



Decision

Matter of: United States Marine Corps--Reconsideration

File: B-417830.2

Date: March 6, 2020

Lisa L. Baker, Esq., and Major Will A. Schmitt, United States Marine Corps, for the agency.

Dr. George B. Inabinet, III, for High Noon Unlimited, Inc., an intervenor.

Michael Willems, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's request for reconsideration of a decision sustaining a protest is dismissed as untimely because the agency did not file its request in accordance with our Office's established regulations and instructions.

DECISION

The United States Marine Corps requests reconsideration of our decision High Noon Unlimited, Inc., B-417830, Nov. 15, 2019, 2019 CPD ¶ 387, in which we sustained High Noon's protest against the award of a contract to High Speed Gear, Inc., under request for proposals (RFP) No. M67854-19-R-1549, issued by the Marine Corps for a quantity of rifle magazine pouches. The Marine Corps contends that our earlier decision contains errors of fact and law that warrant reconsideration of that decision.

We dismiss the request for reconsideration.

BACKGROUND

On August 7, 2019, High Noon filed a protest with our Office alleging, among other things, that the award to High Speed was improper because High Speed's magazine pouch was significantly heavier than was permitted by the solicitation. Protest at 2-3. Specifically, High Noon alleged that the selected magazine pouch, on its own, weighed 0.30 pounds, while the solicitation required that magazine pouches must weigh less than 0.24 pounds. Id. Additionally, High Noon's protest speculated that the weight differential was probably even greater because the agency had calculated the weight of

the awardee's product without the awardee's clips that are required to attach the awardee's product to the rifle. Id. at 3.

The agency report confirmed that the agency had weighed the awardee's samples without its clips, but offered no explanation for that decision. Combined Memorandum of Law and Contracting Officer's Statement (MOL/COS) at 2. In its comments on the agency report, High Noon argued that the agency was required to weigh the samples with their clips because the solicitation required that the product must attach to the rifle, and the clips in question were necessary for the awardee's product to meet that requirement. Comments at 3-4. Additionally, in support of its interpretation of the solicitation, High Noon pointed to a Request for Information (RFI) that the agency issued prior to its issuance of the solicitation, which indicated that the agency would weigh "the total system." Id.

On September 30, the agency filed a request for dismissal on the basis that High Noon's arguments concerning the methodology for weighing the samples, among other things, were untimely supplemental protests. See Agency's Second Request for Dismissal, generally. In the alternative, the agency requested an opportunity to respond to the merits of High Noon's supplemental allegations. Id. On October 21, the GAO attorney assigned to the protest indicated that no additional information was required to resolve the protest. See Electronic Protest Docketing System (EPDS) Docket Entry No. 24.

On November 15, 2019, our Office sustained High Noon's argument concerning the agency's failure to weigh the awardee's product with clips. See High Noon Unlimited, Inc., supra. On the agency's request for dismissal, the decision noted that the protester effectively raised its argument concerning the agency's weighing methodology in its original protest. Id. at 3-5. The decision also noted that the protester's comments merely represented an amplification of its original argument in light of information in the agency report, which confirmed the protester's contentions, and was not an untimely supplemental protest. Id. Regarding the merits of the protest, our decision noted that the RFP required the offered product to have a threshold weight of no more than 0.24 pounds to be acceptable. The decision concluded that the agency erred when it weighed the awardee's product samples without the required clips because the product would not be usable for its intended purpose without the clips; the agency, in effect, weighed only a part of the product. Id. at 7. Additionally, our Office noted that the agency's methodology was inconsistent with the guidance it offered in the pre-solicitation RFI. Id.

At 4:55 p.m. on November 25, the agency filed a "Response to GAO Sustain Recommendation" entry in EPDS on the B-417830.1 protest docket. EPDS Docket Entry No. 26. At 5:28 p.m. the GAO attorney assigned to the initial protest advised the agency that "[i]n order to file a request for reconsideration, please refer to the instructions in the EPDS User Manual available at GAO's public website (note the request for reconsideration tab at the left)." Id. At 5:59 p.m., the agency submitted the instant request for reconsideration through the reconsideration tab in EPDS.

DISCUSSION

The agency argues that our decision erred in several respects. First, the agency contends that our Office erred by refusing to permit the agency to respond to what it characterizes as the protester's supplemental protest grounds. Request for Reconsideration at 6-7. Second, the agency contends that the RFI relied on by the protester and our decision was not subsequently incorporated into the RFP. Id. at 7-11. More significantly, the agency contends that the RFP contradicted the RFI in numerous respects, including the manner in which the products would be weighed. Id. Specifically, the agency contends that the RFP expressly provided that only the magazine pouch, without clips, would be weighed. Id.

We have reviewed the agency's request and conclude, for the reasons described below, that it is untimely. However, we also conclude that, even were it timely, it would not provide a basis for us to reconsider our earlier decision.

Our Regulations require that a request for reconsideration must be filed not later than 10 days after the basis for reconsideration is known or should have been known, whichever is earlier. 4 C.F.R. § 21.14(b). Further, our Regulations establish that EPDS is GAO's web-based electronic docketing system and our website includes instructions and guidance on the use of EPDS. Silverback7, Inc.--Recon, B-415311.9, Nov. 15, 2018, 2018 CPD ¶ 392 at 2. Under our regulations, "[d]elivery of a protest or other document by means other than those set forth in the online EPDS instructions does not constitute a filing." 4 C.F.R. § 21.0(g) (emphasis added). The EPDS instructions set forth the instructions that govern electronic filings for protests before our Office and supplement our protest regulations. AeroSage, LLC, B-417289, Apr. 24, 2019, 2019 CPD ¶ 151 at 7 n.6.

As relevant here, the EPDS instructions specifically state that requests for reconsideration must be filed through EPDS and warn that requests "will not be deemed 'filed' in accordance with GAO's Bid Protest Regulations until the Filer has submitted all of the information required by EPDS through the appropriate portal in EPDS." EPDS Instructions § III.7(a) (emphasis added). As explained in the EPDS user manual for agency points of contact or representatives, after a case is closed, an additional filing option to file a request for reconsideration becomes available on the EPDS case docket sheet. EPDS Agency Point of Contact (POC)/Representative User Manual at 49-51. Accordingly, the appropriate portal in EPDS to file a request for reconsideration of a GAO decision would be through the "Request for Reconsideration" portal option. See HEJV Energetics Joint Venture, LLC--Costs, B-413104.39, Aug. 5, 2019, 2019 CPD ¶ 286 (finding that a request for costs was untimely because it was not filed through the appropriate portal for requests for costs).

Here, the agency's 4:55 p.m. filing of a "Response to GAO Sustain Recommendation" entry in the protest docket was not the appropriate portal in EPDS to file its request for reconsideration. The agency did not file its request in the correct portal until 5:59 p.m.

Our Regulations are clear that filings received after 5:30 p.m. will be treated as having been filed on the following business day, which in this case was November 26, more than 10 days after our decision. 4 C.F.R. § 21.0(g).

The agency argues that our Regulations are, in essence, ambiguous because the EPDS Instructions, which are incorporated by reference into our Regulations, only refer to an “appropriate portal,” without explaining which portal is appropriate. Agency Response to Request for Briefing on Timeliness at 2-7. This is significant, the agency contends, because the more detailed information regarding the “appropriate portal,” is only found in the user guides, which are not incorporated by reference in our Regulations. Id. We find this argument unpersuasive because, to the extent there was any ambiguity, which we do not concede, it was laid to rest in HEJV Energetics Joint Venture, LLC--Costs, a directly analogous case about a request for costs. In that case we expressly addressed the question of the “appropriate portal,” and explained that it is outlined in GAO’s EPDS user manual. See HEJV Energetics Joint Venture, LLC--Costs, supra. Accordingly, we conclude that the request for reconsideration is untimely because it was not filed in the appropriate portal in EPDS within ten days of the agency’s receipt of our decision.¹ HEJV Energetics Joint Venture, LLC--Costs, supra.

Even if the request were timely, it would not provide a basis to reconsider our decision. To prevail on a request for reconsideration, the requesting party either must show that our decision contains errors of fact or law, or present information not previously considered, and which could not have been provided during the original protest, that warrants the decision’s reversal or modification. 4 C.F.R. § 21.14(a) (2011); Department of Veterans Affairs--Recon., B-405771.2, Feb. 15, 2012, 2012 CPD ¶ 73 at 3. The agency’s request does not meet this standard.

The agency initially argues that our Office erred by refusing to permit it to respond to the protester’s comments concerning the weighing process, which the agency characterizes as a supplemental protest ground. Agency Request for Reconsideration at 6-7. Our decision concluded that the protester raised the question of the awardee’s product weight in its original protest, and noted that the protester questioned whether the difference between the awardee’s advertised weight and the agency’s observed weight might have resulted from the agency’s omitting the necessary clips. High Noon Unlimited, Inc., supra at 3-5. As a result, our decision concluded that the protester’s

¹ The agency also argues that, even if this request for reconsideration is untimely, we should nonetheless consider it because it presents issues of significant interest to the procurement system. Response to Request for Briefing on Timeliness at 7-9. While our Regulations provide for consideration of untimely protests where a significant issue is involved or good cause shown, 4 C.F.R. § 21.2(c), there is no similar provision regarding untimely requests for reconsideration. See Simulators Limited, Inc.--Recon., B-208418.2, Mar. 17, 1983, 83-1 C.P.D. ¶ 274. Furthermore, an agency’s request for reconsideration is held to the same stringent filing standard as the request of any other party. See Indian and Native American Employment and Training Coalition--Request by Department of Labor for Reconsideration, B-218973.2, Oct. 2, 1985, 85-2 CPD 371 at 2.

comments merely represented an amplification of its original protest ground, not a supplemental protest ground. Id. We do not believe our decision is in error in this respect.

While, as the agency notes, the protester raised the RFI in support of its understanding of the solicitation requirements for the first time in its comments, the agency had already had ample opportunity to respond on the question of product weight and its weighing methodology, issues squarely raised in the original protest. See Protest at 2-3. In short, given that the product weight and weighing methodology were clearly at issue, the agency had sufficient notice to raise its current arguments concerning these issues in its original agency report. Since the agency could have responded on these points in its agency report, we do not agree that it was legal error to decline to permit the agency to respond on these points a second time.

In any event, even considering the agency's substantive arguments on the merits, they are unavailing. The agency argues that our decision was wrong because the RFP was clear that the source sample to be weighed excluded any provided clips. Request for Reconsideration at 7-11. Specifically, the agency alleges that the solicitation clearly stated that the agency would weigh three of the provided "source selection samples," and further defined "source selection samples" as the "magazine pouch" only, and that the included clips were not part of the "source selection sample" so defined. Id. at 7-8. The agency argues, accordingly, that the protester's reading of the solicitation is unreasonable, or, in the alternative, the solicitation was patently ambiguous because the ambiguity in question was plain on the face of the solicitation. Id. at 9-11. The agency further contends that our decision erroneously concluded that the protester's reading was reasonable on the basis of RFI Questions and Answers that were superseded by and not incorporated in the subsequent RFP. Id. at 7-11. For the reasons described below, we see no basis to reconsider our decision because the reading of the RFP offered by the agency here is not reasonable.

Where a dispute exists as to a solicitation's actual requirements, we will first examine the plain language of the solicitation. Intelsat General Corporation, B-412097, B-412097.2, Dec. 23, 2015, 2016 CPD ¶ 30 at 8. Where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. Crew Training Int'l, Inc., B-414126, Feb. 7, 2017, 2017 CPD ¶ 53 at 4. An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible; a patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, while a latent ambiguity is more subtle. Id.

Contrary to the agency's argument, the solicitation did not define "source selection samples" as magazine pouches only; rather, the solicitation indicated in a table that the source selection samples to be sent to the agency should consist of "24 Rifle Magazine Pouches." Request for Reconsideration, Tab 4, RFP at 4. That is to say, the definition

was focused on the quantity of product to be provided to the agency for evaluation. Moreover, it is not at all clear that the RFP and its incorporated questions and answers define a “magazine pouch” in a way that excludes the clips. Specifically, statement of work (SOW) provision 2.3.2 notes, under the heading “Commercial Item Description,” that the item “[m]ust be compatible with the current Pouch Attachment Ladder System (PALS) for attachment to current load bearing equipment.” Request for Reconsideration, Tab 5, SOW at 1-2. More significantly, in the RFP questions and answers, an offeror asked “[w]hat type of attachment system is desired, such as PALS?” Request for Reconsideration, Tab 7, RFP Questions and Answers, Question 3. The agency responded “[a]s stated in 2.3.2 of the SOW, the pouch must be compatible with PALS.” (emphasis added). Id. However, no party suggests that the awardee’s magazine pouch is compatible with PALS without the included clips. Put another way, had the awardee read the source selection sample definition in the way the agency suggests and sent 24 magazine pouches with no attachment clips, the awardee would have certainly been found to be technically unacceptable.²

Therefore, the agency’s reading of the definition of the source selection sample as excluding clips is not reasonable because it is not consistent with the solicitation when read as a whole, and would lead to an unreasonable outcome. We see no error of law or fact in our original conclusion that the agency’s decision to weigh the magazine pouches without clips does not withstand logical scrutiny.³ High Noon Unlimited, Inc., supra at 7.

Alternatively, even if we view the agency’s argument in the light most favorable to it, and assume that the agency’s reading of the RFP is reasonable, the protester’s alternative reading of the solicitation is also reasonable, for the reasons discussed above. That is

² Moreover, as noted in our prior decision, this interpretation of the plain language of the RFP was entirely consistent with guidance provided by the agency in connection with the pre-solicitation RFI, which, when a prospective offeror asked whether removable clips would be included in the weight calculation, expressly advised that “[t]he total system would be evaluated for weight.” High Noon Unlimited, Inc., supra at 7. While we agree with the agency that an RFP’s language clearly controls where it conflicts with an unincorporated pre-solicitation RFI, we do not agree that the provisions are in conflict.

³ We note that the agency also argued that our decision committed error in relying on irrelevant extrinsic evidence concerning the weight of the awardee’s magazine pouch. Request for Reconsideration at 11-12. Specifically, the agency argues that GAO relied on data concerning the awardee’s generally available commercial product rather than the product actually evaluated by the government which was meaningfully lighter than its commercial offering. Id. However, while the agency alleges that the offered product, when weighed without clips, met the solicitation’s weight requirement, the agency has not alleged that the offered product, when weighed with clips, met the solicitation’s weight requirement. See Id. In light of our view that the RFP’s language reasonably required that the pouches be weighed with clips, we cannot conclude that the agency was prejudiced by this alleged error.

to say, even if the agency's reading were reasonable, the solicitation would be ambiguous, and, contrary to the agency's suggestion, such an ambiguity was not obvious on the face of the solicitation. This is especially so when the protester's reading of the RFP is, in our view, the more natural reading of the RFP language.

Accordingly, such an ambiguity would be a latent ambiguity, and when dealing with latent ambiguities, we will sustain a protest where a latent ambiguity prevented offerors from competing intelligently on a relatively equal basis, as was the case in this procurement. Coastal Int'l Security, Inc., B-411756, B-411756.2, Oct. 19, 2015, 2015 CPD ¶ 340 at 8. As such, even were this request timely, and even were the agency's reading of the RFP reasonable, the protest would nonetheless have been sustained, albeit on a different basis.

The request for reconsideration is dismissed.

Thomas H. Armstrong
General Counsel