



Decision

Matter of: AeroSage, LLC--Reconsideration

File: B-417138.5

Date: April 12, 2019

David M. Snyder for the protester.
May Sena, Esq., Defense Logistics Agency, for the agency.
Paula J. Haurilesko, Esq., and Laura Eyester, 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.

DECISION

AeroSage, LLC, a small business of Tampa, Florida, asks that we reconsider our February 15, 2019, dismissal of its protest challenging the terms of request for proposals (RFP) No. SPE605-19-R-0200, issued by the Defense Logistics Agency (DLA) for petroleum fuel. AeroSage contends that our decision contained multiple errors of fact and law.

We deny the request.

BACKGROUND

The agency issued the solicitation on October 22, 2018, for the delivery of various commercial fuels and distillates. Contracting Officer's Statement/Memorandum of Law at 1; Agency Report (AR), Tab 6, RFP, at 1. Proposals were due November 26, by 3:00 p.m. Eastern Standard Time. RFP at 1. AeroSage timely filed its initial protest on November 26, contending that the solicitation contained various errors.¹

¹ At 6:41 p.m. on November 26, AeroSage filed a supplemental protest, docketed as B-417138.2. Because the supplemental protest challenging the terms of the solicitation was filed after the closing time (3:00 p.m.) for receipt of proposals, the supplemental

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On December 21, DLA filed its report responding to the protest grounds. Because AeroSage elected to proceed without an attorney, a full version of the agency report was provided to our Office, while a redacted version of the report was furnished to the protester. The same day, AeroSage filed an objection to the agency's redacted version of the report by posting an unredacted copy of AeroSage's proposal in our Electronic Protest Docketing System (EPDS).² AeroSage Redaction Objections, Dec. 21, 2018. AeroSage also filed a document alleging that DLA violated the Procurement Integrity Act. AeroSage Procurement Integrity Act Filing, Dec. 21, 2018, at 1. Neither of these filings were styled as supplemental protests.

At 5:31 p.m. on December 31, AeroSage filed its comments on the agency report, and at 5:46 p.m., AeroSage filed what it termed a supplemental protest that duplicated its comments. Response to AR, Dec. 31, 2018; Supp. Protest, Dec. 31, 2018. On January 11, 2019, AeroSage filed yet another supplemental protest alleging that DLA failed to conduct meaningful discussions. Supp. Protest, Jan. 11, 2019, at 2.

On February 15, we dismissed AeroSage's protest for failing to comment within ten days after the agency filed its report. AeroSage, LLC, B-417138 et al., Feb. 15, 2019 (unpublished decision). Included within this dismissal, we also dismissed AeroSage's allegation of a Procurement Integrity Act violation because the EPDS docket is viewable only by parties to a protest and thus there was no disclosure of AeroSage's proposal information. Id. at 2. In addition, we dismissed AeroSage's allegation that DLA failed to engage in meaningful negotiations because, as filed with our Office, this contention did not establish a valid basis for challenging the agency's action. Id. AeroSage then filed its request for reconsideration on February 16.

DISCUSSION

In its request for reconsideration, AeroSage raises multiple arguments alleging that our decision contains errors of fact and law. For example, AeroSage argues that we improperly dismissed its protest for failing to timely file comments and ignored its objections to the agency's redactions to the agency report. AeroSage also argues that we erred in dismissing its supplemental protest of DLA's conduct of negotiations, and disputes our conclusions with respect to its allegation that DLA violated the Procurement Integrity Act. In addition, AeroSage argues that we ignored a protest it

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protest was untimely. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1); see ARINC Eng'g Servs., LLC, B-403471.2, Nov. 5, 2010, 2010 CPD ¶ 270 at 5-6 (allegation of improper bundling untimely when raised after time for receipt of proposals).

² As established by our regulations, EPDS is GAO's web-based electronic docketing system. See 4 C.F.R. § 21.0(f). EPDS is the method used for filing protests and protest-related documents.

contends was filed by its affiliated company, SageCare, Inc.³ We have considered all of AeroSage's arguments for reconsideration and find that none of them provide a basis to modify or reverse 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). The repetition of arguments made during our consideration of the original protest and disagreement with our decision do not meet this standard. Veda, Inc.--Recon., B-278516.3, B-278516.4, July 8, 1998, 98-2 CPD ¶ 12 at 4.

First, AeroSage alleges that we erred in dismissing its protest for failing to timely file comments because its objections to DLA's redactions of the record went unanswered. Request for Recon. at 1-2. Our Bid Protest Regulations provide that comments on the agency report "shall be filed within 10 days after the agency has filed the report, except where GAO has granted an extension of time" and that the protest "shall be dismissed unless the protester files comments within the period of time established." 4 C.F.R. §21.3(i). In addition, our letter acknowledging AeroSage's protest advised that comments on the agency report "must be filed via [EPDS] within 10 calendar days of the filing of the agency's report--otherwise, we will dismiss [the] protest." Acknowledgement of Protest & Confirmation of Report Requirement, B-417138, Nov. 27, 2018, at 1. A document, such as the protester's comments, is considered "filed" with GAO when it is received by GAO by 5:30 p.m. Eastern Time on that day. 4 C.F.R. § 21.0(g).

DLA filed its report on December 21, 2018; therefore, AeroSage's comments were due by 5:30 p.m. on December 31. AeroSage did not timely file its comments and did not request an extension--nor did GAO grant an extension to the time for such filing. Therefore, the protest was properly dismissed. See Aspen Consulting, LLC, B-405778.2, Mar. 19, 2012, 2012 CPD ¶ 117 at 2. AeroSage's complaint concerning the agency's redactions in the agency report did not free AeroSage from its responsibility to file comments within 10 days of the filing of the agency report, nor negate the explicit requirement in section 21.3(i) of our Bid Protest Regulations that AeroSage's protest be dismissed when it did not timely file its comments.

AeroSage also alleges that we erred in dismissing its supplemental protest that DLA failed to engage in meaningful negotiations without obtaining an agency response or allowing the protester an additional response. Request for Recon. at 2-3. AeroSage contends that we dismissed the supplemental protest ground because of its failure to respond to the agency report. Id. at 3.

AeroSage has not demonstrated any error of law or fact. Contrary to AeroSage's allegation, our decision dismissed its supplemental protest for failing to state a valid

³ AeroSage and SageCare share the same owner. Request for Recon. at 2.

basis for challenging the agency's action. Our Bid Protest Regulations provide that protests that lack a detailed statement of the legal and factual grounds of protest shall be dismissed. 4 C.F.R. § 21.5(f). AeroSage's supplemental protest stated that the protester responded to the agency's negotiations letter with "many of the same questions, objections, and issues to discuss to correct error[s] and improprieties in the negotiations and additional documentation requests asking for meaningful discussions." Supp. Protest, Jan. 11, 2019, at 2. As noted in our decision, AeroSage provided no details to explain why the negotiations were not meaningful, but instead repeated some of the same issues raised in its initial protest. See id. In addition, to the extent that AeroSage complains that it did not have the opportunity to further defend its protest ground, our Bid Protest Regulations permit dismissal of protests at any time sufficient information is obtained to warrant dismissal. 4 C.F.R. § 21.5. It is the protester's responsibility to file a protest that is factually and legally sufficient. See 4 C.F.R. § 21.1(c)(4) and (f). AeroSage has provided no basis for our Office to reverse or modify our prior decision.

AeroSage also argues that our decision contained an error of fact with respect to its allegation that DLA violated the Procurement Integrity Act by posting AeroSage's and its affiliate SageCare's proposals to EPDS. AeroSage alleges that the decision wrongly dismissed its contention on the basis that AeroSage and DLA were the only two parties to the protest and only they had access to the EPDS record. Request for Recon. at 2. AeroSage argues that section 21.3(a) of our Bid Protest Regulations requires other offerors to be advised of the protest and these offerors could have intervened in the protest. AeroSage also asserts that our descriptive guide states that bid protest records are "open for public review." Id.

AeroSage misunderstands both our decision and our regulations. As we explained in our decision, the EPDS docket is viewable only by parties to a protest. Because AeroSage and DLA are the only parties to the protest, no other parties had access to the EPDS docket for AeroSage's protest. Under our Bid Protest Regulations, the agency "shall immediately give notice of the protest . . . if no award has been made, to all bidders or offerors who appear to have a substantial prospect of receiving an award." 4 C.F.R. § 21.3(a). Although DLA was required to give notice of the protest to other offerors, no offeror intervened in the protest; therefore, no other parties had access to the EPDS docket. AeroSage's speculation as to what would happen if another offeror had intervened does not demonstrate that we erred in the decision.

With respect to AeroSage's contention that our descriptive guide states that bid protest records are "open for public review," AeroSage is in error. Our descriptive guide discusses GAO's goal of making public a meaningful and transparent decision, but does not state that the entire bid protest record is available for public review. See Bid Protests at GAO: A Descriptive Guide, GAO-18-510SP, May 2018, at 29.

Finally, AeroSage contends that our decision ignored the protest of its affiliate, SageCare. Request for Recon. at 2. Again, AeroSage provides no basis for us to modify or reconsider our decision. On November 26, 2018, SageCare asked to

intervene to support AeroSage's protest. SageCare Request to Intervene, Nov. 26, 2018. On November 28, we denied SageCare's request to intervene on the basis that it did not meet the definition of an intervenor. Notice of Denial of Request to Intervene, Nov. 28, 2018. In addition, we advised SageCare that it could file its own protest. Id. However, SageCare failed to file a protest in compliance with our Bid Protest Regulations. Instead, AeroSage filed its allegation of a Procurement Integrity Act violation and on January 11, 2019, filed a supplemental protest jointly with SageCare, without SageCare filing a protest in accordance with our Bid Protest Regulations. Therefore, again, AeroSage has not demonstrated any error of law or fact in our decision.

The request for reconsideration is denied.

Thomas H. Armstrong
General Counsel