



Decision

Matter of: Wolverton Property Management, LLC--Reconsideration

File: B-415295.4

Date: June 6, 2018

Benjamin U. Bowden, Esq., Vaughn & Bowden, PA, and James B. Halliday, Esq., for the protester.

David W. Altieri, Esq., Department of Veterans Affairs, for the agency.

Pedro E. Briones, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration of decision dismissing a protest for failure to submit comments on the agency report is denied where the requester does not show that our prior decision contains errors of fact or law or information not previously considered.

DECISION

Wolverton Property Management, LLC, of Saucier, Mississippi, requests that our Office reconsider our decision dismissing, for failure to comment, Wolverton's protest of amendments to request for quotations (RFQ) No. VA256-17-Q-1148, issued by the Department of Veterans Affairs (VA) for landscaping services for the Gulf Coast Veterans Health Care System in Biloxi, Mississippi.

We deny the request.

BACKGROUND

Wolverton filed the protest (B-415295.3) through counsel on January 16, 2018, contending that the solicitation, as amended, was inconsistent with the corrective action proposed by the VA in response to Wolverton's earlier protest (B-415295). As required by our Bid Protest Regulations, our Office sent written notices to the protester and the VA advising them, among other things, that the deadline for the agency report was February 15 and that the protester's comments on the agency report "must be received in our Office within 10 calendar days of your [the protester's] receipt of the report--otherwise, we will dismiss your protest." Acknowledgement of Protest & Confirmation of

Report Requirement, B-415295.3, Jan. 19, 2018, at 1 (B-415295.3 Ack. & Conf.) (emphasis in original); 4 C.F.R. § 21.3(a) (2017).¹

On February 15, the VA emailed its agency report to our Office and, at issue here, to only one of Wolverton's two attorneys.² Req., Exh. A, VA Email to Parties, Agency Report, Feb. 15, 2018 (AR Email). The VA's email reminded protester's counsel that it "has ten days from receipt of the Agency Report to submit a response." Id.

Our Office dismissed the protest on March 5, because Wolverton failed to submit comments on the agency report.³ Wolverton Prop. Mgmt., LLC, B-415295.3, Mar. 5, 2018 (unpublished decision). As addressed in our decision, the filing deadlines in our regulations are prescribed under the authority of the Competition in Contracting Act of 1984; their purpose is to enable us to comply with the statute's mandate that we resolve protests expeditiously. Id., citing 31 U.S.C. § 3554(a), Keymiae Aero-Tech, Inc., B-274803.2, Dec. 20, 1996, 97-1 CPD ¶ 153. We explained that to avoid delay in the resolution of protests, section 21.3(i) of our regulations provides 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. Id., citing 4 C.F.R. § 21.3(i). We also explained that, but for this provision, a protester could idly await receipt of the report for an indefinite time, to the detriment of the protest system and our ability to resolve the protest expeditiously. Id., citing California Envtl. Eng'g, B-274807, B-274807.2, Jan. 3, 1997, 97-1 CPD ¶ 99 at 5-6.

On March 7, Wolverton filed this request for reconsideration of our decision to dismiss its protest.

DISCUSSION

The requester contends that our decision to dismiss the protest was "patently unfair," because Wolverton's lead counsel did not receive the agency's report (see note 2 above) and therefore it was "impossible for Wolverton to file comments in response to an Agency Report that it did not and has not received." Req. ¶¶ 5-8, 11. Moreover,

¹ GAO's Bid Protest Regulations were revised effective May 1, 2018. 83 Fed. Reg. 13817 (Apr. 4, 2018). Our citations are to our regulations in effect when Wolverton filed its protest and the instant request for reconsideration.

² As stated above, Wolverton was represented in its protests and in the request for reconsideration by two attorneys, only one of whom (attorney No. 1) received the VA's February 15 email transmitting the agency report. In its request for reconsideration, Wolverton claims, for the first time in this process, that the attorney that did not receive the email (attorney No. 2) was the protester's lead counsel. Req. for Recon. (Req.) ¶ 5.

³ Because the tenth day of the comment period fell on Sunday, February 25, the comments were due on the next day that our Office was open, Monday, February 26. See 4 C.F.R. §§ 21.0(d), 21.3(i).

Wolverton asserts that while only one of its attorneys received the VA's February 15 email, "no Agency Report was attached . . . only a document titled Memorandum of Law with eleven (11) Exhibits." Id. ¶¶ 3-5. Wolverton requests that our Office reinstate the protest, and that "Counsel for Wolverton should be provided a copy of the Agency Report and all related documents and provided an adequate opportunity to respond." Id. ¶¶ 9, 13.

Under our Bid Protest Regulations, to obtain reconsideration of a decision, 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). Wolverton has not met this standard.

Here, even were we to assume that none of Wolverton's attorneys received the agency report, the protester was aware of its responsibility to file timely comments. Since our regulations are published in the Federal Register and the Code of Federal Regulations, protesters are on constructive notice of the comment requirement. Service & Supply Int'l Ltd.--Recon., B-265651.2, Nov. 16, 1995, 95-2 CPD ¶ 225 at 2. Similarly, protesters have constructive notice that the agency report is due approximately 30 calendar days after a protest is filed. 4 C.F.R. § 21.3(c). As set forth above, our acknowledgement of protest also provided Wolverton actual notice that the agency report was due on February 15.⁴ B-415295.3 Ack. & Conf. at 1. In addition, Wolverton was provided actual notice--both in our acknowledgement of protest, as well as in the VA's email transmitting the agency report--that comments are due within 10 days of the protester's receipt of the report.⁵ Id.; see AR Email.

Therefore, regardless of which protester's attorney does or does not receive an agency report--whether lead counsel, co-counsel, partner, associate, or otherwise--it is incumbent on the protester to exercise the degree of diligence necessary to comply with the requirement to file comments on an agency report within 10 calendar days of the protester's receipt of the report. See Milcom Servs., Inc.--Recon., B-251232.2, Feb. 9, 1993, 93-1 CPD ¶ 119 at 1-2. In order to satisfy our statutory mandate to resolve protests expeditiously and to maintain our role as a meaningful, efficient protest forum, we expect all parties to prepare and present their cases carefully and diligently. Consolidated Mgmt. Servs., Inc.--Recon., B-270696.2, B-270696.3, Feb. 13, 1996, 96-1

⁴ We note that failure to receive our acknowledgement notice does not excuse a protester's failure to file comments or provide any basis to reopen a protest, since protesters are, as a matter of law, on constructive notice of the comment requirement. Service & Supply Int'l Ltd.--Recon., supra, at 2-3.

⁵ Our regulations in effect at the time (see note 1 above) also provided, and our acknowledgement of protest warned Wolverton, that we will assume a protester received the agency report on its scheduled due date, unless otherwise advised by the protester. 4 C.F.R. § 21.3(i) (2017); B-415295.3 Ack. & Conf. at 1.

CPD ¶ 76 at 2. We expect the same of any protester, regardless of whether it is proceeding pro se, is represented by legal counsel, or is simply unfamiliar with our rules. See id.; Service & Supply Int'l Ltd.--Recon., supra.

The requester otherwise fails to cite a provision in our regulations or any decision of this Office to support Wolverton's contrary view. See Req. ¶¶ 1-15. Receipt of information requiring action by a protester is effective when that information is received by the protester's counsel.⁶ We find no reason to adopt Wolverton's novel view that receipt of an agency report should only be effectuated when received by the protester's lead counsel. See 31 U.S.C § 3555(a) ("[T]he protest process may not be delayed by the failure of a party to make a filing within the time provided for the filing."). As we have long stated, 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. SageCare, Inc.; AeroSage, LLC--Recon., B-414168.4 et al., July 13, 2017, 2017 CPD ¶ 224 at 5, citing Amerind Constr. Inc.--Recon., B-236686.2, Dec. 1, 1989, 89-2 CPD ¶ 508 at 2. Thus, Wolverton fails to set out legal grounds for reversing or modifying our prior decision.

Wolverton also fails to set out factual grounds for reversing or modifying our prior decision. First, the requester cites no protest filing (and we were unable to identify any) designating either one of its attorneys as lead counsel.⁷ See Req. at 1-3. On the contrary, every protest filing to our Office strongly suggests that attorney No. 1 was lead counsel. As the agency points out, that individual has served as the protester's attorney throughout both protests (B-415295 and B-415295.3) at GAO. See VA Response to Req. at 1. For example, the law firm of attorney No. 1 filed (via email) all of the following: protest B-415295; the protester's objections to the VA's proposed corrective action; protest B-415295.3; and the instant request for reconsideration. Protester's Emails, Mar. 6, 2018, Jan. 12, 2018, Oct. 13, 2017, & Sept. 19, 2017. These emails were all sent by the same attorney's paralegal using an email address from his (attorney No. 1) law firm, listing his name in the signature block. Id. A number of Wolverton's

⁶ Frank A. Bloomer--Agency Tender Official, B-401482, July 20, 2009, 2009 CPD ¶ 174 at 4; CAS, Inc., B-260934.2; B-260934.3, Sept. 12, 1995, 95-2 CPD ¶ 239 at 5 n.5 ("While the expert [consultant] may have received this information late . . . receipt of the agency report by the protester's counsel started the 10-day period for purposes of our timeliness rules."); Columbia Research Corp., B-247073.4, Sept. 17, 1992, 92-2 CPD ¶ 184 at 4; see Bio Rad, B-239832, June 21, 1990, 90-1 CPD ¶ 577 at 2 n.1 ("Internal delays in processing correspondence within a protesting concern does not toll the timeliness provisions of our Regulations.").

⁷ To be fair, the requester is correct that its GAO protests and the request for reconsideration were all signed by both attorneys and included their contact information. See Req. ¶ 5; Protest B-415295 at 5; Protest B-415295.3 at 5; Req. at 3. This fact, however, is neither dispositive nor changes our conclusion that the protester failed to file comments on the agency report.

filings were also submitted on firm letterhead listing only the name of attorney No. 1.⁸ Protester's Letter to GAO, Mar. 12, 2018; Protest B-415295, Cover Letter. Attorney No. 1 also personally emailed the parties on at least two occasions. Protester's Emails to Parties, Mar. 12, 2018, & Oct. 18, 2017. Second, the record shows--and the requester concedes--that attorney No. 1 did, in fact, receive the agency report via email on February 15, 2018.⁹ AR Email; Req. ¶¶ 3, 5. Finally, Wolverton has offered no explanation as to why attorney No. 1, despite receiving the agency report, was unable to submit comments or confer with his co-counsel in this respect. Therefore, contrary to the requester's insistence, it was not "impossible" for Wolverton to file comments.

In sum, Wolverton's request for reconsideration fails to demonstrate that our prior decision contains any errors of law or information not previously considered, and we deny the request accordingly. See Total Control Training, Inc.--Recon., B-414748.4, Aug. 17, 2017, 2017 CPD ¶ 261 at 1-3; Discount Mach. & Equip., Inc.--Recon., B-239104.2, Aug. 6, 1990, 90-2 CPD ¶ 106 at 2-3 (denying request for reconsideration where the protester was aware of its responsibility to file timely comments on the agency report, notwithstanding the requester's assertion that the protester's principals were out of town when the report arrived).

The request is denied.

Thomas H. Armstrong
General Counsel

⁸ On November 20, 2017, the paralegal for attorney No. 1 emailed to our Office an information copy of an agency-level protest filed on that same date by attorney No. 2 (on attorney No. 2's letterhead) on behalf of Wolverton. Email to GAO, Nov. 20, 2017, Attach., Agency-Level Protest. However, we did not consider the November 20 submission to be a GAO protest filing, advised attorney No. 2 of our regulations and requirements for filing a protest at GAO, and took no further action on the submission. See GAO Letter to Att'y No. 2, B-415295.2, Nov. 27, 2017; W.D. McCullough Constr. Co. & M&A Equip. & Constructors Inc., a joint venture, B-238460, Feb. 8, 1990, 90-1 CPD ¶ 166 at 2 n.1, aff'd on recon., B-238460.2, Mar. 5, 1990, 90-1 CPD ¶ 252 (stating that providing an information copy of an agency-level protest is not effective for purposes of filing a protest at GAO, since the protester's correspondence is addressed to the contracting officer, not our Office).

⁹ Although the requester asserts that "no agency report" was attached to the VA's February 15 email, the email attachments included a memorandum of law, a statement from the contracting officer, copies of the original RFQ and the amendment at issue, and copies of various electronic communications among the parties. Req. ¶ 5; AR Email, Attachs. The requester does not explain what type of agency report Wolverton expected, but what the VA submitted (and what attorney No. 1 received) was entirely consistent with our regulations. 4 C.F.R. § 21.3(d).