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

Comptroller General
of the United States

Decision

Matter of: Shertech Pharmacy Piedmont, LLC--Reconsideration

File: B-419069.2

Date: April 1, 2021

Karen S. Sheriff, for the requester.
Tyler W. Brown, Esq., Department of Veterans Affairs, for the agency.
Sarah T. Zaffina, Esq., and Jennifer D. Westfall-McGrail, 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 material errors of fact or law or information not previously considered that warrants reversal or modification of the decision and repeats previously-made arguments our Office considered and rejected.

DECISION

Shertech Pharmacy Piedmont, LLC (Shertech), of Kernersville, North Carolina, requests that we reconsider our decision, *Shertech Pharmacy*, B-419069, Oct. 29, 2020, 2020 CPD ¶ 336, denying its protest challenging the terms of request for quotations (RFQ) No. 36C24620Q0897, issued by the Department of Veterans Affairs (VA) for the provision of radiopharmaceutical products to the VA medical center in Durham, North Carolina.[1] Shertech argued that the RFQ's requirement that the successful contractor be located within a 50-mile radius of the VA's facility is unduly restrictive of competition. We denied the protest because the VA demonstrated that its geographical requirement was reasonably necessary to meet its needs. The requester argues our decision contained factual errors that warrant modification of our prior decision.

We deny the request for the reconsideration.

[1] The requesting party here, Shertech Pharmacy Piedmont, LLC, is the same entity as the protester in the underlying decision.

BACKGROUND

The RFQ sought the provision of radiopharmaceutical products, which are nuclear medicine products used principally in certain diagnostic procedures. *Shertech Pharmacy*, *supra* at 1. As relevant here, the RFQ specifies that certain products be delivered on an as-needed basis and requires these products to be delivered within 1-2 hours of when an order is placed; consequently, the RFQ included a geographical requirement that the contractor be located within a 50-mile radius of the Durham VA Medical Center. *Id.* at 1-2.

Prior to the deadline for receipt of quotations, Shertech filed a protest with our Office that challenged the terms of the solicitation and argued the 50-mile radius requirement was unduly restrictive of competition. Shertech argued that even though it was located outside of this radius, it was able to make timely deliveries within the 1-2 hour time period specified in the solicitation. *Id.* at 2. Shertech therefore alleged that the 50-mile radius requirement was arbitrary and unnecessary to meet the agency's requirements. *Id.*

We denied Shertech's challenge to the agency's geographical requirement, finding that the VA's 50-mile radius requirement was reasonable.[2] We noted that the agency had explained the time and processes involved to prepare and administer the doses for radiopharmaceuticals, which the agency considered in conjunction with the driving time to conclude a 50-mile radius was the maximum allowable distance. *Id.* at 2-3. We found that the record supported the VA's justification for the requirement, which was to ensure that all of the solicited radiopharmaceuticals would be administered in a timely and effective manner to patients that require critical care. *Id.* at 3. We explained that where matters of human life and safety are involved, our Office affords considerable deference to the judgments of the agency's technical experts. *Id.* (citing *OMNIPLEX World Servs. Corp.*, B-415988.2, Dec. 12, 2018, 2018 CPD ¶ 424 at 3). Lastly, we found Shertech did not meaningfully rebut the VA's position because Shertech only provided information relating to how other VA medical facilities handled similar requirements. We noted that each procurement stands on its own, such that an agency's actions during one acquisition have no bearing on its actions in another acquisition. *Id.* (citing as an example, *Ronald L. Glass*, B-417855, Nov. 21, 2019, 2019 CPD ¶ 392 at 4 n.4, where we note that "our Office has long stated that each procurement stands on its own" and the protester has furnished examples of factually distinct procurements).

[2] We also dismissed Shertech's challenge that the agency's requirement for radiopharmaceuticals to be delivered in 1-2 hours was unduly restrictive of competition. *Id.* at 2 n.2. We found that because Shertech first raised this allegation in its comments, which were filed well after the deadline for quotations, the argument was untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1). *Id.*

DISCUSSION

Shertech requests reconsideration of the decision, asserting that we made several mistakes of fact and that we would have resolved the protest differently if we had considered relevant and material information. Req. for Recon. at 1. Shertech also alleges that we did not fairly assess the record and did not understand the protest. *Id.* For the reasons discussed below, we find that none of the arguments presented by the requester provide a basis to grant the request for reconsideration.

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). We will reverse a decision upon reconsideration only where the requesting party demonstrates that the decision contains a material error of law or facts; that is, but for the error, our Office would have likely reached a different conclusion as to the merits of the protest. *Department of Justice; Hope Village, Inc.--Recon.*, B-414342.5, B-414342.6, May 21, 2019, 2019 CPD ¶ 195 at 4 (declining to grant a request for reconsideration alleging that our decision contained a material error of fact where, even assuming the requester's assertion of a factual error was correct, the changed facts would not have impacted our underlying legal analysis). The repetition of arguments made during our consideration of the original protest and disagreement with our prior decision do not meet this standard. *Id.* at 3.

First, Shertech argues that our decision uses incorrect terminology. In particular, the requester takes issue with the statement in the decision that "the radiopharmaceuticals have a limited lifespan due to radioactive decay that begins once the medications are activated." Req. for Recon. at 2 (citing *Shertech Pharmacy*, *supra* at 2). The requester contends that "[t]he terminology used in the decision stating that the 'medications are activated' is incorrect."[3] *Id*. Shertech argues that if we understood that radioactive decay was on-going and that radiopharmaceuticals were calibrated for use at a specific time based on the half-life of the radioactive material and the dosage time, we would not have found the agency's requirement was reasonable. *Id.* at 3.

The protester's argument is unavailing. Even if our decision may have used incorrect terminology, it was not a material error. The protester does not dispute that the medications are calibrated for use at a specific time based on the half-life of the radioactive material, and the analysis underlying our decision rests on the agency's determination that as radiopharmaceuticals must be used within a limited timespan due to radioactive decay, the agency reasonably determined that it could ensure the medicine would be administered timely by imposing a location requirement. Although Shertech disagrees with this aspect of our decision, Shertech's allegations here do not

[3] The requester explains that radioactive decay is an ongoing process where a radioactive molecule, which is in an unstable physical state, attempts to become stable. *Id.* According to Shertech, this process is quantified by the term "half-life," which is defined as "the interval of time required for one half of the atomic nuclei of a radioactive sample to decay." *Id.*

demonstrate that the decision contained a material error of fact that would have impacted our underlying legal analysis. *Department of Justice; Hope Village, Inc.--Recon.*, *supra*.

Next, Shertech asserts that our decision contains materially inaccurate information and objects to our example that TC-99m has a lifespan of one hour after calibration. Req. for Recon. at 3-5. Our decision references the contracting officer's statement, in which he asserts that a dose of TC-99m must be used within an hour after calibration at the contractor's facility due to the half-life of TC-99m. *Shertech Pharmacy*, *supra* at 3 (referencing Contracting Officer's Statement at 2). Shertech argues that the TC-99m is a radioactive component with a half-life of six hours and the lifespan of the radiopharmaceutical depends upon the drug with which TC-99m is used. Req. for Recon. at 5. Thus, in the requester's view, the statement that TC-99m has a lifespan of one hour after calibration is materially false, and if GAO had the looked to the information in the United States Food and Drug Administration approved drug package inserts, it would have found the VA's requirement unreasonable.

To the extent our decision contained an example of medication with a short half-life that was inaccurate, this error was also immaterial, for the reasons explained below. First, we note that the contracting officer provided the example in his statement, and while Shertech referenced the contracting officer's statement in its comments on the agency report, it did not challenge the veracity of the statement at that time. Comments at 3. Moreover, in its comments, Shertech explained and provided an example of what it means when the half-life of TC-99m requires the medicine to be used within one hour of calibration. *Id.* at 3-4.

Further, our reference to the contracting officer's statement that a dose of TC-99m must be used within an hour after calibration at the contractor's facility due to the half-life of TC-99m was merely an example of a radiopharmaceutical with a half-life requiring it to be administered within a specific timeframe. Even assuming, for the sake of argument, that the contested statement was in error, and TC-99m has a half-life of six hours rather than one hour as the requester asserts, this difference was not relevant to our legal analysis and decision finding the agency's requirement reasonable. Accordingly, we do not find that our underlying decision contained a material error of law or mistake of fact that would warrant reversal of our denial of Shertech's protest. *Department of Justice; Hope Village, Inc.--Recon.*, *supra* at 3.

The requester also argues our decision contains a mistake of fact with regard to radiopharmaceuticals that other VA medical centers solicit. Req. for Recon. at 7-9. In our decision, we found that Shertech did not meaningfully rebut the agency's position when it presented information related to how other VA medical facilities handle similar requirements. In doing so, our decision explained that "[t]hese facilities are not located in the Durham, North Carolina, area, and [Shertech] has not shown that these facilities solicited all of the same radiopharmaceuticals being solicited here." *Shertech Pharmacy*, *supra* at 3. Shertech contends that we are mistaken and the other solicitations that Shertech provided demonstrate the VA is acquiring the same

radiopharmaceuticals here. Req. for Recon. at 9. Shertech contends further that we would have resolved the protest differently if we had the benefit of this material information.

We disagree with Shertech. Although we observed that Shertech did not provide information showing that other facilities solicited the same radiopharmaceuticals as those being solicited here, we concluded that "any comparison between the current solicitation and those solicitations is not necessarily meaningful" and noted that "each procurement stands on its own, and an agency's actions during one acquisition have no bearing on its actions in another acquisition." *Shertech Pharmacy*, *supra* at 3 (citing *Ronald L. Glass*, *supra* at 4 n.4). Whether the VA solicits the same pharmaceuticals for other VA medical centers is irrelevant to deciding the reasonableness of the agency's 50-mile radius requirement for the VA medical center in Durham, North Carolina. *See Ronald L. Glass*, *supra*; *see also TriStar Aerospace LLC*, B-419093, Dec. 11, 2020, 2020 CPD ¶ 400 at 5-6. Accordingly, even if the statement was an error, it was not a material error and Shertech has not provided a basis for reconsidering our decision. *Department of Justice; Hope Village, Inc.--Recon.*, *supra* at 3.

With respect to Shertech's remaining arguments, while Shertech may disagree with our Office's resolution of its arguments, its request for reconsideration essentially reasserts and reiterates arguments previously raised in its comments. As our Office has explained, repetition of arguments, without more, does not provide a basis to reconsider a decision. 4 C.F.R. § 21.14(c); *Desktop Alert, Inc.--Recon.*, B-417170.2, Apr. 8, 2019, 2019 CPD ¶ 141 at 2. We therefore find that these arguments do not provide a basis to reconsider our decision.

The request for reconsideration is denied.

Thomas H. Armstrong
General Counsel