



Decision

Matter of: AeroSage, LLC--Costs

File: B-417289.8

Date: August 2, 2019

David M. Snyder, AeroSage, LLC, for the protester.
Matthew Vasquez, Esq., May Sena, Esq., Defense Logistics Agency, 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 recommendation of the amount of costs to be reimbursed is dismissed where the protester failed to submit comments on the agency's response by the due date established by our Office.

DECISION

AeroSage, LLC, a service-disabled veteran-owned small business of Tampa, Florida, requests our Office recommend that the Defense Logistics Agency reimburse it in the amount of \$25,125,¹ for the costs of preparing its unsuccessful quotation and of filing and pursuing its protest B-417289.3, which challenged the issuance of a purchase order by the agency under request for quotations No. SPE605-19-Q-0256, for the delivery of diesel fuel to Fort Drum, New York.²

¹ This is the amount originally requested by AeroSage in its June 5 cost request submitted to our Office. AeroSage subsequently increased the amount of its request to \$30,005. Protester's Response to Request for Dismissal at 2.

² Subsequent to AeroSage's filing of protest B-417289.3, the agency advised our Office that performance of the issued purchase order was complete. AeroSage, LLC, B-417289.3, Apr. 2, 2019, at 1 (unpublished decision). The agency also advised that while it denied AeroSage's protest arguments had any merit, it discovered an error in the procurement record based on which it proposed corrective action and requested dismissal of the protest. Id. Because performance had been completed, the agency proposed to reimburse the protester its reasonable bid and proposal costs and its costs of filing and pursuing the protest. Id. at 2. We dismissed the protest as academic

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We dismiss the request because AeroSage failed to file its comments on the agency's response by the due date established by our Office, as required by our Bid Protest Regulations.

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. See 31 U.S.C. § 3554(a); Keymiae Aero-Tech, Inc., B-274803.2, Dec. 20, 1996, 97-1 CPD ¶ 153. To avoid delay in the resolution of protest related cost requests, our Regulations provide that a protester's failure to file comments within 10 calendar days "shall" result in dismissal of the request except where GAO has granted an extension or has established a shorter period. 4 C.F.R. § 21.8(f)(4). As our Office explained when implementing the requirement for a protester to comment on an agency's response to a request for reimbursement of protest costs, we find that such comments are necessary to provide an adequate record for us to review in issuing our decision. 83 Fed. Reg. 13817, 13822 (Apr. 2, 2018). We further explained that where a protester fails to respond within 10 days, it is appropriate to deem the protester as having abandoned its request. Id. But for this provision, a protester could idly await receipt of the agency's response to a cost request for an indefinite time, to the detriment of the protest system and our ability to resolve the matter expeditiously. See e.g., California Env'tl. Eng'g, B-274807, B-274807.2, Jan. 3, 1997, 97-1 CPD ¶ 99 at 5-6.

Here, the agency submitted its response to AeroSage's cost request in our Electronic Protest Docketing System (EPDS) on June 20, 2019.³ EPDS Docket Entry No. 3. In accordance with our Regulations and instructions provided in our acknowledgment package, AeroSage's comments were due by the close of business on July 1. 4 C.F.R. § 21.8(f)(4); GAO Acknowledgment of Request for Costs Recommendation, at 1 ("You [protester] are required to file comments on the agency response within 10 days of receipt of the response. GAO shall dismiss the request unless you file comments within the 10-day period, except where GAO has granted an extension or established a shorter period.").

The record reflects that at 5:28:45 p.m.⁴ on July 1, AeroSage submitted a filing titled "*Response to Agency Unsupported Comments*," which consisted of two documents--an unsigned and signed version of the same "updated" cost sheet listing the dates, brief descriptions of the work performed, and monetary amounts for each of AeroSage's

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based on the agency's proposed corrective action, and instructed the protester to submit its certified claim for costs directly to the agency within 60 days of our decision. Id.

³ Our Regulations provide that "[f]iling a document in EPDS constitutes notice to all parties of that filing." 4 C.F.R. § 21.0(g).

⁴ All times stated herein are Eastern Time.

claimed costs including additional costs incurred after AeroSage's June 5 submission of its cost request to our Office. EPDS Docket Entry No. 5. AeroSage's 5:28 p.m. submission did not provide any substantive comments on the agency's response to AeroSage's cost request. The record further reflects that at 8:34:28 p.m. on July 1, AeroSage submitted a second filing titled "*Corrected version of Attachment B Tabular Comment Responses*," which consisted of three documents--a letter providing substantive comments on the agency's response to AeroSage's cost request, the previously submitted signed version of the updated cost sheet, and AeroSage's comments on an "*Analysis of Hours*" matrix that the agency provided as part of its response to AeroSage's cost request.⁵ EPDS Docket Entry No. 6.

The protester acknowledges that its initial July 1 filing of 5:28 p.m. was a "misfiling of the unsigned and signed version" of the updated cost sheet, and represents that it intended to and believed that it did file a comment letter with the updated cost sheet as an attachment. Protester's Response to Request for Dismissal at 4. The protester claims that its initial filing contained a request for an extension. *Id.* Contrary to the protester's assertion, however, the record reflects that neither the unsigned or signed version of the updated cost sheet nor the EPDS notations accompanying the 5:28 p.m. upload of these documents contains such a request. EPDS Docket Entry No. 5. The protester neither requested nor received an extension of time to file its comments. Accordingly, the provision of our Regulations permitting a protester a longer time for filing its comments "where GAO has granted an extension" is inapplicable here. 4 C.F.R. § 21.8(f)(4); see e.g., Aspen Consulting, LLC, B-405778.2, Mar. 19, 2012, 2012 CPD ¶ 117 at 1 (request for reconsideration denied where GAO properly dismissed underlying protest because protester requested, but did not receive, an extension and, therefore, failed to file timely comments).⁶

The protester further argues that we should consider a number of other filings to constitute its comments on the agency's June 20 response to the protester's cost request. Protester's Response to Request for Dismissal at 2-4. First, the protester contends that its May 8 certified cost claim to the agency should be considered its comments because it contained documentation substantiating the protester's claimed costs. *Id.* at 4. Second, the protester contends that its May 28 letter responding to the agency's May 22 denial of its May 8 cost claim should be considered its comments because the agency's June 20 response contains no new information not included in the May 22 denial letter. *Id.* at 2 and 4. Third, the protester contends that its June 5 cost request to our Office should be considered its comments because the protester's

⁵ Our Regulations provide that a submission that is received after 5:30 p.m. is considered to be filed on the following business day. 4 C.F.R. § 21.0(g). Accordingly, the protester's July 1 filing of 8:34 p.m. is considered to have been filed on July 2.

⁶ To the extent AeroSage now requests an extension of time to file its comments, we note that our Regulations do not allow for post-deadline extensions. See e.g., PennaGroup, LLC, B-414840.2, B-414841.2, Aug. 25, 2017, 2017 CPD ¶ 266 at 3.

June 5 request included arguments responding to the agency's May 22 denial letter, which again, the protester argues, is substantively the same as the agency's June 20 response. Id. at 3-4. Lastly, the protester contends that its June 21 request for additional information should be considered its comments because it "repeated the false repeated assertions" made by the agency. Id. at 4.

With respect to the first three documents the protester contends should be considered as its comments--its May 8 certified cost claim to the agency, its May 28 response to the agency's May 22 denial letter, and its June 5 cost request to our Office--each of these documents pre-dates the agency's June 20 response to the protester's cost request. Accordingly, these documents cannot satisfy the protester's obligation pursuant to 4 C.F.R. § 21.8(f)(4) to comment on the agency's response to the cost request. See e.g., PennaGroup, LLC, supra, at 2 (dismissing protest for failure to comment where rather than submitting comments on the agency's report, the protester relied upon its pre-report protest filing, providing: "[o]ur legal team has reviewed the [agency's] response and finds no new legal or factual arguments not fully set forth in length in our original Bid Protest").

The last document the protester contends should be considered as its comments--its June 21 request for additional information--was submitted after the agency's June 20 response, but, contrary to the protester's characterization, this document does not comment on the agency's response to the protester's cost request. Rather, the protester's June 21 filing repeats the allegations and document requests from the underlying protest, and explains that the requested document production was necessary "to give the protester a chance to get best pricing for this assisted acquisition," and "to respond to [the agency's] false assertions" that the protester's cost claim "far exceeds what a prudent person would incur" in protesting award of a \$27,125 order. Protester's Request for Information (June 21, 2019). Therefore, we disagree with the protester that the June 21 request for additional information constitutes comments on the agency's response to the protester's cost request.

The protester also requests that we consider its July 1 filing of 8:34 p.m. pursuant to section 21.3(j) of our Regulations, which provides that GAO may permit the submission of additional statements by the parties when "necessary for the fair resolution of the protest." Protester's Response to Request for Dismissal at 2. The protester's request ignores the portion of this section establishing that a party "must receive GAO's approval before submitting any additional statements." 4 C.F.R. § 21.3(j) (emphasis added). Here, the protester neither requested nor received permission to file its additional comments of July 1. Accordingly, the section of our Regulations relied upon by the protester to request consideration of information "necessary for the fair resolution of the protest" is not available here.

In summary, the protester did not file substantive comments on the agency's response to the protester's cost request by the due date established by our Office. As noted above, our rules provide that a cost request shall be dismissed where comments are not submitted on time. 4 C.F.R. § 21.8(f)(4). Under the circumstances presented here, our Regulations do not provide exceptions to the requirement to file comments on time. See e.g., California Env'tl. Eng'g, *supra*, at 5-6; Aspen Consulting, LLC, *supra*, at 1; Andros Contracting, Inc., B-403117, Sept. 16, 2010, 2010 CPD ¶ 219 at 3 (protest dismissed where comments were sent to incorrect e-mail addresses and thus were not filed by due date).

The request is dismissed.

Thomas H. Armstrong
General Counsel