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Decision

Matter of: DNC Parks & Resorts at Yosemite, Inc.

File: B-410998

Date: April 14, 2015

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Melissa Lackey, Esq., and Daniel Pulver, Esq., Department of the Interior, for the agency.

Evan D. Wesser, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Government Accountability Office (GAO) has jurisdiction to hear a protest of the terms of a National Park Service concession prospectus where, in addition to authorizing the contractor to furnish concession services, the prospectus requires the contractor to furnish goods and services of more than a de minimus value to the government.
2. Where an agency refuses to furnish an agency report responding to a protest, GAO will decide the protest on the basis of the documents available, even if that record is limited to documents submitted by the protester.
3. GAO will not resolve disputes involving interpretation of an existing contract between the protester and the agency, even where the value of the assets to be acquired by the follow-on contractor from the protester bears upon evaluation factors of the current solicitation, because this involves a matter of contract administration not subject to GAO's review.
4. Protest challenging a solicitation's estimate for the value of assets that the successor contractor will be required to acquire from the incumbent contractor as creating material uncertainty prohibiting a reasonable comparative evaluation of proposals is dismissed where the protester failed to establish that it is an interested party to challenge the estimates in the absence of any competitive prejudice.

DECISION

DNC Parks & Resorts at Yosemite, Inc. (DNC), of Buffalo, New York, challenges the terms of prospectus No. CC-YOSE004-16, which was issued by the Department of the Interior, National Park Service (NPS), for a concession contract to operate, maintain, and make improvements to national park facilities located in Yosemite National Park and the El Portal Administrative Site. DNC, the incumbent contractor, argues that the Prospectus is inconsistent with applicable regulations and will not allow for a reasonable assessment of proposals because it is based on a flawed estimate of the initial capital investment that a non-incumbent awardee would be required to make by purchasing the incumbent contractor's assets.

We dismiss the protest.

BACKGROUND

The Prospectus seeks proposals to conduct the concession operations at Yosemite National Park and the El Portal Administrative Site, including overnight accommodations, food and beverage, retail, auto fuel, recreation activities, and related services. Prospectus, Bus. Opp., at 1. The Prospectus anticipates the award of a 15-year contract. Id. at 12. The concessioner, in exchange for the right to conduct the concession operations, will be required to pay the agency a portion of gross receipts, or a "franchise fee." Id., Draft Contract, at 15. The minimum franchise fee is eight percent. Id., amend. No. 12, at 3.¹

The Prospectus and resulting award are subject to NPS's Concession Contracts regulations, located at 36 C.F.R. part 51. Id., Bus. Opp., at 1; Proposal Instructions, at 1. Consistent with the requirements of 36 C.F.R. § 51.17, NPS, for purposes of award, is to consider the following evaluation factors:

- Primary Factor 1 (0-5 points) – The responsiveness of the proposal to the Prospectus' objectives of protecting, conserving, and preserving resources of the park.

¹ The Prospectus includes a projection of anticipated gross receipts for 2016 of \$129 million to \$142.6 million. Prospectus, Bus. Opp., at 20. The Prospectus does not include any projected annual gross receipts beyond 2016. Projecting the Prospectus' estimate for 2016 over the 15-year term of the contract, the total anticipated gross receipts for the contract are between \$1.935 billion and \$2.139 billion.

- Primary Factor 2 (0-5 points) – The responsiveness of the proposal to the Prospectus’ objectives of providing necessary and appropriate visitor services at reasonable rates.
- Primary Factor 3 (0-5 points) – The experience and related background of the Offeror, including the past performance and expertise of the Offeror in providing the same or similar visitor services.
- Primary Factor 4 (0-5 points) – The financial capability of the Offeror to carry out its proposal.
- Primary Factor 5 (0-4 points) – The amount of the proposed minimum franchise fee and other forms of financial consideration to NPS.
- Secondary Factor 1 (0-3 points) – The quality of the Offeror’s proposal to conduct its operations in a manner that furthers the protection, conservation, and preservation of the park and other resources through environmental management programs and activities.
- Secondary Factor 2 (0-1 point) – The Offeror’s ability to ensure appropriate maintenance activities continue within Yosemite Valley during the seasonal opening and closing of the High Sierra Camps and operations throughout the Tuolumne Meadows corridor.
- Secondary Factor 3 (0-2 points) – The Offeror’s commitment to upgrade personal property at locations providing overnight accommodations.

Id., Proposal Instructions, at 3.

The Prospectus provides that NPS will select for award the responsive proposal with the highest cumulative point score. Id. The Prospectus further states that “[c]onsideration of revenue to the United States . . . will be subordinate to the objectives of protecting, conserving, and preserving resources of the park area and of providing necessary and appropriate visitor services to the public at reasonable rates.” Id.

Under DNC’s incumbent contract, any successor contractor will be required to acquire from DNC certain assets and other interests held by DNC in connection with performance of the incumbent contract. As relevant here, DNC’s contract provides that DNC will “sell and transfer to the successor designated by [NPS] . . . all other property of [DNC] used or held for use in connection with such operations,” and that NPS “will require such successor, as a condition to the granting of a contract to operate, to purchase from [DNC] . . . such other property, and to pay [DNC] the fair value thereof” (hereinafter, the “Other Property”). Id., appx. D, Contract No. CC-YOSE004-93, at 21. Consistent with the requirements of the incumbent

contract, the Prospectus required that offerors agree “[t]o acquire property of [DNC] used or held for use in the operation under the terms of the Existing Contract,” and “[t]o resolve any dispute regarding the value of the property of [DNC] in accordance with the terms of the Existing Contract and to allow [NPS] to participate in the property value determination.” Id., Proposal Package, at 3.

On May 30, almost a month after NPS posted a notice of a site visit in advance of the release of the Prospectus, counsel for DNC notified NPS that it had undertaken its own valuation of the Other Property that DNC uses in connection with its incumbent operations, which DNC appraised at approximately \$100 million. See Letter from DNC Asst. General Counsel to Yosemite Superintendent (May 30, 2014) at 1. Relevant to the issues in this protest is certain DNC intangible property, comprised of intellectual property, a customer database, and internet-related intangibles (hereinafter, the “Intangible Other Property”). DNC, based on third party appraisals, asserts that the “fair value” for its Intangible Other Property is approximately \$51.2 million, which is comprised of: \$36 million for 32 trademarks and service-marks; \$8 million for “brand extension value” for the marks; \$2 million for DNC’s customer database; and \$5 million for Yosemite-related domain names, websites, and social media accounts. Protest at 6-7.²

The original Prospectus estimated that the total value of DNC’s Other Property was \$22.5 million. Prospectus, Bus. Opp., at 30. The Prospectus did not specifically identify what property was included in the total, other than stating that the total “includes personal property such as furniture, trade fixtures, equipment, and vehicles.” Id. The Prospectus also included the caveat that the “total is only an estimate, and the final determined value could differ from this estimate.” Id.³

Following several additional exchanges between DNC and NPS regarding DNC’s Other Property, the agency issued amendment No. 9 to the Prospectus on November 20. NPS recounted the exchanges between DNC and the agency, and NPS’s view of the sufficiency of the supporting materials submitted by DNC in

² The Prospectus does not specifically address the types of intellectual property claimed as DNC’s Intangible Other Property. See Prospectus, appx. D, Contract No. CC-YOSE004-93, at 21-22.

³ More globally, the Prospectus notified offerors that:

Offerors are responsible for undertaking appropriate due diligence with respect to this business opportunity. All of the statements made in this Prospectus regarding the nature of the business and its likely future are only opinions of the Service. Offerors may not rely on any representations of the Service in this regard.

Prospectus, Proposal Instructions, at 5.

furtherance of its valuation of the Intangible Other Property. The agency stated that “although [DNC’s] intellectual property appraisal report describes valuation methods and approaches in detail, it merely presents a chart with a single figure purporting to represent the fair market value of the asset,” and that “[n]o assumptions, projected revenues or royalty rates are cited.” Prospectus, amend. No. 9, at 1. The agency further stated that “based on information provided to date by [DNC], the Service has chosen not to increase its estimate for the initial investment in this Business Opportunity at this time,” but advised that it would “continue to investigate [DNC’s] claims” and “make any necessary adjustments through a future amendment.” Id. at 2.

After further exchanges between DNC and NPS, the agency issued amendment No. 12 to the Prospectus on December 22. The agency increased the estimated value for DNC’s Other Property to \$30.6 million, including \$3.5 million for DNC’s Intangible Other Property. Prospectus, amend. No. 12, at 2, 3. Amendment No. 12 retained the caveat that the Prospectus’ valuation for DNC’s Other Property was only an estimate. See id.

JURISDICTION OVER A PROTEST OF THE TERMS OF THE PROSPECTUS

Prior to the due date for the agency report, NPS notified our Office that it is the agency’s position that GAO does “not have jurisdiction to consider protests of prospectuses for NPS concession contracts because these contracts are not for the procurement of goods or services,” and, therefore, are outside the scope of our bid protest jurisdiction under the Competition in Contracting Act of 1984, as amended, (CICA), 31 U.S.C. §§ 3551-3556. NPS Response to Protest (Jan. 22, 2015) at 1. The agency, relying on its analysis of our Office’s jurisdiction, therefore declined to submit a report responding to the protest, a matter that we address separately below. See id. at 3; Email from Agency Counsel (Jan. 23, 2015) at 1. For the following reasons, we disagree with NPS regarding our jurisdiction over the protest.

Our authority to decide bid protests derives from CICA and encompasses written objections by interested parties to “[a] solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services.” 31 U.S.C. § 3551(1)(A). We have found that our Office lacks jurisdiction to consider a protest challenging the award of a “pure” concession contract, that is, a no-cost contract that merely authorizes a concessioner to provide goods or services to the public, as opposed to the government. Public Commc’ns Servs., Inc., B-400058, B-400058.3, July 18, 2008, 2009 CPD ¶ 154 at 6; White Sands Concessions, Inc., B-295932, Mar. 18, 2005, 2005 CPD ¶ 62 at 1-2. We have consistently recognized, however, that some concession contracts are hybrids that require the delivery of goods and/or services to the government. Public Commc’ns Servs., Inc., supra, at 6; Great S. Bay Marina, Inc., B-296335, July 13, 2005, 2005 CPD ¶ 135 at 2 (Great S. Bay Marina II); Starfleet Marine Transp., Inc., B-290181, July 5, 2002, 2002 CPD ¶ 113 at 6. Our jurisdiction extends to concession prospectuses and

selections where the concessioner is to provide services to an agency which it would otherwise have to purchase or perform in addition to authorizing a firm to provide services to park visitors. E.g., Moboco, Inc., B-409186, B-409186.2, Feb. 5, 2014, 2014 CPD ¶ 46 at 2 n.2; Recreation Resource Mgmt. of Am., Inc., B-406072, Feb. 1, 2012, 2012 CPD ¶ 60 at 5.

Here, the unrebutted information submitted by DNC demonstrates that this is not an instance where the only services that the concessioner will be required to furnish are those pertaining to the upkeep of the space in which it operates its business. E.g., White Sands Concessions, Inc., supra, at 2 (finding no jurisdiction where the only services the concessioner was required to furnish were maintenance, repair, housekeeping, groundskeeping, and pest and weed control for the snack bar/gift shop it was operating). Rather, the concessioner here will be required to deliver to the agency goods and services of more than de minimus value that the agency might otherwise have had to purchase or perform itself. E.g., Great S. Bay Marina, Inc., B-293649, May 3, 2004, 2004 CPD ¶ 108 at 2 (Great S. Bay Marina I) (concessioner required to commit to reconstruction and rehabilitation services valued at over \$3 million for government-owned facilities); Starfleet Marine Transp., Inc., supra, at 8 (concessioner for ferryboat services required to provide janitorial services for agency's docks and piers, equip ferries with public address systems for use by Park Ranger, and provide transportation for Park Ranger).

For example, the concessioner will be required to provide snow removal, litter removal, and maintenance, including paving and painting, to NPS's Yosemite History Center and Hill Studio parking lot, which is not a concession facility. See Prospectus, amend. No. 1, Questions & Answers, at 4. The concessioner will also be required to provide the agency with all necessary medical supplies and equipment at the Badger Pass Ranger Station. Prospectus, Draft Contract, exh. B-5, Badger Pass Operating Plan, at B5-3. Additionally, the concessioner must provide complimentary visitor transportation services (VTS), including operating three pre-established shuttle routes and after-hours, on-demand visitor and employee transportation services. Id., exh. B-6, VTS Operating Plan, at B6-1. In addition to providing VTS to park visitors, NPS employees also utilize the services. See Decl. of DNC President, ¶ 27.⁴ The concessioner also will be

⁴ NPS, in the Prospectus, takes the position that the purpose of the VTS is "to promote visitor use of Concession Facilities by reduction of related traffic congestion." Prospectus, Draft Contract, exh. B-6, VTS Operating Plan, at B6-1. As DNC argues, and the agency does not rebut, however, the VTS also serve non-concession locations within Yosemite. See Decl. of DNC President, ¶ 27. We also note that NPS represented that other shuttle services not covered by the Prospectus "will be operated under a separate procurement contract between the Service and a third party operator." Prospectus, amend. No. 2, Questions & Answers, at 9 (emphasis added).

required to allow NPS vehicles to refuel at the concessioner's gas stations. Prospectus, Draft Contract, exh. B, Operating Plan, at B-36. DNC estimates that the value of these goods and services will be approximately \$1.9 million a year, or a total of \$28.6 million over the life of the contract. Protest at 19; DNC Br. (Feb. 2, 2015) at 2.

As these examples demonstrate, and in the absence of any specific rebuttal from NPS, we find that there is sufficient evidence that the concessioner will be required to provide the agency with valuable goods and services of more than a de minimus value in addition to providing concession services to the public. Therefore, we find that the Prospectus contemplates a "mixed transaction" subject to our bid protest jurisdiction.

NPS argues that we should reconsider our previous analysis based on two recent decisions issued by the United States Court of Federal Claims, which found that concession acquisitions generally are not "in connection with the procurement of goods or services," and thus are outside of the court's bid protest jurisdiction pursuant to the Tucker Act, 28 U.S.C. § 1491(b)(1). See Agency's Response to Protest (Jan. 22, 2015) at 1-2 (citing Jordan Pond Co., LLC v. United States, 115 Fed. Cl. 623 (2014), and Eco Tour Adventures, Inc. v. United States, 114 Fed. Cl. 6 (2013)).

We are aware of the Court of Federal Claims' recent decisions interpreting the court's own jurisdiction under the Tucker Act to hear protests of two specific concession acquisitions, and we respect the court's decisions with regard to its own jurisdiction. However, our Office is not bound by decisions of the Court of Federal Claims. E.g., Kingdomware Techs.--Recon., B-407232.2, Dec. 13, 2012, 2012 CPD ¶ 351 at 3. We have found under CICA that where the government invites private offerors to compete for a business opportunity, the performance of which also involves the delivery of property or services to the government, all elements necessary to invoke our jurisdiction are present. Starfleet Marine Transp., Inc., supra, at 8. When the government acquires goods or services, even as part of what is otherwise a concession contract, our review serves to ensure the integrity of the procurement and public confidence that the government will award acquisition contracts fairly. The Court of Federal Claims' decisions in Jordan Pond and Eco Tour Adventures did not address any new precedent, law, or arguments. Rather, the court reached different conclusions regarding the same arguments that NPS has previously raised before our Office. Compare, e.g., Eco Tour Adventures, 114 Fed. Cl. at 20-21 with Starfleet Marine Transp., Inc., supra, at 7-8. While the court appeared to disagree with our analysis regarding jurisdiction over concession contracts involving a "mixed transaction," the court's analysis of the issue appears to be dicta. In Jordan Pond, the court expressly found that the required maintenance of concession buildings in that case was "better characterized as a condition of the opportunity to operate the concession rather than as separate services provided to the Park Service." 115 Fed. Cl. at 630. Thus, the court may

not have been confronted with an actual “mixed transaction.” Here, however, we find that NPS is acquiring goods and services of more than a de minimus value for its own benefit in addition to authorizing the provision of goods and services to the public. In sum, we believe that our exercise of jurisdiction over this protest is consistent with our established interpretation of our jurisdiction over “mixed transactions” under CICA and with our responsibility to ensure that federal government contracts are acquired and awarded reasonably, consistent with applicable law, and in a manner consistent with CICA’s broad mandate for full and open competition.

THE AGENCY’S FAILURE TO FURNISH A REPORT

Our authority under CICA encompasses written objections by interested parties to an award or proposed award of a contract for the procurement of property or services. 31 U.S.C. § 3551(1)(a). CICA requires that when such a protest is filed with our Office, the contracting agency is to submit a complete report on the protested procurement to our Office within 30 days after receiving notice of the protest from us. 31 U.S.C. § 3553(b)(2). We find that NPS’s refusal to submit a report to our Office in this matter based on its view of our jurisdiction with respect to concession prospectuses was inconsistent with the requirements of CICA. See Great S. Bay Marina II, supra, at 4-5.

CICA requires that our Office decide protests timely filed by interested parties, so long as the protests state a valid basis and are within our Office’s jurisdiction. The agency’s report to our Office is a key element in our Office’s resolution of bid protests. A contracting agency is free to request that our Office dismiss a protest on the basis of a lack of jurisdiction, or for failure to state a valid basis, untimeliness, or other reasons, and agencies do that regarding hundreds of protests each year.

It was improper for the agency here to refuse to provide a report to our Office. It is for our Office, not the contracting agency, to determine whether a protest is within our jurisdiction, just as it is for our Office, not the contracting agencies, to determine whether a protest is timely and states a valid basis. CICA requires contracting agencies to furnish a report to our Office, 31 U.S.C. § 3553(b)(2), and we therefore conclude that NPS’s refusal to do so is inconsistent with its legal obligations under CICA. In a prior instance where NPS refused to submit an agency report based on its view of our jurisdiction, we reported NPS’s violation of its obligations under CICA to the appropriate Congressional committees. See Great S. Bay Marina II, supra, at 4-5. However, in light of our dismissal of the protest on other grounds, we do not believe referral to Congress of NPS’s violation of CICA is appropriate in this case.

Given the agency’s refusal to submit a report in response to the protest, CICA’s mandate that we resolve protests filed by interested parties means that we are deciding this case based on the documentation submitted by the protester. Great S. Bay Marina II, supra, at 4. While, as explained below, we are dismissing this

protest on separate grounds raised sua sponte by our Office, where a protest indicates that a contracting agency has violated procurement law to the prejudice of the protester, and the agency provides no rebuttal or documents supporting its action, our Office will sustain the protest. Id. at 5. Moreover, where we have sustained a protest in these circumstances, we are not inclined to reconsider the matter where the contracting agency bases a request for reconsideration on information that it could have presented during our initial consideration of the protest but chose not to do so. Id.

CHALLENGE TO THE TERMS OF THE PROSPECTUS

DNC alleges a number of challenges to the terms of the Prospectus, primarily based on the disparity in estimates included in the Prospectus for DNC's Intangible Other Property—NPS's valuation of \$3.5 million versus DNC's valuation of \$51.2 million.⁵ First, DNC argues that by failing to provide a reasonable, supported estimate for the value of DNC's Intangible Other Property, NPS has failed to include a minimum capital investment, as required by 36 C.F.R. § 51.5(a)(3). See Protest at 20-22. Second, DNC argues that the Prospectus is "fundamentally misleading" because it fails to adequately assess the fair value of DNC's Intangible Other Property. See id. at 22-24. Third, DNC argues that NPS cannot reasonably assess whether offerors' proposals afford a reasonable opportunity for net profit because of the agency's allegedly inadequate consideration of the fair value of DNC's Intangible Other Property. See id. at 24-25. And fourth, DNC argues that NPS cannot conduct a reasonable comparison of proposals due to the relative uncertainty around the Prospectus' valuation of DNC's Intangible Other Property. See id. at 26-28. For the reasons that follow, we dismiss the protest because these grounds either concern matters of contract administration that our Office does not review, or because the protester is not an interested party to raise these arguments.

While CICA governs the manner in which most procurements are conducted, it exempts those covered by "procurement procedures otherwise expressly authorized by statute." 41 U.S.C. § 3301(a). The NPS Concessions Management Improvement Act of 1998, 16 U.S.C. § 5951 et seq., establishes such procedures for the award of NPS concession contracts. Great S. Bay Marina I, supra, at 2;

⁵ DNC also represented that the parties' respective valuations for other DNC Other Property, including inventory, furniture, fixtures, equipment, and vehicles, differ by approximately \$900,000. See DNC Br. (Mar. 4, 2015) at 3. Notwithstanding the parties' different valuations for this DNC tangible Other Property, we understand DNC's protest to only focus on the different valuations for DNC's Intangible Other Property. See id. at 2-3. Additionally, DNC initially challenged the agency's alleged failure to account for approximately \$14 million in fixed capitalized assets, but DNC subsequently withdrew that protest allegation. See id. at 2 n.3. Therefore, our analysis is limited only to DNC's challenges regarding the Intangible Other Property.

Starfleet Marine Transp., Inc., *supra*, at 10. Where CICA and the implementing Federal Acquisition Regulation do not apply to procurements that are otherwise in our jurisdiction, we review the record to determine if the agency's actions were reasonable and consistent with any statutes and regulations that do apply. Open Spirit, LLC, B-410428, B-410428.2, Dec. 15, 2014, 2014 CPD ¶ 373 at 6; Great S. Bay Marina I, *supra*, at 2-3.

Contract Administration

First, based on our review of DNC's submissions, our Office requested supplemental briefing regarding whether resolution of the protest would require our Office to resolve the parties' apparent dispute regarding the corpus and value of DNC's Intangible Other Property to be acquired by a successor contractor pursuant to the terms of the incumbent contract. We advised the parties that such a dispute would raise a matter of contract administration not for our review as part of our bid protest function. See GAO Request for Supp. Briefing (Feb. 23, 2015). In this regard, our Office considers bid protest challenges to the award or proposed award of contracts. 31 U.S.C. § 3552. Therefore, we generally do not review matters of contract administration, which are within the discretion of the contracting agency and for review by a cognizant board of contract appeals or court. Bid Protest Regulations, 4 C.F.R. § 21.5(a); Colt Def., LLC, B-406696.2, Nov. 16, 2012, 2012 CPD ¶ 319 at 5.

In response, NPS argued that DNC's protest is effectively a claim arising under the terms of the existing contract that NPS undervalued the "fair value" of DNC's Intangible Other Property, which is inherently a question of contract administration because it would require our Office to resolve an apparent contract dispute. See Agency Br. (Mar. 4, 2015) at 1-2. Additionally, NPS argues that any post-award valuation dispute would be between DNC and the successor contractor, both of which are private parties. *Id.* at 2. DNC argued that its protest does not implicate a matter of contract administration because the protest does not challenge "the unreasonableness of NPS's 'starting point' figure," but, rather challenges the "uncertainty" caused by NPS's adoption of a "broad range" in the Prospectus of \$3.5 million to \$51.2 million for the estimated value of DNC's Intangible Other Property. DNC Br. (Mar. 4, 2015) at 4. DNC argues that in light of the uncertainty caused by the disparity in the valuation of the Intangible Other Property in the Prospectus, NPS is unable to conduct a reasonable, comparative assessment of proposals, including, for example, whether an offeror has adequate financial capability to perform its proposal or whether the proposed approach affords a reasonable opportunity for net profit. *Id.* at 5-8.

As an initial matter, we disagree with DNC's characterization of the Prospectus as including an unreasonably broad range for the value of DNC's Intangible Property. Rather, the Prospectus reflects the agency's current valuation, notifies prospective offerors of DNC's disputed valuation, and advises prospective offerors of the need

to conduct their own diligence and valuations. See Prospectus, amend. No. 12, at 2, 3. In any event, we view DNC's protest allegations in essence as challenging the reasonableness of the agency's valuation of DNC's Intangible Other Property or, alternatively, challenging the agency's decision not to make a final valuation before issuing the Prospectus. See Protest at 21 (stating NPS's estimate for the value of DNC's Other Property is "woefully inaccurate"); DNC Br. (Feb. 2, 2015) at 6 (arguing that it was "both irrational and contrary to law to conduct [the] solicitation without first determining the fair value of [DNC's] property"). These questions, however, at their heart go to a potential dispute between the agency and the protester under the incumbent contract. We find that our consideration of the reasonableness of the parties' disputed positions regarding the adequacy of the valuation of the Intangible Other Property would require our Office to effectively resolve a dispute arising under the terms of the existing contract. As such, DNC's challenges are not for our consideration as part of our protest function.

We find this protest to present similar facts and considerations as our decision in Colt Defense, LLC, supra. In Colt Defense, our Office was confronted with a pre-award challenge to the terms of a solicitation incorporating an estimated royalty rate under a license agreement between the protester and the agency. The protester challenged the agency's reliance on an estimated, "speculative royalty amount," which was concededly for "evaluation purposes only," and which the protester alleged "understate[d] the true cost to the government." Id. at 5. The protester effectively contended that the agency could not conduct the procurement until the parties had reached an agreement as to the final royalty rate under their agreement. Id. We first held that we would not resolve a dispute involving the interpretation of the parties' licensing agreement, even where the amount of the royalty fee under the agreement impacted evaluation factors of the current solicitation. Id. We then dismissed the protest because the agency acted within its reasonable discretion in accounting for the royalty due to the protester in order to evaluate the relative costs of proposals, even though the royalty figure used by the agency was only an estimate and was subject to further negotiation between the protester and agency. Id. at 5-7.

In this regard, we do not find persuasive DNC's argument that a final, determined value for the Intangible Other Property, as opposed to an estimate that the NPS expressly directed that offerors could not rely upon, was necessary for NPS to meet its obligation pursuant to 36 C.F.R. § 51.5(a)(3) to provide "[t]he minimum capital investment, if any, that the concessioner must make." See Protest at 21 (arguing the estimate in the Prospectus could not satisfy the minimum capital investment requirement because "NPS insists that offerors 'may not rely on' [the] estimate"); DNC Br. (Mar. 4, 2015) at 5 (stating DNC "does not argue that the minimum capital investment cannot be an estimate," but challenging the "uncertain variable" between NPS's estimate and DNC's valuation). First, as in Colt Defense, while NPS was required to account for the potential compensation due to DNC pursuant to the terms of the incumbent contract, it was not unreasonable to utilize an estimate

where a final valuation determination has not yet been made. We also do not find unreasonable NPS's use of an estimate that shifted the risk of the final valuation of DNC's Intangible Other Property to prospective offerors. The mere presence of risk in a solicitation does not make the solicitation inappropriate or improper, as it is within the agency's discretion to compete a proposed contract that imposes maximum risks upon the selected contractor and minimum burdens upon the agency. OMNIPLEX World Servs. Corp., B-295698, B-295698.2, Mar. 18, 2005, 2005 CPD ¶ 43 at 3.

The inclusion of an estimate for the compensation due to DNC is also entirely consistent with NPS's own regulations, which requires that the agency only provide in a prospectus "[a]n estimate of the amount of any compensation due a current concessioner from a new concessioner under the terms of an existing or prior concession contract." 36 C.F.R. § 51.5(d). Thus, DNC's argument challenging NPS's reliance on an estimate in the Prospectus, as opposed to a final determined amount, would render 36 C.F.R. § 51.5(d) superfluous.

Therefore, we dismiss the protest because it raises a matter of contract administration. There is no dispute that DNC will be entitled to some compensation for its Intangible Other Property if award is made to an offeror other than DNC. Thus, as discussed above, we think the agency can properly account for this cost in the Prospectus, despite any remaining uncertainty as to the exact amount to be paid to DNC under the incumbent contract.

Interested Party

Next to the extent DNC argues that the range of estimates in the Prospectus creates an unreasonable degree of uncertainty for purposes of preparing and evaluating offers, we conclude that the protester is not an interested party to raise these concerns. Under the bid protest provisions of CICA, only an interested party may protest a federal procurement. That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a)(1). Determining whether a party is interested involves consideration of a variety of factors, including the nature of the issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. RELM Wireless Corp., B-405358, Oct. 7, 2011, 2011 CPD ¶ 211 at 2. Whether a protester is an interested party is determined by the nature of the issues raised and the direct or indirect benefit or relief sought. Id.

Here, we find that DNC is not an interested party to challenge the alleged "uncertainty" in the Prospectus because we discern no competitive prejudice to DNC. Competitive prejudice is an essential element of every viable protest, and where none is shown or otherwise evident, we will not sustain a protest, even where a protester may have shown that an agency's actions arguably were improper.

Interfor US, Inc., B-410622, Dec. 30, 2014, 2015 CPD ¶ 19 at 7. DNC, the incumbent, has no uncertainty in accounting for the minimum capital investment for the Intangible Other Property that it must include in its proposal; DNC can include \$0 for this component. It is the pool of potential offerors other than DNC who could suffer competitive harm in the formulation of their respective proposals from the alleged uncertainty. It will be these offerors, not DNC, who must account for the contingency of contract negotiations and potential litigation over the final determined value of DNC's Other Property.

In analogous circumstances, we have found that a bidder unaffected by an alleged solicitation defect is not an interested party to challenge the alleged defect. For example, we have held that a prospective offeror generally is not an interested party to challenge a specification as unduly restrictive in cases where it can meet the requirement set forth in the solicitation, as such a challenge would be, in essence, on behalf of other potential suppliers who are economically affected by the specification's allegedly restrictive nature. E.g., Government & Military Certification Sys., Inc., B-409420, Apr. 2, 2014, 2014 CPD ¶ 116 at 4; Westinghouse Elec. Corp., B-224449, Oct. 27, 1986, 86-2 CPD ¶ 479 at 3.

Here, no other prospective offerors challenged the terms of the Prospectus prior to the proposal due date of January 21, 2015. NPS advises that it received proposals from DNC and at least one additional offeror. See Email from Agency Counsel (Jan. 23, 2015) at 1.

Additionally, the "harm" to DNC appears to be that the alleged "broad range" between NPS's and DNC's estimates could dilute its incumbent advantage because the Prospectus' estimate suggests that DNC should only have a \$3.5 million advantage over its competitors with respect to the Intangible Other Property that DNC, as the incumbent, will not be required to account for in its proposal. See DNC Br. (Mar. 4, 2015) at 7 (arguing the alleged range in the Prospectus "prejudices DN[C] because it encourages and rewards a buy-in strategy" from other offerors). We do not find that a protest concerning this type of harm falls within the scope of our jurisdiction under CICA, which requires us to ensure that the statutory requirements for full and open competition are met--not to protect any interest a protester may have in more restrictive specifications. See Virginia Elec. & Power Co.; Baltimore Gas & Elec. Co., B-285209, B-285209.2, Aug. 2, 2000, 2000 CPD ¶ 134 at 7-8. In this regard, our Office generally does not permit a protester to use our Bid Protest function to advocate for more restrictive, rather than more open, competitions for government requirements. E.g., New Mexico State Univ., B-409566, June 16, 2014, 2014 CPD ¶ 228 at 5 (denying an incumbent's protest challenging an agency's decision to not require pricing for components for which the incumbent had an exclusive teaming arrangement with the sole manufacturer); Honeywell Tech. Solutions, Inc., B-407159.4, May 3, 2012, 2013 CPD ¶ 110 at 3

(denying an incumbent's protest that the solicitation should have included more stringent minimum relevance levels under the past performance evaluation factor).⁶

We dismiss the protest.

Susan A. Poling
General Counsel

⁶ In any event, DNC's protest allegations appear to be premature as they merely anticipate that NPS will evaluate proposals unreasonably and in a manner inconsistent with the terms of the Prospectus. Our Office assumes that agencies will conduct procurements in a fair and reasonable manner in accordance with the terms of the solicitation, and we will not consider a protest allegation which speculates that an agency will not evaluate proposals in the manner set forth in the solicitation. DGC Int'l, B-410364.2, Nov. 26, 2014, 2014 CPD ¶ 343 at 3. DNC speculates that offerors will adopt NPS's estimate of \$3.5 million for DNC's Intangible Other Property in order to make their proposals more attractive, and that NPS will not reasonably evaluate offerors' financial capability or whether the proposed approaches provide a reasonable opportunity for net profit. Notwithstanding the protester's and agency's dispute as to the valuation of DNC's Intangible Other Property, the Prospectus specifically requires that each offeror provide their respective estimate of the acquisition and start-up costs of the business, including providing the methodology and assumptions used to develop the estimate. See Prospectus, Proposal Package, at 18. To the extent that DNC believes that NPS failed to properly evaluate proposals with regard to financial capability or whether they offered a reasonable opportunity for net profit, that would be a challenge to the agency's evaluation of proposals, not to the terms of the Prospectus.