



Decision

Matter of: Department of Commerce--Reconsideration

File: B-417084.2

Date: March 21, 2019

Florence N. Bridges, Esq., Department of Commerce, for the agency.
Edward J. Tolchin, Esq., Offit Kurman Attorneys at Law, for Cyber Data Technologies, Inc., the protester.

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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 alleging errors in the underlying decision based on information that was available, but not submitted, during the initial protest is denied because parties withhold or fail to submit relevant evidence, information, or analysis for our initial consideration at their own peril.

DECISION

The Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), requests reconsideration of our decision, CyberData Techs., Inc., B-417084, Feb. 6, 2019, 2019 CPD ¶ 34, sustaining a protest filed by CyberData Technologies, Inc., a small business, of Herndon, Virginia, challenging the issuance of a task order to Ace Info Solutions, Inc., a small business, of Reston, Virginia, under request for quotations No. EG-133W-17-RQ-1234, which was issued by NOAA, for weather and climate computing infrastructure services.

We sustained the protest in part where the contemporaneous evaluation record produced by the agency included a heavily redacted version of the selection decision, even though our Office had issued a protective order under 4 C.F.R. § 21.4, which would have barred release of the decision document to any individual not admitted to the protective order. The redacted version of the selection decision contained insufficient information explaining the basis for why the proposals of the protester and awardee were determined to be technically equal. NOAA's view, at the time, was that

the entire text of the selection document was not relevant to the protest here. NOAA requests reconsideration of our decision, arguing that additional information supporting the reasonableness of the agency's evaluation of proposals is documented in the redacted portions of the selection decision. The agency further argues that our Office failed to adequately apprise the agency of our concerns with, and to allow the agency to address, the apparent inadequacy of the record produced by NOAA in response to the protest.

We deny the request for reconsideration.

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). NOAA primarily argues, in essence, that its failure to previously produce all relevant information should be excused because our Office did not provide adequate notice of our concerns with the insufficiency of the record produced in response to the protest, and to provide NOAA with an opportunity to supplement its limited production. In this regard, NOAA argues that our Office, in response to the agency's and intervenor's objections to our request for an unredacted version of the selection decision, permitted the agency to produce a redacted version. We find no merit to these arguments.¹

As an initial matter, the previously redacted portions of the selection decision do not provide a basis for reconsideration because while the agency had this information, it did not raise the information in the prior protest proceedings. 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.

¹ NOAA also argues that our Office effectively inferred an unalleged basis of protest that the agency did not properly have an opportunity to address, specifically concern with the agency's determination that the proposals were technically equal, as the basis for our sustaining the protest. See Request for Recon. at 5-6. This argument is without merit. CyberData's filings unquestionably challenged the reasonableness of the agency's determination that the protester's and intervenor's proposals were technically equal, and, as a result, that the agency unreasonably elevated the importance of price. See, e.g., Protest (B-417084) at 6 ("NOAA then disclosed during the debriefing that the only difference between the proposal evaluation ratings was the low price offered by Ace The fact that both offers received adjectival scores of 'Good' as supplied to the non-price factors, is not sufficient to excuse the Agency's duty to apply more significance to the non-price factors than it did to the price factor.") (internal citation omitted); CyberData Comments at 3 ("CyberData has repeatedly stated that it does not protest the overall adjectival rating applied to either proposal submitted in response to the Solicitation. Instead, it challenges NOAA's abandonment of the best value determination process based solely on overall equality in the adjectival ratings.") (internal citation and footnote omitted).

Department of Veterans Affairs--Recon., B-405771.2, Feb. 15, 2012, 2012 CPD ¶ 73 at 4. 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. Here, there is no question that the information now relied upon by the agency was available and could have been submitted during our initial consideration of the protest. In this regard, we have repeatedly warned that parties that withhold or fail to submit all relevant evidence, information, or analyses for our consideration do so at their own peril. Department of the Air Force--Recon., B-244007.3, Mar. 17, 1992, 92-1 CPD ¶ 287 at 6; Department of the Army--Recon., B-237742.2, June 11, 1990, 90-1 CPD ¶ 546 at 5. Thus, this additional information fails to provide a viable basis to request reconsideration of our prior decision.

We similarly find that NOAA's arguments that it was incumbent upon our Office to notify the agency of our concerns with the adequacy of its record produced in response to the protest fail to state a sufficient basis upon which to reconsider our prior decision. We have recognized that where an agency represents that it will produce all relevant documents, and that the documents will fully reflect the agency's analyses and evaluations, we will generally accept the agency's representations, based on a presumption of good faith. TriCenturion, Inc.; SafeGuard Servs., LLC, B-406032 et al., Jan. 25, 2012, 2012 CPD ¶ 52 at 13. Notwithstanding this general principle, however, it is incumbent on an agency to submit an adequate record supporting the reasonableness of its evaluation and source selection decision. We have repeatedly cautioned that where an agency fails to document its evaluation, or fails to retain evaluation materials, it bears the risk that there may not be adequate supporting rationale in the record for our Office to conclude that the agency had a reasonable basis for the source selection decision. Id. This principle applies with equal force where, as here, an agency elects not to provide relevant documents or relevant portions of documents.

Here, NOAA asserted that the unredacted portions of its selection decision were the only portions relevant to the asserted protest grounds, and that those portions of the decision adequately demonstrated the reasonableness of the source selection decision. Based on our review of those limited portions, however, we could not conclude that the agency had adequately demonstrated the reasonableness of its ultimate selection decision. As set forth above, it was incumbent upon NOAA to provide an adequate record and to justify the reasonableness of its selection decision. The agency, at its own peril, elected to submit a heavily redacted version of its contemporaneous rationale supporting its evaluation and selection decision.

NOAA's contention that it was incumbent upon our Office to instruct the agency concerning the consequences of its aggressive redaction of relevant supporting documents is misplaced. Our bid protest process is by its nature an adversarial process whereby the parties are responsible for arguing the issues in the protest and presenting support for their positions. Accordingly, notwithstanding the agency's suggestions to

the contrary, it is not the responsibility of our Office to advise an agency when it has failed to adequately support its position during the course of a protest other than through the issuance of a final decision resolving the protest, which we did.² Thus, the agency's failure to produce an adequate record in support of its position, to which it alone had access, rests at its own feet. The agency's argument therefore fails to state an adequate basis upon which to reconsider our prior decision.

The request is denied.

Thomas H. Armstrong
General Counsel

² Pursuant to 4 C.F.R. § 21.10(e), the GAO attorney assigned to a protest may conduct alternative dispute resolution outcome prediction and advise the parties regarding the likely outcome of protest; however, this is not mandatory, and was not used in this case.