U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: The State of Oklahoma

File: B-416851.9

Date: September 22, 2020

Peter A. Nolan, Esq., and Andrew J. Schumacher, Esq., Winstead PC, for the protester.
Alan Grayson, Esq., Law Office of Alan Grayson, for Mitchco International, Inc., the intervenor.
Andrew J. Smith, Esq., and Dana J. Chase, Esq., Department of the Army, for the agency.
Lois Hanshaw, Esq., and Evan C. Williams, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest by a state licensing agency, filed after the conclusion of binding arbitration with the Department of Education, challenging the elimination of its proposal from the competitive range and award of a contract under a solicitation issued pursuant to the Randolph-Sheppard Act is dismissed. The Act gives authority for review of disputes between federal agencies and state licensing agencies regarding these procurements to the Secretary of Education, not the Government Accountability Office.

DECISION

The State of Oklahoma, a state licensing agency (SLA), protests the award of a contract to Mitchco International, Inc. (MCI), under request for proposals (RFP) No. W9124J-18-R-0024, issued by the Department of the Army for full food services and dining facility services at Fort Sill, Oklahoma. The protester contends that the agency has failed to comply with various provisions of the Randolph-Sheppard Act (RSA).

We dismiss the protest.

BACKGROUND

We provide a brief history of this procurement, which has been the subject of multiple protests before our Office.

On August 31, 2018, the agency issued the solicitation, which provided for award to be made on a lowest-priced, technically acceptable basis, considering the following factors: technical capability, past performance, and price. *The State of Oklahoma*, B-416851.6 *et al.*, July 3, 2019 (unpublished decision). The solicitation stated that this procurement would be conducted pursuant to the RSA, which establishes a priority for blind persons represented by SLAs under the terms of the RSA, in the award of contracts for, among other things, the operation of cafeterias in federal buildings. *Id.* at 1; 20 U.S.C. § 107; 34 C.F.R. § 395.33(a). Under the RSA's implementing regulations, if a designated SLA submits an offer found to be within the competitive range for the acquisition, the agency will consult with DOE, in an effort to obtain the services at a reasonable cost. 34 C.F.R. § 395.33.

Between September and December 2018, Oklahoma, the designated SLA, filed several pre-award protests with our Office and the agency. *The State of Oklahoma*, *supra* at 2. Oklahoma submitted a proposal by the December 19 closing date. Protest at 3. After completing its evaluation, the agency eliminated Oklahoma from the competitive range on March 14, 2019, and made award to MCI on May 15. *Id.* at 3-4.

Oklahoma also filed a complaint with the Secretary of Education protesting, among other things, that the Army's evaluation and elimination of Oklahoma from the competitive range violated the RSA and its implementing regulations. *Id.* at 3. On April 12, in accordance with 34 C.F.R. § 395.37(b), the Department of Education (DOE) convened an arbitration panel to hear Oklahoma's complaints.[1] *Id.* On June 22, 2020, the arbitration panel ruled that the Army had violated the RSA and was therefore required to include the protester in the competitive range and engage in negotiations.[2] Protest exh. D, DOE Arbitration Panel Decision at 71. On July 31, the agency notified Oklahoma that it intended to appeal the arbitration panel's decision. Letter from Army to Protester, July 31, 2020, at 1.

Also on July 31, Oklahoma protested to our Office, asserting that the agency's actions were inconsistent with the RSA and various related Army regulations and solicitation provisions that implement the RSA. Specifically, the protester argues that the agency's decision to ignore the panel's conclusions and refusal to place Oklahoma in the competitive range and commence negotiations violates 34 C.F.R. § 395.37(d), which states that if an arbitration panel finds that an agency has violated the RSA, the head of the agency must promptly terminate any acts or practices found to be in violation and take such other action as may be necessary to carry out the panel's decision. Protest at 8. The protester also asserts that in making award to MCI, the agency failed to

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[1] Section 395.37 of title 34 of the Code of Federal regulations provides that DOE will convene an arbitration panel to hear an SLA's complaint regarding a federal agency's compliance with the RSA. The panel's decision will be final and binding, subject to appeal and review. 34 C.F.R. § 395.37(b).

[2] The protester received DOE's decision on July 21. Protest at 5.

provide Oklahoma the priority afforded by the RSA if Oklahoma were to be included in the competitive range. *Id.* at 9.

The Army requests dismissal of the protester's challenges to the award decision and the agency's alleged refusal to comply with the panel's decision. The agency argues that these allegations should be treated as an SLA's complaint regarding a federal agency's compliance with the RSA. Agency Req. for Dismissal at 7. In this regard, the agency asserts that GAO has long viewed such complaints as subject to DOE's binding arbitration and, therefore, outside GAO's jurisdiction. *Id.*

In response, the protester asserts that its protest is "nothing more" than a challenge to whether an award decision is consistent with the solicitation and should be understood as a procurement matter that our Office has jurisdiction to resolve under the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557. Resp. to Req. for Dismissal at 2-3. Additionally, while acknowledging that DOE is the proper forum to decide an SLA's challenge to its elimination from the competitive range, the protester asserts that GAO decisions do not prevent an SLA that has previously engaged in arbitration with DOE from returning to GAO to protest the award of a contract after DOE's binding arbitration has concluded. *Id.* at 3-4. While the protester is correct that GAO has not previously reached the issue of whether an SLA may return to our Office to protest a federal agency's compliance with the RSA after the conclusion of binding arbitration with DOE, as discussed below, we now conclude that such a protest is outside our bid protest jurisdiction.[3]

DISCUSSION

This procurement was conducted pursuant to the RSA, which establishes a priority for blind persons recognized and represented by SLAs, such as Oklahoma, in the operation of vending facilities, including cafeterias, in federal buildings. 20 U.S.C. § 107; 34 C.F.R. § 395.33(a). With respect to the operation of cafeterias at federal facilities, the Act directs the Secretary of Education to issue regulations to establish a priority for blind licensees whenever "such operation can be provided at a reasonable cost with food of a high quality comparable to that currently provided to employees, whether by contract or otherwise." 20 U.S.C. § 107d-3(e). Pursuant to this authority, the Secretary of Education has promulgated regulations addressing the RSA's requirements. The implementing regulations provide that federal agencies requiring cafeteria services must invite SLAs to respond to a solicitation for such services. 34 C.F.R. § 395.33(b). If a

[3] In contemplating whether an SLA's complaint could raise a procurement matter separate from the RSA, we note that the Court of Federal Claims has observed that "[i]t is doubtful, however, whether procurement award issues exist that are truly independent of the Act," and that the "very broad language" of the RSA's arbitration provisions "encompasses all federal agency actions that have a reasonable nexus to the Act . . . ." *See Maryland State Dep't. of Educ.,* B-400583*,* B-400583.2, Nov. 7, 2008, 2008 CPD ¶ 209 at 6 (quoting *Kentucky, Educ. Cabinet, Dept. for the Blind v. United States*, 62 Fed. Cl. 445 (2004)).

designated SLA submits an offer found to be within the competitive range for the acquisition, the agency is required to consult with DOE, in an effort to obtain the services at a reasonable cost. *Id*. § 395.33(a), (b).

Additionally, with respect to disputes between SLAs and federal agencies, both the statute and the implementing regulations provide for the filing of complaints with the Secretary, which are then to be resolved by binding arbitration. 20 U.S.C. § 107d-1(b); 34 C.F.R. § 395.37. An arbitration panel is then established to resolve such SLA complaints in accordance with the Administrative Procedure Act. 34 C.F.R. § 395.37(b). The panel's decision is "final and binding," subject to appeal and review as a final agency action for purposes of chapter 7 of title 5, dealing with judicial review. *Id.* If the arbitration panel finds that an agency has violated the RSA, the head of the agency must promptly terminate any acts or practices found to violate the RSA and take such other action as may be necessary to carry out the panel's decision. *Id.* § 395.37(d).

We have interpreted the RSA and its implementing regulations as vesting authority with the Secretary of Education regarding SLA complaints concerning a federal agency's compliance with the RSA. *Louisiana State Dep't. of Soc. Servs. Louisiana Rehab. Servs.*, B-400912.2, July 1, 2009, 2009 CPD ¶ 145 at 2; *Washington State Dep't. of Servs. for the Blind*, B-293698.2, Apr. 27, 2004, 2004 CPD ¶ 84 at 3-5; *Mississippi State Dep't. of Rehab. Servs.*, B-250783.8, Sept. 7, 1994, 94-2 CPD ¶ 99 at 3. Accordingly, in our view, complaints, such as the resolution of the SLA's challenges to its exclusion from the competitive range or to the terms of a solicitation, are subject to the RSA's binding arbitration provisions and are not for consideration by our Office under its bid protest jurisdiction. *Maryland State Dep't. of Educ., supra* at 7 [hereinafter *Maryland*, B-400583*,* B-400583.2]; *Maryland State Dep't. of Educ.*, B-288501, B-288502, Aug. 14, 2001, 2001 CPD ¶ 143 at 3 [hereinafter *Maryland*, B-288501, B-288502].

Our view in this regard reflects our more general view that where, as here, Congress has vested oversight and final decision-making authority in a particular federal official or entity, we will not consider protests involving issues subject to review by that official or entity. *Washington State Dept. of Servs. for the Blind*, *supra* (DOE has authority to hear SLA's challenges raising issues subject to RSA); *see*, *e.g.*, *High Point Sec., Inc.--Recon. & Protest*, B-255747.2, B-255747.3, Feb. 22, 1994, 94-1 CPD ¶ 169 at 2 (determinations by the Small Business Administration under the certificate of competency program pursuant to 15 U.S.C. § 637(b)(7)); *ARA Envtl. Servs., Inc.*, B-254321, Aug. 23, 1993, 93-2 CPD ¶ 113 at 2 (protest of award under the Javits-Wagner-O'Day Act, 41 U.S.C. §§ 8501-8506).

Although the protester argues that its protest grounds are "nothing more" than procurement challenges to the agency's failure to follow the solicitation language, we disagree. Here, the protest clearly states "[w]ith this protest [Oklahoma] challenges . . . the [a]gency's refusal to place [Oklahoma's] proposal back into the competitive range and commence negotiations solely with [Oklahoma]." Protest at 8. The protest also states that in making award to MCI, the agency failed to provide Oklahoma the priority afforded by the RSA if Oklahoma were to be included in the competitive range. *Id.* at 9.

Based on our review, the substance of these challenges raises allegations concerning the agency's compliance with the RSA and its implementing regulations. More specifically, these arguments challenge whether the Army reasonably excluded Oklahoma's proposal from the competitive range. As our Office has consistently stated, we will not review issues that go to the question of whether the SLA should be included in the competitive range. Rather, such issues ultimately challenge whether an agency's actions improperly denied the SLA the priority required under the RSA and its implementing regulations, and therefore must be resolved through binding arbitration with DOE. *Georgia Bus. Enter. Program-Vocational Rehab. Agency*, B-416182.2, Nov. 23, 2018, 2018 CPD ¶ 400 at 4; *Maryland*, B-400583, B-400583.2, *supra*.

In addition, the protester argues that jurisdiction to hear disputes between an SLA and a federal agency depends on whether a complaint was filed before or after the completion of binding arbitration with DOE. *See* Resp. to Req. for Dismissal at 3-4. We see no such limitation in the regulations. With respect to disputes between SLAs and federal agencies, both the statute and the regulations provide for the filing of complaints with the Secretary, which are then resolved by binding arbitration. 20 U.S.C. § 107d-1(b); 34 C.F.R. § 397.37. Specifically, the regulation, which tracks closely the language of the statute, provides:

> Whenever any [SLA] determines that any department, agency, or instrumentality of the United States which has control of the maintenance, operation, and protection of Federal property is failing to comply with the provisions of the Act or of this part and all informal attempts to resolve the issues have been unsuccessful, such licensing agency may file a complaint with the Secretary.

34 C.F.R. § 395.37(a).

In our view, this language does not draw a distinction between disputes arising before or after arbitration. A limited distinction is included in the Act. In this regard, the implementing regulations identify a distinction that specifically permits an SLA to file a complaint with the Secretary where the SLA was dissatisfied with an agency's decision to exclude the SLA's proposal from the competitive range. *See* 34 C.F.R. § 395.33(b). Consequently, if disputes arising after arbitration were to be treated differently than disputes arising before arbitration, the regulations could have drawn such a distinction. However, such a distinction does not exist here. Without such a distinction, we have no basis to conclude that section 395.37(a) of the implementing regulation does not apply to disputes that occur after the conclusion of DOE's binding arbitration. *See e.g.*, *Maryland*, B-288501, B-288502, *supra* (solicitation challenges are subject to the RSA where such challenges are not distinguished in the regulation from disputes that are subject to binding arbitration before DOE). Accordingly, a dispute between an SLA and

a federal agency that arises after the completion of binding arbitration with DOE is also not for consideration by our Office under our bid protest function.

The protest is dismissed.

Thomas H. Armstrong
General Counsel