



**G A O**

Accountability \* Integrity \* Reliability

**Comptroller General  
of the United States**

**United States Government Accountability Office  
Washington, DC 20548**

## Decision

**Matter of:** DAI, Inc.

**File:** B-408625; B-408625.2

**Date:** November 6, 2013

---

Michael A. Hordell, Esq., Michael R. Golden, Esq., and Robert T. Leahy, Esq.,  
Pepper Hamilton LLP, for the protester.

CPT George P. Farley, Department of the Army, for the agency.

Cherie J. Owen, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel,  
GAO, participated in the preparation of the decision.

---

### **DIGEST**

1. Protest not filed within 10 days of closing date for proposal receipt, which constituted initial adverse action on agency-level protest, is untimely.
  2. Protester is not an interested party to challenge de facto sole-source award where the firm would not be able to provide a product satisfying the solicitation's specifications if the procurement were competed.
- 

### **DECISION**

DAI, Inc., of Westerville, Ohio, protests the terms of request for proposals (RFP) No. W58RGZ-13-R-0023, issued by the Department of the Army, Army Materiel Command, for aviation light utility mobile maintenance carts. Specifically, DAI contends that the carts are not a commercial item, that the agency's specifications are unduly restrictive, and that the acquisition is a de facto sole-source procurement.

We dismiss the protest.

### **BACKGROUND**

The RFP seeks proposals to provide lightweight, all-terrain carts that are capable of transporting aviation personnel, tools, equipment, and small cargo to help support aviation maintenance activities on airfields, tactical bases, and forward operating bases. Agency Report (AR), Tab 3, Capability Production Document, at 5.

In February 2012, the agency conducted market research in which it initially identified seven companies that sold utility vehicles that could potentially meet the agency's needs. AR, Tab 10, Feb. 2012 Market Research, at 4. The agency reviewed the product lines of each manufacturer and eliminated two firms that produced vehicles that ran only on electric energy. Id. at 5. The agency then developed a 73-question survey based on its additional requirements and asked the five remaining companies to complete the questionnaire by stating whether they offered products that could meet the agency's requirements. Two companies submitted completed questionnaires. Id. at 5. Based on these responses, the agency found that one of the companies (Company A) appeared to be able to meet the agency's requirements. The agency also found that, based on its initial review of firms' product lines, another company (Company C) that had not completed a survey appeared to be able to meet the agency's core requirements.<sup>1</sup> Id. at 6.

On June 6, the agency issued the solicitation, which is set aside for small businesses and anticipates the award of an indefinite-delivery/indefinite-quantity (IDIQ) fixed-price per unit contract. AR at 3. The RFP seeks proposals to provide aviation light utility mobile maintenance carts as a commercial item. The agency estimates that the total contract value is \$69,015,049. Id.

On July 7, DAI filed an agency-level protest challenging the terms of the solicitation. AR, Tab 14, Agency-Level Protest. Specifically, DAI protested that the procurement was erroneously classified as a commercial item buy. Id. at 2. DAI requested that the agency either cancel the RFP and re-solicit the requirement as a non-commercial item, or amend the solicitation to remove the specifications that DAI alleged deviated from the Federal Acquisition Regulation's (FAR) definition of a commercial item. Id.

On July 9, the proposal submission period closed. The agency received two proposals by the July 9 closing date.<sup>2</sup> After conducting an initial evaluation of the two proposals, on July 24 the agency issued an amendment to the solicitation and allowed offerors until July 31 to submit revised proposals.<sup>3</sup> The agency states that, pursuant to FAR § 15.206(c), the amendment was issued only to offerors that had submitted proposals by the initial due date. AR at 7. However, because the amendment was posted on the FedBizOpps website, it was accessible to the public. On July 24 and 25, the agency received e-mail inquiries from firms interested in

---

<sup>1</sup> The agency also conducted market research in October 2010. In its 2010 market research, the agency concluded that none of the companies it surveyed had a commercial off-the-shelf item that met all of the agency's desired performance attributes. AR, Tab 9, Oct. 2010 Market Research, at 8.

<sup>2</sup> DAI did not submit a proposal.

<sup>3</sup> The amendment was posted on the FedBizOpps website.

submitting proposals in response to the solicitation. In both cases, the agency informed the firms that the solicitation had closed on July 9 and that the amendment was issued only to offerors who had submitted proposals by the initial closing date. AR, Tab 21, E-mail Communications with Company 1, at 1; AR, Tab 22, E-mail Communications with Company 2, at 1.

On July 31, DAI filed a protest with our Office.

## DISCUSSION

In its initial protest, DAI argued that the solicitation was improperly characterized as a commercial item procurement and that it contained specifications that are unduly restrictive. After receiving the agency report, DAI filed a supplemental protest with our Office contending that the procurement is a de facto sole-source award because only one company that responded to the agency's questionnaire appeared to be able to meet all of the product specifications. Comments & Supp. Protest at 4.

### Timeliness of Initial Protest Grounds

The agency contends that DAI's initial July 31 protest to our Office is untimely because DAI failed to protest within 10 days of initial adverse agency action on its agency-level protest. On July 7, DAI filed its agency-level protest challenging the terms of the solicitation. Two days later, on July 9, the agency proceeded with receipt of proposals as scheduled. On July 19, DAI contacted the agency to inquire about the status of its agency level protest. The agency responded on July 22 that it was still in the process of preparing its response.

Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3), where a protest is filed initially with the agency, any subsequent protest to our Office must be filed no later than 10 days after actual or constructive knowledge of initial adverse agency action. Our Bid Protest Regulations define the term "adverse agency action" to include action or inaction by an agency that is prejudicial to the position taken in the protest, including the agency's proceeding with the receipt of proposals. 4 C.F.R. § 21.0(f). Once the contracting activity proceeds with receipt of proposals, the protester is on notice that the contracting activity will not undertake the requested corrective action; consequently, timeliness is measured from this point rather than from the receipt of a subsequent formal denial of the agency-level protest. Lifecare Management Partners, B-297078.2, Nov. 21, 2005, 2006 CPD ¶ 8 at 10; Consolidated Indus. Skills Corp., B-231669.2, July 15, 1988, 88-2 CPD ¶ 58 at 1-2 (closing occurring one day following filing of agency-level protest constitutes initial adverse agency action). Protesters may not assume that receipt of proposals will be postponed in the face of an agency-level protest. See Sunbelt Indus., Inc.--Recon., B-245780.2, Oct. 29, 1991 91-2 CPD ¶ 399 at 2 (regardless of whether protester had actual knowledge that agency proceeded with bid opening, since bid opening date passed

without being extended, protester should have known that the procurement was continuing notwithstanding its protest).

Here, the RFP, which was posted on FedBizOpps,<sup>4</sup> informed offerors that the date for receipt of proposals was July 9. Even after DAI filed its agency-level protest, FedBizOpps showed that the closing date for receipt of proposals remained July 9. Given that offerors are charged with constructive notice of FedBizOpps postings, PR Newswire Association, LLC, B-400430, Sept. 26, 2008, 2008 CPD ¶ 178 at 2, DAI is charged with constructive notice that the date for receipt of proposals remained the same. That is, as of July 9, DAI had constructive notice of the agency's inaction in the face of its protest. Therefore, a protest with our Office should have been filed no later than July 19. DAI did not file its initial protest with our Office until July 31, more than 10 days after the initial adverse agency action.<sup>5</sup> Therefore, DAI's initial protest of the solicitation's terms is dismissed as untimely.

#### De Facto Sole Source

After receiving the agency report, DAI filed a timely supplemental protest with our Office alleging that the procurement is a de facto sole-source procurement. Specifically, the protester notes that, according to the agency's February 2012 market research, only one company returned a questionnaire that indicated that it might be capable of meeting all of the agency's requirements.<sup>6</sup> Comments & Supp.

---

<sup>4</sup> The FedBizOpps website, [www.fbo.gov](http://www.fbo.gov), is the government-wide point of entry for the electronic publication of notices. Federal Acquisition Regulation (FAR) § 2.101, 5.003, 5.101, 5.201.

<sup>5</sup> DAI contends that the agency's July 24 RFP amendment led the protester to believe that the competition had been reopened. DAI states that that it did not have "even a scintilla of a clue" that the amendment had been issued only to offerors that had submitted proposals by the original closing date. Comments & Supp. Protest at 14. DAI contends that, because it was not aware that Amendment 2 was issued only to current offerors, it should not be prevented from filing a protest prior to the due date for submission of revised proposals identified in the amendment. However, DAI's misunderstanding of the agency's actions on July 24 does not alter the fact that initial adverse agency action occurred on July 9 with the agency's decision to proceed with the receipt of proposals. Therefore, DAI's protest was required to be filed no later than July 19. This conclusion is not altered by the fact that, after the time for filing a timely GAO protest had passed, DAI may have incorrectly believed that the competition had reopened.

<sup>6</sup> As noted above, the agency concluded, based on its initial review of firms' product lines, that another company that had not completed a survey (Company C) appeared to be able to meet the agency's core requirements. DAI contends that the agency's conclusion in this regard is unreasonable because Company C did not

(continued...)

Protest at 4. Therefore, DAI contends that the agency conducted a sole-source procurement without obtaining a justification and approval. Id. at 2.

We find that DAI is not an interested party raise this challenge. Under the provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-56, only an interested party may protest a federal procurement. That is, a protester must be an actual or prospective supplier whose direct economic interest would be affected by the award of a contract or the failure to award a contract. Bid Protest Regulations, 4 C.F.R. § 21.0(a).

Here, DAI acknowledges that it is unable to offer a product that meets the RFP's specifications as they are currently written. Comments and Supp. Protest at 10 (DAI admits that it was "unable to submit a proposal that was both acceptable and competitive" in response to the solicitation). Given that we are dismissing DAI's untimely initial protest challenging the solicitation's terms, DAI would not have been eligible for award since it was unable to submit a responsive offer. See Merlin Int'l, Inc., B-310611, Jan. 2, 2008, 2008 CPD ¶ 66 at 3. Thus, DAI is not an interested party to challenge the agency's alleged determination to proceed on a de facto sole-source basis. Id.; Sales Resources Consultants, Inc., B-284943, B-284943.2, June 9, 2000, 2000 CPD ¶ 102 at 5.

The protest is dismissed.

Susan A. Poling  
General Counsel

---

(...continued)

complete the questionnaire regarding whether its product satisfied the additional requirements identified by the agency. Comments & Supp. Protest at 4. Therefore, DAI argues, the agency had no information on which to base its conclusion that Company C might also be able to satisfy the requirements of the solicitation. Id.