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Decision

Matter of: VS2, LLC

File: B-418942.4; B-418942.5

Date: February 25, 2021

Cameron S. Hamrick, Esq., C. Peter Dugan, Esq., and Roger V. Abbott, Esq., Miles & Stockbridge P.C.; and Paul F. Khoury, Esq., Craig Smith, Esq., and Cara L. Lasley, Esq., Wiley Rein LLP, for the protester.

Kevin P. Mullen, Esq., James A. Tucker, Esq., Alissandra D. Young, Esq., and Victoria D. Angle, Esq., Morrison & Foerster LLP, for Vectrus Mission Solutions Corporation, an intervenor.

Wade L. Brown, Esq., and Jonathan A. Hardage, Esq., Department of the Army, for the agency.

Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's issuance of task order in the wake of its implementing corrective action in response to a previous protest is dismissed; notwithstanding protester's characterization of its complaint as a protest, it actually amounts to an untimely request for reconsideration that also fails to provide a cognizable basis for reconsideration.

DECISION

VS2, LLC, of Alexandria, Virginia, protests the issuance of a task order to Vectrus Mission Solutions Corporation, of Alexandria, Virginia, under request for proposals (RFP) No. W52P1J-19-R-0070, issued by the Department of the Army for logistics support services at Fort Benning, Georgia. VS2 argues that issuance of the task order to Vectrus was improper.

We dismiss the protest.

BACKGROUND

This is the second occasion where a protest has been filed in connection with the agency's conduct of this acquisition. The agency previously awarded a task order to VS2, and both Vectrus and a second concern, Vanquish Worldwide, LLC, filed protests

challenging that award. (VS2 fully participated as an intervenor in the prior protests.) Our Office sustained the protest filed by Vectrus, concluding that the agency had misevaluated its cost proposal. *Vectrus Mission Solutions Corporation, Vanquish Worldwide, LLC*, B-418942, *et al.*, Oct. 27, 2020, 2020 CPD ¶ __. In that same decision, we dismissed the protest filed by Vanquish, concluding that it was not an interested party to file its protest in light of our conclusions relating to the protest of Vectrus.

As we explained in our prior decision, the RFP contemplated the issuance of a predominantly cost-plus-fixed-fee type requirements task order for a base year and four 1-year options to perform the solicited services. The agency was to evaluate proposals considering total evaluated cost/price, as well as three non-cost/price factors: technical, small business participation plan, and past performance. RFP at 79. The RFP provided that the technical and small business participation plan factors would be evaluated on a pass/fail basis (and be assigned ratings of acceptable or unacceptable); the agency would perform a “qualitative assessment” of each offeror’s past performance and assign confidence ratings; and cost/price would be evaluated for realism and reasonableness.

The RFP advised that the agency would make award on a low-cost/price, technically acceptable basis (considering the technical and small business participation plan factors) to the offeror receiving a substantial confidence rating under the past performance factor. RFP at 78, 79.

In its original source selection, the agency assigned both the VS2 and Vectrus proposals acceptable ratings under the technical and small business participation factors, and also assigned both proposals substantial confidence ratings under the past performance factor. Vectrus submitted the lowest overall cost/price of \$250,831,287, compared to the proposed cost/price submitted by VS2 of \$257,097,548. However, in evaluating the Vectrus cost/price proposal, the agency applied an upward most probable cost adjustment of approximately \$19.7 million, resulting in Vectrus having an evaluated cost/price of \$270,551,185. Based on these evaluation findings, the agency issued the task order to VS2, concluding that it was the firm submitting the lowest overall cost/price proposal that was rated acceptable under the technical and small business participation factors that also was assigned a substantial confidence rating under the past performance factor.

Vectrus protested the agency’s decision to apply an upward most probable cost adjustment to its proposed cost/price. Vectrus argued that the cost at issue was one that it had legally bound itself to absorb, and therefore maintained that the upward adjustment was erroneous.

We sustained Vectrus’s protest, agreeing that the agency had erred in applying the upward most probable cost adjustment to the proposal. We found that, in fact, Vectrus had legally bound itself to absorb that cost. We therefore concluded that, for evaluation and source selection purposes, Vectrus’s cost/price should have been \$250,831,287, the amount proposed by Vectrus. In light of that conclusion, we found that Vectrus was

entitled to receive the task order based on the express terms of the RFP. We recommended that the agency terminate the task order issued to VS2, and issue the task order to Vectrus, if otherwise proper.

Upon receipt of our earlier decision, the agency followed our recommendation, terminating the task order issued to VS2 and issuing a task order to Vectrus. After being advised of the agency's actions and receiving a debriefing, VS2 filed its current protest.¹

DISCUSSION

VS2 asserts it is challenging the agency's most recent selection decision. Notwithstanding VS2's characterization, we conclude that the current protest amounts to an untimely request for reconsideration that also fails to provide a basis for our Office to reconsider our earlier decision. VS2's allegations fall into four broad categories: (1) allegations previously raised and considered during our review of Vectrus's original protest; (2) allegations that could have been, but were not, raised during our review of Vectrus's original protest; (3) allegations challenging or disagreeing with our earlier decision, or with the comments Vectrus filed in the earlier protest; and (4) a challenge to our recommended course of corrective action.

As an initial matter, we note that our Bid Protest Regulations, 4 C.F.R. § 21.14, contemplate that any party to a bid protest (such as VS2 here) may request reconsideration of our earlier decision. Such requests must be timely, that is, filed within 10 days of when the basis for reconsideration is known or should be known. *Id.* Additionally, any request for reconsideration must include a detailed statement of the factual and legal grounds upon which reversal or modification of our earlier decision is warranted, specifying any errors of law made or information not previously considered. *Id.*

VS2's current protest was submitted to our Office on December 11, 2020, more than 10 days after we issued our earlier decision on October 27. Thus, to the extent VS2's current protest amounts to a request for reconsideration, the request is untimely. We set forth below the reasons we conclude that VS2's current protest constitutes a request for reconsideration that is both untimely, and also fails to provide a basis for our Office to reconsider our earlier decision.

¹ The task order was issued under the Enhanced Army Global Logistics Enterprise multiple-award, indefinite-delivery, indefinite quantity contracting program. Because the value of the task order is in excess of \$25 million, our Office has jurisdiction to consider the protest. 10 U.S.C. §2304(e)(1)(B).

Arguments Previously Made

Among other things, a request for reconsideration that merely repeats arguments previously made does not provide a basis for our Office to reconsider our earlier decision. *Capital Brand Group, LLC--Recon.*, B-418656.2, July 9, 2020, 2020 CPD ¶ 231 at 3.

A comparison of VS2's comments filed in response to Vectrus's earlier protest and its current filing reveals that much of VS2's latest filing is--literally--a word-for-word restatement of its earlier comments with nothing more than minor variations.² Cf. VS2's Comments on the Agency Report, Aug. 31, 2020, at 3-33 *with* VS2's Protest Filing, Dec. 11, 2020, at 16-51. This amounts to a largely verbatim restatement of VS2's earlier arguments that were made and considered during our earlier review of Vectrus's protest. Repetition of these arguments that were made during the earlier protest does not provide a basis for our Office to reconsider our earlier decision.

Arguments That Could Have Been--But Were Not--Previously Made

VS2's latest filing raises several arguments that could have been--but were not--raised during our earlier consideration of Vectrus's protest. A party's assertion of new arguments that could have been--but were not--made during an earlier protest fails to state a cognizable basis for protest, and otherwise does not provide a basis for our Office to reconsider an earlier decision. See *Good Food Services, Inc.*, B-244528, B-244528.3, Dec. 30, 1992, 92-2 CPD ¶ 448 (where GAO sustains earlier protest on basis that protester's proposal was misevaluated, GAO will not consider subsequent protest filed by the original awardee that original protester's proposal otherwise does not meet RFP requirements, since that argument should have been--but was not--made during consideration of the original protest); see also, *Techniarts Engineering*, B-238520, B-238520.5, Dec. 31, 1991, 91-1 CPD ¶ 20 (same).

In its latest protest filing, VS2 argues that the agency should not have assigned Vectrus a substantial confidence rating for its past performance because it misevaluated Vectrus's past performance for various reasons. According to VS2, the agency failed to consider past performance information relating to certain examples identified by VS2, and Vectrus failed to "self-report" these same allegedly adverse past performance examples. These arguments are based entirely on either the contents of the prior record, or upon information that was or should have been known to VS2 well before our earlier decision was issued.³ Given that VS2 made no mention of these concerns

² As an example of these minor variations, VS2's current protest filing characterizes an argument made by Vectrus in the earlier protest as "perplexing." Protest at 50. Previously, VS2 characterized this very same argument as "baffling." VS2 Comments, Aug. 31, 2020, at 32. Nonetheless, VS2's argument in both filings is otherwise identical.

³ For example, VS2 identifies a task order to perform logistics support services at Fort Bragg, North Carolina, awarded to Vectrus in 2016 under which VS2 claims Vectrus

during our earlier consideration of Vectrus's protest--despite the fact that all of the information necessary to advance these allegations was known or should have been known to VS2 at that time--these allegations also do not provide a basis to reconsider our earlier decision.

VS2 suggests that it did not previously challenge the agency's evaluation of Vectrus's past performance because it was not an "interested party" to advance the argument at the time of the earlier protest. As we understand its argument, VS2 essentially takes the position that, because it was not the protester at that time, it was not an interested party to challenge the evaluation of the Vectrus proposal. We disagree.

VS2's position ignores the fact that, had it made these arguments (and had we agreed with its position), this would have had the effect of rendering Vectrus ineligible for award. If VS2 had shown that Vectrus's past performance had been unreasonably evaluated, Vectrus would not have been in line for issuance of the task order because it would not have received a substantial confidence rating, a prerequisite under the terms of the RFP for being issued the task order. It follows that the appropriate time to have raised these arguments was during our consideration of Vectrus's original protest.⁴ *Good Foods Services, supra; Techniarts Engineering, supra.*

experienced performance problems during a period stretching from 2018 through June 2020, a period of time before issuance of our earlier decision. VS2 also directs our attention to a discussion of past performance information relating to Vectrus that appeared in a 2016 decision of our Office.

⁴ VS2's arguments relating to Vectrus's past performance, while nominally a challenge to the agency's evaluation, are more fundamentally a procedural challenge to Vectrus's standing as a protester. Any procedural challenge to the sufficiency of the earlier protest (a challenge to Vectrus's interested party status, a challenge to the timeliness of the protest, or a challenge to our jurisdiction to consider a protest) is one that should have been advanced by VS2 during our original consideration of the Vectrus protest, since such challenges bear directly on whether our Office should dismiss the matter, or consider the underlying merits of the protest.

VS2 appears to have understood this in connection with the other protest filed by Vanquish challenging the agency's original source selection decision. Vanquish argued that the agency erred in failing to issue the task order to it as the low-priced offeror, simply because it had received a neutral--rather than a substantial--past performance confidence rating. In the very first filing submitted to our Office in response to Vanquish's argument, VS2, on its own initiative, raised just such a procedural challenge to Vanquish's protest. VS2 argued that Vanquish's protest was an untimely challenge to the terms of the RFP. VS2 Request for Partial Dismissal, B-418942.2, at 2-10.

So too here, VS2 should have timely raised its argument concerning the evaluation of Vectrus's past performance during the initial protest as soon as it had the information necessary to raise the matter. Under the terms of the solicitation here, which limited eligibility for award to offerors with a substantial performance confidence rating, this

In any case, even if we were to agree with VS2 that it was not required to make these arguments at the time of the original protest, once VS2 received our earlier decision sustaining Vectrus's protest and recommending that award be directed to that firm, VS2 could have timely requested reconsideration of our decision on that basis. 4 C.F.R. § 21.14. Since VS2 also failed to raise these allegations in a timely-filed request for reconsideration, there is no basis for our Office to consider these allegations at this late juncture.

Arguments relating to the Prior GAO Decision and/or Vectrus's Prior Comments

VS2 also raises a variety of arguments challenging the findings and conclusions that our Office reached in our previous decision, as well as arguments relating to the contents of Vectrus's comments responding to the agency report in the earlier protest (and the contents of the prior agency report itself).⁵ All of these arguments amount to an untimely request for reconsideration.

VS2 was in possession of the agency report, Vectrus's comments responding to that report, as well as our earlier decision, no later than October 27, 2020. To the extent that VS2 thought we failed to take adequate cognizance of any portion of the record in the earlier case, or to the extent that it thought our decision was in error, VS2 was required by our regulations to file a request for reconsideration raising these concerns no later than 10 days after receiving our earlier decision. 4 C.F.R. § 21.14(b). Since VS2 did not raise these concerns within 10 days of our earlier decision, these allegations do not provide a basis for our Office to reconsider our earlier decision.

Challenge to the Agency's Implementation of Corrective Action

Finally, VS2 argues that the agency issued the task order to Vectrus without exercising any independent judgment, or performing any substantive evaluation or analysis, and instead simply followed the recommendation in our earlier decision. According to VS2, our recommendation contained what it describes as an important qualifier. Specifically, VS2 focuses on the language of our recommendation that provided for issuing the task order to Vectrus "if otherwise proper."

issue would have constituted a procedural challenge to Vectrus's status to pursue the protest as an interested party.

⁵ For example, VS2 argues that our prior decision was wrong as a matter of law when we concluded that the agency erred in applying the upward cost adjustment to the Vectrus proposal. Protest at 73-80. VS2 also argues that our earlier decision ignored the contents of discussions that occurred between Vectrus and the agency. *Id.* at 82-85. In addition, VS2 challenges the arguments made by Vectrus in its comments submitted in response to the agency's earlier report filed in response to the Vectrus protest. *Id.* at 52-73.

According to VS2, this language in our recommendation required the agency to essentially perform an entirely new evaluation before making its new selection decision, taking into consideration all of the RFP's evaluation factors. Protest at 85-98. In addition, VS2 argues that the agency was required to take into consideration the risk that VS2 maintains is inherent in Vectrus's proposed approach to absorb some of the costs of performance. *Id.* VS2 further argues that the agency was required to perform a detailed analysis explaining why removal of the earlier upward cost adjustment to the Vectrus proposal was no longer reasonable or rational. *Id.*

VS2's focus in this area is almost entirely related to our earlier recommendation. In essence, VS2 is raising an untimely argument that our Office should modify our earlier recommendation. As we explained in our earlier decision--and as we have consistently stated--where, as here, an offeror such as Vectrus proposes a cap or ceiling on a particular cost that limits the government's liability and shifts liability for that cost to the offeror--and no other issue calls into question the effectiveness of the cap--any upward adjustment to the capped cost is improper. *Affordable Engineering Services, Inc.*, B-407180.4, B-407180.5, Aug 21, 2015, 2015 CPD ¶ 334 at 5; *Halifax Technical Services, Inc.*, B-246236, *et al.*, Jan 24, 1994, 94-1 CPD ¶ 30 at 9; *Vitro Corporation*, B-247734, B-247734.3, Sept. 24, 1992, 92-2 CPD ¶ 202 at 7. Any question concerning a firm's ability to perform the contract in light of a capped cost that is below the actual cost is a matter of the firm's responsibility. *Id.*

Applying that rule in the Vectrus case, we concluded that the agency's upward most probable cost adjustment during its evaluation of the Vectrus proposal was improper. We also concluded that, in the absence of the upward cost adjustment, Vectrus was entitled to issuance of the task order under the express terms of the RFP. Importantly, we did not recommend (as we do in many protests challenging the evaluation of proposals) that the agency reevaluate proposals, or make a new source selection decision in the wake of such a reevaluation. Instead, we recommended that the agency issue the task order to Vectrus, if otherwise proper.

The phrase in our recommendation "if otherwise proper" was intended to preserve the agency's discretion to ensure that issuing the task order to Vectrus would be proper and adequately safeguard the agency's interests. Here, the agency prepared contractual language that it included in the task order in order to ensure that Vectrus would be legally bound by the commitment it previously had made to absorb the costs identified in its proposal.

The agency's action amounts to a largely ministerial act taken to ensure that issuing the task order to Vectrus would be "otherwise proper." Developing and including contractual language to further ensure that Vectrus will absorb the costs identified in its proposal was a reasonable precaution on the part of the agency.

In short, the agency's actions here were consistent with our earlier recommendation that the task order be issued to Vectrus, and also were consistent with the basis for award stipulated in the RFP. To the extent that VS2 thought some other, additional action was

required of the agency, it should have timely requested reconsideration of, or a modification to, our recommendation. Since it did not timely make that request, its current allegation amounts to an untimely request that we decline to consider.⁶

The protest is dismissed.

Thomas H. Armstrong
General Counsel

⁶ We note that, even in cases where we recommend that the agency reevaluate proposals and make a new source selection decision, we routinely use the phrase “if otherwise proper” in recommending that the agency make award to the selected firm. See e.g. *PMSI, LLC d/b/a Optum Workers’ Compensation Services of Florida*, B-417237.2, B-417237.3, Jan. 20, 2020, 2020 CPD ¶ 63 at 14 (recommending that the agency revise the solicitation, solicit, obtain and evaluate revised proposals, and make a new source selection, making award to the selected firm “if otherwise proper”).