



Decision

Matter of: Adams and Associates, Inc.

File: B-417120; B-417125

Date: January 16, 2019

G. Lindsay Simmons, Esq., and Hopewell H. Darneille III, Esq., Jackson Kelly PLLC, for the protester.

Alex P. Hontos, Esq., Daniel Falknor, Esq., and Phil Steger, Esq., Dorsey & Whitney LLP, for Management & Training Corporation, the intervenor.

Dennis A. Adelson, Esq., and Jose Otero, Esq., Department of Labor, for the agency. Evan D. Wesser, Esq., Jonathan L. Kang, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Post-award protests alleging that all procuring agency headquarters procurement personnel are biased and incapable of reasonably evaluating the protester's proposals are dismissed as untimely where the protester was aware of the underlying facts giving rise to its bias and retaliation allegations prior to the closing dates for the receipt of proposals, and failed to timely challenge the issue prior to proposal submission.
2. Remaining protest allegations are dismissed where the agency has proposed adequate corrective action, including the reevaluation of proposals and issuance of new selection decisions, that will render the protests academic.

DECISION

Adams and Associates, Inc., of Reno, Nevada, protests the award of contracts to Management & Training Corporation, of Centerville, Utah, under request for proposals Nos. 1630J5-17-R-00003 and 1630J2-18-R-00004, which were issued by the Department of Labor (DOL), for the operation of the Atterbury Job Corps Center in Edinburgh, Indiana, and the Earle C. Clements Job Corps Center in Morganfield, Kentucky. Adams primarily alleges that the agency is biased and retaliating against the company, as well as challenges the agency's evaluation of proposals, and its resulting source selection decisions.

We dismiss the protests.

Bias & Retaliation

Our Bid Protest Regulations contain strict rules for the timely submission of protests. Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Dominion Aviation, Inc.--Recon., B-275419.4, Feb. 24, 1998, 98-1 CPD ¶ 62 at 3. Under these rules, a protest based on alleged improprieties in a solicitation that are apparent prior to closing time for receipt of proposals must be filed by that time. 4 C.F.R. § 21.2(a)(1). As discussed below, we find that Adams' bias and retaliation protest grounds are based on information that was readily apparent prior to the closing time for proposals, and are essentially untimely challenges to the fundamental ground rules for the procurements.

Adams argues that DOL's evaluation of proposals and source selection decisions are "irreversibly flawed and tainted by DOL's bias and impermissible retaliation against Adams." Protest (B-417120) at 1; Protest (B-417125) at 1. Specifically, the protester contends that DOL's Office of Contract Management (OCM), which took over all Job Corps Center procurements in 2011 and was clearly identified in the solicitations as the unit responsible for these procurements, has taken a number of retaliatory measures and expressed bias against Adams based on its bid protests and other advocacy regarding Job Corps Center procurements. See, e.g., Protest (B-417120) at 15-19. As its requested relief, the protester argues that "proposals must be re-evaluated without any input or interference by DOL's [OCM] or other DOL Headquarters personnel." Id. at 1. In essence, Adams contends that the procurement process is irredeemably flawed in that any agency official from OCM or headquarters who reasonably could have been involved in this procurement is incapable of fairly evaluating the protester's proposals.

DOL and the intervenor seek dismissal of Adams' bias and retaliation claims, arguing, among other grounds, that the protest allegations are untimely. Specifically, the parties argue that the protester was aware that DOL's OCM would be conducting the procurement, and was fully aware of the alleged instances of bias and retaliation, many of which occurred before the initial closing dates for proposals, and, thus, any protests based on the allegations had to have been filed at those times. Adams argues that dismissal is not appropriate because any protests would have been premature unless and until the protester could establish competitive prejudice, which could only be established by the loss of the procurements. Thus, Adams argues that its protests were timely filed post-award. For the reasons that follow, we find the protest allegations untimely.

Here, there is no question that the factual predicates for Adams' bias and retaliation allegations were reasonably known to the protester prior to the closing times for proposals. Specifically, the protester contends that no DOL OCM or headquarters personnel could have fairly and impartially evaluated its proposals based on alleged retaliatory conduct largely predating the closing of the solicitations, and that Adams was aware that OCM was responsible for conducting all Job Corps Center procurements as of 2011, and these procurements in particular. In this regard, the protester alleges bias

and acts of retaliation beginning in 2011, and continuing up to and through the solicitations' respective closing dates in February and May 2018. Protest (B-417120) at 11-19; Protest (B-417125) at 10-12.

As addressed above, our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. More specifically, challenges which go to the heart of the underlying ground rules by which a competition is conducted should be resolved as early as practicable during the solicitation process, but certainly in advance of an award decision if possible, not afterwards. Armorworks Enters, LLC, B-400394, B-400394.2, Sept. 23, 2008, 2008 CPD ¶ 176 at 7. Such a rule promotes fundamental fairness in the competitive process by preventing an offeror from taking advantage of the government as well as other offerors, by waiting silently only to spring forward with an alleged defect in an effort to restart the procurement process, potentially armed with increased knowledge of its competitors' position or information. Blue & Gold, Fleet, L.P. v. United States, 492 F.3d 1308, 1313-14 (Fed. Cir. 2007). It also promotes efficiency by ensuring that concerns regarding a solicitation are raised before contractor and government resources are expended in pursuing and awarding the contract, thus avoiding costly and unproductive litigation after the fact. Id.

Based on its assertions that no DOL official in the OCM or headquarters could fairly and impartially evaluate its proposals, it is apparent that Adams is attempting in its post-award protests to challenge the heart of the underlying processes by which the competitions were conducted. In this regard, the protester's allegations are premised on the notion that the procurement processes in place were so flawed, or corrupted, that they could not yield fair and proper results. As noted above, however, our timeliness rules do not allow a protester to wait to raise a fundamental flaw with the procurement process until after an award decision has been made. Rather, such issues must be protested early on, specifically, before the closing date for the receipt of proposals. Additionally, we find no merit to the protester's argument that any protest would have been premature prior to its loss of the procurements. In light of the protester's sweeping assertion that no DOL OCM or headquarters personnel would fairly and impartially evaluate its proposals, we find that Adams has presented quintessential challenges to the ground rules of the procurements that had to be challenged prior to the closing dates for proposals. Therefore, we dismiss the protester's bias and retaliation claims as untimely.

Remaining Protest Allegations

In addition to its bias and retaliation claims, Adams challenges the agency's evaluations of proposals. Specifically, the protester challenges the agency's determinations that Adams' proposals were technically unacceptable, and that the intervenor's proposals were technically acceptable, under the staffing resources evaluation factor. Additionally, Adams challenges the agency's evaluations of the proposals under the past performance and price evaluation factors. As a result of the alleged errors, the protester alleges that the source selection decisions were unreasonable.

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556. Our role in resolving bid protests is to ensure that the statutory requirements for full and open competition are met. Pacific Photocopy & Research Servs., B-278698, B-278698.3, Mar. 4, 1998, 98-1 CPD ¶ 69 at 4.

Subsequent to the filing of this protest, the agency represented that it will take actions which will render the protests academic. Specifically, the agency represents that it will reexamine the records of these procurements, including its evaluations of staffing resources proposals, and issue new award decisions. See, e.g., Agency Notice of Corrective Action (Protest B-417120) (Dec. 17, 2018) at 1.¹ We do not consider academic protests because to do so would serve no useful public policy purpose. Dyna-Air Eng'g Corp., B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132. We only consider protests against specific procurement actions and will not render to a protester what would be, in effect, an advisory decision. Id.

Adams objects that the proposed corrective action is too narrow because it does not appear to address its challenges to the agency's price evaluation. Specifically, the protester contends that "DOL needs to resolve the issues relating to the J-1 pricing form that lie at the heart of the price evaluators' failure and inability to conduct a rational price evaluation and come up with prices that make sense or can be compared on an 'apples to apples' basis." Opp. to Corrective Action (B-417120) at 2; Opp. to Corrective Action (B-417125) at 2. We find no merit to this argument. First, the agency's proposed corrective action, to conduct a new evaluation of offerors' staffing plans and issue a new award decision, is sufficient to render the protests academic. To the extent that the corrective action fails to address any protest allegation timely raised in the instant protests, Adams may raise such arguments in new protests filed in accordance with our Bid Protest Regulations.

With respect to the specific allegation, Adams' demand that the agency amend the solicitations to revise the pricing instructions raises material questions as to the timeliness of Adams' pricing protest grounds. Specifically, the agency and intervenor moved to dismiss the protester's pricing protest grounds as amounting to untimely challenges to the terms of the solicitations. Adams represented that, although it believed the solicitations' pricing instructions were flawed, it was not challenging the

¹ Based on our request for clarification, the agency represents that it may take further corrective action, including amending the solicitation and requesting revised proposals. See Agency Response to GAO Request for Clarification (Dec. 20, 2018) at 1. Although the protester objects that the agency is vague about what further actions the agency may take, or whether such further actions are necessary, these arguments fail to demonstrate that the minimum corrective action promised to reevaluate offerors' staffing approaches and issue new source selection decisions is insufficient to render the protests academic.

terms of the solicitations. Rather, it was challenging the agency's apparent flawed evaluations using the solicitations' allegedly flawed pricing provisions. In light of the protester's allegations that the agency gave conflicting figures for the intervenor's total evaluated prices, as well as its allegations regarding the disparity in its proposed prices and its evaluated prices, we declined to dismiss the protest allegations. To the extent, however, that the protester argues that an amendment to the solicitations' pricing instructions is required in order to render its protests academic, it appears that the protester is confirming the arguments of the agency and intervenor that its price-related protest allegations are untimely challenges to the terms of the solicitations. In this regard, we have repeatedly recognized that where a protester fails to challenge an obviously flawed evaluation scheme prior to the time for receipt of initial proposals or quotations, we will consider a post-award challenge to the scheme as untimely. NaphCare, Inc., B-406695, B-406695.2, Aug. 3, 2012, 2012 CPD ¶ 246 at 8-9; Ball Aerospace & Techs. Corp., B-402148, Jan. 25, 2010, 2010 CPD ¶ 37 at 5. Without deciding the timeliness of those allegations at this point, we find that the requested relief is unrelated to any possible timely pricing-related protest grounds alleged by the protester, and therefore find that Adams' demand for solicitation amendments as a precondition to dismissal of the protests as academic is without merit.

The protests are dismissed.

Thomas H. Armstrong
General Counsel