



Decision

Matter of: Desktop Alert, Inc.

File: B-417170

Date: January 24, 2019

Howard Ryan, Desktop Alert, Inc., for the protester.
Scott N. Flesch, Esq., Richard Hagner, Esq., Jason W. Allen, Department of the Army, for the agency.
Heather Self, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of an agency's decision to perform requirements in-house rather than to contract for them is dismissed because such decisions are a matter of executive branch policy.
 2. Protest alleging violation of statutory preferences applicable to the purchase of commercial items is dismissed because such preferences are inapplicable to an agency's in-house performance of requirements.
 3. General challenge to alleged past and present agency acquisitions and other non-acquisition actions, without specifying any particular procurement, fails to state a valid basis for protest.
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DECISION

Desktop Alert, Inc. generally protests the actions of the Department of the Army in planning and obtaining an emergency alert system for use at multiple Army installations. The protester contends the Army is accomplishing this work improperly through both in-house use of existing government off the shelf (GOTS) software and various contracts or task orders, although the protester presents no information about any specific solicitations or contracts. The protester argues the Army's use of GOTS software contravenes both Office of Management and Budget Circular A-76 and Federal Acquisition Regulation (FAR) part 12.

We dismiss the protest.

First, the protester contends the Army was required to conduct an A-76 competition to determine whether to use an in-house solution versus a private sector contract to meet its need for an emergency alert system, and that since 2008 federal law has prohibited the conduct of such competitions. Protest at 2-3. Second, the protester contends the Army violated “longstanding federal acquisition policy to utilize the commercial sector for the acquisition of goods and services.” Id. at 3-4. Third, the protester challenges multiple unspecified Army procurements as improper sole-source acquisitions. Id. at 2. The protester claims it is unable to specify solicitation or contract numbers because the Army allegedly used oral solicitation procedures. Protester’s Response to Request for Dismissal at 2. The protest includes additional arguments, such as a contention that the Army’s actions are wasting tax dollars. We have considered all of the protester’s arguments and although we address only a portion here, we find none of the arguments constitute a valid timely protest basis.

A-76 Competition

Office of Management and Budget Circular No. A-76 sets forth executive branch policy for determining whether to perform services in-house or under contract. Contrary to the protester’s assertions, an agency’s decision to perform services in-house need not be based on the results of an A-76 cost comparison. Techniarts Eng’g., B-243045, Mar. 5, 1991, 91-1 CPD ¶ 250 at 1; Marann Inventories, Inc. - Recon., B-237651.4, July 20, 1990, 90-2 CPD ¶ 54. Thus, the lack of such a study provides no basis to object to the Army’s action. Id. Also, the prohibitions cited by the protester are prohibitions on the use of A-76 competitions to outsource work currently performed by federal employees. See e.g., Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245 § 8040 (Sept. 28, 2018); Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 § 742 (Dec. 18, 2015). Here the challenged action is not outsourcing but insourcing.

Our Office generally does not review agency decisions to perform requirements in-house rather than to contract for them, because such decisions are a matter of executive branch policy. See Daniels Mfg. Corp., B-253637, June 7, 1993, 93-1 CPD ¶ 439; Sterling Bakery, Inc., B-232469, Sept. 16, 1988, 88-2 CPD ¶ 255. We will review such decisions only where a competitive solicitation has been issued to compare the costs of contracting out with in-house performance and it is alleged that the resulting comparison is faulty or misleading. Id. This limited exception to our review of these cases is not applicable here because no such solicitation has been issued.

Commercial Item Acquisition Policy

The protester also complains that the Army’s actions have violated statutory preferences applicable to the purchase of commercial items. The Federal Acquisition Streamlining Act of 1994 (FASA) established, among other things, a preference and specific requirement for the acquisition of commercial items that are sufficient to meet the needs of an agency. 10 U.S.C. § 2377. This section of FASA is implemented in

FAR part 12, and allows agencies to use solicitation terms, and other procedures, that more closely resemble the commercial marketplace when procuring commercial items. Part 12 of the FAR also establishes procedures regarding how agencies determine whether commercial items or nondevelopmental items are available that could meet the agency's requirements. See e.g. FAR § 12.101. These and other provisions of FASA and FAR part 12 apply to federal procurements to distinguish between the acquisition of commercial versus non-commercial items. Here, the protester complains not about a procurement action but rather the Army's decision to meet its emergency alert system need in-house in lieu of using a procurement. Accordingly, the procurement preferences of FASA and FAR part 12 are inapplicable.

Further, even if the protester's challenge to the Army's decision to use an in-house GOTS solution rather than a contract provided a valid basis for protest it is not clear how the protest is timely. The record indicates the Army made its decision to use an in-house GOTS solution in July 2016, and the protester raised concerns about the decision prior to July 5, 2017. See Protest at 5 and attach. 1 at 1, Information Paper, July 5, 2017. Our Bid Protest Regulations require protesters to set forth in their protests "all information establishing the timeliness of the protest." 4 C.F.R. § 21.1(c)(6). The protest here does not include any information in this regard. However, it appears from the face of the protest the protester knew, or should have known, of its basis for protest no later than July 5, 2017. Because our Office did not receive this protest until December 10, 2018, the protest is untimely. 4 C.F.R. § 21.2(b); see e.g., Childrey, Contract Servs., Inc., B-207259, May 17, 1982, 82-1 CPD ¶ 469 (dismissing as untimely a protest filed five months after protester learned of the agency's insourcing decision).

Sole-Source Procurements

Finally, the protester contends the Army is using an improper sole-source procurement to obtain its emergency alert systems, but has not identified a specific procurement. Under our Bid Protest Regulations, our Office only considers timely protests filed by interested parties involving a "solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services; the cancellation of such a solicitation or other request; an award or proposed award of such a contract; and a termination of such a contract, if the protest alleges the termination was based on improprieties in the award of the contract." 4 C.F.R. § 21.1(a). A protester is required to identify the solicitation and/or contract number and set forth in detail the legal and factual grounds of its protest. 4 C.F.R. § 21.1(c)(3) and (4). The general protest of alleged past and present Army acquisitions and other non-acquisition actions establishing an allegedly duplicative emergency alert system, without specifying any particular procurement, does not meet this requirement. See National Customer Eng'g., B-250641, Oct. 5, 1992, 92-2 CPD ¶ 226.

The protest is dismissed.

Thomas H. Armstrong
General Counsel