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Decision

Matter of: Wyle Laboratories, Inc.--Reconsideration

File: B-416528.3

Date: March 6, 2019

Alexander J. Brittin, Esq., Brittin Law Group, PLLC; and Jonathan D. Shaffer, Esq., and Mary Pat Buckenmeyer, Esq., Smith Pachter McWhorter PLC, for the requester. Keith R. Szeliga, Esq., Adam A. Bartolanzo, Esq., and Shaunna E. Bailey, Esq., Sheppard, Mullin, Richter & Hampton LLP, for Deloitte Consulting LLP, the intervenor. Carl J. Verneti, Esq., Department of Homeland Security, 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

Request for reconsideration of a prior decision denying a protest challenging the requester's exclusion from the competition is denied where the requester seeks to introduce new information that could have been raised previously, or that essentially repeats arguments previously made.

DECISION

Wyle Laboratories, Inc., of Huntsville, Alabama, seeks reconsideration of our decision, Wyle Labs., Inc., B-416528.2, Jan. 11, 2019, 2019 CPD ¶ 19, denying its protest challenging the rejection of its quotation and the issuance of a task order to Deloitte Consulting LLP, of Arlington, Virginia, under request for quotations (RFQ) No. 01C18Q0106, issued by the Department of Homeland Security (DHS), Customs and Border Protection (CBP), for professional, technical, and operational support services, in support of DHS's Office of Facilities and Asset Management. The RFQ was issued under the General Services Administration's (GSA) One Acquisition Solution for Integrated Services (OASIS) multiple-award indefinite-delivery, indefinite-quantity contract.

Wyle, a holder of an OASIS contract, entered into an asset purchase agreement with Grant Thornton to transfer Wyle's OASIS contract, as well as the assets and liabilities used in or relating to the performance of the OASIS contract, to Grant Thornton. The corporate transaction at issue required the parties, pursuant to Federal Acquisition Regulation (FAR) § 42.1204(a)(2), to submit a novation request to GSA in order to

request that Grant Thornton be recognized as Wyle's successor-in-interest on the OASIS contract. Wyle's quotation, submitted in response to the RFQ, acknowledged that the quotation had been prepared by and submitted on behalf of Grant Thornton. Wyle's quotation also provided that pending GSA's approval of the novation, Grant Thornton would perform the entirety of the substantive requirements as Wyle's subcontractor, and subsequently upon GSA's approval of the novation agreement would assume full responsibilities as the prime as Wyle's successor-in-interest. CBP concluded that issuance of the task order to Wyle presented unacceptable risk because the government will not have a contract with Grant Thornton unless and until GSA approves Wyle's request. As a result, CBP found Wyle ineligible for award.

In its protest, Wyle argued that CBP's conclusion was unreasonable because the agency's risk assessment was inconsistent with Wyle's outstanding rating under the technical and management approach factor. We denied the protest, concluding that CBP reasonably assessed the risks presented by Wyle's 100 percent pass-through to Grant Thornton, which hinged on GSA's approval of the novation of Wyle's OASIS contract to Grant Thornton. On reconsideration, Wyle argues that reversal of our prior decision is warranted because our Office failed to consider that GSA approved the novation to Grant Thornton on December 21, and our decision erroneously concluded that the agency could reasonably assess risk with Wyle's proposed approach while simultaneously rating the quotation as outstanding under the technical and management approach factor.

The request for reconsideration is denied because the new information relied upon by the requester--i.e., GSA's approval of Wyle's novation request--fails to demonstrate any material error of fact or law in our prior decision that would warrant our reconsideration. Instead, the request simply expresses Wyle's disagreement with our decision.

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). Here, Wyle argues that GSA's December 21 approval of the novation to Grant Thornton has undermined our January 11 decision regarding the reasonableness of CBP's consideration of the risks associated with the quotation. Request for Recon. at 5-7. Additionally, the requester again argues that our decision erroneously concluded that CBP could positively evaluate the quotation's technical and management approach, but eliminate the quotation based on the risk associated with Wyle's transfer of its OASIS contract and related assets to Grant Thornton. Id. at 7. We find that neither asserted argument provides a basis upon which to reconsider our prior decision.

As an initial matter, the approved novation of December 21 does not provide a basis for reconsideration because while Wyle knew of this information, it did not raise the information in the prior protest proceedings, which concluded with the issuance of our decision on January 11, 2019. In order to provide a basis for reconsideration, additional information not previously considered must have been unavailable to the requesting

party when the initial protest was being considered. Timberline Helicopters, Inc.--Recon., B-414507.2, Aug. 1, 2017, 2017 CPD ¶ 251 at 2. Failure to make all arguments or submit all information available during the course of the initial protest undermines the goals of our bid protest forum--to produce fair and equitable decisions based on consideration of all parties' arguments on a fully developed record--and cannot justify reconsideration of our prior decision. Id. Although the period for submitting comments had closed by the time the requester allegedly obtained the approved novation on December 21, Wyle could--and should--have sought leave to present the new information prior to the issuance of our decision. See 4 C.F.R. § 21.3(j) (permitting a party to request leave to submit additional statements). Thus, the December 21 novation relied upon by the requester in its request for reconsideration provides no basis on which to grant the request.

Moreover, even if the requester's failure to raise the novation in the proceeding below was excusable, GSA's decision to grant the novation request provides no basis to conclude that CBP's risk analysis was unreasonable at the time it was made. Wyle argues, without any legal or factual support, that the agency's concerns about the risk in the event the novation was not granted was unreasonable because the government routinely approves novation requests, and, in this case, there was no express indication from GSA regarding reservations with respect to the Wyle-Grant Thornton assignment. We disagree. In this regard, the government generally has broad discretion whether to approve a novation request, see FAR § 42.1204(a), and in a number of documented instances has declined to approve a novation. See, e.g., Engility Corp., B-416650, B-416650.2, Nov. 7, 2018, 2018 CPD ¶ 385; Bulova Techs. Ordnance Sys. LLC, ASBCA No. 59089, Aug. 30, 2018, 18-1 BCA ¶ 37183; ERG Consultants, Inc., VABCA No. 3223 et al., Mar. 17, 1992, 92-2 BCA ¶ 24905.

Furthermore, we also find no merit to Wyle's arguments that CBP could not reasonably find that the contracting arrangement between Wyle and Grant Thornton presented material risks, while also finding that Wyle's quotation warranted an outstanding rating under the technical and management approach factor. As an initial matter, this argument was previously raised by the requester, and addressed by our Office in the underlying decision. Wyle Labs., Inc., supra, at 6. Repetition of arguments previously made during our earlier consideration of the protest, and disagreement with our prior decision does not provide a basis for our Office to reconsider our prior decision. B3 Solutions, LLC--Recon., B-408683.5, May 8, 2014, 2014 CPD ¶ 146 at 2.

In any event, the resulting analysis of the quotation's technical merit and risk analysis are not incongruent or otherwise irrational. CBP effectively concluded that Wyle proposed a strong approach to the technical and management performance of the resulting work. CBP, however, also reasonably identified risk with the potential consequences arising from Wyle's proposed approach of entering into an agreement where it would pass 100 percent of the performance requirements through to Grant Thornton pending GSA's approval of the novation. In this regard, Wyle conceded that it had assigned all of the assets necessary for performing this work to Grant Thornton. CBP reasonably noted the risk associated with its lack of privity with Grant Thornton in

the event GSA did not approve the novation. As noted above, while the protester believes the risk that GSA would not approve the novation was minimal, there is no reason that CBP had to bear such risk arising from Wyle's decision to voluntarily assign its OASIS contract and associated assets to Grant Thornton. On this record, we have no basis to reconsider our prior decision.

The request for reconsideration is denied.

Thomas H. Armstrong
General Counsel