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## Decision

**Matter of:** General Services Administration; SBD Alliant, LLC--Reconsideration and Modification of Remedy

**File:** B-417126.5; B-417126.6

**Date:** August 23, 2019

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### DIGEST

Agency and awardee requests for reconsideration of a prior sustain decision are denied because the analysis and conclusions reached in the prior decision did not contain an error of law, or consideration of facts that were not available to the parties during the course of the prior protest. Instead, the arguments made in the underlying protest, by the protester, the agency, and the awardee, were based on a requirement that was deleted from the solicitation by an amendment, but the agency now advises that it did not provide our Office with the complete text of the amendment, and instead omitted the page which made the change because representatives of the agency forgot about the change. In addition, there is no dispute that the complete text of the amendment was available to all parties during the course of the procurement, or that the parties pursued and defended the protest based on the incomplete text of the amendment. Since the legal basis for our decision stands, we do not change the underlying analysis, but since the agency had already amended the solicitation prior to the recommendation in our prior decision, we modify the prior decision to withdraw our previous recommendation that the agency reevaluate these proposals and make a new selection decision. We also withdraw the recommendation that the protester be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees.

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### DECISION

The General Services Administration (GSA) and SBD Alliant, LLC (SBD), a small business of Vienna, Virginia, both request reconsideration of our decision, AlliantCorps,

LLC, B-417126 et al., Feb. 27, 2019, 2019 CPD ¶ 98, sustaining a protest filed by AlliantCorps, LLC, a small business, of San Antonio, Texas, challenging the issuance of a task order to SBD, under task order request (TOR) No. ID07180004. The TOR was issued by GSA in support of the Defense Health Agency for network sustainment and deployment support to the military health system both inside and outside the United States.

We deny the requests for reconsideration, but modify the prior decision to withdraw our earlier recommendations.

## BACKGROUND

These requests for reconsideration raise unique issues. Both requesters allege errors in the underlying decision based on information about changes to the solicitation during the course of the procurement that were known to the agency, the protester, and the awardee, but were not disclosed to our Office during the course of the protest. As set forth below, since the legal basis for the conclusions in our decision stands, we do not change our prior analysis. Nonetheless, the prior decision is modified and our recommendations are withdrawn, as discussed below.

The TOR was released on August 15, 2018, through GSA's e-Buy system to holders of GSA's Alliant small business (SB) governmentwide acquisition contract (GWAC), and anticipated the award of a hybrid fixed-price/time-and-materials task order with a 1-year base period and four 1-year option periods. Agency Report (AR), Tab 3, TOR, Request for Quotations (RFQ) Summary Sheet; id., Performance Work Statement (PWS) at 2, 13; id., appendix A, Evaluation Criteria at 1.

The TOR contemplated issuing the task order on a best-value tradeoff basis considering the following factors: past experience, technical approach, and price.<sup>1</sup> Id., appendix A, Evaluation Criteria at 1. Past experience was more important than technical approach, and both factors, when combined, were more important than price. Id. As relevant here, the solicitation stated that the agency would consider past experience within the last five years of the TOR response due date to the extent the work was relevant in scope, size, and duration to the requirements identified in the PWS. Id. at 2. The solicitation, as originally issued, defined similar in duration "as a requirement that has at least been ongoing for more than one year, has had at least one (1) option exercised, and at least one (1) contractor performance assessment reporting system [CPARS] evaluation has been completed for the first year." Id. at 2-3.

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<sup>1</sup> The TOR contemplated making award to the "best-suited contractor" utilizing a streamlined comparative analysis of offerors' responses, which is described in detail in our AlliantCorps, LLC decision. TOR, appendix C, Rating Plan; AlliantCorps, LLC, supra at 3-4.

The solicitation was amended three times.<sup>2</sup> In amendment 1, the agency provided answers to questions about the terms of the solicitation, which included a question expressing concerns that the past experience requirements were overly restrictive. Specifically, the question challenged the requirement, quoted above, that any claimed past experience effort must have a CPARS evaluation completed for the first year. AR, Tab 4, TOR, amend. 1, TOR Questions and Answers (Q&A) at 5. In response, the agency stated that a past performance reference would be accepted “where an offeror performed over one (1) year on a project and had one (1) option exercised, if an annual [CPARS] evaluation was not completed for that base year and the end of the base year was not more than four (4) months (120 days) prior to the [TOR] response due date.” Id.

In an apparent attempt to further relax the past experience requirement, the agency again revised this requirement in amendment 3 to the solicitation. This amendment eliminated the requirement that any past experience without a completed CPARS must involve work where the base year ended less than 4 months prior to the TOR response date. Agency Req. for Recon., exh. 1, TOR, amend. 3, at 2. Of particular relevance here, amendment 3 was comprised of 2 pages--a summary page and a second page. The language removing the restrictive requirement was only found on the second page of the amendment, and was not referenced on the first page (the summary page). During the underlying protest, the version of the solicitation provided in the agency’s report only included the summary page. In addition, none of the other parties--not the protester, nor the intervenor--pointed out to our Office that the complete text of amendment 3 was not provided. Our Office first learned that the solicitation was incomplete when the agency (and subsequently the intervenor) submitted their requests for reconsideration. Compare AR, Tab 7, TOR, amend. 3 with Agency Req. for Recon., exh. 1, TOR, amend. 3, at 2.

As explained in our prior decision, the agency received responses from seven offerors, including AlliantCorps and SBD, and conducted six comparative evaluations. As relevant here, in the evaluation between AlliantCorps and SBD, the agency determined that AlliantCorps’ past experience was comparatively equal to SBD’s. Because SBD’s proposal was found to offer a comparatively better technical approach, however, the agency concluded that SBD offered the best value. Based on SBD’s technical superiority and lower price, the agency issued the task order to SBD.

AlliantCorps filed a protest with our Office on November 11, 2018, challenging multiple aspects of the agency’s evaluation and award decision. Relevant here, AlliantCorps argued that the agency should not have considered a past experience example submitted by SBD. The example at issue was in its third option year of performance, but did not have a completed CPARS evaluation. As a result, AlliantCorps argued that the referenced experience did not meet the applicable solicitation requirement--i.e., the experience did not have a completed CPARS evaluation, and the base performance

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<sup>2</sup> The TOR and its amendments were issued through the GSA e-Buy system.

period ended far earlier than four months prior to the response date for the TOR here. In making this argument, the protester cited to the solicitation as it existed prior to the issuance of amendment 3. 2<sup>nd</sup> Supp. Protest at 5-7 (citing AR, Tab 5).

The agency, also relying on the TOR as it existed prior to amendment 3, responded that it reasonably considered SBD's past experience example because the "terms of the TOR do not require that [the contracting officer] reject [experience examples] that do not meet the 120-day limitation language." 2<sup>nd</sup> Supp. Contracting Officer's Statement (COS) at 2. In this regard, the contracting officer stated that "the sole purpose of requiring a PPQ [past performance questionnaire] or a CPARS was to confirm at least 12 months of performance with an exercised option" and that because the "similarity in duration" requirement evaluates the ability of offerors to perform a similar scope of work for more than 12 months, it would have been unreasonable to reject SBD's past performance reference. Id. As a result, the contracting officer accepted a past performance reference for evaluation "regardless of whether the end of the base year was more than four (4) months prior to the [TOR] response due date." Id.

AlliantCorps contended in its comments that it was prejudiced by the agency's waiver of this requirement because it would have selected different past experience references had it known the agency would waive the CPARS requirement. Protester's 2<sup>nd</sup> Supp. Comments at 5-6. In support of its argument, AlliantCorps submitted a declaration by an individual responsible for preparing AlliantCorps' proposal, stating that "AlliantCorps selected three past experience examples to include in its [p]roposal based on the evaluation criteria announced in the TOR . . . Had I known that the [a]gency would evaluate as it now appears to have done, AlliantCorps would have submitted different references." Id., Senior Vice President (VP) Declaration at 1-2.

The intervenor, SBD, also submitted comments in support of the agency's evaluation and arguments, which similarly failed to recognize that the solicitation had been amended. SBD maintained that GSA reasonably accepted PPQs for contracts without a completed CPARS, and with base years that ended more than four months prior to the TOR response in order to "avoid the irrational outcome whereby GSA would have to reject [past experience examples] even though they clearly demonstrated the offeror's ability to perform the instant procurement." Intervenor's 2<sup>nd</sup> Supp. Comments at 6-9.

Our Office sustained AlliantCorps' protest, in part, after concluding that the agency waived a material requirement without providing notice to all offerors, and concluding that the waiver resulted in competitive prejudice to the protester. AlliantCorps, supra at 8-9. In our decision, we recommended the agency consider its needs and if appropriate amend the solicitation. Id. at 14. We further recommended that, in the event the solicitation is amended, the procurement be re-opened to permit all offerors to compete against the agency's actual requirements. Id. We also recommended that the agency reimburse AlliantCorps its costs of filing and pursuing the protest. Id. After the issuance of our decision sustaining AlliantCorps' protest, GSA and SBD requested that our Office reconsider our decision.

## DISCUSSION

GSA and SBD now request that we reconsider our prior decision sustaining the protest because the decision was based on solicitation language that was deleted by amendment 3. Agency's Req. for Recon. at 3; SBD's Req. for Recon. at 7-9. Specifically, the requesters complain that during the initial protest, the protester based its arguments on the solicitation as it existed prior to the issuance of amendment 3.

In requesting reconsideration, the agency acknowledges that it failed to provide in its agency report the entire text of amendment 3, and instead provided only the summary page of the amendment--which, as noted above, includes no mention of the change to the past experience requirement. In addition, the agency did not, during the course of the underlying protest, point out that the protester's arguments were relying on an incomplete version of the solicitation. In this regard, the contracting officer states that it was not until February 27, 2019, the date that our decision was issued, that he "remembered that [he] had properly modified the restrictive CPARS/PPQ requirement through TOR [a]mendment 3" issued to all holders of the Alliant SB GWAC. Id.

The requesters contend that this misrepresentation of the solicitation constitutes "new information" that was not presented to or considered by our Office during the initial protest. Thus, the requesters argue that the agency did not waive a material solicitation requirement, and contend that GSA properly considered SBD's past experience example under the TOR. Agency's Req. for Recon. at 3; SBD's Req. for Recon. at 8-9, 10-11.

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). 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. Department of Commerce--Recon., B-417084.2, Mar. 21, 2019, 2019 CPD ¶ 112 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 Veterans Affairs--Recon., B-405771.2, Feb. 15, 2012, 2012 CPD ¶ 73 at 4.

In this regard, we have repeatedly warned that parties that withhold or fail to submit all relevant evidence, information, or analyses for our consideration do so at their own peril. Department of the Air Force--Recon., B-244007.3, Mar. 17, 1992, 92-1 CPD ¶ 287 at 6; Department of the Army--Recon., B-237742.2, June 11, 1990, 90-1 CPD ¶ 546 at 5. It is now clear from the record before us that all three parties (i.e., the protester, agency, and intervenor) overlooked the text found on the second page of amendment 3 that removed the restrictive provision from the solicitation. It is also clear that none of these parties provided to our Office--or made arguments based on--the

complete text of the amendment, which might have avoided the outcome here. There is also no dispute that the entirety of amendment 3 had previously been posted on GSA's e-Buy system.

While the agency's request for reconsideration alleges that AlliantCorps made factual misrepresentations during the course of the underlying protest dispute, there is no basis to assign all blame for this situation to the protester.<sup>3</sup> In making their allegations, arguments, and replies, all three of these parties overlooked the complete text of the solicitation as amended. There is no question now that the information presented and relied upon by the requesters was available and could have been submitted during our initial consideration of the protest--just as there is no question that the protester, too, bears responsibility for this misrepresentation.<sup>4</sup>

## RECOMMENDATION

Although we find no basis to reconsider the legal analysis supporting our prior decision, we nonetheless conclude that modification of the remedies recommended by our Office is merited by the facts presented here. In issuing our recommendation, we observed--based on the record before us at the time--that the agency's arguments suggested that the solicitation's CPARS requirement did not reflect its minimum needs. AlliantCorps, LLC, supra at 14. As a result, we recommended that the agency consider its needs and if appropriate amend the solicitation. Id. We further recommended that in the event the solicitation is amended that the procurement be re-opened to permit all offerors to

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<sup>3</sup> Our Office permitted AlliantCorps to provide a response to the agency's allegations. An AlliantCorps Senior VP submitted a declaration stating that "[a]t the time I submitted my supplemental declaration . . . I was unaware that [a]mendment 3 contained a second page." AlliantCorps' Response, Senior VP Declaration.

<sup>4</sup> The agency alternatively seeks reconsideration of our decision on the basis that the declaration submitted by AlliantCorps' senior VP during the underlying protest was "highly insufficient to support" our conclusion that the agency's waiver of the CPARS requirement resulted in competitive prejudice to AlliantCorps. Agency's Req. for Recon. at 5-6. In this regard, the agency contends that the declaration did not provide specific details about the contracts that AlliantCorps considered submitting, but ultimately did not, because of the restrictive CPARS language. Id. As discussed above, to obtain reconsideration the requesting party must set out factual and legal grounds upon which reversal or modification of the decision is warranted, specifying any errors of law made or information not previously considered. 4 C.F.R. § 21.14(a). Here, the agency's request does not demonstrate our decision contained an error of fact or law; or specify any information not previously considered. Rather, it merely reflects the requester's disagreement with our decision to accept the representations made under oath by the AlliantCorps senior VP, which fails to meet our standard for reversing or modifying the decision. See Veda, Inc.--Recon., B-278516.3, B-278516.4, July 8, 1998, 98-2 CPD ¶ 12 at 4.

compete against the agency's actual requirements. Id. Because the agency had already amended the solicitation to remove the CPARS restriction through amendment 3, and the offerors, likewise, already had an opportunity to compete against that revised requirement, we modify our prior decision to remove the recommendation that the agency reconsider its needs and re-open the procurement.

We also modify our decision where we recommended that the agency reimburse AlliantCorps its costs of filing and pursuing the protest. Id. Our Office recommends that an agency reimburse a protester's costs of filing and pursuing the protest, including reasonable attorney and consultant fees, when we conclude that the agency's actions are inconsistent with applicable procurement laws and regulations. 31 U.S.C. § 3554(c)(1)(A); 4 C.F.R. § 21.8(d). These recommendations relieve private parties with valid claims of the burden of vindicating the public interests that Congress has sought to promote. Department of the Army--Modification of Remedy, B-292768.5, Mar. 25, 2004, 2004 CPD ¶ 74 at 2; Department of the Navy--Modification of Remedy, B-284080.3, May 24, 2000, 2000 CPD ¶ 99 at 3. Specifically, a recommendation for the reimbursement of protest costs relieves a protester of the financial demands of acting as a private attorney general where it brings to light an agency's failure to conduct a procurement in accordance with law and regulation. E&R, Inc.--Claim for Costs, B-255868.2, May 30, 1996, 96-1 CPD ¶ 264 at 2.

Here, while we find no error of law in our underlying decision based on the record that was presented at that time, we now conclude--based on the corrected record before us--that AlliantCorps did not actually bring to light improprieties in the procurement. Rather, as a result of AlliantCorps' misrepresentation of the underlying solicitation--which all of the parties knew or should have known was not accurate--our Office concluded that the agency waived a material solicitation requirement without notice to the offerors, when in fact the requirement at issue had already been removed from the solicitation. Accordingly, for the reasons discussed above, we modify our prior decision to remove both the recommendation to reopen the procurement, and the recommendation that the agency reimburse AlliantCorps its costs of pursuing its protest. See Department of Veterans Affairs--Recon., supra at 6 (modifying recommended remedy that agency reimburse protester's costs of pursuing protest where record shows that the protester failed to disclose a material fact concerning its status as interested party).

The requests for reconsideration are denied, but we modify our prior decision to withdraw our earlier recommendations.

Thomas H. Armstrong  
General Counsel