



Decision

Matter of: Silverback7, Inc. -- Reconsideration

File: B-415311.9

Date: November 15, 2018

Christopher Grim, for the protester.

Scott N. Flesch, Esq., Major Adam Kama, and Wayne Brandom, Esq., Department of the Army, for the agency.

Heather Self, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration is denied where GAO did not commit legal or factual error when dismissing protest allegations because the record confirmed that the protestor failed to file timely comments on the agency report, and non-receipt of Electronic Protest Docketing System e-mail notification of the report's filing does not excuse failure to comment.

DECISION

Silverback7, Inc. of Orlando, Florida, requests reconsideration of our decision dismissing its protest challenging award of a contract to SOLKOA, Inc. of Colorado Springs, Colorado, pursuant to request for proposals (RFP) No. W9124G-17-R-0001, issued by the Department of the Army for survival, evasion, resistance, and escape instruction and instructional support services at Fort Rucker, Alabama. Silverback7's protest challenged the agency's evaluation and award decision. We dismissed the protest allegations because Silverback7 failed to file comments on the agency report within the time required by our Bid Protest Regulations. 4 C.F.R. § 21.3(i)(1)-(2).

We deny the request for reconsideration.

Silverback7 filed its protest with our Office on August 31, 2018. We acknowledged receipt with a letter that delineated the procedures and deadlines for filing the agency report and the protestor's comments. The letter explicitly advised that "[w]ritten comments must be filed via our Electronic Protest Docketing System (EPDS) within 10 calendar days of the filing of the agency report--otherwise, we will dismiss your protest." Protestor's Development Letter, B-415311.6, Sept. 4, 2018. The letter established the

agency report due date as October 1, and the record reflects the agency filed its report in EPDS on that date. Accordingly, under our regulations, the protestor was required to submit its comments by October 11. Having failed to receive the protestor's comments by this date, our Office dismissed Silverback7's protest. Silverback7, Inc., B-415311.6, Oct. 18, 2018 (unpublished decision).

In support of its request for reconsideration, the protestor argues that dismissal was improper since it did not actually learn the agency had filed the report in EPDS until we issued our decision dismissing the protest. Request for Recon. at 1. Specifically, the protestor alleges that prior to October 1, it received six auto-generated e-mail notifications from EPDS in connection with the first six filings submitted in the system. Id. The protestor alleges it did not, however, receive e-mail notifications on October 1 when the agency filed its report in the system (docket entries 7-10). Id. According to the protestor, the next e-mail notification it received from EPDS was on October 18 notifying the parties that our Office had uploaded our decision resolving the protest (docket entry number 11). Id. The protestor surmises there was likely an error with the EPDS system, which resulted in the system failing to deliver the e-mail notifications at the time the agency filed its report. Id. at 2. Having failed to receive the e-mail notice through no fault of its own, the protestor maintains that we should excuse its failure to submit comments and reopen its protest. Id. at 1-2.

Under our Bid Protest Regulations, a party requesting reconsideration must either show that our decision contains an error of fact or law, or present information not previously considered, that warrants the decision's reversal or modification. 4 C.F.R. § 21.14(a); Waterfront Techs., Inc. -- Recon., B-403638.4, June 29, 2011, 2011 CPD ¶ 126 at 3. As discussed below, Silverback7's request for reconsideration is without merit.

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. See 4 C.F.R. § 21.0(f). EPDS is the method used for filing initial protests and protest related documents and, under our regulations, “[a] document is *filed* on a particular day when it is received in EPDS by 5:30 p.m., Eastern Time.” 4 C.F.R. §§ 21.0(g) (emphasis in original) and 21.1(b). Additionally, our regulations establish that the act of “[f]iling a document in EPDS constitutes notice to all parties of that filing.” 4 C.F.R. § 21.0(g). Thus, our regulations establish that the act of filing a document in EPDS puts all parties on notice of the filing, essentially establishing a rule of constructive notice with respect to all EPDS filings. By definition the doctrine of constructive notice imputes knowledge to a party without regard to the party's actual knowledge of the matter at issue. See Worldwide Language Resources, Inc.; SOS Int'l Ltd., B-296984 et al., Nov. 14, 2005, 2005 CPD ¶ 206 at 9, citing, Townsend v. Little and Others, 109 U.S. 504, 511, 3 S. Ct. 357, 27 L. Ed. 1012 (1883) (“[c]onstructive notice is defined to be in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted”).

The e-mail notifications, which are at the heart of the protestor's request for reconsideration, are provided for in the instructions and guidance on the use of EPDS

referenced in our regulations and maintained on GAO's website. As set forth in these instructions, the system automatically generates a "Notice of Electronic Filing" when a document is filed in EPDS and automatically e-mails the notice to all users authorized to participate in a case. EPDS Instruction No. IV.16(a), Apr. 2018.

Assuming, as alleged by the protester, that EPDS did not generate the e-mail notifications when the agency filed its report and related documents in EPDS on October 1, the failure of the system in this regard did not excuse the protester's own failure to submit comments in response to the agency report. As noted above, under our regulations, the act of filing a document in EPDS puts all parties on notice of the filing--there is no mention of e-mail notifications. Rather, the auto-generated EPDS e-mail notifications of new filings in a case are a courtesy provided to parties, they are not a substitute for parties actively checking the EPDS docket for new filings and diligently pursuing the case. Accordingly, our EPDS instructions and guidance expressly speak to this issue and warn EPDS users regarding the e-mail notifications that "it is the user's responsibility to regularly review the docket for new case developments . . . the failure to receive any system generated e[-]mails will not excuse a party's failure to timely respond to case developments." Id.

Furthermore, our cases have consistently explained that a protestor must notify GAO when it fails to receive the report by the due date specified in the initial development letters generated by our Office and request an extension because late receipt does not alter the period for submitting comments. See US21, Inc. -- Recon., B-415045.10, July 16, 2018, 2018 CPD ¶ 246 at 3; TMC Global Professional Servs. -- Recon., B-414937.2, Sept. 25, 2017, 2017 CPD ¶ 295 at 3 (explaining that "a protestor's late receipt of an agency report does not alter the period for submitting comments, unless the protestor notifies our Office of its late receipt prior to the due date for comments established in the development letter."). Therefore, if the protestor believed its non-receipt of an e-mail notification by 5:30 p.m. ET October 1 meant the agency had not filed its report, the protestor first should have checked EPDS to determine if the report had been filed and if the report had not been filed in EPDS, which was not the case here, the protestor should have notified GAO of the agency's failure to file.

The request for reconsideration is denied.

Thomas H. Armstrong
General Counsel