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Decision

Matter of: Capital Brand Group, LLC--Reconsideration

File: B-418656.2

Date: July 9, 2020

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Robert T. Notigan, Esq., General Services Administration, for the agency.

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DIGEST

Request for reconsideration of decision dismissing a challenge to the terms of the solicitation as untimely is denied where the requesting party has not shown that the decision contains errors of fact or law that warrant reversal or modification.

DECISION

Capital Brand Group, LLC (CBG), a small disadvantaged business of Silver Spring, Maryland, requests that we reconsider our decision in *Capital Brand Group, LLC*, B-418656, Apr. 24, 2020 (unpublished decision), dismissing as untimely the company's challenge to the terms of request for quotations (RFQ) No. 47PD0319Q0003, issued by the General Services Administration (GSA) to holders of GSA Federal Supply Schedule (FSS) 03FAC-facilities maintenance and management, for operations and maintenance services at the Elijah B. Prettyman United States Courthouse and William B. Bryant Annex in Washington, D.C. CBG argues that our Office's decision not to invoke the "significant issue exception" to our timeliness rules was in error.

We deny the request for reconsideration.

BACKGROUND

CBG is the current holder of a GSA contract, awarded on August 1, 2018, on a sole-source basis under the Small Business Administration's (SBA) 8(a) program, for

operations and maintenance services at the courthouse and annex.¹ Protest at 3. The RFQ here was issued on May 30, 2019. RFQ at 1.² The solicitation indicated that it was set aside for small businesses, but was not part of the 8(a) program. *Id.* Although CBG does not hold the FSS 03FAC schedule and therefore could not directly access the RFQ, the agency provided CBG with a copy of the solicitation on June 11. Protest at 6; see *also* CBG Resp. to GSA Req. for Dismissal, exh. A, CBG Email to SBA, June 12, 2019. The RFQ had a closing date for the receipt of quotations of July 1.³

On April 10, 2020, CBG filed a protest with our Office contending that the RFQ improperly solicited quotations for the same operations and maintenance services currently performed by CBG under the 8(a) program, and that GSA had removed the requirement from the 8(a) program in violation of applicable SBA regulations. Protest at 7-8. CBG also asserted that its protest was timely because it was filed within 10 days of when CBG learned of GSA's position that the work under the RFQ was considered a new requirement and was never under the 8(a) program. *Id.* at 2, *citing* exh. A, GSA Letter to Rep. John Sarbanes, Mar. 30, 2020 (GSA's response to a congressional inquiry regarding CBG).

On April 13, the agency requested that the CBG protest be dismissed as untimely under 4 C.F.R. § 21.2(a)(1) of our Bid Protest Regulations, because it challenged an alleged impropriety in the solicitation that should have been protested before the initial closing time for submission of quotations. GSA Req. for Dismissal at 1.

On April 16, in response to the agency dismissal request, CBG contended that it could not have anticipated that GSA would ignore the requirement to receive SBA approval before removing the requirement from the 8(a) program, and thus timeliness should be measured from the date when CBG learned that GSA considered the FSS procurement to be a new requirement. CBG Resp. to GSA Req. for Dismissal at 3. Additionally, CBG alternatively argued that even if the protest was determined to be untimely, GAO should nonetheless "hear the protest because it raises issues significant to the procurement system; namely, GSA's position that it can unilaterally remove requirements from the 8(a) Program by procuring them through an FSS buy without

¹ Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes the SBA to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. Federal Acquisition Regulation (FAR) 19.800. This program is commonly referred to as the 8(a) program.

² Citations to the RFQ are to exhibit 1 of the agency's dismissal request in the underlying protest.

³ Although the RFQ stated that quotations were due July 1, both parties have stated that the closing date was July 11. GSA Req. for Dismissal at 1; CBG Resp. to GSA Req. for Dismissal at 3. While it is unclear if the July 11 date is a typographical error, or if the deadline was extended by amendments not in the record, the difference does not affect the protest outcome.

receiving approval of SBA as required by SBA regulations and the FAR.” *Id.* at 4, *citing* 4 C.F.R. § 21.2(c).

On April 24, we dismissed CBG’s protest as untimely. *Capital Brand Grp., LLC, supra* at 2. In this dismissal, we stated that our timeliness rules specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial quotations be filed before that time. *Id.* Our decision also found that CBG was aware, based on the terms of the RFQ, that GSA did not intend to fulfill this requirement through the 8(a) program; but CBG did not file its protest until after the deadline for receipt of quotations. *Id.* Lastly, we declined to consider CBG’s untimely protest under the significant issues exception, as we concluded that the issue was not of widespread interest to the procurement community. *Id.* n.4.

CBG filed a timely request for reconsideration on May 4. The agency submitted a response to CBG’s request for consideration on May 5 and CBG provided a reply on May 7.

DISCUSSION

CBG does not dispute the determination that its underlying protest was untimely filed. Rather, CBG contends that “GAO’s finding that the issue presented in CBG’s protest is not of widespread interest to the procurement community is erroneous.” Req. for Recon. at 3. In support thereof, CBG includes a May 4, 2020, letter from the SBA Associate Administrator, Office of Business Development, stating “we believe the above-captioned protest does raise an issue of widespread interest to the procurement community.” *Id.*, exh. A., SBA Letter to CBG Counsel, May 4, 2020, at 1. The requester also opines that “the RFQ is part of a strategy by GSA to avoid procuring requirements, which are currently being provided by 8(a) contractors, through the 8(a) Program, to the prejudice of 8(a) contractors.” Req. for Recon. at 1-2.

Under our Bid Protest Regulations, to prevail on a request for reconsideration, the requesting party must show that our decision contains errors of fact or law, or present information not previously considered, that warrants the decision’s reversal or modification. 4 C.F.R. § 21.14(a), (c); *Analytic Strategies LLC; Gemini Indus., Inc.--Recon.*, B-413758.4, B-413758.5, Mar. 9, 2017, 2017 CPD ¶ 87 at 5. The repetition of arguments made during our consideration of the original protest and disagreement with our decision do not meet this standard. 4 C.F.R. §21.14(c); *Walker Dev. & Trading Grp.--Recon.*, B-411246.2, Sept. 14, 2015, 2015 CPD ¶ 284 at 2. Additionally, a party’s assertion of new arguments or presentation of information that could have been, but was not, presented during the initial protest also fails to satisfy the standard for granting reconsideration. *JEQ & Co., LLC--Recon.*, B-415338.8, May 9, 2019, 2019 CPD ¶ 175 at 4; *Walker Dev. & Trading Grp.--Recon.*, *supra* at 2, 5.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without disrupting or delaying

the procurement process. *Gorod Shtor*, B-411284, May 22, 2015, 2015 CPD ¶ 162 at 2-3; *Dominion Aviation, Inc.--Recon.*, B-275419.4, Feb. 24, 1998, 98-1 CPD ¶ 62 at 3. Of relevance here, our timeliness rules require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1); see *AmaTerra Env'tl. Inc.*, B-408290.2, Oct. 23, 2013, 2013 CPD ¶ 242 at 3.

Pursuant to 4 C.F.R. § 21.2(c), however, our Office may consider the merits of an untimely protest where good cause is shown or where the protest raises issues significant to the procurement system. In order to prevent our timeliness rules from becoming meaningless, exceptions are strictly construed and rarely used. *Vetterra, LLC*, B-417991 *et al.*, Dec. 29, 2019, 2020 CPD ¶ 15 at 3. What constitutes a significant issue is decided on a case-by-case basis. *Cyberdata, Techs., Inc.*, B-406692, Aug. 8, 2012, 2012 CPD ¶ 230 at 3. However, we generally regard a significant issue as one of widespread interest to the procurement community and that has not been considered on the merits in a prior decision. *Vetterra, LLC, supra*; *Baldt Inc.*, B-402596.3, June 10, 2010, 2010 CPD ¶ 139 at 2-3. Moreover, invoking the significant issue exception "is a matter entirely within [GAO's] discretion." *Mark Dunning Indus., Inc.--Request for Recon.*, B-234367.2, Sept. 26, 1989, 1989 WL 241254, at *1; see also *The Dep't of the Navy; Fairchild Weston Sys., Inc.--Request for Recon.*, B-230013.2, B-230013.3, July 29, 1988, 88-2 CPD ¶ 100 at 2; *Ensign Aircraft Co.*, B-207898.4, May 17, 1983, 83-1 CPD ¶ 520 at 2.

CBG essentially argues that its protest raised a significant issue--and that we erred in the exercise of our discretion--because the SBA now states that it believes the issue to be of widespread interest to the procurement community. *Req. for Recon.* at 1. The agency argues that CBG's protest does not meet the significant issue exception because our Office has previously considered whether an agency improperly removed work from the 8(a) program, and placed it under an FSS contract, without application of the set-aside withdrawal requirements found in FAR 19.506. Memorandum of Law at 1, *citing Alpa Techs. & Servs., Inc.*, B-408762.2, Feb. 12, 2014, 2014 CPD ¶ 66 at 9; *Global Analytic Info. Tech. Servs., Inc.*, B-297200.3, Mar. 21, 2006, 2006 CPD ¶ 53 at 2; *Millennium Data Sys., Inc.*, B-292357.2, Mar. 12, 2004, 2004 CPD ¶ 48 at 9.

Here, CBG has not demonstrated that reversal or modification of our dismissal decision is merited. As a preliminary matter, CBG's reconsideration request primarily reasserts its previous contention that even if the protest was untimely, our Office should nonetheless consider the protest under the significant issue exception to our timeliness rules. *Req. for Recon.* at 1-2. This argument, however, was previously raised by CBG and considered by our Office, and therefore fails to state an adequate basis for reconsideration of our decision. *Walker Dev. & Trading Grp.--Recon., supra* at 2 ("Repetition of arguments made during our consideration of the original protest and disagreement with our decision do not meet this standard.").

We also find no merit in CBG's request that we reconsider our dismissal of the protest in light of the May 4, 2020, letter from the SBA stating that agency's view that the CBG

protest is of widespread procurement community interest. As noted above, 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). Information not previously considered does not mean information that arises from events that took place after we issued our decision. *Epsilon Sys. Sols., Inc.*, B-414410.3, Sept. 20, 2017, 2017 CPD ¶ 292 at 5; *InSpace 21 LLC*, B-410852.4, Apr. 3, 2015, 2015 CPD ¶ 124 at 5. Here, we issued our decision on April 24 and CBG did not provide the SBA letter to our Office until May 4.⁴ In sum, the subsequent SBA opinion does not provide grounds for our Office to conclude that we erred in deciding, as we did, not to exercise our significant issue exception discretion.

Lastly, as the agency points out, we have considered protests concerning whether an agency improperly removed work from the 8(a) program, and we have concluded that the FAR exempts task orders issued under FSS contracts from application of the set-aside withdrawal requirements found in FAR 19.506. *Alpa Techs. & Servs., Inc., supra*; *Global Analytic Info. Tech. Servs., Inc., supra*; *Millennium Data Sys., Inc., supra*. Nor does CBG dispute that our Office has previously issued decisions on the merits of the issue it now raises. See Comments at 1-2. In fact, the SBA letter on which CBG relies states that a decision on the merits of the CBG protest would only provide “additional guidance and clarity” of the issue. Request for Reconsideration, exh. A., SBA Letter to CBG Counsel, May 4, 2020, at 2. We find, in this instance, that providing “additional guidance and clarity” does not rise to the standard we have established for the discretionary use of our significant issue exception and provides no basis to reconsider our decision dismissing the protest.

The request for reconsideration is denied.

Thomas H. Armstrong
General Counsel

⁴ CBG has also provided no reason why the letter from the SBA could not have been obtained and provided in the underlying protest, either as part of its response to the agency dismissal request or with the protest itself--which had been filed almost 9 months after the RFP closing date.