



Decision

Matter of: Optimo Information Technology, LLC--Reconsideration

File: B-419956.351

Date: July 24, 2023

Eden Brown Gaines, Esq., Brown Gaines, LLC, for the protester.
Karyne C. Akhtar, Esq., Krystal Jordan, Esq., and Kevin Misener, Esq., Department of Health and Human Services, for the agency.
Anh-Thi H. Le, and Evan D. Wesser, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration of our decision dismissing the protest for failure to comment is denied where the protester's comments were untimely filed, and, therefore, our prior decision was not based on a material factual or legal error.

DECISION

Optimo Information Technology, LLC, a small business of Bloomsburg, Pennsylvania, requests reconsideration of our decision, *Optimo Information Technology, LLC*, B-419956.258, June 21, 2023, 2023 CPD ¶ 148, dismissing its protest challenging the exclusion of its proposal from the competition conducted by the Department of Health and Human Services, National Institutes of Health (NIH), under request for proposals (RFP) No. 75N98121R00001, which was issued for the award of multiple indefinite-delivery, indefinite-quantity governmentwide acquisition contracts for information technology (IT) services, known as Chief Information Officer-Solutions and Partners (CIO-SP4).

We deny the request for reconsideration because it fails to establish any material factual or legal errors with respect to the underlying decision dismissing Optimo's protest.

To obtain reconsideration under our Bid Protest Regulations, 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.

Our Office dismissed Optimo's underlying protest pursuant to 4 C.F.R. § 21.3(i) for failing to timely submit comments in response to the agency's report. To avoid delay in the resolution of protests, our regulations provide that a protester's failure to file comments within 10 calendar days "shall" result in dismissal of the protest except where GAO has granted an extension or has established a shorter period. 4 C.F.R. § 21.3(i).

As addressed in our prior decision, Optimo's comments were due by the close of business, *i.e.*, 5:30 p.m. Eastern Time, on May 22. However, Optimo did not file its comments on the agency report in the Electronic Protest Docketing System (EPDS) until 5:40 p.m. on May 22, past the established deadline. On the day of the filing deadline, Optimo's counsel logged on to EPDS shortly before 5:30 p.m.¹; because the counsel's EPDS dashboard appeared to be loading for an extended period of time, she e-mailed Optimo's comments to GAO's protest inbox at 5:28 p.m. and later filed the protest in EPDS at 5:40 p.m. However, because EPDS did not experience a technical failure or was otherwise not available during normal system operating hours, Optimo's e-mail did not constitute a "filing" as defined by our regulations; therefore, we dismissed the protest. See 4 C.F.R. § 21.0(g) (stating that a document is "filed" on a particular day when it is received in EPDS by 5:30 p.m.).

Optimo has requested that we reconsider our decision dismissing its filing as untimely. In challenging our decision, Optimo first argues that we erroneously considered the agency's untimely filed report. Req. for Recon. at 2-3. Second, Optimo maintains that our decision dismissing the protest as untimely based on the protester's failure to timely file its comments in EPDS is contrary to the regulations and instructions pertaining to EPDS. Specifically, the protester contends that the general operating status of EPDS should be irrelevant to the question of whether an individual user was experiencing technical issues and could not successfully complete a filing during a specific period of time. *Id.* For the reasons that follow, we find that Optimo has failed to establish a material error of fact or law in our underlying decision that would warrant reversal, and, therefore, we deny the request for reconsideration.

Optimo first maintains that we erroneously considered the agency's report that was filed after the deadline established by our Office. *Id.* Our Bid Protest Regulations require the contracting agency to file a report within 30 days; the agency's failure to comply with the prescribed time limits may result in resolution of the protest without consideration of the untimely submission. See 4 C.F.R. § 21.3(c); *Price Waterhouse*, B-220049, Jan. 16, 1986, 86-1 CPD ¶ 54 at 5. However, we will consider the contents of a late agency report where the late submission did not prejudice the protester. See *General Electric*

¹ Specifically, EPDS system logs reflect that counsel logged into EPDS at 16:27:17 p.m. Central Time, or less than three minutes prior to the 5:30 p.m. Eastern Time filing deadline.

Co., B-228191, Dec. 14, 1987, 87-2 CPD ¶ 585 at 2-3. Although the agency report was filed 4 days after the initially-required due date, Optimo cannot reasonably establish that it was prejudiced by the delay.² Optimo was still allowed 10 days from the date it received the agency report to submit its comments with GAO.³ See *TIW Systems, Inc.*, B-222585.8, Feb. 10, 1987, 87-1 CPD ¶ 140 at 2 (finding that an agency's 1-day delay in filing its report did not prejudice the protester when the protester was still allowed 7 working days to file its comments with GAO). Therefore, we find no merit to Optimo's arguments and decline to reconsider our decision on this basis.

Optimo next maintains that our decision was contrary to the EPDS Instructions providing that a filer may utilize e-mail "[i]f EPDS is unavailable during normal system operating hours," and that we acted inconsistently with these instructions by failing to allow the alternative e-mail filing option when EPDS was allegedly unavailable to Optimo, notwithstanding that EPDS was generally available and not experiencing technical difficulties for other users.⁴ Req. for Recon. at 3. For the reasons that follow, the protester's assertion does not show that our decision contained any errors of fact or law.

Relevant here, the EPDS Instructions provide that if "a Filer is unable to file a document in EPDS due to a technical failure of EPDS [between 8:00 a.m. and 5:30 p.m. Eastern Time Monday through Friday]," a filer may use the alternative filing procedures set forth in the EPDS Instructions. Under those alternative procedures, the filer is first supposed to "[c]ontact GAO to ascertain EPDS's operating status," and then may proceed to make its submission to protests@gao.gov, along with a detailed description of the nature of the technical error encountered in EPDS that prevented the filer from completing its filing. EPDS Instructions, Section VII.22(b).

Consistent with prior decisions of our Office, our underlying decision here recognized that the alternative e-mail filing method only constitutes a "filing" under our regulations

² Although the agency should have either timely filed its report or sought an enlargement of time, we note as mitigating circumstances that the agency was contemporaneously responding to scores of protests challenging the agency's evaluation of proposals in connection with the solicitation. See, e.g., *Systems Plus, Inc. et al.*, B-419956.184 *et al.*, June 29, 2023, 2023 CPD ¶ ____; *Phoenix Data Security, Inc. et al.*, B-419956.200 *et al.*, July 10, 2023, 2023 CPD ¶ ____.

³ We further note that while Optimo contemporaneously argued that our Office should deem its allegations "conceded" by the agency based on the agency's untimely submission of the agency report, see B-419956.258, Comments at 1-2, Optimo never requested an enlargement of time to file its comments or otherwise argued that the untimely submission of the report precluded its ability to meaningfully submit comments.

⁴ GAO's records for EPDS for the time period in question do not identify any problems with EPDS. Further, according to EPDS system logs from approximately 4:00 – 5:30 p.m. on May 22, other users in at least 10 different other pending protests successfully completed filings in EPDS.

when EPDS is unavailable; that is, when EPDS itself is experiencing a technical failure or difficulties. In this regard, when EPDS is functioning and available, a user's failure to timely complete a filing in EPDS is generally not excusable. See *Erimax, Inc.*, B-421141 *et al.*, Dec. 21, 2022, 2023 CPD ¶ 6 at 2-3 (finding that a protester's inability to access his EPDS account due to the expiration of his user account and subsequent e-mail to the protest inbox before the deadline did not constitute a timely filing, as the alternative e-mail filing method is only available when EPDS is unavailable); *CWIS, LLC*, B-416544, July 12, 2018, 2018 CPD ¶ 236 at 2-3 (finding that a protester's receipt of an error message when attempting to file in EPDS at 5:29 p.m. Eastern Time did not constitute a technical failure of EPDS excusing the filer's failure to timely complete its filing in EPDS). Our decision was consistent with our prior decisions interpreting the availability of the alternative e-mail filing method. In short, the inability of protester's counsel to timely file was not due to any problem with EPDS; rather, it was due to counsel's imprudent decision to log in to the system only a few minutes before the filing deadline. Accordingly, we find no compelling basis to deviate from those decisions on the facts presented here and Optimo's disagreement with our decision provides no basis on which to grant reconsideration.

The request for reconsideration is denied.

Edda Emmanuelli Perez
General Counsel