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441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Academy Medical, LLC--Reconsideration

File: B-418223.4

Date: February 9, 2021

Julie M. Nichols, Esq., Roeder, Cochran, Phillips, PLLC, for the protester.
Jason A. M. Fragoso, Esq., Department of Veterans Affairs, for the agency.
Michael Willems, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration of prior decision is denied where the requesting party has not shown that our decision contains either errors of fact or law or information not previously considered.

DECISION

Academy Medical, LLC, a service-disabled veteran-owned small business (SDVOSB), of West Palm Beach, Florida, requests that our Office reconsider our decision, *Academy Medical, LLC*, B-418223.3, Oct. 7, 2020, 2020 CPD ¶ 324, in which we denied the protest of Academy's elimination from the competitive range under request for proposals No. 36C10G19R0050, issued by the Department of Veterans Affairs (VA), for the distribution and supply management of medical, surgical, dental, and laboratory supplies to VA medical centers and other governmental agencies. The protester alleges that our decision contained factual and legal errors that warrant modification of our prior decision.

We deny the request for reconsideration.

BACKGROUND

In our prior decision, we denied Academy's challenge to its elimination from the competitive range. *Academy Medical, LLC*, *supra*. Specifically, we denied the protester's challenges to the agency's price reasonableness methodology, independent government cost estimate (IGCE), and the agency's decision to exclude the protester from the competitive range because its price was unreasonable. *Id.* at 3-7. Additionally, we concluded that the protester had abandoned its challenges to the

agency's non-price evaluation because the protester did not substantively respond to the agency's arguments on those issues. *Id.* at 4.

Academy requests that we reconsider the decision because, according to Academy, it was based on legal and factual errors. Request for Reconsideration at 1. Academy contends that, among other things, the decision erred by concluding: that the agency had excluded Academy from the competitive range on the basis of both price and non-price factors; that the protester's challenges to the non-price evaluation factors were abandoned; and that the agency's price reasonableness methodology and IGCE were reasonable. *Id.* at 2-8. Academy additionally argues that our decision applied an incorrect legal standard in considering the agency's price reasonableness evaluation. *Id.* at 8-12.

DISCUSSION

Under our Bid Protest Regulations, to obtain reconsideration, a requesting party must demonstrate that our prior decision contains errors of fact or law, or present new information not previously considered that would warrant reversal or modification of our earlier decision. 4 C.F.R. § 21.14(a); *Blue Horse Corp.--Recon.*, B-413929.2, B-413929.4, May 16, 2017, 2017 CPD ¶ 149 at 4. Repetition of arguments previously made, or disagreement with our prior decision, do not provide a basis for our Office to reconsider the earlier decision. *Id.* For the reasons discussed below, Academy's request does not support reconsideration of our decision.

First, the protester argues that our decision is factually incorrect. Specifically, Academy argues the decision incorrectly characterized the agency as having excluded the protester from the competition on the basis of both non-price and price factors, and a finding that Academy's proposal could not be made awardable through discussions. Request for Reconsideration at 2-3 (*citing Academy Medical, LLC*, *supra* at 3). The protester argues this was incorrect because the agency acknowledged that the non-price issues could potentially be resolved through discussions--the agency excluded the protester from the competition because the protester's price was high enough that it was unlikely to be resolved through discussions. *Id.* Thus, in the protester's view, it was excluded from the competition on the basis of price factors alone and the decision's statement to the contrary was in error. *Id.*

The protester's argument is unavailing. The portion of the decision referenced by the protester summarized the agency's evaluation as part of the factual background, and is almost verbatim from the agency's contemporaneous evaluation. *Academy Medical, LLC*, *supra* at 3; AR, Tab 6; Proposal at 598; AR, Tab 8, Business Clearance Memo. at 92-99. Moreover, our decision's substantive discussion of the protester's legal arguments correctly acknowledged that the agency's price evaluation was the determinative factor in excluding the protester from the competition and explicitly addressed the issues the protester raises now. *See Academy Medical, LLC*, *supra* at 7. Accordingly, even assuming, for the sake of argument, that the contested statement was in error, the decision substantively addressed the points that the protester now

claims were ignored and concluded that the agency did not err in excluding the protester from the competition on the basis of its price. *Id.* In short, the protester has not explained in what way remedying this alleged inaccuracy would alter the outcome of the decision or provide a basis for us to reconsider it.

Next, the protester objects to our conclusion that the protester abandoned its protest grounds concerning the agency's evaluation of the non-price factors. Request for Reconsideration at 3-6. In this regard, the protester concedes that its comments did not substantively address the agency's response to its protest allegations concerning the non-price factors. *Id.* Nonetheless, the protester argues that, because the agency report acknowledged the protester was excluded from the competition because its price was unreasonably high, any arguments concerning the evaluation of the non-price factors were essentially moot and there was no need for the protester to have addressed them in its comments. *Id.*

The distinction the protester is attempting to draw is irrelevant to the outcome of the decision. If a protester elects not to substantively respond to the agency's rebuttal of its protest grounds, we will treat those protest grounds as abandoned and decline to consider them further. *See The Green Tech. Group, LLC*, B-417368, B-417368.2, June 14, 2019, 2019 CPD ¶ 219 at 8; *Earth Res. Tech., Inc.*, B-403043.2, B-403043.3, Oct. 18, 2010, 2010 CPD ¶ 248 at 6. The protester does not argue, however, that we should have substantively considered the protest grounds in our decision. Rather, the protester argues that the issues were rendered moot by the agency's admission, and that we should have declined to consider the protest grounds for that reason instead. Request for Reconsideration at 3-6. But the protester does not explain why the basis on which we declined to further consider those protest grounds is significant to the outcome of the decision. In short, the protester has not explained in what way remedying this alleged inaccuracy would alter the outcome of the decision or provide a basis for us to reconsider it.

Third, the protester alleges that our decision erred by concluding that the agency acted reasonably when it used the IGCE, rather than price competition, as the basis for its price reasonableness analysis. Request for Reconsideration at 6-8. Specifically, the protester disputes the agency's conclusion that the variance in offerors' prices precluded the establishment of price reasonableness on the basis of competitive pricing. *Id.* Moreover, the protester contends that the agency's IGCE was flawed because it relied on pricing for offerors that were terminated for default or offered unusual discounts unlikely to be present in this case. *Id.*

Preliminarily, the protester advanced identical arguments during the course of its prior protest, and we rejected them in our decision. *See, e.g.*, Comments at 2-6. As noted above, repetition of arguments previously made, or disagreement with our prior decision, do not provide a basis for our Office to reconsider the earlier decision. *Blue Horse Corp.--Recon.*, *supra*.

In any event, the record supports our decision. As we noted in our decision, the prices offered by SBVOSBs showed significant price variance on all contract line item numbers (CLINs) that had more than one SDVOSB offeror, such that it was reasonable for the agency to conclude that it could not establish price reasonableness based on competitive pricing. *See Academy Medical, LLC*, *supra* at 5-6; AR, Tab 8, Business Clearance Memo. at 68-76. With respect to the IGCE, the record also supports our conclusion that the IGCE was created using relevant historical pricing and included contracts for substantially the same services and geographic areas. *Id.* In short, the protester's arguments in this regard consist of nothing more than repetition of its previous arguments, and otherwise provide no basis for us to reconsider our decision.

Finally, the protester argues that our decision applied an incorrect legal standard for review of the agency's price reasonableness determination. Request for Reconsideration at 8-12. Specifically, the protester contends that our decision did not assess whether the agency's price reasonableness determination was consistent with applicable law. *Id.* The protester notes that 38 U.S.C. § 8127(d)(1) provides that the VA must set-aside procurements if, among other things, the contracting officer "has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price[. . . .]" *Id.* at 9 (c*iting* 38 U.S.C. § 8127(d)(1)).

The protester maintains that these provisions change the nature of our inquiry into the contracting officer's price reasonableness analysis. *Id.* at 10. According to the protester, the relevant question is not whether the contracting officer exercised reasonable discretion when concluding that the price was unreasonable, but rather "whether there exists no basis for him/her to conclude that the price can be deemed reasonable." *Id.* (emphasis omitted). The protester argues that the statute compels the application of this latter standard, and our decision erred by not applying it. *Id.*

The legal standard advanced by the protester is without any textual basis in 38 U.S.C. § 8127, however, and reflects the protester's fundamental misunderstanding of what the statute requires. Specifically, 38 U.S.C. § 8127(d)(1) requires an agency to set aside a procurement for certain veteran-owned small businesses or SDVOSBs when the contracting officer has a reasonable expectation that, among other things, award can be made at a fair and reasonable price. That is to say, the statutory requirements relate to VA's decision to pursue a set-aside as an initial matter. In this case, the agency set aside a portion of the procurement for SDVOSBs on the basis of an expectation that the agency could receive fair and reasonable pricing from two or more SDVOSBs. *See Academy Medical, LLC, supra* at 2.

Although the statutory language compels VA to pursue a set-aside under certain circumstances, it has no bearing on the contracting officer's ultimate analysis of whether the prices actually received are reasonable. We have explained that the VA's assessment of the likelihood that it will receive fair and reasonable prices when considering a set-aside and its analysis of prices actually received are separate

inquiries subject to different statutory and regulatory requirements.[1] *See, e.g.*, *Veteran Shredding, LLC*, *B-417399*, June 4, 2019, 2019 CPD ¶ 210 at 4. Simply put, there is no statutory or regulatory basis for the protester's contention that a decision to set-aside a procurement for SDVOSBs creates a presumption that the prices actually received from such firms are reasonable. Accordingly, the protester's argument that our Office applied the wrong legal standard is without merit.

The request for reconsideration is denied.

Thomas H. Armstrong
General Counsel

[1] Specifically, while 38 U.S.C. § 8127(d) and its implementing regulations govern the VA's set-aside decisions, section 15.404-1 of the Federal Acquisition Regulation governs an agency's evaluation of proposed prices received in response to a solicitation.