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Decision

Matter of: Odin Construction Solutions, Inc.--Reconsideration

File: B-419793.3

Date: November 3, 2021

Daniel Foster, Esq., Wilke Fleury, LLP, for the requester.
Jim Weiner, Esq., and Ryan A. Black, Esq., Department of the Interior, for the agency.
Heather Weiner, 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 fails either to demonstrate that our decision contains errors of fact or law, or to present new information not previously considered that would warrant reversal or modification of prior decision.

DECISION

Odin Construction Solutions, Inc., a small business of Rocklin, California, asks that we reconsider our decision, *Odin Construction Solutions, Inc.*, B-419793, B-419793.2, July 23, 2021, 2021 CPD ¶ 297. In that decision, we denied Odin's protest challenging the award of a contract to EWS/RSCI, LLC, of Gillette, Wyoming, also a small business, under request for proposals (RFP) No. 140R4020R0015, issued by the Department of the Interior, Bureau of Reclamation, for the Big Sandy Dam Reservoir Enlargement Project, near Farson, Wyoming. Odin argues that our decision was based on factual and legal error and an incomplete record, and asserts that our Office did not consider information in the record that warrants reversal of the decision.

We deny the request for reconsideration.

BACKGROUND

The RFP, issued September 3, 2020, sought proposals from small businesses to perform various construction services, including the excavation and rehabilitation of existing dam and dike embankments. Agency Report (AR), Contracting Officer's

Statement (COS) at 1.¹ Award was to be made to the offeror whose proposal provided the best value to the government, based upon cost/price and the following four non-cost/price factors: technical capability, technical plan, master plan, and past performance. AR, Tab 1, RFP at 72-73. The first three factors were each divided into equally weighted subfactors. *Id.* The RFP specified that the non-cost/price evaluation factors, when combined, would be considered significantly more important than cost/price in determining best value. *Id.* at 72.

The agency received and evaluated six timely proposals. COS at 4. The agency held discussions and received final proposal revisions from Odin, EWS/RSCI and one other offeror. *Id.* The contracting officer determined that EWS/RSCI's proposal, which was rated more highly than Odin's under the past performance and master plan factors, represented the best value to the government notwithstanding its higher price. AR, Tab 12, Post-Negotiation Memorandum (PNM) at 11. Odin protested the award of the contract to EWS/RSCI with our Office, challenging the evaluation of its proposal under the past performance and master plan factors. Odin also argued that the agency evaluated the proposals unequally under the technical plan, master plan, and past performance factors, and failed to conduct a reasonable tradeoff in selecting EWS/RSCI's proposal at a higher cost/price for award.

On July 23, 2021, our Office denied Odin's protest, finding that the agency's evaluation was reasonable. After the issuance of our decision denying Odin's protest, Odin requested that our Office reconsider our decision. On August 13, Odin submitted a supplemental request for reconsideration based on "new information" the requester states it became aware of on August 3. Supp. Req. for Recon. at 3.

DISCUSSION

Odin requests reconsideration of the decision, asserting that we made numerous mistakes of fact and that we would have resolved the protest differently if we had considered relevant and material information. Odin also alleges that we failed to consider information in the record that warrants reversal of the decision. In addition, the requester contends that new information not previously considered reflects bias on the part of agency personnel. 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

¹ Citations are to the agency report provided in response to Odin's underlying protest, B-419793, B-419793.2.

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. *Veda, Inc.-Recon.*, B-278516.3, B-278516.4, July 8, 1998, 98-2 CPD ¶ 12 at 4.

First, Odin argues that our conclusion--that the agency reasonably and equally evaluated the proposals of Odin and the awardee under the technical approach subfactor--was based on factual error. As relevant here, technical approach was one of two equally weighted subfactors under the technical plan factor. RFP 67-69. Odin asserted in its protest that "even though both Odin and EWS/RSCI were evaluated as having a significant strength, the evaluation unreasonably and unequally rated Odin's proposal good and EWS/RSCI's proposal outstanding." *Odin Constr., supra* at 3. Our decision concluded that the agency reasonably assessed different ratings for the two offerors' proposals under the technical approach subfactor in light of the more "extensive strengths and significant strengths identified in the [awardee's] proposal." *Id.* at 4.

In support of this conclusion, the decision noted the evaluators assessed all of the identified strengths of each proposal under the technical approach subfactor. *Id.* at 3. For Odin's proposal, the evaluators found that information provided regarding the firm's cold weather concrete methodology should be "considered significant strengths." *Id.* at 4, citing AR, Tab 11, Add. to Technical Proposal Evaluation Committee (TPEC) Report at 7. Additionally, the agency concluded that Odin's proposal had multiple strengths and that "those strengths, combined with a significant strength for one aspect of the work, merited a rating of good." *Odin Constr., supra* at 4. With regard to the evaluation of the awardee's proposal, on the other hand, the decision found that the evaluators "identified multiple significant strengths based on the firm's detailed approach to selective excavation and handling materials, techniques for avoiding material contamination, and approach to handling frozen materials." *Id.* As noted above, the decision concluded that the record showed the agency had a reasonable basis to assess different ratings to Odin's and the awardee's proposals under the technical approach subfactor based on the more extensive strengths and significant strengths identified in the awardee's proposal. *Id.*

Odin argues that the premise in our decision that the agency concluded that Odin's proposal had only "a significant strength" "is false," constitutes a "critical error," and "fails to consider information presented by Odin in its Supplemental Comments." Req. for Recon. at 3. According to the requester, the record shows that Odin's proposal had multiple significant strengths for this subfactor, and the agency "contradicted its own record" during the "adversarial bid-protest process" when it stated that Odin's proposal had only a single significant strength. *Id.* at 3. The requester alleges that our decision "erroneously adopted" the factual error that "Odin only received 'a significant strength'"

with regard to the technical approach subfactor and that this error was prejudicial to Odin. *Id.* at 4.

Rather than demonstrate factual error, Odin's request for reconsideration reasserts and reiterates an argument that it previously raised in its supplemental comments. See Supp. Comments at 3 ("Faced with the prospect of having to justify the unjustifiable, the Agency is left with no choice but to attempt to invent new, false inferences from the existing Agency Report."); *id.* ("The Agency claims that . . . [the awardee] received three (3) significant strengths while Odin only received one (1) significant strength. . . . That portrayal of the Agency Report is flawed and a flat-out falsehood."), *with* Req. for Recon at 3 ("During the adversarial bid-protest process . . . where the Agency's primary goal was to support its award by any means necessary, the Agency contradicted its own record when it asserted, '[the awardee] received 3 Significant Strengths . . . whereas Odin received 1 Significant Strength.'").

We considered this argument in concluding that the agency had a reasonable basis to assess different ratings under the technical approach subfactor based on the more extensive strengths and significant strengths identified in the awardee's proposal. Although Odin may disagree with our Office's resolution of this argument, none of the assertions in its request for reconsideration demonstrates that our decision contained legal or factual errors.² We therefore find no basis to reconsider our decision.

Odin also argues that our decision contains errors of fact relating to the contracting officer's tradeoff decision. The requester takes issue with the statement on page eight of our decision noting that the record showed that "[t]he contracting officer identified specific areas where EWS/RSCI's proposal demonstrated advantages." *Odin Constr.*, *supra* at 8. Odin asserts that this statement "is false" and that the record "failed to

² Odin also asserts that our decision should have afforded little or no weight to the contracting officer's statement concerning the rationale for the agency's evaluation because it "contradicts the documented facts in the Addendum to the TPEC Summary Report." Req. for Recon. at 3. We note that Odin previously raised this argument, and therefore, it does not provide a basis to grant the request for reconsideration simply because our prior decision did not specifically address this argument. Moreover, the argument does not, in any event, provide a basis to reverse or modify our prior decision. Our Office generally considers post-protest explanations, such as those presented by the contracting officer here, in our review of the rationality of selection decisions, where the explanations provide a detailed rationale for an agency's contemporaneous conclusions and simply fill in previously unrecorded details, if those explanations are credible and consistent with the contemporaneous record. *McLaurin Gen. Maint., Inc.*, B-411443.2, B-411443.3, Jan. 14, 2016, 2016 CPD ¶ 41 at 6. Based on our review of the record, the contracting officer's statement is consistent with, and simply adds additional details regarding, the TPEC's evaluation. See Supp. COS at 4-6; AR, Tab 11, Add. to TPEC Report at 7. Accordingly, we find no legal or factual error that would warrant reconsideration of our decision.

explain why and how [the awardee's] proposal was technically superior to Odin's proposal." Req. for Recon. at 5-6.

Odin raised this same argument in its comments to the agency report.³ See Supp. Comments at 4 (asserting that the "record is devoid of any discussion of, or rational explanation" justifying payment of a premium for the awardee's proposal, and instead, maintaining that the agency "relied exclusively on unsubstantiated, conclusory assertions."). Odin's repetition of its arguments, and disagreement with our conclusion, however, do not provide a basis to reconsider our decision. *Veda, supra*.

Next, Odin claims that our decision failed to consider information in the record pertaining to the agency's assignment of ratings for the key personnel, quality control plan, and project schedule subfactors. Req. for Recon. at 4-5. These are three of five subfactors under the master plan factor. RFP at 67-69. EWS/RSCI's proposal received a rating of good for all three of these subfactors. Odin's proposal received a rating of acceptable under the key personnel and project schedule subfactors, and a rating of good under the quality control plan subfactor. AR, Tab 11, Add. to TPEC Report at 1, 4-6.

With regard to the key personnel subfactor, for example, the requester maintains that our decision failed to address Odin's assertion that "despite Odin having more extensive strengths related to this subfactor than [EWS/RSCI], the Agency still assigned [EWS/RSCI] a higher competitive rating." Req. for Recon. at 4. Similarly, for the quality control plan subfactor, the requester complains that our decision "completely overlooked" its allegations that "Odin's proposal presented a significant strength" and that the agency failed to follow the solicitation's evaluation criteria. *Id.* at 5. As for the project schedule subfactor, the requester asserts that our decision disregarded Odin's allegations that "the balance of strengths and weaknesses did not support the [a]gency's ratings with regard to the subfactor" and Odin's proposal "should have received the same rating" as the awardee. *Id.*

³ In addressing the protester's argument, our decision concluded that the contemporaneous documentation of the source selection judgment provided a reasonable basis for the selection of the awardee's higher-cost proposal. Req. for Recon. at 8. Our decision noted that the specific areas where the contracting officer found the awardee's proposal demonstrated advantages included "extensive experience in concrete construction in cold weather and its use of multiple techniques to ensure success during necessary winter work, its broad experience and detailed procedures for excavation, its use of specific techniques for avoiding risks that could cause additional work or schedule disruption, and the highly experienced personnel that the firm proposed for the most important roles on the project." *Odin Constr., supra* at 8, citing AR, Tab 12, PNM at 9-10. Our decision explained that "[b]ased on the advantages that EWS/RSCI provided by those specific significant strengths, the contracting officer determined that the additional cost of awarding the contract to EWS/RSCI was justified," and that "[i]n our view the record properly documents the basis for the contracting officer's tradeoff decision." *Id.*

The requester's arguments present no new facts or error of law; again, Odin's arguments simply repeat its previous protest allegations and represent disagreement with our conclusions. Our decision explained that Odin's initial protest and first supplemental protest raised challenges to multiple aspects of the evaluation of its proposal under the master plan and past performance factors; argued that the ratings were assessed unequally under the technical plan, master plan, and past performance factors; and asserted that the contracting officer made an unreasonable tradeoff in selecting the awardee's proposal at its higher cost/price. *Odin Constr., supra* at 3. The decision further explained that we concluded the evaluation was reasonable; we discussed, as examples, one challenge under each of those factors. *Id.*

While our Office reviews all issues raised by protesters, our decisions may not necessarily address with specificity every issue raised; this practice is consistent with the statutory mandate that our bid protest forum provide for "the inexpensive and expeditious resolution of protests." See *Access Interpreting, Inc.*, B-413990.2, June 12, 2018, 2018 CPD ¶ 224 at 4. In further keeping with our mandate, our Office does not issue decisions in response to reconsideration requests solely to address a protester's dissatisfaction that a decision does not address each of its protest issues. *Id.* Thus, we find no basis to grant the request for consideration simply because our prior decision did not specifically address these arguments.

Finally, Odin asks that we reconsider our decision in light of new information not previously considered, which the requester asserts, reflects "undue influence and bias" by agency personnel towards Odin. Supp. Req. for Recon. at 5. Odin points to a Contractor Performance Assessment Reporting System (CPARS) assessment for EWS/RSCI's work on the instant contract, which Odin states it discovered on August 3, 2021, after the agency mistakenly uploaded it to Odin's CPARS account. *Id.* at 3. Odin contends that the agency's comments in the report, and in particular a statement by the agency that EWS/RSCI had been "very forthcoming in providing help and assistance as we help the solicitors provide information to the GAO," indicates that the agency allowed EWS/RSCI to help the agency in the preparation of information for the protest. *Id.* at 5. Odin argues that EWS/RSCI's participation in the protest "exhibits undue influence and bias," which the requester asserts, caused "prejudice to Odin as it was not selected for the [p]roject and lost the [p]rotest." *Id.*

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). In the context of a protest challenging an agency's evaluation of proposals and source selection decision, information not previously considered means contemporaneously available information--in existence at the time of the agency's selection decision--that could or should have had a material effect on the agency's evaluation and selection decision. *Mission1st Grp., Inc.--Recon.*, B-419369.3, Apr. 29, 2021, 2021 CPD ¶ 182 at 3. New information does not mean information relating to future events that were unknown or unknowable to the agency during its source selection process. *Id.*

Here, the record shows that the agency made its selection decision on February 12, 2021. AR, Tab 12, PNM. All of the new information presented by Odin concerns the agency's actions during the course of the protest, which was filed on April 28, 2021, well after the agency made its selection decision. See Supp. Req. for Recon at 4.

Odin has not explained, and it is not apparent, how the agency's actions in responding to the protest could or should have had a material effect on the agency's evaluation and selection decision. To the extent the requester's argument alleges bad faith or bias by agency personnel towards Odin, our decisions have consistently explained that government officials are presumed to act in good faith, and a contention that procurement officials are motivated by bias or bad faith must be supported by convincing proof; our Office will not attribute unfair or prejudicial motives to procurement officials based upon mere inference, supposition, or unsupported speculation. *Lawson Envtl. Servs. LLC*, B-416892, B-416892.2, Jan. 8, 2019, 2019 CPD ¶ 17 at 5 n.5. The burden of establishing bad faith is a heavy one. *Id.* A protester must present facts reasonably indicating, beyond mere inference and suspicion, that the agency acted with specific and malicious intent to harm the protester. *Id.* Nothing alleged by Odin meets this heavy burden of proof. Accordingly, Odin has failed to present new information of the sort contemplated under our standard for granting a request for reconsideration.

In sum, Odin's requests for reconsideration express disagreement with our decision denying its earlier protest, repeat arguments made during our consideration of the protest, and do not present information that was not previously considered. Odin's requests do not satisfy our standard for reconsideration and do not provide a basis for reversing our prior decision.

The request for reconsideration is denied.

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