



Decision

Matter of: SageCare, Inc.; AeroSage, LLC--Reconsideration

File: B-414168.4; B-414168.5; B-414436.3; B-414436.4

Date: July 13, 2017

David M. Snyder, SageCare, Inc.; David M. Snyder, AeroSage, LLC, the requesters. Journey L. Beard, Esq., Defense Logistics Agency, for the agency. Evan D. Wesser, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Request for reconsideration of our decision dismissing protests for failure to comment is denied where the first protester's initial comments were submitted by a legally separate affiliate, and its supplemental comments were not filed at the address specifically designated under GAO's Bid Protest Regulations for filing protest documents via e-mail.
 2. Request for reconsideration of our decision dismissing protests for failure to comment is denied where the second protester made an unauthorized filing of comments in the protests filed by a legally separate affiliate, but failed to submit comments in response to the agency's report submitted in response to its own protests.
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DECISION

SageCare, Inc., a small business, of Tampa, Florida, and AeroSage, LLC, a small business, of Tampa, Florida, request reconsideration of our decisions, SageCare, Inc., B-414168.3, B-414436.2, May 22, 2017 (unpublished decision) and AeroSage, LLC, B-414168.2, B-414436, May 22, 2017 (unpublished decision), dismissing their respective protests challenging the terms of solicitation Nos. SPE600-15-R-0211 and SPE600-17-R-0202, which were issued by the Defense Logistics Agency (DLA), for fuel.¹

¹ Our Office did not previously consolidate the SageCare and AeroSage protest decisions. As will become apparent for the reasons discussed herein, we consolidate the parties' respective requests for reconsideration for resolution.

We deny the requests for reconsideration because they fail to establish any material factual or legal errors with respect to the underlying decisions dismissing the requesters' respective protests.

Under our Bid Protest Regulations, to obtain reconsideration 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. We have previously explained that information not previously considered means information that was not available when the initial protest was filed. Norfolk Dredging Co.--Recon., B-236259.2, Oct. 31, 1989, 89-2 CPD ¶ 405.

Our Office separately dismissed SageCare's and AeroSage's protests pursuant to 4 C.F.R. § 21.3(i) for failing to submit comments in response to the agency's reports filed in each party's respective protests. SageCare, Inc., supra; AeroSage, LLC, supra.² Both requesters seek reconsideration of our decisions dismissing their respective protests, arguing that they each timely filed comments in response to the agency report filed with our Office on April 10, 2017.³ SageCare further contends that it never received the agency's April 26 agency report in response to its protests (B-414168.3, B-414436.2). As detailed below, the record demonstrates that neither AeroSage nor SageCare properly or timely filed comments in their respective protests. Therefore, we find no material legal or factual errors warranting reversal of our prior decisions.

On March 6 at 7:51 am, AeroSage filed a single pre-award protest challenging solicitation Nos. SPE600-15-R-0211-0001 and SPE600-17-R-0202.⁴ The protest of solicitation No. SPE600-15-R-0211-0001 was docketed as B-414168.2, and the protest of solicitation No. SPE600-17-R-0202 was docketed as B-414436 (hereinafter, collectively the "AeroSage Protests"). The AeroSage Protests were filed on AeroSage letterhead, were executed by AeroSage's President, and did not indicate that AeroSage was filing the protest on behalf of any other firm. On March 8, GAO consolidated the AeroSage Protests, as evidenced by the issuance of a single set of acknowledgement

² In relevant part, 4 C.F.R. § 21.3(i) states that a "protest shall be dismissed unless the protester files comments within the 10-day period [following receipt of the agency report], except where GAO has granted an extension or has established a shorter period."

³ As addressed below, the agency report in response to AeroSage's protests (B-414168.2 and B-414436) was actually due on April 5. Due to transmission issues, however, the agency did not successfully serve the entirety of the report on AeroSage until April 10.

⁴ All times referenced herein are eastern time.

of protest and confirmation of report letters pursuant to 4 C.F.R. § 21.3(a). The agency report for the AeroSage Protests was due on or before April 5.

On March 27 at 5:30 pm, SageCare filed a single pre-award protest also challenging solicitation Nos. SPE600-15-R-0211-0001 and SPE600-17-R-0202. The protest of solicitation No. SPE600-15-R-0211-0001 was docketed as B-414168.3, and the protest of solicitation No. SPE600-17-R-0202 was docketed as B-414436.2 (hereinafter, collectively the “SageCare Protests”). The SageCare Protests were filed on SageCare letterhead, were executed by SageCare’s President, and did not indicate that SageCare was filing the protest on behalf of any other firm or requesting consolidation with any other pending protests. Our Office inadvertently failed to issue acknowledgement of protest and confirmation of report requirement letters for the SageCare protests.⁵ Notwithstanding this oversight, however, pursuant to 4 C.F.R. § 21.3(c) the agency report for the SageCare Protests was due within 30 days of GAO’s notice to the agency, which here was by April 27.

Beginning on April 5, the agency attempted to file and serve its agency report in response to the AeroSage Protests. Due to transmission issues, the complete report was not served on AeroSage until April 10. The April 10 agency report was directed only to the AeroSage Protests, and did not purport to respond to SageCare’s Protests. AeroSage’s comments were due on or before April 20.

On April 17, GAO received two sets of comments in response to the April 10 agency report responding to the AeroSage Protests. The first comments, received at 5:28 pm, were filed by SageCare’s President. The subject of the email was “SageCare Response to DLAE Agency Report – Protest, B-414168.2, B-414436.” Email from SageCare to GAO (Apr. 17, 2017). The attached comments were written on SageCare letterhead and executed by SageCare’s President. The “subject line” of the comments began “SageCare B-414436 Response to Defense Logistics Agency (DLA) Agency Report for SPE600-17-R-0202 and/or SPE600-15-R-0211-0001,” while the “RE” line was “AeroSage B-414168.2 Response to DLA Agency Report SPE600-17-R-0202 and/or SPE600-15-R-0211-0001.” SageCare’s Comments (Apr. 10, 2017) at 1.

The second comments, received at 5:29 pm, were filed by AeroSage’s President. The subject of the email was “AeroSage Response to DLAE Agency Report – Protest, B-414168.2, B-414436.” Email from AeroSage to GAO (Apr. 17, 2017). The attached comments, however, appeared to be the same as those filed by SageCare at 5:28 pm. Indeed, the attached comments similarly appeared on SageCare letterhead, were executed by SageCare’s President, and included the same inconsistent “Subject” and “RE” line titles. AeroSage’s Comments (Apr. 10, 2017) at 1. While we recognize that

⁵ Based on our records, there is no indication that SageCare contacted the assigned GAO attorney with regard to the status of the protest development letters or the due date for the agency report, or with respect to consolidation of the SageCare and AeroSage Protests.

the same individual is the President of both SageCare and AeroSage, there was no indication in the comments or otherwise that SageCare, a separate legal entity, was authorized to represent AeroSage, another separate legal entity, in connection with the AeroSage Protests.

On April 18, AeroSage requested to file a supplemental response to the agency report. Email from AeroSage to GAO (Apr. 18, 2017). On April 20 at 5:29 pm, AeroSage sent its supplemental response to the assigned GAO attorney, and copied two DLA attorneys, the DLA Bid Protest inbox, and SageCare's President. AeroSage, however, failed to file its supplemental response with the protests@gao.gov inbox. Email from AeroSage (Apr. 20, 2017). AeroSage's supplemental response appeared on AeroSage letterhead, was executed by AeroSage's President, and did not purport to be filed on behalf of any other firm.

Consistent with its obligation under 4 C.F.R. § 21.3(c), the agency submitted its agency report in response to the SageCare Protests via AMRDEC Safe Access File Exchange on April 26. Therefore, SageCare's comments were due by no later than May 8. At the time our Office dismissed the protests on May 22, we had not received any comments from SageCare with respect to the SageCare Protests.

As the above history demonstrates, our Office reasonably determined that neither AeroSage nor SageCare properly or timely submitted comments in their respective protests. With respect to AeroSage, the first set of comments addressing the agency's report prepared to address the AeroSage Protests was received on April 17, but was not submitted by AeroSage; rather, the comments were submitted by SageCare. Specifically, the filing was submitted on SageCare letterhead and executed by SageCare's President. At no point in the protest proceeding did AeroSage represent that SageCare was authorized to represent it in the proceedings before our Office. Indeed, we note that AeroSage's initial protest and supplemental comments were both submitted on AeroSage letterhead and were executed by AeroSage's President.

In this regard, we find no merit to AeroSage's assertion that "GAO has ruled SageCare is a representative of AeroSage." AeroSage Request for Recon. at 2. This assertion, which is unsupported by any citation to where our Office purportedly made this determination, ostensibly relies on our recent decision in AeroSage LLC, B-414314, B-414314.2, May 5, 2017, 2017 CPD ¶ 137. If so, AeroSage materially misconstrues the import of that decision. In AeroSage LLC, our Office denied AeroSage's protest challenging an agency's decision not to set-aside a procurement for service-disabled, veteran-owned small businesses (SDVOSB) because we found that the agency had reasonably concluded that there was not a reasonable expectation of receiving two or more offers from responsible SDVOSBs at fair and reasonable prices. Specifically, we found the agency's determination in this regard to be reasonable where the only two SDVOSBs expected to submit offers were AeroSage and SageCare. In light of the firms' common ownership and the fact that the principal and negotiator for both firms was the same individual, our Office concluded that the agency reasonably determined that adequate price competition would not occur because AeroSage and SageCare

would essentially be competing against each other. AeroSage LLC, 2017 CPD ¶ 137 at 6-7. Our determination in AeroSage LLC, however, is irrelevant to the question of whether SageCare, a separate legal entity, was authorized to represent AeroSage, another separate legal entity, in protest proceedings before our Office.

Additionally, we reasonably determined that the April 20 submission was not properly filed. Specifically, AeroSage failed to properly file its response with the protests@gao.gov inbox. As set forth in 4 C.F.R. § 21.0(f), a document is only “filed” with GAO if it is submitted to the protests@gao.gov inbox (or by other official method not relevant here). Serving a courtesy copy of comments on the assigned GAO attorney is insufficient to constitute filing under our Bid Protest Regulations. See Andros Contracting, Inc., B-403117, Sept. 16, 2010, 2010 CPD ¶ 219 at 3. Therefore, because neither the April 17 nor April 20 submissions were acceptable, we find no basis to reconsider our prior decision dismissing the AeroSage Protests for failure to comment.

With respect to SageCare, our Office also reasonably determined that the requester had failed to comment. In support of its request for reconsideration, SageCare contends that it understood the AeroSage and SageCare Protests to have been consolidated, that the agency’s April 10 report responded to both protests, and that its April 17 comments should have been considered with respect to the SageCare Protests. SageCare, however, never sought consolidation of the SageCare Protests with the AeroSage Protests, and our Office never advised the parties that the protests had been consolidated. Rather, SageCare apparently assumed that the protests had been consolidated based on the fact that our Office did not issue acknowledgment of protest and confirmation of report requirement letters for the SageCare Protests. SageCare, however, made this assumption at its own peril. As noted above, the agency’s April 10 agency report was directed only to the AeroSage Protests, and did not concern the SageCare Protests. Accordingly, SageCare’s April 17 comments could not have been with respect to the SageCare Protests.

We also find no basis to reconsider our prior decision based on SageCare’s representation that it never received the April 26 agency report in response to the SageCare Protests. As addressed above, we acknowledge that our Office erred in inadvertently failing to provide the parties with the acknowledgment of protest and confirmation of report requirement letters for the SageCare Protests, which include the due date for submission of the agency report. Nevertheless, SageCare was on constructive notice that the agency report was due approximately 30 calendar days after the filing of its protest. See 4 C.F.R. § 21.3(c) (establishing that an agency shall file its report on a protest within 30 days after notice of the protest). Nevertheless, SageCare waited until the subject request for reconsideration to first advise our Office that it had not received the agency’s report, more than 30 days after the agency report was due to have been filed. Bid protests are serious matters, which require effective and equitable procedural standards to ensure that protests can be resolved without unduly disrupting the procurement process. Amerind Constr. Inc.--Recon., B-236686.2, Dec. 1, 1989, 89-2 CPD ¶ 508. Because we find SageCare’s lack of diligence in inquiring regarding the due date for the agency report and its comments, or the status of consolidation with

the AeroSage Protests, to have been the primary reasons for its failure to respond to the agency report submitted in response to the SageCare Protests, we have no basis to reconsider our decision dismissing SageCare's protests.

The requests for reconsideration are denied.

Susan A. Poling
General Counsel