



Decision

Matter of: Department of Housing and Urban Development--Reconsideration

File: B-414459.5

Date: September 26, 2018

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Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration is denied where requesting party fails to demonstrate that prior decision contained errors of fact or law, and fails to present information not previously considered, that would warrant reversal or modification of prior decision.

DECISION

The Department of Housing and Urban Development (HUD) requests reconsideration of our decision in Dynaxys LLC, B-414459.4, Apr. 28, 2018, 2018 CPD ¶ 152. In that decision, we sustained in part, and denied in part, the protest of Dynaxys against the award of a contract to KeyBank National Association under request for proposals (RFP) No. DU100R-15-R-0001, issued by HUD to acquire multi-family mortgage loan servicing. Specifically, we found that there were errors in the agency's evaluation of proposals that drew into question the agency's source selection decision. We recommended that the agency reevaluate proposals and make a new selection decision. In its reconsideration request, HUD maintains that we erred for several reasons in sustaining Dynaxys' protest.

We deny the request for reconsideration.

BACKGROUND

The agency originally awarded a contract to KeyBank on March 13, 2017. After being advised of the agency's award decision, Dynaxys filed a protest in our Office, maintaining, among other things, that the agency unreasonably found Dynaxys' proposed price unreasonably high, and failed to consider the relative merits of the two firms' proposals in arriving at its selection decision.

After development of the protest record in that case, the cognizant Government Accountability Office (GAO) attorney conducted an “outcome prediction” alternative dispute resolution (ADR) conference. In the course of that ADR conference, the GAO attorney advised the parties that GAO likely would sustain Dynaxys’ protest challenging the agency’s determination that Dynaxys’ proposed price was unreasonably high on the basis that the record failed to support the agency’s determination. In addition, the GAO attorney advised that GAO likely would sustain Dynaxys’ protest of the agency’s source selection decision on the basis that the agency unreasonably failed to consider the relative merits of the proposals based on the evaluation scheme set forth in the RFP.

In response to the ADR conference, the agency informed our Office that it would take corrective action consisting of, at a minimum, reevaluating proposals, and making a new price reasonableness determination, best-value tradeoff, and selection decision. Based on the agency’s proposed corrective action, we dismissed Dynaxys’ protest as academic. Dynaxys LLC, B-414459, B-414459.2, May 30, 2017, (unpublished decision).

The agency thereafter reevaluated proposals. As we noted in our last decision, Dynaxys’ and KeyBank’s final ratings and prices were as follows:¹

	Dynaxys	KeyBank
Technical Approach	Good	Good
Management Plan	Good	Good
Quality Control Plan	Good	Good
Key Personnel	Excellent	Good
Past Performance	Excellent	Neutral
Socioeconomic Participation	Excellent	Marginal
Price	\$68,269,998	\$46,729,263

¹ The RFP provided for award on a best-value tradeoff basis considering six non-price evaluation factors, in descending order of importance: technical approach, management plan, quality control plan, key personnel, past performance, and socioeconomic participation. The non-price evaluation factors, when combined, were deemed significantly more important than price. As proposals became more equal in non-price merit, the solicitation provided that the importance of price would increase. In addition, the solicitation provided that the agency would assign adjectival ratings to the proposals under each evaluation factor, and included definitions for each rating. The ratings for the non-price factors (other than past performance and socioeconomic participation which are not relevant to the current discussion), were excellent/very low risk, good/low risk, fair/medium risk, marginal/high risk, or unacceptable/very high risk. RFP at 33-34.

Agency Report, B-414459.4, exh. 14, Source Selection Decision, at 2. Based on these evaluation results, the agency once again selected KeyBank for award, finding that the technical superiority of the Dynaxys proposal did not merit the price premium associated with award to that firm. Id. at 6. After being advised of the agency's selection decision, Dynaxys filed a second protest with our Office. As noted above, that protest challenged, among other things, the agency's technical evaluation of the proposals, and also the reasonableness of the agency's selection decision.

Our Office sustained Dynaxys' protest in part, finding that the agency had misevaluated proposals under the technical approach factor. In this connection, the RFP contemplates performance of nine different tasks, the first of which is the "transition-in" task. RFP, Attach. A, Performance Work Statement, at 26-30. The record showed that the agency awarded the KeyBank proposal two minor strengths under the technical approach factor for features of its proposal relating to its performance of the transition-in task. Specifically, the agency assigned the KeyBank proposal a minor strength for proposing a web-based system that had multiple fields of loan servicing and accounting data that allowed the agency to tailor or customize reports generated by the system (the "customized reports" strength); and assigned the proposal a second minor strength for proposing a methodology to convert or transition-in the "notes servicing" portfolio in only 90 days (the "90-days" strength). Agency Report, B-414459.4, exh. 10, Technical Evaluation Report (TEP), at 30, 35. These strengths also were identified in the agency's selection decision as part of the agency's rationale for awarding to KeyBank's lower-rated, lower-priced proposal. Agency Report, B-414459.4, exh. 14, Source Selection Decision, at 3.

In its protest, Dynaxys argued that the agency erroneously assigned these strengths to the KeyBank proposal because these features merely met--but did not exceed--the requirements of the solicitation. Alternatively, Dynaxys argued that if the strengths properly had been assigned to KeyBank's proposal, then the Dynaxys proposal also should have been assigned similar strengths because it had offered the same features.

We agreed with the protester and sustained this aspect of its protest, finding that, in fact, the features in the KeyBank proposal that had been assigned these strengths were merely features required by the solicitation, and the agency therefore unreasonably assigned the strengths. Dynaxys LLC, supra. at 7. We also sustained Dynaxys' protest because, in its source selection decision (in addition to relying on the unreasonably-assigned strengths noted above), the agency did not perform a meaningful or substantive comparison of the strengths identified in the firms' proposals and consider these strengths in relation to the prices proposed. Id. at 10. We recommended that the agency reevaluate proposals and make a new source selection decision. HUD has requested reconsideration of the decision.

DISCUSSION

In its request for reconsideration, the agency argues that our prior decision contained several errors that warrant its reversal. We discuss the agency's contentions below.

We note at the outset that, under our Bid Protest Regulations, a party requesting reconsideration either must show that our decision contains an error of fact or law, or present information not previously considered, that warrants reversal or modification of our prior decision. 4 C.F.R. § 21.14(a); Waterfront Techs., Inc.--Recon., B-403638.4, June 29, 2011, 2011 CPD ¶126 at 3. HUD's request does not meet this standard.

HUD argues first that we erred in failing to dismiss Dynaxys' protest because of a protective order violation that occurred in connection with the filing of its second protest. Citing our decision in PWC Logistics Servs., Co. KCS(c), B-310559, Jan. 11, 2008, 2008 CPD ¶ 25, HUD alleges that Dynaxys' counsel violated the protective order issued during consideration of the firm's initial protest, B-414459, B-414459.2. HUD contends that the alleged violation was so serious that our Office should have dismissed the protest without addressing its merits. In this connection, there is no dispute that Dynaxys' counsel used materials that were subject to the protective order issued in the first protest to file its second protest (B-414459.4) with our Office without first requesting permission to do so. HUD therefore argues that our Office should reconsider our earlier decision because we erred in failing to dismiss Dynaxys' second protest without consideration of it on the merits. We disagree. We also disagree that HUD's position provides a basis for us to reconsider our earlier decision.

In PWC Logistics Servs., Co. KCS(c), supra., we dismissed the protest without considering it on the merits because the record showed that there had been an initial, inadvertent, disclosure of protected material by counsel to the protester's senior management, and senior management materially exacerbated the situation by reviewing and knowingly disseminating the materials to other PWC employees, notwithstanding the fact that the materials were clearly marked as protected.

We found that the protester's actions undermined the protective order's effectiveness, and by extension, the integrity of our bid protest function. PWC Logistics Servs., Co. KCS(c), supra. at 12-13. Of particular note, we explicitly recognized that dismissal of a protest for violation of a protective order was a severe sanction to be employed in only the rarest of cases, with due regard for the inadequacy of other, lesser, sanctions; the protester's (as opposed to counsel's) responsibility for what occurred; the gravity of what occurred; the prejudice to the other parties resulting from the violation; and the salutary deterrent effect of dismissal on others who might be tempted to such conduct in the future. Id.

None of the concerns identified in PWC Logistics Servs., Co. KCS(c), supra. are present here. The record here shows that Dynaxys' counsel used protected materials obtained during its first protest to file the firm's second protest without first soliciting and obtaining our Office's permission to do so. However, there is no showing that any protected materials obtained during the first or second protest ever were disseminated to any individual not admitted to either protective order. There also is no showing that any Dynaxys employee engaged in improper behavior that would bring into question the integrity of the protester itself; that there was any resulting prejudice to the agency or any other competitor associated with this acquisition; or that anything occurred to

impugn the integrity of our bid protest function. In the final analysis, what occurred here was a technical violation of the protective order issued in the first case that did not have any adverse consequences to the parties, our forum, or the protective order process. Given these circumstances, we would have had no basis to dismiss Dynaxys' second protest for violation of the protective order; it follows that this does not provide a basis for us to reconsider our earlier decision.

Second, HUD argues that the protester's challenge relating to the two strengths assigned to the KeyBank proposal (the "customized reports" strength and the "90-days" strength that formed the basis for sustaining the protest) were untimely raised. HUD argues that it advanced this timeliness argument during the second protest, but that our Office failed to address its argument. Specifically, HUD argues that the two strengths were assigned to the KeyBank proposal during its first evaluation, but Dynaxys did not challenge this aspect of the agency's evaluation during the first protest. The agency therefore reasons that any challenge to the same two strengths assigned to the KeyBank proposal raised during the firm's second protest was untimely and should have been dismissed. See Synergy Solutions, Inc., B-413974.3, June 15, 2017, 2017 CPD ¶ 332 at 6-7.

This also does not provide a basis for granting the agency's reconsideration request. Our review of the record shows that Dynaxys actually did raise a challenge to the agency's assignment of the "customized reports" strength after receiving the agency report during the first protest. Dynaxys Comments and Supplemental Protest, Apr. 24, 2017, at 19-22. While the agency is correct that Dynaxys did not challenge the agency's assignment of the "90-days" strength during the first protest, that strength was not clearly identified as a strength during the agency's first evaluation.

Specifically, the record shows that the "90-days" strength was stated in the "general comments" section of the agency's technical evaluation report, Agency Report, B-414459, exh. 8, Technical Evaluation Report, at 31. However, it was not mentioned in the "strengths" section of the agency's technical evaluation report; instead, only the "customized reports" strength is listed there. Id. at 35. While we acknowledge that the record arguably shows that the "90-days" strength was identified by the agency during its initial evaluation, it was not listed as a separate strength in the portion of the agency's report where KeyBank proposal's strengths were listed. In contrast, the two strengths clearly are listed in the "strengths" section of the agency's technical evaluation report prepared during the agency's second evaluation. Agency Report, B-414459.4, exh. 10, at 35. Inasmuch as we resolve any doubt concerning timeliness in favor of the protester, Dock Express Contractors, Inc. B-227865.3, Jan. 13, 1988, 88-1 CPD ¶ 23 at 8, this does not provide a basis for our Office to reconsider our earlier decision.

Finally, HUD takes issue with the substance of our prior decision, arguing that the evaluation errors that occurred did not prejudice Dynaxys; that the agency's source selection decision was not unreasonable; and that our Office applied what the agency describes as a heightened standard of reasonableness regarding the adequacy of the agency's tradeoff analysis. These arguments either amount to disagreement with our

prior decision, or a restatement of arguments the agency previously made that we considered and rejected during the earlier protest. As such these arguments do not provide our Office with a basis to reconsider our earlier decision.

The request for reconsideration is denied.

Thomas H. Armstrong
General Counsel