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Decision

Matter of: Vysnova Partners, Inc.--Reconsideration

File: B-420654.4

Date: October 25, 2022

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James C. Braswell, Esq., General Services Administration, for the agency.

Heather Self, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration of prior decision denying initial protest and dismissing supplemental protest as untimely is denied because the requesting party has not shown that our decision contains errors of fact or law that would warrant reversal or modification of the decision.

DECISION

Vysnova Partners, Inc., a small business of Landover, Maryland, requests reconsideration of our decision in *Vysnova Partners, Inc.*, B-420654 *et al.*, July 7, 2022, 2022 CPD ¶ 177, in which we denied a challenge to the agency's elimination of the protester's proposal from competition and dismissed, as untimely, a supplemental argument raised by the protester for the first time in its comments on the agency's report responding to the protest.

We deny the request for reconsideration.

BACKGROUND

In its protest, Vysnova challenged the agency's rejection of the firm's proposal based on what Vysnova contended was the agency's "erroneous finding that the proposal failed to comply with certain material requirements of the [solicitation] because it did not include 'supporting cost/price documentation for all proposed subcontractors, including total value of proposed subcontract.'" Protest at 1. Specifically, Vysnova argued that the agency's finding was erroneous because the solicitation "did not prohibit (and, thus, permitted) the use of unpriced subcontractors, as Vysnova proposed." *Id.* see also at 9-10. Alternatively, Vysnova maintained "there was a latent ambiguity in the

[solicitation] regarding the use of unpriced subcontractors, and the [a]gency abused its discretion in failing to seek clarification from Vysnova regarding the five unpriced subcontractors it proposed.” *Id.* at 1-2, 10-11.

In our decision, we denied Vysnova’s challenge to the elimination of the firm’s proposal from the competition because the record reflected that Vysnova’s proposal failed to provide required cost/price documentation for certain unpriced subcontractors. *Vysnova Partners, Inc., supra* at 1, 4-6. We also denied Vysnova’s contention that the agency unreasonably failed to engage in clarifications to address the missing cost/price documentation, finding that there was no requirement for the agency to engage in clarifications. *Id.* at 1, 7. In our decision, we explained that, in order to make its proposals acceptable, Vysnova would have been required to submit a revised proposal, and that such a “material revision to the protester’s proposal would have required the agency to conduct discussions, rather than clarifications.” *Id.* at 7.

In its comments on the agency’s report responding to the protest, Vysnova argued that the cost information allegedly missing from its proposal was not material to the agency’s evaluation because the solicitation limited the requirement for subcontractor cost information to proposed subcontracts that represented more than ten percent of the total contract value.¹ Comments & 1st Supp. Protest at 6. We dismissed this argument as untimely. *Vysnova Partners, Inc., supra* at 6 n.4. We noted that Vysnova was notified of the basis of elimination of its proposal from competition--missing required cost/price information for unpriced subcontractors--on March 28, but raised this materiality line of argument for the first time in its May 9 comments, rather than in its initial protest. *Id.* As this argument was not raised until more than ten days after Vysnova knew or should have known the basis of its protest, we concluded it was untimely, and declined to consider it further. *Id.*; 4 C.F.R. § 21.2(a)(2).

DISCUSSION

In its request for reconsideration, Vysnova contends that we improperly dismissed, as untimely, its materiality argument by erroneously treating the argument as a supplemental protest allegation, rather than recognizing the argument as a comment on Vysnova’s previous, timely raised protest arguments. Req. for Recon. at 5-6. The requester contends that had we considered this argument as a timely submitted comment, we would have sustained, rather than denied, Vysnova’s underlying challenge to the elimination of its proposal from competition. *Id.* at 1-2. According to the requester, the firm’s failure to submit information not required by the solicitation, would not have served as a reasonable basis for the agency to eliminate Vysnova from the competition. *Id.*

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

¹ For ease of reference, we will refer to this as Vysnova’s “materiality argument.”

considered. 4 C.F.R. § 21.14(a). The repetition of arguments made during our consideration of the original protest and disagreement with our decision do not meet this standard. *Desktop Alert, Inc.--Recon.*, B-417170.2, Apr. 8, 2019, 2019 CPD ¶ 141 at 2.

Vysnova's contention regarding the nature of its materiality argument is not supported by the record. Rather, the record shows that, in its March 28 notice to Vysnova, the agency specifically informed Vysnova that the elimination of the firm's proposal was based on the failure to provide cost/price information that the agency considered to be an "absolute" material requirement of the solicitation. Protest at 17-18, exh. A, Letter from Agency to Vysnova. Yet, nowhere in its initial protest did Vysnova challenge the agency's categorization of the missing cost/price information as a material requirement. See generally Protest. Contrary to Vysnova's representation that its materiality argument was a comment on the agency's report responding to the firm's initial protest, the record reflects that it was, in fact, an entirely new line of legal argument--i.e., a supplemental protest ground--that Vysnova had not timely raised in its initial protest. Vysnova's materiality argument was not based on any new information presented in the agency report; Vysnova was already aware of the basis for this argument when Vysnova received the agency's letter, notifying the firm the reason for Vysnova's elimination from the competition. Protest at 17-18, exh. A, Letter from Agency to Vysnova.

As we have explained, where a protester initially files a timely protest, and later supplements it with independent grounds of protest, the later-raised allegations must independently satisfy the timeliness requirements. *Savvee Consulting, Inc.*, B-408416.3, Mar. 5, 2014, 2014 CPD ¶ 92 at 5. Our regulations do not contemplate the unwarranted piecemeal presentation or development of protest issues through later submissions citing examples or providing alternate or more specific legal arguments missing from earlier general allegations of impropriety. *BluePath Labs, LLC--Costs*, B-417960.4, May 19, 2020, 2020 CPD ¶ 175 at 6. The piecemeal presentation of evidence, information, or analysis supporting allegations previously made is prohibited. *Raytheon Blackbird Techs., Inc.*, B-417522, B-417522.2, July 11, 2019, 2019 CPD ¶ 254 at 4. Our Office will dismiss a protester's piecemeal presentation of arguments that could have been raised earlier in the protest process. 4 C.F.R. § 21.2(a)(2); see e.g. *American Roll-On Roll-Off Carrier Group, Inc.*, B-418266.9 *et al.*, Mar. 3, 2022, 2022 CPD ¶ 72 at 11 n.12 (dismissing as untimely protester's challenges to the agency's responsibility determination raised for the first time in protester's comments on the supplemental agency report because they constituted "new alternate legal arguments" involving facts that were available to the protester in the agency's initial report).

Additionally, Vysnova requests reconsideration of our dismissal because it was *sua sponte*. Req. for Recon. at 1, 5. Specifically, Vysnova contends that because the agency did not "assert that there were timeliness concerns" with the protester's materiality argument, Vysnova was not afforded the opportunity to address our Office's timeliness concerns with the protester's materiality argument. *Id.* at 4-5. As a result, Vysnova maintains, our dismissal was legally erroneous. *Id.* at 5.

Vysnova's argument, here, ignores the provision of our regulations establishing that protests which are "untimely on their face may be dismissed." 4 C.F.R. § 21.2(b). There is no provision in our regulations, however, that requires our Office to provide a protester an opportunity to respond to our timeliness concerns prior to issuing such a dismissal. Rather, our regulations set forth that "[a] protester shall include in its protest all information establishing the timeliness of the protest." *Id.*; *TCA Reservations, Inc.--Recon.*, B-244445, B-244445.2, July 29, 1991, 91-2 CPD ¶ 99 at 2. This requirement applies equally to supplemental protest arguments. Here, Vysnova's comments on the agency's report neither identified the materiality argument as a supplemental protest ground nor established the timeliness of the materiality argument.

Finally, Vysnova argues that even if its materiality argument was an untimely raised supplemental protest ground, rather than a timely submitted comment, we should still consider it under the significant issue exception to our timeliness rules. *Req. for Recon.* at 6. We find no merit to this argument. Pursuant to our regulations, our Office may consider the merits of an untimely protest when good cause is shown or when the protest raises issues significant to the procurement system. 4 C.F.R. § 21.2(c). 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. Generally, however, we regard a significant issue as one of widespread interest to the procurement community that has not been considered on the merits in a prior decision. *Vetterra, LLC, supra*. Moreover, invoking the significant issue exception is a matter entirely within our Office's discretion. *Capital Brand Group, LLC--Recon.*, B-418656.2, July 9, 2020, 2020 CPD ¶ 231 at 4. Here, Vysnova has failed to demonstrate that its argument regarding the materiality of cost/price information not included in its proposal is an issue of widespread interest to the procurement community that would warrant resolution in the context of an otherwise untimely protest. *See Baldt Inc.*, B-402596.3, June 10, 2010, 2010 CPD ¶ 139 at 2-3. As such, we decline to invoke this exception to our timeliness rules.

The request for reconsideration is denied.

Edda Emmanuelli Perez
General Counsel