



Decision

Matter of: HEJV Energetics Joint Venture, LLC--Costs

File: B-413104.39

Date: August 5, 2019

William A. Shook, Esq., The Law Offices of William A. Shook PLLC, for the protester. Erin V. Podolny, Esq., and Kevin Misener, Esq., Department of Health and Human Services, for the agency.

Robert J. Y. Nunnery, Young H. Cho, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation that agency reimburse the protester's costs associated with filing and pursuing its bid protest is dismissed as untimely where the protester does not file its request in accordance with our Office's established regulations and instructions.

DECISION

Heartland-Energetics Joint Venture, LLC (HEJV), an 8(a) small business of McLean, Virginia, requests that our Office recommend that the Department of Health and Human Services, National Institutes of Health (NIH) reimburse the firm its reasonable costs of filing and pursuing its protest challenging its nonselection for award of a contract under request for proposals (RFP) No. NIHJT2016015, for information technology supplies and services.

We dismiss the request.

BACKGROUND

On January 9, 2019, HEJV filed a protest arguing that NIH's request for an eligibility determination for HEJV was flawed and unequal when compared to other apparent successful offerors whose contract awards were pending eligibility determinations from the Small Business Administration (SBA). Protest at 3. On April 17, after submission of the agency report and comments, our Office conducted a conference call during which alternative dispute resolution (ADR) was offered. NIH subsequently advised our Office

that as a result of the ADR, the agency intended to take corrective action by requesting an eligibility determination for HEJV from the SBA and requested that our Office dismiss the protest as academic. Notice of Corrective Action. As a result, on April 19, our Office dismissed the protest as academic. Heartland-Energetics Joint Venture, LLC, B-413104.31, Apr. 19, 2019 (unpublished decision).

On May 1, HEJV filed an entry into the B-413104.31 protest docket, entitled “Request to Use Protected Material in a Related Proceeding.” B-413104.31, Electronic Protest Docketing System (EPDS) Docket Entry No. 43. In the accompanying comments to the filing, HEJV stated, “[t]his is the protester’s request for costs,” and submitted a document requesting a recommendation from our Office that it be reimbursed costs pursuant to 4 C.F.R. § 21.8(e). Id.

The same day, our Office informed HEJV--through the same docket entry--that “[p]rotester’s request that GAO recommend reimbursement of costs must filed in accordance with our regulations and EPDS instructions; detailed instructions are also available in the user guide.” Id. On May 20, HEJV filed, in EPDS, this request, which was docketed as B-413104.39.

DISCUSSION

HEJV requests that our Office recommend, pursuant to 4 C.F.R. § 21.8(e), that the agency reimburse HEJV its costs associated with filing and pursuing its earlier bid protest because our Office dismissed the protest as a result of the agency’s corrective action. Protester’s Req. for Costs.

The agency responds that HEJV’s request is untimely because it was filed more than 31 days after GAO dismissed the protest. Agency Response to Protester’s Req. for Costs at 1, 3. In this regard, the agency asserts that despite being instructed by GAO, on May 1, to properly file its request, HEJV did not file its request until May 20, which was 31 days after it learned that GAO had closed the protest based on the agency’s decision to take corrective action on April 19. Id. at 3.

In its comments, HEJV responds that its request was timely, asserting that, although GAO has published guidance on the use of EPDS, the law that governs the timeliness rules are found in our protest regulations, which require a protester to file its request for recommendation for reimbursement of cost within 15 days after the close of a protest in the EPDS system. Protester’s Response to Agency at 1-2 (citing 4 C.F.R. §§ 21.0(g), 21.8(e)(3)). The protester maintains that because its May 1 request was filed in the EPDS system within 15 days of learning that our Office had closed the protest based on the agency’s decision to take corrective action, its request was timely. Id.

Under our Bid Protest Regulations, if an agency decides to take corrective action in response to a protest, our Office may recommend that the agency pay the protester the reasonable costs of filing and pursuing the protest, including attorneys’ fees and consultant and expert witness fees. 4 C.F.R. § 21.8(e). The protester must file the

request no later than 15 days after the date on which the protester learned that GAO had closed the protest due to the agency's taking corrective action. Id.; Chase Supply, Inc.--Costs, B-411059.3 et al., May 17, 2016, 2016 CPD ¶ 135 at 3 n.3 (dismissing requests for recommendation for reimbursement of costs that were not timely filed). Filings not received by the processes established under our protest regulations by the deadline are considered untimely. The Continuum Eng'g--Recon., B-410298.2, Feb. 12, 2015, 2015 CPD ¶ 79 at 1-2.

Here, contrary to HEJV's assertions, its May 1 request was not filed in accordance with our regulations. As established by our regulations, 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 relating to costs 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 protesters and intervenors, after a case is closed, three additional filing options become available on the EPDS case docket sheet, including, as relevant here, an option to file a request for a recommendation of entitlement to costs. EPDS Protester/Intervenor User Manual §§ 8, 8.2. Accordingly, the appropriate portal in EPDS to file a request for a recommendation from GAO that the agency reimburse the protester its costs would be through the "Request for Entitlement" portal option.

Our instructions also explain that upon successful filing, EPDS will create a new entry on the filer's EPDS dashboard and generate an e-mail notice to the agency, with a copy to the filer, that a request relating to costs has been filed. EPDS Instructions § III.7(c). The instructions also state that the e-mail notice will provide the "time of filing," which is defined as "the time recorded by EPDS when a filing is successfully received by EPDS." Id. §§ 1.2(I), III.7(c). The time of filing is the official time that GAO will use to determine the timeliness of a filing in accordance with 4 C.F.R. § 21.0(g), and "[t]he time of filing will be reflected in the docket in EPDS." Id. § 1.2(I). Finally, the instructions further advise that if the filer does not receive any of the system generated information identified above or see a new entry on the EPDS dashboard, the filer should contact GAO for further guidance. Id. § III.7(c).

Here, HEJV's May 1 filing as a "Request to Use Protected Material in a Related Proceeding" entry in the B-413104.31 protest docket was not the appropriate portal in EPDS to file its request for a recommendation of reimbursement of costs. Despite our Office's instruction--provided to the protester on the same day--to file its request in

accordance with our regulations and EPDS instructions, HEJV did not take any action to file its request in the appropriate EPDS portal (which would have generated an e-mail providing “time of filing” notice) until May 20, which was 31 days after the dismissal of the B-413104.31 protest. Accordingly, we agree with the agency that HEJV’s request for a recommendation of reimbursement of costs is untimely. Chase Supply, Inc.-- Costs, supra, at 3 n.3.

Our regulations contain strict rules for the timely submission of protests, comments, and requests for reconsideration or for recommendation of reimbursement of costs; specifically, a request for recommendation of reimbursement of costs must be filed no later than 15 days after the date on which the protester learned (or should have learned, if that is earlier) that our Office closed the protest based on the agency’s decision to take corrective action. 4 C.F.R. § 21.8(e). These rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Verizon Wireless, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4. Furthermore, the Competition in Contracting Act “mandates that our bid protest forum provide for the ‘inexpensive and expeditious resolution of protests.’” Latvian Connection LLC, B-413442, Aug. 18, 2016, 2016 CPD ¶ 194 at 5 (quoting 31 U.S.C. § 3554(a)(1)). An expansive interpretation of the EPDS filing instructions would “create confusion as to when [or where] documents were actually filed, and . . . [be] detriment[al] [to] both the procurement process and our ability to expeditiously resolve the protest.” US21, Inc.-- Recon., B-415045.10, July 16, 2018, 2018 CPD ¶ 246 at 2.

The request is dismissed.

Thomas H. Armstrong
General Counsel