Decision

Matter of: AeroSage, LLC

File: B-417289

Date: April 24, 2019

David M. Snyder, AeroSage LLC, for the protester.
Matthew Vasquez, Esq., and May Sena, Esq., Defense Logistics Agency, 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 requirement for vendor to provide written acceptance of government offer made pursuant to a request for quotations in less than three hours is denied where the amount of time provided was not unreasonable under the circumstances of the procurement, including that the agency required performance on the next day.

2. Protest of an agency’s failure to implement the statutorily required stay of performance is dismissed as it is not a matter for consideration by GAO.

DECISION

AeroSage LLC, a service-disabled veteran-owned small business of Tampa, Florida, protests the award of a purchase order to Infinite Energy Corp., a woman-owned small disadvantaged business of New York, New York, under request for quotations (RFQ) No. SPE605-19-Q-0253, issued by the Defense Logistics Agency (DLA) for diesel fuel. The protester argues the agency unreasonably withdrew the government’s offer and moved to the next lowest-priced technically acceptable vendor for award after providing AeroSage less than three hours to provide written acceptance of the offer. The protester also alleges the agency violated the Competition in Contracting Act by failing to stay contract performance.¹

¹ AeroSage also protests the alleged cancellation of RFQ No. SPE605-19-Q-0253 and subsequent resolicitation of the same requirement under RFQ No. SPE605-19-Q-0256. AeroSage’s challenge to the issuance and terms of RFQ No. SPE605-19-Q-0256 is (continued...)
We deny the protest in part and dismiss it in part.

BACKGROUND

The agency issued the RFQ as a small business set-aside on February 5, 2019, pursuant to the commercial item and simplified acquisition procedures of Federal Acquisition Regulation (FAR) parts 12 and 13. Agency Report (AR), Tab 1, RFQ, at 1. The initial RFQ sought quotations for delivery of 10,000 gallons of diesel fuel to Fort Drum, New York. Id. Shortly after posting the RFQ on the Federal Business Opportunities website, the agency amended the RFQ to increase the quantity of fuel to 10,200 gallons. AR, Tab 3, RFQ amend., at 1.

The RFQ contemplated award of a single fixed-price purchase order to the vendor evaluated as providing the best value to the government. RFQ at 1-2. The agency utilized a lowest-priced technically acceptable (LPTA) award methodology. Agency Response to Questions for the Record, Mar. 6, 2019, at 2; AR, Tab 19, Supplemental Contracting Officer’s Statement (COS), Mar. 6, 2019, at 1 ¶ 4. The RFQ established the time for receipt of quotations as 4 p.m. February 6, and a delivery date for the required fuel of February 8. RFQ at 2. Both AeroSage and Infinite Energy submitted timely quotations via e-mail on February 6. AR, Tab 4, AeroSage Quotation; Tab 20, Infinite Energy Quotation. The agency evaluated quotations and found that AeroSage submitted the LPTA quotation. Supp. COS at 1 at ¶ 5; AR, Tab 21, Abstract of Quotations.

At 7:17 a.m. on February 7, the CO e-mailed an offer for the fuel requirement to AeroSage’s President, who was the company’s point of contact for the procurement. AR, Tab 6, E-mail from CO to AeroSage, Feb. 7, 2019. The CO’s e-mail instructed AeroSage to accept the government’s offer by signing an attached purchase order and returning it no later than 10 a.m. Id. Specifically, the e-mail provided as follows.

(...continued)

before our Office as a separate protest, docketed as B-417289.2. This decision addresses only AeroSage’s challenge to the agency’s actions in making award under RFQ No. SPE605-19-Q-0253.

2 The RFQ contained ambiguous language seeming to establish a best-value tradeoff award methodology. RFQ at 2. AeroSage does not challenge the agency’s use of an LPTA award methodology in lieu of the best-value tradeoff methodology arguably required by the solicitation.

3 All times referenced herein are eastern standard.

4 The agency represents that the official business hours of the contracting office are 6 a.m. to 6 p.m. Monday through Friday. AR, Tab 27, E-mail from David Peterson, DLA Energy, to Contracting Officer (CO), Mar. 4, 2019.
You must sign and return the attached document [purchase order] to the attention of Janet Richards and myself by e-mail no later than 10:00 AM today if you wish to accept this order.

*          *          *          *          *

If we do not receive the signed document [purchase order] by 10:00 AM this morning, we will move on to the next lowest priced offer.

Id. At 9:36 a.m., the CO e-mailed AeroSage a reminder that if the purchase order was not signed and returned by 10:00 a.m. the “lack of response will indicate that you do not wish to accept the order and we will then move on to the next lowest price.” AR, Tab 7, E-mail from CO to AeroSage, Feb. 7, 2019. At 10:09 a.m., having received no response to the offer, the CO e-mailed AeroSage affirming that it would “move forward with another vendor” and advising AeroSage to “[t]ake no further steps to delivering this fuel, the offer below from DLA Energy to AeroSage is rescinded in full.” AR, Tab 8, E-mail from CO to AeroSage, Feb. 7, 2019.

At 10:15 a.m., AeroSage’s President responded with an e-mail providing: “I am on an airline and just got on gogo flight. I did not receive any document to sign.” AR, Tab 9, E-mail from AeroSage to CO, Feb. 7, 2019. The CO did not respond to this e-mail. See Supp. COS at 2 ¶ 10. At 10:23 a.m., the contract specialist e-mailed a notice to all the vendors that submitted quotations informing them that Infinite Energy would receive award. AR, Tab 23, Award Notification E-mail, Feb. 7, 2019. Infinite Energy submitted the second lowest-priced technically acceptable quotation. Supp. COS at 3 ¶ 11; AR, Tab 21, Abstract of Quotations.

AeroSage filed an agency-level protest at 10:26 a.m. AR, Tab 10, E-mail from AeroSage to CO, Feb. 7, 2019. AeroSage’s agency-level protest asserted: “When I [AeroSage’s President] left my house at 6:15 this morning I did not have any notice of award.” Id. AeroSage objected to the agency making award to another vendor and requested the agency stay performance pending a decision on its agency-level protest. Id. At 10:45 a.m., the agency denied AeroSage’s agency-level protest explaining that AeroSage had not responded to the government’s offer by the set time; that the travel of AeroSage’s President was irrelevant; and that the agency had a need “to move forward to the next lowest priced quote as this delivery is for tomorrow, February 8, 2019, and must be awarded to a responsive vendor in order to meet the delivery timeframe.” AR, Tab 11, E-mail from CO to AeroSage, Feb. 7, 2019. This protest followed.

DISCUSSION

AeroSage raises multiple objections to the agency’s requirement for AeroSage to provide written acceptance of the government’s offer in less than three hours. AeroSage also contends that the agency failed to implement the statutory stay of performance after AeroSage filed its protest with our Office. For the reasons discussed below we find no basis to sustain the protest.
Requirement for Written Acceptance of Offer

AeroSage challenges the “brief, notification and award process,” whereby the agency provided AeroSage with 2 hours and 43 minutes to accept the government’s offer in writing. Protest at 2. AeroSage asserts that the agency added the requirement for written acceptance of the offer to the purchase order even though it was not in the RFQ and that “[t]he only reason it could be [an] appropriate request for the CO, is to retaliate against the protest[er]” and to “steer [the] contract to [a] favored vendor at [a] 27% higher price.” Comments at 2.

A vendor’s submission in response to an RFQ is a quotation, and a quotation is not a submission for acceptance by the government to form a binding contract. FAR § 13.004(a); Computer Assocs. Int’l, Inc.--Recon, B-292077.6, May 5, 2004, 2004 CPD ¶ 110 at 3. A vendor’s quotation is purely informational, and in the RFQ context, it is the government that makes the offer. Id. When appropriate, an agency may ask a vendor to accept a government offer in writing.5 FAR § 13.004(b); see also FAR § 13.302-3(a) (“When it is desired to consummate a binding contract between the parties before the contractor undertakes performance, the contracting officer shall require written (see 2.101) acceptance of the purchase order by the contractor.”). The FAR, however, does not establish a period of time for an agency to leave open a government offer for acceptance. Nevertheless, just as agencies are required to establish solicitation response times that will afford interested vendors a reasonable opportunity to respond, Military Agency Servs. Pty., Ltd., B-290441 et al., Aug. 1, 2002, 2002 CPD ¶ 130 at 5-6, it is axiomatic that an agency must provide a vendor a reasonable opportunity to respond to its request for written acceptance of a government offer.

What constitutes a reasonable opportunity to respond will depend on the circumstances of the individual acquisition, and the decision as to the appropriate response time lies within the discretion of the contracting officer. Cf., Specialty Marine, Inc., B-296988, Oct. 11, 2005, 2005 CPD ¶ 177 at 3 (applying this standard of review to an agency’s provision of five days to respond to two RFQs for work on a Navy oiler--one for systems flushing work and one for temporary cooling water and low-pressure air services); Military Agency Servs. Pty. Ltd., supra, at 2-3 and 5-6 (applying this standard of review to an agency’s provision of 35 minutes response time for an RFQ where services were required to be performed the next day). Where a protester contends that the agency allowed insufficient time to provide written acceptance of the government’s offer, we will review the agency’s actions to determine if they were reasonable and consistent with applicable procurement statutes and regulations. We will not disturb a contracting officer’s exercise of discretion in this regard unless it is shown to be unreasonable or the result of a deliberate attempt to exclude the protester from the competition. Id.

5 An agency may withdraw the government’s offer at any time before acceptance occurs by notifying the vendor in writing. FAR § 13.004(c).
Here, we conclude that the 2 hour 43 minute response time for acceptance of the
government’s offer was not unreasonable under the circumstances. The record
establishes the government’s offer to AeroSage was made one day before fuel delivery
was required to occur. RFQ at 2; AR, Tab 6, E-mail from CO to AeroSage, Feb. 7,
2019. The CO explains he believed the response time for AeroSage to review, sign,
and return the offered purchase order was reasonable given that the purchase order
had a single line item, was only 13 pages long, and contained only standard terms and
conditions. Supp. COS at 2 ¶ 7. The CO further explains that in establishing the
deadline he took into consideration that if AeroSage should choose not to accept the
purchase order, he would need sufficient time to offer the purchase order to another
vendor with enough time to still meet the next day performance requirement. Id.

AeroSage argues that it was not able to respond because its point of contact for the
procurement, AeroSage’s President, was traveling and his travel prevented him from
viewing the agency’s e-mail of the government’s offer in time to respond. Protest at 1.
Where, as here, the response time provided was reasonable in light of the requirement
for the fuel to be delivered the next day, the protester’s unavailability does not render
the response time unreasonable when, at the time it established the response time, the
agency was unaware of the protester’s unavailability and did not become aware of it
until after the response time closed. See AR, Tab 9, E-mail from AeroSage to CO,
Feb. 7, 2019 (first notice to agency of AeroSage’s President’s unavailability sent 15
minutes after the close of the response time).

AeroSage concedes that section 13.004(b) of the FAR permits an agency to request
that a vendor accept the government’s offer in writing, but asserts that the agency
added this requirement to the purchase order when it was not in the RFQ. Comments
at 2. In effect, AeroSage argues that the agency utilized an unstated solicitation term.
AeroSage, however, does not point to any procurement law or regulation that requires
an agency to include in an RFQ a term setting forth offer and acceptance procedures.

While it is a fundamental premise of government procurements that prospective
contractors must be advised of the bases upon which their bids, proposals, or
quotations will be evaluated, the situation here does not involve an unstated basis of
evaluation for award. The agency’s procedure for effectuating offer and acceptance
when conducting a simplified acquisition under FAR part 13 has no bearing on the
evaluation of quotations; the offer and acceptance process unfolds after evaluations are
completed and a prospective awardee has been selected. While it may be prudent for
an agency that anticipates requiring a short turn-around for acceptance of an offer
resulting from an RFQ to indicate such in the RFQ, we are not aware of any
requirement, and the protester cites to none, that an agency do so. But see, AeroSage
LLC, B-409627, July 2, 2014, 2014 CPD ¶ 192 at 5-6 (finding that the agency violated
fundamental premise of government procurements that offerors must be advised of the
bases upon which their proposals will be evaluated where the agency’s use of the
FedBid automated reverse auction system put vendors on notice through FedBid’s
terms of use that a particular offer and acceptance process and timeline would be utilized but the agency implemented a different accelerated timeline in contravention of the FedBid terms of use).

AeroSage also contends that the agency requested written acceptance of the offer in a short period of time “to retaliate against the protest[er]” and to “steer [the] contract to [a] favored vendor at [a] 27% higher price.” Comments at 2. In support of this argument, AeroSage points to alleged disparate treatment of AeroSage and Infinite Energy by the agency. Id. Specifically, AeroSage highlights that the agency called Infinite Energy regarding the offer made to it but did not make a similar phone call to AeroSage. Id.

As a general matter, government officials are presumed to act in good faith, and a protester’s contention that procurement officials were motivated by bias or bad faith must be supported by convincing proof. Cyberdata Techs., Inc., B-417084, Feb. 6, 2019, 2019 CPD ¶ 34 at 6. We will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Id. The burden of establishing bad faith is a heavy one. Evidence establishing a possible defect in an agency’s actions generally is not sufficient in itself to establish that the agency acted in bad faith; the protester must also present facts reasonably indicating, beyond mere inference and suspicion, that the actions complained of were motivated by a specific and malicious intent to harm the protester. Lawson Envtl. Servs., LLC, B-416892, B-416892.2, Jan. 8, 2019, 2019 CPD ¶ 17 at 5 n.5.

Here, the record establishes that the agency requested that each vendor accept the government’s offer in writing by signing and returning the purchase order, and that the awardee did so within one hour of receiving the government’s offer. AR, Tab 6, E-mail from CO to AeroSage, Feb. 7, 2019 (“You must sign and return the attached document [purchase order] … if you wish to accept this order.”); Tab 17, E-mail from CO to Infinite Energy, Feb. 7, 2019, 12:04 p.m. (“Please sign and return this document [purchase order].”); Tab 18, E-mail from Infinite Energy to CO, Feb. 7, 2019, 12:48 p.m. (attaching signed purchase order).

The record also establishes that the phone call the agency placed to Infinite Energy was precipitated by circumstances not present with AeroSage. Based on notification of the protest from AeroSage, the CO asked the contract specialist to instruct Infinite Energy not to deliver until further notice. Supp. COS at 3 ¶ 13; AR, Tab 24, E-mail from CO to Contract Specialist, Feb. 7, 2019. The contract specialist, however, mistakenly sent an e-mail to Infinite Energy cancelling, rather than temporarily suspending, the fuel delivery. Supp. COS at 3 ¶ 15; AR, Tab 17, E-mail from Contract Specialist to Infinite Energy, Feb. 7, 2019. The CO telephoned Infinite Energy, in part, to correct the contract specialist’s erroneous cancellation message. Supp. COS at 3 ¶ 15. There had been no similar erroneous communications sent to AeroSage to prompt a clarifying telephone call from the CO.
Contrary to AeroSage’s allegation of bias in favor of the awardee, the record reflects that the different treatment afforded the awardee resulted from a dissimilar set of circumstances not affecting the protester. Based on this record, we find no basis to conclude that the CO’s actions were motivated by bias. Further, the agency’s actions could not have affected the protester’s competitive position as both the agency’s extension of a government offer and telephone call to Infinite Energy occurred after the agency withdrew the government’s offer to AeroSage. AR, Tab 8, E-mail from CO to AeroSage, Feb. 7, 2019, 10:08 a.m. (withdrawing offer to AeroSage); Supp. COS at 3 ¶ 15 (noting that the CO’s phone call to Infinite Energy occurred between 11:19 a.m. and 11:32 a.m.); AR, Tab 17, E-mail from CO to Infinite Energy, Feb. 7, 2019, 12:04 p.m., (making offer to Infinite Energy). Accordingly, AeroSage’s objections to the agency’s request for written offer acceptance in less than three hours are denied.

Agency Failure to Implement Statutory Stay of Performance

AeroSage also argues that the agency violated the Competition in Contracting Act (CICA), 31 U.S.C. §§ 3551-3557, by failing to suspend and instead accelerating delivery of the fuel requirement after AeroSage filed its protest with our Office. Comments at 3. Under CICA, a contracting agency is required to withhold authorization to start performance or suspend contract performance that has begun if it receives notice of a protest from our Office within ten calendar days of the date of contract award. 31 U.S.C. § 3553(d)(3)(A). We meet our statutory obligation to notify agencies of protests filed with our Office through e-mail notifications generated by our Electronic Protest Docketing System (EPDS) and sent to an agency’s designated points of contact for receipt of such notices. See EPDS Instructions, April 2018, at 4 § III.6.(c) (“Upon successfully filing a new protest, EPDS will: (i) provide the Filer with a receipt or payment confirmation code for the Filing Fee; (ii) create a new protest entry on the Filer’s EPDS dashboard; and (iii) pursuant to GAO’s notification obligation pursuant to 31 U.S.C. § 3553(b)(1), generate an e-mail notice to the procuring agency, with a copy to the Filer, that a new protest has been filed.”).

AeroSage filed its protest in EPDS at 11:05 a.m. on February 7. At 11:07 a.m., AeroSage provided the CO with a copy of its protest to our Office, as required by section 33.104(a)(1) of the FAR. AR, Tab 13, E-mail from AeroSage to CO, Feb. 7, 2019. At 11:08 a.m., EPDS sent an automatic e-mail notification of the protest to the six DLA designated points of contact for receipt of such notifications. Protest Notification E-mail from EPDS to Agency, Feb. 7, 2019.

6 This document sets forth the instructions that govern electronic filings for protests before our Office. These instructions supplement our Bid Protest Regulations, and are available on our website at: https://www.gao.gov/legal/bid-protests/file-a-bid-protest (last visited April 22, 2019).

7 Five of the point of contact e-mail addresses on file with our Office are for individuals at DLA and the sixth e-mail address is for a DLA bid protest e-mailbox. Protest Notification E-mail from EPDS to Agency, Feb. 7, 2019.
Based on notification of the protest from AeroSage, at 11:12 a.m., the CO asked the contract specialist to instruct Infinite Energy not to deliver until further notice. Supp. COS at 3 ¶ 13; AR, Tab 24, E-mail from CO to Contract Specialist, Feb. 7, 2019. At 11:19 a.m., the contract specialist e-mailed Infinite Energy that the agency needed to cancel the fuel delivery to Fort Drum, New York. AR, Tab 17, E-mail from Contract Specialist to Infinite Energy, Feb. 7, 2019. After requesting that the contract specialist instruct Infinite Energy to stay performance, the CO spoke with agency counsel. Supp. COS at 3 ¶ 13. After speaking with agency counsel, the CO telephoned Infinite Energy to explain that the cancellation e-mail had been sent in error and to ask if delivery could be accelerated. Id. at 3-4 ¶¶ 15-16. The agency represents that the CO “decided to change delivery from February 8, 2019, to February 7, 2019, because the requiring activity was using a lot of fuel and the contracting officer hoped that the Infinite Energy would deliver the fuel before AeroSage filed with GAO the protest that AeroSage had claimed it had filed in an . . . email to the contracting officer.” Agency Response to Questions for the Record, Mar. 6, 2019, at 4.

At 11:32 a.m., the CO e-mailed Infinite Energy confirming that the order was not cancelled and affirming the request for accelerated delivery. AR, Tab 17, E-mail from CO to Infinite Energy, Feb. 7, 2019. Within the next thirty minutes, Infinite Energy telephoned the CO to confirm that it could accelerate delivery for completion on February 7 rather than February 8, Supp. COS at 4 ¶ 17, and at 4:25 p.m. on February 7, Infinite Energy began delivery of 10,142 gallons of diesel fuel to Fort Drum, New York. AR, Tab 25, E-mail from Infinite Energy to Contract Specialist and CO, Feb. 7, 2019.

The record establishes that at approximately 11:12 a.m. on February 7, agency counsel erroneously advised the CO that the agency had not received notification of the protest from our Office. Supp. COS at 3 ¶ 13. The record also establishes that EPDS sent an automatic e-mail notification of the protest to the agency at 11:08 a.m. Protest Notification E-mail from EPDS to Agency, Feb. 7, 2019. The agency represents that neither agency counsel nor the CO became aware of our Office’s notification of the protest until February 8, after contract performance had been completed. See Agency

8 The RFQ allowed for a ten percent variance between the fuel quantity ordered (10,200 gallons) and the fuel quantity delivered. RFQ at 2; RFQ amend. at 2.

9 At 4:09 a.m. on February 8, one of DLA’s designated points of contact for receipt of protest notifications forwarded the EPDS notification e-mail to an individual with the Office of Counsel for DLA Energy, who at 1:51 p.m. forwarded the notification to agency counsel for this protest. Agency Response to Questions for the Record, Mar. 7, 2019, at 1 and at attach. 1, Agency Notification E-mail Chain, Feb. 8, 2019. The forward of the EPDS notification e-mail was subsequent to verbal notification of the protest filing provided to agency counsel on the morning of February 8. Id. at 1. Also on February 8, agency counsel informed the CO that notice of the protest had been received from GAO. Supp. COS at 4 ¶ 20.
Response to Questions for the Record, Mar. 7, 2019; Supp. COS at 4 ¶ 20. Notwithstanding any time delays caused by the agency’s internal processing of our Office’s notification, it appears that the statutory requirement to stay performance of the protested contract award should have been triggered by the 11:08 a.m. EPDS e-mail notifying the agency of the protest.

Based on the record, it appears AeroSage is correct that the agency failed to suspend contract performance and instead requested accelerated delivery of the required fuel from the awardee after receiving notice of the protest from our Office. However, an agency’s failure to comply with the statutory stay requirement is not a valid basis of protest. 4 C.F.R. § 21.6 (“GAO does not administer the requirements to stay award or suspend contract performance.”); AeroSage LLC; SageCare, Inc., B-415267.13, B-415267.14, Mar. 19, 2018, 2018 CPD ¶ 114 at 5; Serco, Inc., B-410676.2, Dec. 12, 2014, 2014 CPD ¶ 371 at 2-3 (whether the agency failed to comply with the stay of performance is not a matter for consideration by GAO).¹⁰ Consequently, AeroSage’s objection to the agency’s failure to suspend contract performance is dismissed.

The protest is denied in part and dismissed in part.

Thomas H. Armstrong
General Counsel

¹⁰ A protester desiring to seek enforcement of CICA’s stay provisions must request relief from a court of competent jurisdiction—currently the U.S. Court of Federal Claims. See e.g., AT&T Corp., B-414886 et al., Oct. 5, 2017, 2017 CPD ¶ 330 at 3 n. 7 (noting that the agency overrode the stay of contract performance during the pendency of the protest, and that the protester challenged the override by seeking declaratory and injunctive relief at the U.S. Court of Federal Claims); Chapman Law Firm Co., LPA, B-296847, Sept. 28, 2005, 2005 CPD ¶ 175 at 3 n. 3 (noting that the protester unsuccessfully challenged the agency’s stay override at the U.S. Court of Federal Claims); Altos Federal Group, Inc., B-294120, July 28, 2004, 2004 CPD ¶ 172 at 2 (noting that the agency initially stayed performance but subsequently overrode the stay of performance, and the protester filed suit in the U.S. Court of Federal Claims seeking reinstatement of the stay).