



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Department of Veterans Affairs--Reconsideration

File: B-405771.2

Date: February 15, 2012

Lisa Marie Clark, Esq., Department of Veterans Affairs, for the agency.
Audra J. Zarlenga, Esq., and Kyle G. Baker, Esq., Thompson Hine LLP, for
Commandeer Construction Company LLC, the protester.
Jonathan L. Kang, Esq., and James A. Spangenberg, Esq., Office of the General
Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's request to reconsider our decision sustaining a protest is denied where agency's request either reiterates arguments made previously and merely expresses disagreement with the prior decision, and is based on information that was available to the agency during the course of the underlying protest, but was not brought to GAO's attention until the request for reconsideration.
 2. GAO modifies its recommended remedy that the agency reimburse the protester's costs of pursuing its protest, where the record shows that the protester failed to disclose a material fact concerning its status as interested party.
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DECISION

The Department of Veterans Affairs (VA) asks that we reconsider our decision in Commandeer Constr. Co. LLC, B-405771, Dec. 29, 2011, 2011 CPD ¶ 287, in which we sustained the protest filed by Commandeer Construction Company LLC (CCC), of Twinsburg, Ohio, concerning the rejection of its bid by the Department of Veterans Affairs (VA) under invitation for bids (IFB) No. VA-250-11-IB-0191, which was issued as a set-aside for service-disabled veteran-owned small businesses (SDVOSB), for renovation of an existing medical facility in Chillicothe, Ohio.

We deny the request for reconsideration, but modify our recommendation.

BACKGROUND

As discussed in Commandeer Constr. Co. LLC, supra, the Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, provides the VA with independent authority to restrict competition to SDVOSB concerns under certain circumstances. 38 U.S.C. § 8127(d) (2006 & Supp. 2011). In this regard, 38 U.S.C. § 8127(e) states that a small business concern may be awarded a contract under an SDVOSB set-aside only if the concern and the veteran owner of the concern are listed in a database of veteran-owned small businesses (VOSB), which the Act requires the Secretary to maintain. The VA has issued regulations which establish a database of VOSBs, called the Vendor Information Pages (VIP) database.¹

As relevant here, the VA acquisition regulation (VAAR) states that, prior to January 1, 2012, all SDVOSB and VOSB concerns were required to be “listed” in the VIP database in order to receive an award under an SDVOSB or VOSB set-aside; this process permitted vendors to self-certify their status. VAAR § 804.1102. After January 1, 2012, the VAAR states that all such concerns must be “listed as verified” by the VA in order to receive award. Id. Due to concerns regarding potential fraud, the VA subsequently issued a deviation from this regulation to require, for awards prior to January 1, 2012, that the VA’s Center for Veterans Enterprise (CVE) verify the status of any apparently successful offeror that is not already listed as verified. VAAR § 804.1102(a), Verification of Status of Apparently Successful Offeror (Oct. 2010) (Deviation). The deviation further required an “apparently successful offeror” to provide the CVE with information establishing that it meets the requirements to be a SDVOSB. Id. The CVE’s review, called a “fast track verification process,” was to be completed within 21 business days. See VAAR § 804.1102(b).

The VA issued the IFB on July 14, 2011, as an SDVOSB set-aside. The solicitation stated that award would be made to an SDVOSB concern that had “been verified for ownership and control and [was] so listed in the [VIP] database.” IFB at 35. The IFB also included the deviation clause discussed above. IFB at 12.

Prior to submitting its bid, on August 8, CCC submitted an application to the CVE for inclusion in the VIP database. On August 30, CCC submitted its bid, which, at \$9,151,000, was the lowest received by the VA. On August 31, the contracting officer (CO) advised CCC that it was not eligible for award because it was not “listed” in the VIP database. CCC filed a protest with our office, arguing that the terms of the IFB and the deviation clause entitled it, as an apparently successful

¹ For a detailed discussion of the statutory and regulatory background of the VIP database, and the relevant IFB, see Commandeer Constr. Co. LLC, supra, at 1-3.

offeror that was not verified in the VIP database, to a fast-track review of its SDVOSB status.

On December 13, after development of the record, the GAO attorney assigned to the protest conducted an outcome prediction alternative dispute resolution (ADR) conference. See Bid Protest Regulations, 4 C.F.R. § 21.10(e) (2011). During this conference call, the GAO attorney indicated that GAO likely would sustain the protests on the basis that the IFB and deviation clause contained a latent ambiguity concerning the eligibility of an apparently successful offeror that was not listed in the VIP for a fast-track review of its SDVOSB status. Also during this conference, the GAO attorney advised that a possible course of corrective action for the VA would be to complete the review of CCC's SDVOSB status to verify whether CCC should be listed in the VIP database. The VA did not undertake voluntary corrective action in response to the ADR conference, but instead continued to argue that CCC was not eligible for a fast-track review of its status.

On December 29, our Office issued a decision sustaining CCC's protest. In the decision, we concluded that the deviation clause was latently ambiguous, as it could be reasonably interpreted as providing an opportunity for an offeror, such as CCC, who was not currently listed as verified in the VIP database, to be eligible for the fast-track verification process. Commandeer Constr. Co. LLC, supra, at 5. We recommended that the agency "review CCC's SDVOSB status to determine whether the company can be verified," and that the protester be awarded the contract if it were found to be eligible for verification and otherwise responsible. Commandeer Constr. Co. LLC, supra, at 6. We also recommended that the agency reimburse CCC its costs of pursuing the protest, including reasonable attorneys' fees.

REQUEST FOR RECONSIDERATION

The VA requests that we reconsider our decision to sustain the protest. The VA first argues that our decision was incorrect because: (1) our decision was inconsistent with our decision in FedCon RKR JV LLC, B-405257, Oct. 4, 2011, 2011 CPD ¶ 205; and (2) we failed to give deference to the VA's interpretation of its own regulation.

To prevail on a request for reconsideration, the requesting party must either 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) (2011); Department of Housing and Urban Dev.--Recon., B-279575.2, Nov. 4, 1998, 98-2 CPD ¶ 105 at 2; Department of the Army--Recon., B-271492.2, Nov. 27, 1996, 96-2 CPD ¶ 203 at 5.

Here, the VA's arguments as to the applicability of our decision in FedCon RKR JV LLC, supra, the interpretation of VAAR § 804.1102 and the IFB, and the

determination that CCC was ineligible for award were fully briefed by the parties during the protest proceedings, and were addressed by our Office in our decision.² See Commandeer Constr. Co. LLC, *supra*, at 4-5. However, a request for reconsideration that reiterates arguments made previously and merely expresses disagreement with the prior decision does not meet the standard for granting reconsideration. Gordon R.A. Fishman--Recon., B-257634.4, Sept. 9, 1996, 96-2 CPD ¶ 110 at 2-3. Thus, we find no basis to reconsider the merits of our prior decision.

The VA nevertheless contends that there are “two pertinent developments” concerning the protest that merit reconsideration of our decision: (1) CCC did not extend its bid by the November 30, 2011 date requested by the VA; and (2) CCC was advised by the agency on November 10 that CVE had denied its application for verification as an SDVOSB. Request for Reconsideration at 4.

In order to provide a basis for reconsideration, additional information not previously considered must have been unavailable to the requesting party when the initial protest was being considered. Allstate Van & Storage, Inc.--Recon, B-270744.2, Aug. 20, 1996, 96-2 CPD ¶ 72 at 2. Failure to make all arguments or submit all information available during the course of the initial protest undermines the goals of our bid protest forum--to produce fair and equitable decisions based on consideration of all parties' arguments on a fully developed record--and cannot justify reconsideration of our prior decision. Department of the Army--Recon., B-237742.2, June 11, 1990, 90-1 CPD ¶ 546 at 4.

Here, we conclude that the standard for reconsideration has not been satisfied. In this regard, both of the two facts cited by the VA in its request for reconsideration were known to the agency prior to the issuance of our decision on December 29, 2011.

First, the VA notes that the IFB required offerors' bids to be valid until November 29. In its request for reconsideration, the agency provided a letter, dated November 28, which requested that CCC extend its bid for 90 days. The agency states that although the protester was provided 7 days to respond, it did not do so. Agency Comments (Jan. 23, 2012) at 1; Email from VA to CCC, Dec. 1, 2011, at 1. The agency, however, did not advise our Office of the letter, or CCC's failure to extend its bid, prior to the ADR conference or the issuance of the decision by our Office. Because the VA could have, but did not bring this matter to our attention, the alleged expiration of CCC's bid does not provide a basis to reconsider our decision.

² As noted, prior to the issuance of our decision, a representative of our Office discussed the merits of this protest with the parties, where our representative indicated that we would likely sustain the protest.

Next, the VA states that “VA legal and contracting in Ohio just discovered on January 3, 2012 through the chain of officials within VA that CVE denied [CCC’s] SDVOSB application on November 9, 2011.” Request for Reconsideration at 2. The agency states that CCC was advised of the denial of its application on November 10. The VA contends that this denial made the protester ineligible for award, and therefore, not an interested party to maintain its protest.

Here too, the VA was aware of the relevant facts prior to the ADR conference, and prior to the issuance of the decision. The VA implies that it was not required to bring this matter to our attention because the CO responsible for the procurement and agency legal counsel were not personally aware that the agency had denied CCC’s application. See Agency Comments (Jan. 23, 2012) at 2. In this regard, the agency states that the CO “lacked knowledge that the [CVE] had denied protester’s request for SDVOSB status on November 9, 2011 . . . because CVE does not publicly post denials of verification applications.” Id.

We see no excuse for the failure of the VA’s CO, and the VA’s legal counsel, to ascertain the status of CCC’s request to CVE. During the ADR conference, the GAO attorney assigned to the protest stated that one of the possible avenues for voluntary corrective action would be for the VA to complete its review of CCC’s SDVOSB status, to determine whether the protester was eligible for award. Given the required “fast track” nature of the CVE review and our Office’s specific comments regarding the status of the review, we find it inexplicable that the VA contracting officials and counsel would elect to proceed with the defense of this protest rather than inquire about the status of CCC’s SDVOSB application.³ On this record, we conclude that the VA’s request does not identify new information that was unavailable to the VA during the underlying protest proceedings.

We recognize that our recommendation that the VA review CCC’s SDVOSB status to determine whether it can be verified for the VIP database is, effectively, rendered moot by the VA’s rejection of CCC’s SDVOSB application on November 9, 2011. Nonetheless, in light of the VA’s failure to raise any arguments that satisfy the standards for reconsideration, we decline to reconsider our decision.

MODIFICATION OF RECOMMENDATION

Although we find no basis to reconsider our decision, we nonetheless conclude that a modification of the remedy is merited by the facts here. As discussed above, CCC did not notify our Office that the VA had rejected its SDVOSB status application on November 9--a month before the ADR conference, and nearly 2 months before our Office issued the decision. In its response to the VA’s request

³ The VA does not indicate that such a query would have been difficult or time consuming.

for reconsideration, CCC argues that the information concerning the rejection of the protester's SDVOSB status "was accessible to both the VA and Commandeer for nearly two months," and that "Commandeer [has no] duty to disclose this information once the Protest had been initiated." Protester's Comments (Jan. 20, 2012) at 3.

We find the protester's position no more tenable than the agency's. At a minimum, we categorically reject the protester's argument that it had no duty to advise our Office of the rejection of its SDVOSB status. Under our Bid Protest Regulations, a protester must have a direct economic interest which is affected by the award of a contract in order to be considered an interested party. 4 C.F.R. § 21.0(a)(1). Our regulations also require an offeror to "[s]et forth all information establishing that the protester is an interested party for the purpose of filing a protest." 4 C.F.R. § 21.1(b)(5). The VA's rejection of CCC's application for verification as an SDVOSB caused the protester to be ineligible for award, and therefore, not an interested party to pursue the protest.

While our regulations do not specifically require a protester to advise our Office after the filing of a protest of any facts which show that it is no longer an interested party, we think such a disclosure is incumbent on a protester or its outside counsel, particularly where the facts relate to the very merits of the protest being brought. The failure to advise our Office that the VA had rejected CCC's application for verification as an SDVOSB resulted in our Office expending unnecessary time and resources to conduct the ADR conference and issue a decision that did not need to be issued.

When our Office finds that an award decision does not comply with statute or regulation, we may recommend that the agency reimburse a protester's costs of filing and pursuing the protest, including reasonable attorney and consultant fees. 31 U.S.C. § 3554(c)(1)(A) (2006); 4 C.F.R. § 21.8(d). We view remedies concerning a recommendation for reimbursement of protest costs to be a matter within our Office's discretion, based on the circumstances of each protest. See Lockheed Martin Corp.--Costs, B-295402.2, Nov. 1, 2005, 2005 CPD ¶ 192 at 3. For the reasons discussed above, we modify our prior to decision to remove the recommendation the VA reimburse CCC its costs of pursuing its protest.

The request for reconsideration is denied, but our earlier recommendation is modified.

Lynn H. Gibson
General Counsel