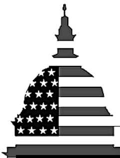
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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: VETcorp, Inc.--Reconsideration

File: B-412198.2

Date: May 9, 2016

Frank V. Reilly, Esq., for the protester.
Michael P. Giordano, Esq., United States Marine Corps, for the agency.
Elizabeth Witwer, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration of a prior decision dismissing a post-award challenge to the terms of the solicitation as untimely is denied where the protester does not show that the prior decision contains errors of fact or law that warrant reversal or modification.

DECISION

VETcorp, Inc., a service-disabled, veteran-owned small business (SDVOSB), of Frederick, Maryland, requests reconsideration of our decision in VETcorp, Inc., B-412198, Oct. 8, 2015 (unpublished decision), in which we dismissed VETcorp's protest of the rejection of its offer by the United States Marine Corps under request for proposals (RFP) No. M00264-15-R-1018. The protester contends that our decision dismissing its protest was flawed based on errors of fact and law.

We deny the request for reconsideration.

BACKGROUND

The Marine Corps issued the RFP on July 6, 2015 as a SDVOSB set-aside. RFP at 1. The RFP contemplated the award of a fixed-price, single-award, indefinite-delivery, indefinite-quantity (IDIQ) contract, consisting of a base year and four 1-year options, for the delivery of caustic soda to three locations at Marine Corps Base Quantico, Virginia. Id. at 1, 7-9. The RFP provided that the agency would evaluate proposals under the following three factors: (1) technical capability, (2) past performance, and (3) price. The RFP provided that the agency would make

an award to the offeror who submitted the lowest-priced, technically acceptable offer. Id. at 43-42.

The RFP stated that technical acceptability would be determined by an offeror's demonstrated capacity to meet the requirements of the Statement of Work (SOW). Id. at 43. Of relevance here, paragraph 4 of the SOW required:

> The Contractor must have visited the sites of all plants prior to submitting its quote, in order to become familiar with plant security and tank connection points.

RFP, SOW ¶ 4, at 8.

The Marine Corps amended the RFP twice to post dates for site visits. Through RFP amendments 001 and 002, dated July 14 and July 21, respectively, the Marine Corps provided dates for site visits "in accordance with paragraph 4 of the Statement of Work." Amend. 001 at 1; Amend. 002 at 1. Both amendments also extended the closing date for receipt of proposals to permit offerors to attend the site visits. Id. The amendments advised that offerors should arrive at a designated meeting place and that the parties would then travel together "to the location where the work will be completed." Amend. 001 at 2; Amend. 002 at 2.

On September 21, the Marine Corps notified VETcorp that its proposal was determined to be unacceptable because VETcorp failed to attend any of the offered site visits.[1] Protest at 2. VETcorp filed a protest with our Office on September 30. VETcorp's sole ground for protest was that the failure to attend a site visit is not a valid basis to reject an offer. Id. The entirety of VETcorp's argument is contained in two paragraphs in its protest:

> 6. The Agency misevaluated the Protestor's proposal and the Protestor's proposal was therefore improperly rejected. This is because a firm's failure to attend a site visit is not a valid basis to reject an otherwise acceptable offer.
>
> 7. Had the Agency followed the law, the Protester would have been the successful offeror because the Protestor's proposal is technically acceptable and the Protestor's price is lower than the price of the Awardee.

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[1] Because our Office dismissed the protest prior to the filing of the agency report in this matter, the record does not reflect how many proposals the agency received in response to the RFP. Nor does the record reflect the prices submitted by the protester or the awardee. VETcorp alleges, however, that its price was lower than the awardee's price. Protest at 3.

Id. at 2-3. The protester did not cite any legal authority to support its argument regarding these two points.

On October 8, our Office dismissed the protest finding that VETcorp did not state a valid basis to challenge the agency's actions where "the RFP expressly required offerors to visit the plant sites prior to submitting their proposals--a requirement that VETcorp did not meet." VETcorp, Inc., supra, at 2. We also held that, to the extent VETcorp intended to argue that the RFP's requirement in this regard was improper, its protest was untimely. Id. (citing Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1)).

VETcorp filed a timely request for reconsideration on October 14. At our Office's request, the Marine Corps submitted a response to VETcorp's request for reconsideration on November 12 and VETcorp provided a reply on November 17.

DISCUSSION

VETcorp raises two central arguments. First, VETcorp contends that our decision erred in concluding that it failed to meet a material requirement of the solicitation. Req. for Recon. at 2. Specifically, VETcorp contends that the RFP did not require offerors to conduct a site visit prior to submitting a proposal in response to the RFP. Id. at 1-5. Second, VETcorp contends that our decision erred in dismissing its protest as untimely. Id. at 6-7. In this respect, VETcorp alleges that we have previously found similar challenges to be timely even when filed after the date for receipt of proposals. Id. For the reasons discussed below, we find no basis to reconsider our dismissal of VETcorp's protest.

Under our Bid Protest Regulations, to prevail on a request for reconsideration, the requesting party must show that our decision contains errors of fact or law, or present information not previously considered that warrants the decision's reversal or modification. 4 C.F.R. § 21.14(c); Precise Mgmt., LLC--Recon., B-410912.2, June 30, 2015, 2015 CPD ¶ 193 at 4. Repetition of arguments made during our consideration of the original protest and disagreement with our decision do not meet this standard. 4 C.F.R. § 21.14(c); Walker Dev. & Trading Grp.--Recon., B-411246.2, Sept. 14, 2015, 2015 CPD ¶ 284 at 2. Additionally, a party's assertion of new arguments or presentation of information that could have been, but was not, presented during the initial protest also fails to satisfy the standard for granting reconsideration. Walker Dev. & Trading Grp.--Recon., supra, at 2, 5.

VETcorp Presents New Arguments Not Previously Raised

The crux of the protester's request for reconsideration is that the Marine Corps' use of the word "quote" in paragraph 4 of the SOW means the site visit was required after award and prior to submitting a quotation in response to the issuance of a delivery order. Req. for Recon. at 2-3. Accordingly, VETcorp argues that it was under no duty to complete a site visit prior to submitting its proposal in response to

the RFP. Id. at 2-3. For this reason, the protester argues that our decision erred in concluding that its proposal failed to meet a material solicitation requirement.

Alternatively, VETcorp contends that, even if offerors were required to complete a site visit prior to submitting a proposal, the site visit posted in amendment 001 to the RFP was scheduled for a date in 2014, whereas the amendment was issued in 2015. Id. at 4. Although VETcorp readily admits the reference to 2014 was likely a typographical error, it claims that it should not have been penalized for failing to attend this particular site visit. Id. VETcorp further contends that the amendments posting dates for the site visits did not expressly state that the proposed site visits were "mandatory." Id. VETcorp also contends that none of the offerors could have visited all three sites because, pursuant to VETcorp's interpretation of the language of the amendments, only one of the three locations would be visited during each site visit. Id. Therefore, according to VETcorp, if an offeror attended only one of the posted dates for the site visits, it would have visited only one of the three locations. Id. Finally, VETcorp posits that, if the awardee did visit all three locations, the Marine Corps must have provided other, unannounced site visits, which would represent disparate treatment of the offerors. Id.

VETcorp did not raise any of these arguments in its initial protest. Rather, the initial protest raised only one argument, i.e., that "a firm's failure to attend a site visit is not a valid basis to reject an otherwise acceptable offer." Protest at 2. A party's assertion of new arguments or presentation of information that could have been, but was not, presented during the initial protest does not meet the standard for granting reconsideration of a decision by our Office; similarly, a party's failure to make all arguments or submit all information available during the course of the initial protest undermines the goals of our bid protest forum--to produce fair and equitable decisions based on consideration of all parties' arguments on a fully developed record--and cannot justify reconsideration of our prior decision. Walker Dev. & Trading Grp.--Recon., supra, at 5; B3 Solutions, LLC--Recon., B-408683.5, May 8, 2014, 2014 CPD ¶ 146 at 3. Because VETcorp did not raise these contentions in its original protest, and because VETcorp has not explained why it could not, or did not, raise these arguments earlier, these arguments provide no basis for us to reconsider our earlier decision.

Our Dismissal of VETcorp's Challenge to the RFP's Terms Was Proper

Next, VETcorp contends that its protest of the RFP's mandatory site visit requirement should not have been dismissed as untimely.[2] Req. for Recon. at 6-7.

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[2] As explained above, this alternative basis to dismiss VETcorp's protest was based upon the possibility that VETcorp meant to challenge the RFP's requirement of mandatory site visits. VETcorp, Inc., supra, at 2 ("[T]o the extent VETcorp means to (continued...)

Rather, VETcorp argues that we have previously determined such challenges to be timely even when filed after the date for receipt of proposals. Id. As explained below, however, our prior decisions do not support VETcorp's contentions.

In its request for reconsideration, VETcorp relies upon our prior decisions in Edward Kocharian & Co., Inc., B-193045, Jan. 15, 1979, 79-1 CPD ¶ 20, and Arrowhead Construction, Inc., B-220386, Jan. 8, 1986, 86-1 CPD ¶ 16. Req. for Recon. at 5-7. Our decision in Kocharian involved a procurement conducted pursuant to the sealed bidding provisions of part 14 of the Federal Acquisition Regulation (FAR). Kocharian, supra, at 1. The invitation for bids (IFB) included a mandatory pre-bid inspection requirement. Id. at 2. In a post-award challenge, the protester contended that the agency improperly rejected its bid as nonresponsive for failure to comply with the solicitation's requirement. Id. at 2-3. The agency, in turn, contended that the protest was untimely filed because it was not filed prior to bid opening. Id. at 3 (citing 4 C.F.R. § 20.2(b)(1) (1979)).

In Kocharian, we explained that, under our rules, a challenge to a solicitation provision, such as a requirement that firms attend a site visit, must be filed prior to bid opening. Id. at 3-4. Because, however, the agency in that case indicated that it intended to include a mandatory site inspection requirement in all of its upcoming solicitations, our Office concluded that the issue "present[ed] a principle of widespread interest" and we agreed to consider the issue on the merits "even if untimely filed." Id. at 4. Accordingly, the merits of the protest were resolved under our "significant issue" exception.[3] Id. (citing 4 C.F.R. § 20.2(c) (1979)).[4]

(...continued)
argue that the RFP's requirement in this regard was improper, its protest is untimely."). VETcorp does not contest this assumption.

[3] On the merits, we held that, in a procurement conducted pursuant to FAR part 14, where a bid does not take exception to the government's requirements, a bidder's failure to attend a mandatory pre-bid site inspection does not justify rejection of the bid as nonresponsive. Kocharian, supra, at 7. See also Edward Kocharian & Co., Inc.--Recon., B-193045, May 10, 1979, 79-1 CPD ¶ 326 at 1, 3. This is because acceptance of a bid effectively binds a bidder to perform at the bid price in accordance with the advertised terms and specifications. Kocharian, supra, at 7. The failure to attend a pre-bid site inspection does not define or limit that obligation. Kocharian--Recon., supra, at 3, 5. In our subsequent denial of the agency's request for reconsideration, we clarified, however, that the failure to attend a pre-bid site inspection may be considered by the agency in determining whether the bidder is responsible, i.e., whether the bidder possesses "the apparent ability to successfully meet the contract requirements[.]" Id. at 6. See also Rowe Contracting Serv., Inc., B-200594, Jan. 22, 1981, 81-1 CPD ¶ 40 at 3; Gebruder Kittelberger GmbH & Co., B-278759, Dec. 8, 1997, 1997 U.S. Comp. Gen. LEXIS 521.

Because we previously considered this matter under the significant issue exception to the timeliness rule for solicitation challenges, our decision in Kocharian does not provide a basis to conclude that our Office will review such challenges to the terms of a solicitation in a post-award context. See Grunley Constr. Co., Inc., B-407900, Apr. 3, 2013, 2013 CPD ¶ 182 at 8 n.6 (declining to exercise our significant issue exception where we have previously decided the merits of the issue). To the contrary, our decision supports the opposite conclusion--that challenges to the terms of the solicitation must be filed prior to bid opening. Kocharian, supra, at 3-4. Thus, our dismissal of VETcorp's challenge to the terms of the RFP was proper and provides no basis for reconsideration.

VETcorp also relies upon our decision in Arrowhead Construction, Inc., to argue that we have previously determined such challenges to be timely even when filed after contract award. Req. for Recon. at 6-7. VETcorp's reliance on this prior decision is equally unavailing. In Arrowhead Construction, Inc., which, like Kocharian, also involved a procurement conducted pursuant to FAR part 14 procedures, we did not determine the normal timeliness rules pertaining to solicitation challenges to be inapplicable to protests challenging mandatory site inspection requirements. Rather, our decision was silent on this matter because, unlike VETcorp's protest here, the protester in Arrowhead Construction, Inc., did not object to the solicitation's terms. Rather, in a post-award protest, the protester objected to the propriety of making an award to a firm that did not attend a site inspection offered by the agency. Arrowhead Constr., Inc., supra, at 4. In other words, the protester challenged the agency's decision to waive a solicitation requirement. Our Office held that the protest ground was timely raised because the protester did not receive notice that the agency intended to waive the solicitation's requirement for attendance at the site visit until after bid opening. Id.

Here, in contrast, VETcorp's protest did not challenge the agency's decision to waive a requirement of the solicitation for the awardee. Rather, VETcorp challenged the propriety of the solicitation's requirement itself. Hence, VETcorp's challenge is distinct from that raised by the protester in Arrowhead Construction, Inc., and provides no basis for reconsideration of our dismissal of VETcorp's protest.

We also note that our decisions in Kocharian and Arrowhead Construction, Inc., pertained to procurements conducted pursuant to the sealed bidding procedures of

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(...continued)
[4] As relevant here, neither our timeliness rule pertaining to solicitation challenges nor the language of our "significant issue" exception to the rule at the time of our decision in Kocharian differs in any material way from our current Regulations. Compare 4 C.F.R. § 20.2(b)(1) (1979) with 4 C.F.R. § 21.1(a) (2016); compare 4 C.F.R. § 20.2(c) (1979) with 4 C.F.R. § 21.2(c) (2016).

FAR part 14; and our decisions, therefore, expressly relied upon the concept of responsiveness. Although the failure to attend a mandatory site inspection is not a basis for rejecting an otherwise responsive bid submitted in response to an IFB, the concept of responsiveness generally does not apply to negotiated procurements.[5] See e.g., A.I.A. Construzioni S.P.A., B-289870, Apr. 24, 2002, 2002 CPD ¶ 71 at 3; Gardiner, Kamya & Assocs., P.C., B-258400, Jan. 18, 1995, 95-1 CPD ¶ 191 at 2 n.1.

Finally, VETcorp contends that it did not need to file a pre-award protest challenging the RFP's allegedly improper mandatory site inspection requirement because VETcorp "may presume that the agency will act properly." Protester's Reply in Support of Reconsideration at 4. Essentially, VETcorp argues that an offeror may ignore allegedly improper solicitation terms upon the assumption that the agency will not apply them; and, unless and until the agency applies the improper terms, the protest is not ripe for review. We find neither merit nor any legal support for this proposition.

To the contrary, it is well-settled that a party who has the opportunity to object to the terms of a solicitation containing a patent error and fails to do so prior to the close of

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[5] We have consistently applied the rule set forth in Kocharian when addressing FAR part 14 procurements. See e.g., Firetech Automatic Sprinklers, Inc., B-248452, Aug. 12, 1992, 92-2 CPD ¶ 100; Construcciones Jose Carro, Inc., B-236117, Nov. 6, 1989, 89-2 CPD ¶ 430; I.M.I., Inc., B-233863, Jan. 11, 1989, 89-1 CPD ¶ 30; Arrowhead Constr., Inc., supra; Southeastern Serv., Inc., and MC&E Serv. and Support Co., Inc., B-183108, June 16, 1975, 75-1 CPD ¶ 366; Gebrude Kittelberger GmbH & Co., supra; Maron Constr. Co., Inc., B-193106, Mar. 9, 1979, 1979 U.S. Comp. Gen. LEXIS 2816. Nonetheless, we are aware of two instances in which our Office has seemingly applied Kocharian in the context of a negotiated procurement. See Rowe Contracting Serv., Inc., supra; Q.S. Incorp., B-203503, May 4, 1982, 82-1 CPD ¶ 417. Both decisions are factually distinguishable, however, because in both cases we determined that the RFP did not mandate attendance at a site inspection. In any event, in both decisions, our Office relied upon Kocharian for the general proposition that, even if the RFPs had been written in mandatory terms, the failure to attend a site inspection "does not require the rejection of the bid or offer[.]" Rowe Contracting Serv., Inc., supra, at 2 (citing Kocharian, supra); Q.S. Inc., supra, at 4-5 ("The fact that a firm did not attend thus would not necessarily mean that the firm could not submit an acceptable proposal.") (citing Kocharian, supra). Despite our general reliance on Kocharian in these decisions, neither decision squarely addressed whether a rule contingent upon the concept of responsiveness should apply outside the context of an IFB issued under FAR part 14. To the extent these two decisions could be read to apply Kocharian to negotiated procurements, we clarify that the rule in Kocharian does not apply to negotiated procurements.

the bidding process or the time set for receipt of proposals waives its ability to raise the same objection later. Baldt Inc., B-402596.3, June 10, 2010, 2010 CPD ¶ 139 at 2. See also Blue & Gold, Fleet, L.P. v. United States, 492 F.3d 1308, 1315 (Fed. Cir. 2007). As our Office has held, this "rule promotes fundamental fairness in the competitive process by preventing an offeror from taking advantage of the government as well as other offerors, by waiting silently only to spring forward with an alleged defect in an effort to restart the procurement process, potentially armed with increased knowledge of its competitors' position or information." Del-Jen Edu. & Training Grp./Flour Fed. Solutions LLC, B-406897.3, May 28, 2014, 2014 CPD ¶ 166 at 7 n.9 (citing Blue & Gold, Fleet, L.P. v. United States, supra, at 1313-14). Moreover, such a rule is efficient in that it ensures "that concerns regarding a solicitation are raised before contractor and government resources are expended in pursuing and awarding the contract, thus avoiding costly and unproductive litigation after the fact." Id. VETcorp offers no reason to depart from this rule here.[6]

In sum, our prior decisions do not support VETcorp's contention that its challenge to the RFP's mandatory site inspection requirement was timely filed. Moreover, we find no basis for an exception to our general timeliness rules to permit disappointed bidders and offerors to dispute the propriety of mandatory site inspection requirements after the submission of offers. Rather, the propriety of such provisions must be challenged prior to the date set for submission of bids or proposals.

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[6] Other cases cited by VETcorp in support of its argument are factually distinguishable, as none involved a challenge to the terms of the solicitation. Protester's Reply in Support of Reconsideration at 4 (citing Haworth, Inc.; Knoll North Am., Inc., B-256702.2, B-256702.3, Sept. 9, 1994, 94-2 CPD ¶ 98 (protester need not file defensive protest where agency was merely "considering" cancelling an award but had not made a final determination to do so); Tamper Corp., B-235376.2, July 25, 1989, 89-2 CPD ¶ 79 (protester need not file defensive protest where agency indicated that it would "review" the responsiveness of bid but had not made a final determination regarding responsiveness); Dock Express Contractors, Inc., B-227865.3, Jan. 13, 1988, 88-1 CPD ¶ 23 (protester need not file defensive protest where agency expressed concern regarding the technical acceptability of the proposal but had not yet rejected the proposal as unacceptable)). In these cases, we held that the protester may presume that the agency would act properly and did not need to file a protest until it knew or should have known that the agency had not done so. See e.g., Dock Express Contractors, Inc., supra, at 6. These cases are inapposite in the present context.

Thus, VETcorp's request for reconsideration does not identify any error of either fact or law that warrants reversal or modification of our prior dismissal.

The request for reconsideration is denied.

Susan A. Poling
General Counsel