agency prior to the closing time for the receipt of proposals. AeroSage, LLC, supra at 3. Last, our Office concluded that AeroSage’s challenge to the November 20 negotiations letter failed to state a valid basis of protest because the protester did not explain why the agency’s actions violated a procurement law or regulation. Id. at 3 n.3.

The protester argues that the decision should be reconsidered because it contains errors of fact and law. In this regard, AeroSage asserts that its protest with our Office was timely because it was a protest of “award improprieties” that was made within 10

days of award. Request for Recon. at 1. The protester further argues that all of the protest arguments were timely made within 10 days of different adverse agency actions. The protester additionally asserts that the decision erred by dismissing the protest without first requiring the agency to submit a report in response to the protest. AeroSage also contends that its protest raised issues significant to the procurement system, and therefore, under 4 C.F.R. § 21.2(c), should not have been dismissed as untimely.¹ Last, the protester asserts that “new information validates the alleged protest facts that these awards were improperly made to favored vendors.” Request for Recon. at 3.

To prevail on a request for reconsideration, the requesting party either must show that our prior decision contains errors of either fact or law, or must 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. Our Office will not consider a request based on repetition of arguments previously raised, and disagreement with the prior decision does not meet the standard for granting reconsideration. Id. at § 21.14(c); Veda, Inc.--Recon., B-278516.3, B-278516.4, July 8, 1998, 98-2 CPD ¶ 12 at 4. Here, AeroSage’s request does not demonstrate that our decision contained an error of fact or law, and does not present new information warranting reversal or modification. We therefore conclude that the request does not meet our standard for reconsideration.

In this regard, the protester fails to demonstrate that our Office erred in concluding that AeroSage’s protest was not filed with our Office “within 10 days of actual or constructive knowledge of initial adverse agency action.” 4 C.F.R. § 21.2(a)(3). While the protester contends that it filed its GAO protest “based on different specific adverse actions,” Request for Recon. at 1, it does not directly address our Office’s finding that these

¹ AeroSage also challenges our Office’s requirement that SageCare Inc., an affiliate of the protester, pay a separate electronic protest docketing system (EPDS) fee. The protester argues that SageCare should be permitted to avoid payment of the fee because the protest at issue was filed jointly by AeroSage and SageCare, and these protesters paid the fee once. As an initial matter, we note that contrary to the protester’s suggestion, the requirement for each protester to pay an EPDS fee did not remove protest information from our Office’s consideration, since AeroSage remained a party to the proceeding. The protester has not explained the basis for this contention, or provided any support for it.

Moreover, we find nothing objectionable about requiring each protester to pay an EPDS filing fee. Section 1501 of the Consolidated Appropriations Act for 2014 authorizes our Office to “require each person who files a protest under this subchapter to pay a fee to support the establishment and operation of the electronic system under this subsection.” Pub. L. No. 113–76, § 1501, 128 Stat. 5, 434 (Jan. 17, 2014), codified at 31 U.S.C. § 3555(c)(2)(A). In addition, nothing in either the EPDS instructions or in our Bid Protest Regulations permits multiple parties to file joint protests.

subsequent agency actions were not the initial adverse agency action. As our decision noted, with respect to the protester's October 26 agency-level protest, the initial adverse agency action was the contracting activity having proceeded with accepting offers, at which point the protester was first on notice that the agency would not undertake the requested corrective action. AeroSage, LLC, supra, at 3. Since the protester did not file a protest within 10 days of this date, we find that our decision did not err in concluding that this protest ground was untimely.

Similarly, we find no error of fact or law with respect to the decision's dismissal of AeroSage's challenge to the requirements for offerors to submit certificates of analysis and commitment letters. In this regard, for challenges of alleged solicitation improprieties, our Bid Protest Regulations require an interested party to file a protest prior to the time set for the receipt of initial proposals. 4 C.F.R. § 21.2(a)(1). The protester has not rebutted our Office's finding that this protest ground was not raised with the agency until November 29, which was well after the October 26 due date for initial proposals.

In its request for reconsideration, AeroSage argues that its protest was timely because the protest challenged "award improprieties," and was filed within 10 days of the protester receiving an award notification. Request for Recon. at 1. We note, however, that the substance of AeroSage's challenge was, in fact, to the terms of the solicitation. We have consistently recognized that a protester cannot wait until after award to challenge solicitation improprieties, even where it attempts to challenge such solicitation terms under the guise of a protest to an awarded contract. See, e.g., Pulaski Furniture Corp., B-206444.4, Feb. 23, 1983, 83-1 CPD ¶ 185 at 3.²

We therefore find that our decision did not err in dismissing AeroSage's complaints pertaining to the terms of the solicitation as untimely. The protester contends, however, that its protest raises "issues significant to the procurement system" and should therefore be considered by our Office under an exception to our timeliness requirements. Request for Recon. at 2. In this regard, pursuant to 4 C.F.R. §21.2(c), our Office may consider the merits of an untimely protest where good cause is shown or where the protest raises a significant issue of widespread interest to the procurement community. Global Aerospace Corp., B-414514, July 3, 2017, 2017 CPD ¶ 198

² Additionally, we find to be baseless the protester's assertion that our Office prematurely and improperly dismissed the protest prior to the deadline for the agency report. As our Office explained in Latvian Connection LLC--Recon., B-415043.3, Nov. 29, 2017, 2017 CPD ¶ 354 at 11 n.14., our Bid Protest Regulations permit us to stay the requirement for submission of an agency report pending consideration and resolution of a party's request for dismissal. Id. (citing 4 C.F.R. §§ 21.3, 21.5, 21.10(e)). This long-standing practice saves the procuring agency the time and effort of preparing a report where dismissal of the protest may be warranted, which is entirely consistent with the Competition in Contracting Act's statutory mandate that GAO provide for the "inexpensive and expeditious" resolution of protests. Id. (citations omitted).

at 7 n.7. In order to prevent our timeliness rules from becoming meaningless, however, exceptions are strictly construed and rarely used. Hawker Beechcraft Def. Co., LLC, B-406170, Dec. 22, 2011, 2011 CPD ¶ 285 at 4 n.4. Here, we do not find that AeroSage's untimely protest raises a significant issue of widespread interest to the procurement community, and therefore do not find that it qualifies for the applicable exception.

Last, AeroSage contends that new information--specifically a "Justification for Other than Full and Open Competition" document issued by DLA to award a new contract for this requirement--validates the merits of the protester's challenge to the agency's allegedly improper requirements and actions. Request for Recon. at 3. We find, however, that this "new information" does not bear on the bases for our dismissal of AeroSage's protest and therefore does not warrant the reversal or modification of our decision.

The request for reconsideration is dismissed.

Thomas H. Armstrong
General Counsel