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Decision

Matter of: Department of State--Reconsideration

File: B-415045.11

Date: December 3, 2018

Kathleen D. Martin, Esq., Department of State, for the agency.
Christopher R. Shiplett, Esq., Randolph Law, PLLC, for US21, Inc., the protester.
Tracie Anton, Blue Force, Inc., for the intervenor.
Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration of decision not to dismiss as untimely supplemental protest filed within 10 days of when protester received document providing basis of protest is denied where record lacked a basis to conclude that protest was untimely.

DECISION

The Department of State (DoS) requests that we reconsider our decision in US21, Inc., B-415045.9, Sept. 10, 2018, 2018 CPD ¶ ____, in which we sustained US21's second supplemental protest of the award of a contract to Blue Force, Inc. under request for proposals (RFP) No. SAQMMA-17-R-0213, for services in support of the DoS mission to provide support to the Palestinian Authority Security Forces program in Jordan and the West Bank. DoS argues that the decision should be reconsidered because our Office erred in failing to dismiss US21's second supplemental protest as untimely.

We deny the request.

BACKGROUND

The RFP, issued March 17, 2017, was a combined synopsis/solicitation, seeking proposals from small business offerors to provide a program management office and the services of training mentors, language assistants, and subject matter experts in support of DoS efforts to strengthen the skills, competencies, and abilities of the Palestinian Authority to provide law enforcement, security, and public safety in the West Bank.

As explained in earlier decisions by our Office, US21 filed both a protest and a supplemental protest with our Office on May 2, 2018. As relevant to the timeliness issue raised in this reconsideration request, DoS filed its agency report (AR) using our Office's electronic protest docketing system (EPDS) on June 1. Counsel for US21 was not able to access the AR initially, and contacted counsel for DoS on June 4 in an attempt to resolve the problem. On June 6, the problem was resolved so counsel for US21 could access the AR through EPDS.¹

On the morning of June 11, and before the protester's comments on the agency report were due, counsel for US21 requested an extension of time to file comments. Letter from Counsel for Protester to GAO, June 11, 2018, at 1. Our Office responded the same day, and set June 12 as the new due date for the protester's comments, to which we added that resetting the comments due date did not extend the time for the protester to file any new or amended grounds of protest.

The protester filed its comments and a second supplemental protest on June 14. The second supplemental protest was based on information that counsel for US21 learned in the AR, specifically in an exhibit designated as AR Tab 7, which was the agency's final award determination memorandum. See Protester's Comments & Second Supp. Protest at 8-9. We dismissed the initial and supplemental protests because the protester had not filed its comments by June 12. US21 requested reconsideration of that decision, which our Office denied. US21, Inc.--Recon., B-415045.10, July 16, 2018, 2018 CPD ¶ 246 at 3.

DoS requested that our Office also dismiss as untimely the second supplemental protest that US21 filed on June 14. On June 21, our Office informed the parties that an AR responding to the second supplemental protest would be due on July 3. In notes posted to the EPDS docket on June 28 and again on July 20, the Government Accountability Office attorney stated that the second supplemental protest would not be dismissed. After completing development of the record on the second supplemental protest (including timely comments by US21), our Office issued a decision sustaining that protest. US21, Inc., B-415045.9, Sept. 10, 2018, 2018 CPD ¶ ____ at 7.

REQUEST

DoS argues that our Office erroneously concluded that the second supplemental protest was timely. The agency further argues that our Office should therefore reconsider our September 10 decision and, instead of sustaining US21's second supplemental protest, we should dismiss it as untimely. Reconsideration Request at 9.

¹ Counsel for DoS asserts that the agency sent a copy of the AR to counsel for the protester by email on June 4, which counsel for the protester denies receiving. Reconsideration Request at 8 n.9; Letter from Counsel for Protester to GAO, June 11, 2018, at 1.

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). As explained below, we deny the agency's request because our decision not to dismiss US21's second supplemental protest was not based on an error of fact or law.

The protester filed the second supplemental protest on June 14. The second supplemental protest argued that the agency miscalculated Blue Force's past performance, an allegation based on a document that counsel for US21 first received as an exhibit to the AR on either June 4 or 6. The second supplemental protest was filed within 10 calendar days of both June 4 and 6, which was the earliest time that US21's counsel could have learned the information about the evaluation of Blue Force's past performance in the final award determination memorandum, making it timely.

Although DoS does not meaningfully dispute that counsel for US21 was unable to obtain the AR when it was submitted to our Office on June 1, the agency nevertheless argues that the filing constituted constructive notice to US21 of its contents. Regardless of the fact that counsel for US21 could not, in fact, obtain the AR or its exhibits on June 1, DoS argues that constructive notice alone was sufficient.

In effect, DoS's argument is that counsel for US21 knew or should have known information that it could not know. As we have recently explained in the context of EPDS filings,

the act of filing a document in EPDS puts all parties on notice of the filing, essentially establishing a rule of constructive notice with respect to all EPDS filings. By definition the doctrine of constructive notice imputes knowledge to a party without regard to the party's actual knowledge of the matter at issue.

Silverback7, Inc.--Recon., B-415311.9, Nov. 15, 2018, 2018 CPD ¶ ____ at 2.

Applying that doctrine, we concluded that the act of filing a document in EPDS puts a protester "on notice of the filing," even where the protester denied receipt of a separate email notification that the document had been filed. Id. at 3.

Here, however, there is no dispute that counsel for US21 was on notice that the agency had filed the AR on June 1, and that counsel for the protester attempted to retrieve the AR. The dispute is whether counsel for US21 should be construed as knowing information in the AR and exhibits on June 1, notwithstanding that counsel did not (and he represents, despite diligent effort, that he could not) obtain access to the documents until June 4 or 6. DoS argues that our timeliness rules should be applied "very strictly," Reconsideration Request at 6, with the consequence being that we should consider counsel for US21 to have known the contents of the AR on June 1, even though counsel could not view them then, and later advised the agency, and at a later point advised our Office also, of this fact. This interpretation of our timeliness rule is not

tenable. Rather, as we have often noted, it is our practice to resolve doubts about timeliness in favor of the protester. Engineered Air Sys., Inc., B-236932, Jan. 19, 1990, 90-1 CPD ¶ 75 at 5. The record shows that with diligent effort, counsel for US21 obtained the AR no earlier than June 4, and the second supplemental protest was filed within 10 days, on June 14. As such, DoS has not shown that our decision to view the protest as timely filed was the product of an error of fact or law.

The request is denied.

Thomas H. Armstrong
General Counsel