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Comptroller General  
of the United States

United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** Walker Development & Trading Group--Reconsideration

**File:** B-411246.2

**Date:** September 14, 2015

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Terrance Walker, for the requestor.

Harold W. Askins III, Esq., Department of Veterans Affairs, for the agency.

Cherie J. Owen, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Request for reconsideration of a prior decision dismissing a protest is denied where the protester does not show that the prior decision contains errors of fact or law that warrant reversal or modification of the decision.

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### DECISION

Walker Development & Trading Group, of Reno, Nevada, a small business, requests reconsideration of our decision in Walker Development & Trading Group, B-411246, Apr. 2, 2015, in which we dismissed Walker's protest challenging the decision of the Department of Veterans Affairs (VA) to exercise an option under a contract awarded in 2012 to Lifewatch Services, Inc., of Rosemont, Illinois, under request for quotations (RFQ) No. VA248-12-Q-0797, for cardiac and monitoring services. Walker asserts that our decision failed to address several arguments raised in its protest.

We deny the request for reconsideration.

### BACKGROUND

The RFQ, issued on February 1, 2012, provided for issuance of a fixed-price order, for a base year with four 1-year options, to furnish ambulatory cardiac telemetry services at the VA Medical Center in Gainesville, Florida. Walker did not submit a quote, nor did it file a protest challenging the agency's decision not to set aside the procurement for small business concerns, by the February 10, 2012 closing date. The VA awarded the order to Lifewatch on April 1, 2012. The VA exercised the first and second options under the order on April 1, 2013 and April 1, 2014, respectively.

After the VA announced its intent to exercise the third option, Walker filed a protest with our Office on March 16, 2015.

In its protest, Walker alleged that there were more than two small businesses listed on the sam.gov website under the relevant North American Industry Classification System (NAICS) code for this requirement, and that, therefore, those small businesses “should have been given the opportunity to do fair and open bidding on fbo.gov instead of the methods chosen.” Protest at 1-2.

On April 2, we dismissed the protest. First, we found that to the extent that Walker was arguing that this acquisition should have been set aside for small business concerns, this argument was untimely. Under our Bid Protest Regulations, a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals must be filed before that time. 4 C.F.R. § 21.2(a)(1). We concluded that whether this acquisition was properly solicited on an unrestricted basis was apparent prior to the closing time of the solicitation, as the record reflected that the RFQ was published on the FedBizOpps (Federal Business Opportunities) website in advance of the February 10, 2012 solicitation closing date. Thus, Walker’s protest, which was based on alleged improprieties that were apparent prior to the closing but were raised after the closing time, was untimely. We also concluded that Walker’s argument that the VA should have conducted a “Rule of Two” analysis prior to exercising the contract option failed to state a valid basis of protest. Walker Dev. & Trading Group, supra, at 3-4.

## DISCUSSION

Walker requests reconsideration of our decision in B-411246 dismissing its protest. The protester first appears to argue that our decision failed to address its argument that Lifewatch Services is not a small business. Request for Recon. at 1. Second, the protester alleges that we failed to address its argument that the “Rule of Two” applies when an agency exercises an option. Id. at 2. Finally, the protester argues that the contracting officer failed to consider whether a more advantageous price could be obtained from other offerors, rather than exercising the option. Id.

Under our Bid Protest Regulations, to prevail on a request for reconsideration, the requesting party must show either 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); Department of the Navy--Recon., B-405664.3, May 17, 2012, 2013 CPD ¶ 49 at 2. Repetition of arguments made during our consideration of the original protest and disagreement with our decision do not meet this standard. Veda, Inc.--Recon., B-278516.3, B-278516.4, July 8, 1998, 98-2 CPD ¶ 12 at 4. Additionally, a party’s assertion of new arguments or presentation of information that could have been, but was not, presented during the initial protest also fails to satisfy the standard for granting reconsideration.

Department of the Navy--Recon., *supra*; Precise Mgmt., LLC--Recon., B-410912.2, June 30, 2015, 2015 CPD ¶ 193 at 4.

In requesting reconsideration, the protester contends that Lifewatch Services exceeds the size limitations for the applicable NAICS code. However, since the Small Business Act, 15 U.S.C. § 637(b)(6), gives the Small Business Administration (SBA), not our Office, the conclusive authority to determine matters of small business size status for federal procurements, we therefore will not review a protester's challenge to another company's size status. Bid Protest Regulations, 4 C.F.R. § 21.5(b)(1); Mark Dunning Indus., Inc., B-405417.2, Nov. 19, 2013, 2013 CPD ¶ 267 at 5.

Next, Walker argues that Federal Acquisition Regulation (FAR) § 17.207(d) requires agencies to conduct a "Rule of Two" analysis when exercising an option under an existing contract.<sup>1</sup> In this regard, the protester also argues that our discussion of Major Contracting Servs., Inc., B-410472, Sept. 14, 2009, 2009 CPD ¶ 170, cited by Walker in arguing that exercise of the third year option was improper, was somehow improper or the result of an error of law.

In our decision, we distinguished Major Contracting, in which we sustained a protest challenging the agency's exercise of an option, from the situation in this protest. Specifically, we noted that in Major Contracting, the agency exercised an option that was available under FAR clause 52.217-8, which provides that the agency may require a contractor to continue performance of an otherwise expiring contract for up to six months, upon proper notice. Our Office held in that decision that because the price of the option to extend was not evaluated as part of the initial award, as required by FAR § 17.207(f), the exercise of the option resulted in an extension beyond the scope of the original contract, and therefore constituted a new procurement that had been conducted on a sole-source basis. Major Contracting Servs., Inc., *supra* at 6. In contrast, Walker's protest challenged the exercise of the third option year that was exercised in accordance with the terms of the contract award. In this regard, the record showed that the original competition of the order, in 2012, included the evaluation of the four 1-year options. Thus, the exercise of the contract option here did not constitute an extension beyond the scope of the

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<sup>1</sup> The "Rule of Two" describes a long-standing regulatory policy intended to implement provisions in the Small Business Act, 15 U.S.C. § 644(a), requiring that small businesses receive a "fair proportion of the total purchases and contracts for property and services for the Government." 49 Fed. Reg. 40,135 (Oct. 3, 1984). Accordingly, the Rule of Two requires agencies to set aside for small business participation an acquisition over \$150,000 if there is a reasonable expectation of receiving fair market offers from at least two responsible small business concerns. FAR § 19.502-2(b); see Edmond Scientific Co., B-410179, B-410179.2, Nov. 12, 2014, 2014 CPD ¶ 336 at 5.

original contract. We therefore find no merit in Walker's argument that our decision contained an error of fact or law with respect to our discussion of the applicability of Major Contracting to the circumstances here.

Nor do we find any merit to Walker's contention that the agency was required to conduct a "Rule of Two" analysis prior to exercising the contract option. In this regard, FAR § 17.207 imposes a number of requirements when the contracting officer seeks to exercise an option. For example, FAR § 17.207(c) provides that:

(c) The contracting officer may exercise options only after determining that—

(1) Funds are available;

(2) The requirement covered by the option fulfills an existing Government need;

(3) The exercise of the option is the most advantageous method of fulfilling the Government's need, price and other factors (see paragraphs (d) and (e) of this section) considered;

(4) The option was synopsisized in accordance with Part 5 unless exempted by 5.202(a)(11) or other appropriate exemptions in 5.202;

(5) The contractor is not listed in the System for Award Management Exclusions (see FAR 9.405-1);

(6) The contractor's past performance evaluations on other contract actions have been considered; and

(7) The contractor's performance on this contract has been acceptable, e.g., received satisfactory ratings.

FAR § 17.207(c). In addition, FAR § 17.207(d) further provides that:

(d) The contracting officer, after considering price and other factors, shall make the determination on the basis of one of the following:

(1) A new solicitation fails to produce a better price or a more advantageous offer than that offered by the option. . . .

(2) An informal analysis of prices or an examination of the market indicates that the option price is better than prices available in the market or that the option is the more advantageous offer.

(3) The time between the award of the contract containing the option and the exercise of the option is so short that it indicates the option price is the lowest price obtainable or the more advantageous offer. . . .

FAR § 17.207(d). Nothing in FAR § 17.207 requires the contracting officer to conduct a “Rule of Two” analysis prior to exercising a contract option. Nor has Walker cited any legal authority for this position, and we are aware of none.

Finally, Walker appears to argue that the contracting officer failed to fulfill certain of the requirements of FAR § 17.207(c), including the requirements that, in certain situations, the contracting officer may exercise an option only after determining that funds are available; the requirement covered by the option fulfills an existing government need; the exercise of the option is the most advantageous method of fulfilling the government’s need, price and other factors considered; and the option was synopsisized in accordance with the FAR. In this regard, in its request for reconsideration, Walker argues that “other companies . . . could have saved the government money.” Request for Recon. at 2.

However, we note that Walker did not raise this argument in its initial protest. Rather, the initial protest challenged the agency’s failure to conduct a “Rule of Two” analysis prior to exercise of the option. A party’s assertion of new arguments or presentation of information that could have been, but was not, presented during the initial protest does not meet the standard for granting reconsideration; a party’s 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. B3 Solutions, LLC--Recon., B-408683.5, May 8, 2014, 2014 CPD ¶ 146 at 3; Department of the Navy--Recon., *supra*, at 2.

Since Walker did not raise this contention in its original protest, and since Walker has not explained why it could not, or did not, raise these arguments earlier, these arguments provide no basis for us to reconsider our earlier decision.

The request for reconsideration is denied.

Susan A. Poling  
General Counsel