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Decision

Matter of: Rotair Aerospace Corporation

File: B-421381; B-421381.2

Date: April 19, 2023

James M. White, Esq., Marshall & White, PLLC, for the protester.
Noah B. Bleicher, Esq., and Moshe B. Broder, Esq., Jenner & Block, LLP; and Jade C. Totman, Esq., and Kate Connelly, Esq., The Boeing Company, all for the intervenor.
William Muldoon, Esq., Defense Logistics Agency, for the agency.
Michael P. Price, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is dismissed as untimely where the protester's previous correspondence with the agency was an agency-level protest, the agency's subsequent response constituted adverse agency action, and the protester did not file its protest with our Office within 10 calendar days of the adverse agency action.

DECISION

Rotair Aerospace Corporation, a small business of Bridgeport, Connecticut, protests the agency's decision to award a sole-source contract to The Boeing Company (Boeing), of Arlington, Virginia, under request for proposals (RFP) No. SPRRA1-22-R-0063, issued by the Defense Logistics Agency (DLA) for helicopter weapon system spare parts. The protester raises multiple challenges to the agency's decision to award a sole-source contract, and also alleges that the agency engaged in improper bundling by procuring two parts under the same solicitation without proper justification.

We dismiss the protest.

BACKGROUND

On September 16, 2022, DLA published a presolicitation notice on the System for Award Management (SAM) website, SAM.gov,¹ seeking national stock number spare parts for the United States Army's AH-64 Apache Helicopter, namely, flight control arm assemblies and bell cranks for the aircraft's weapon system.² AR, Ex. 29, Presolicitation Notice. The presolicitation notice stated that the requirement was restricted to Boeing, the original equipment manufacturer, pursuant to FAR section 6.302-1, because Boeing was the only approved source for the required parts. *Id.*; Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 2. The notice explained that the parts had to be purchased from Boeing because "[t]he rights to use the data needed to purchase this part from additional source(s) are not owned by the Government and cannot be purchased, developed, or otherwise obtained." AR, Ex. 29, Presolicitation Notice at 2. The notice also stated that the parts "must be acquired from a manufacturing source(s) specified on a source control or selected item drawing" and that any offerors had to meet prequalification requirements to be eligible for award. *Id.* Despite stating that the requirement was restricted to Boeing, the notice invited firms that could produce the required items to identify themselves and seek source approval in order to compete for future solicitations. *Id.*

On September 30, Rotair sent a self-styled "[f]ormal [o]bjection" letter to the agency via email, objecting to the presolicitation notice and the information contained therein. AR, Ex. 32, Rotair Formal Objection Letter at 1. The protester raised objections to the agency's intention to award the contract to Boeing on the following grounds: (1) the agency was mistaken in its belief that it did not have ownership rights to the complete technical data package required to manufacture the parts, and any claim by Boeing arguing otherwise was incorrect; (2) the protester in fact was in possession of the technical data package required to manufacture the parts, and was thus fully capable of producing them, therefore establishing it was an eligible approved source; and (3) the

¹ The SAM.gov website is the current government-wide point of entry, "the single point where Government business opportunities greater than \$25,000, including synopses of proposed contract actions, solicitations, and associated information, can be accessed electronically by the public." Federal Acquisition Regulation (FAR) 2.101.

² In addition to being required to undergo first article testing and an engineering fatigue test under the terms of the solicitation, the bell crank is considered an aviation critical safety item. Agency Report (AR), Exh. 1, RFP at 2. An aviation critical safety item is a part that, should it fail, malfunction, or otherwise be absent from the aircraft, could cause a catastrophic or critical failure resulting in the loss of or serious damage to the aircraft or weapon system, an unacceptable risk of personal injury or loss of life, or an uncommanded engine shutdown that jeopardizes safety. 10 U.S.C. § 3243(g)(1). Though the arm assembly is not considered a critical safety item, it is also required to undergo first article testing and an engineering fatigue test. RFP at 2.

agency lacked justification for its decision to bundle the arm assembly and bell crank parts into the same procurement. *Id.* at 2.

Also on September 30, DLA issued the solicitation, which contemplated a sole-source contract to Boeing and a one-time buy of the spare parts at an estimated value of \$3.2 million.³ RFP at 2. The solicitation, like the presolicitation notice, cited FAR section 6.302-1 as the basis for the agency's intent to award the sole-source contract to Boeing. COS/MOL at 1-2.

After not receiving a response from DLA, Rotair again emailed the agency on November 28, nearly two months after it sent its formal objection letter. AR, Ex. 33, Email from Rotair to DLA, Nov. 28, 2022. In its email, the protester stated that "[s]ince issuing the attached objection letter to the presolicitation of [the requisition number], we have noted that the solicitation has been issued. However, we did not receive a formal acknowledgement of our concerns addressed within the objection letter. Please advise." *Id.* at 1-2.

DLA responded to Rotair via email on November 29, stating that although it is the procuring agency, it is the Army, and specifically the Army's Aviation and Missile Command System Readiness Directorate, Sustainment Division that has the sole authority to determine approved sources for these parts. *Id.* at 1. The agency advised that all prospective offerors seeking to submit a proposal for these spare parts are required to be an Army approved source, and any inquiries or concerns regarding the source approval should thus be directed to the Army. The agency also referenced July 2022 correspondence between the protester and the Army, in which the Army informed the protester that it had been removed as an approved source for the parts and could not bid on future solicitations for the arm assembly because the government does not have the ability to distribute a complete technical data package, as some components of the technical data package had been marked proprietary by Boeing. AR, Ex. 23, Army Letter to Rotair.

The RFP established a closing date of January 10, 2023, and on January 9, Rotair filed the instant protest with our Office.

DISCUSSION

Rotair raises multiple challenges to DLA's decision to award a sole-source contract to Boeing. The protester argues that it was approved as a source for the arm assemblies in 2004, and that it remains fully capable of manufacturing those parts for the Army. Protest at 8, 12-13. Further, the protester contends that the government's removal of

³ SAM.gov indicates that DLA issued the solicitation at 4:24 p.m. Central Time on September 30. The time stamp on the protester's email to DLA containing its formal objection letter is 10:59 a.m. on September 30. See AR, Ex. 33, Email from DLA to Rotair, Nov. 29, 2022.

the protester from the source approval list was improper because the government lacked the justification for removal and further failed to promptly notify the protester of its removal as required by the FAR. *Id.* at 9-10. Finally, the protester argues that it was improper for the government to rely on Boeing's representations that certain components of the technical data package for the arm assembly part are proprietary to Boeing, because the government has unlimited data rights in the technical data package. *Id.* at 10-12.

On February 9, after DLA responded to Rotair's protest grounds in the agency report, Boeing filed a request for dismissal with our Office. Intervenor Req. for Dismissal at 1. In its request, Boeing argues that our Office should dismiss the protest as untimely, because the protester was required to file its protest with our Office within 10 days of adverse agency action with respect to its agency-level protest. *Id.* at 2-3. To that end, Boeing argues that the protester's formal objection letter to DLA constituted an agency-level protest, and that the agency's November 29 emailed response constituted adverse agency action, triggering the start of the 10-day window for filing protests with our Office as prescribed by our Bid Protest Regulations.⁴ *Id.* at 3-6.

Rotair contends that the protest should not be dismissed on timeliness grounds because its objection letter to DLA was not an agency-level protest, and, in any event, the agency's response did not amount to adverse agency action. See Resp. to Req. for Dismissal at 2-7. The protester also alleges that its protest to our Office included a protest ground that was not discussed in its objection letter to the agency, and the request for dismissal should be denied for that reason as well. *Id.* at 7.

Our regulations contain strict rules for the timely submission of protests. Where a protest first has been filed with a contracting activity, any subsequent protest to our Office, to be considered timely, must be filed within 10 calendar days of actual or constructive knowledge of initial adverse agency action. 4 C.F.R. § 21.2(a)(3). These timeliness rules hold true even where, as here, a protester files a protest with our Office challenging the terms of the solicitation prior to the closing date for receipt of proposals. See *Coulson Aviation (USA), Inc.*, B-411525, B-411525.2, Aug. 14, 2015, 2015 CPD ¶ 272 at 8. In this regard, where a protester has timely filed an agency-level protest challenging the terms of a solicitation, it must file a protest with our Office within 10 calendar days of adverse agency action in order to be considered timely, even if the end of the 10-day time period for filing occurs prior to the deadline for receipt of proposals. *Id.*; see also *Science and Technology Corp.*, B-420216, Jan 3, 2022, 2022 CPD ¶ 1 at 4-5.

⁴ Our Office invited the agency to file comments with respect to Boeing's request for dismissal. Electronic Protest Docketing System No. 33. The agency concurred with all of the arguments advanced by Boeing, and also requested our Office dismiss Rotair's protest as untimely. Agency Resp. to Req. for Dismissal at 7. Since both the intervenor and the agency raise the same arguments for dismissal, this decision refers to the agency filings.

Here, as explained below, we find that Rotair's formal objection to DLA on November 28 constituted an agency-level protest, and that the agency's response on November 29 was adverse agency action. Thus, the protester was required to file its protest with our Office by close of business on December 9 in order for it to be considered timely. Accordingly, we dismiss the protest as untimely because it was filed more than 10 calendar days after the protester received actual or constructive knowledge of initial adverse agency action on an agency-level protest.

Agency-Level Protest

Rotair argues that its September 30 objection letter to DLA was not an agency-level protest for multiple reasons. First, the protester asserts that the objection letter was made in response to the presolicitation notice, and thus cannot be an agency-level protest because a presolicitation notice, unlike a solicitation, cannot be the subject of a protest. *Resp. to Req. for Dismissal* at 2-4. Next, the protester contends that its November 28 follow-up email to DLA also cannot be considered an agency-level protest, because the text of the email, only a few sentences in its entirety, did not request any specific relief from the agency. *Id.* at 5. Further, the protester maintains that the November 28 email was still merely an objection to the presolicitation notice, and thus could not be considered a protest for the same reason the September 30 letter could not be considered an agency-level protest. *Id.*

DLA contends that the points raised in Rotair's September 30 objection letter qualify as an agency-level protest. Specifically, the agency argues that the protester repeatedly expressed dissatisfaction with the agency's decision to proceed with a sole-source contract to Boeing and the agency's decision not to consider the protester an approved source for the parts. *Agency Resp. to Req. for Dismissal* at 4. Further, the agency argues that on November 28, after the agency had issued the solicitation, Rotair "timely raised" the objections from its September 30 letter with respect to the newly issued solicitation. *Id.* at 5. Lastly, the agency maintains that the protester requested specific relief by asking the agency to issue the solicitation without restriction or at least allow the protester to compete for the work, and procure each part separately. *Id.*

The FAR requires that an agency-level protest include, among other things, a request for a ruling by the agency and a statement requesting a form of relief. FAR 33.103(d)(2)(v)-(vi). Although a letter or email does not have to explicitly state that it is intended as a protest for it to be so considered, it must, at least, express dissatisfaction with an agency decision and request corrective action. *Silver Investments, Inc.*, B-419028, Oct. 26, 2020, 2020 CPD ¶ 332 at 4. To that end, our Office has consistently stated that a written statement must convey the intent to protest by a specific expression of dissatisfaction with the agency's actions and a request for relief, as opposed to a statement that merely expresses a suggestion, hope, or expectation. *Id.*

As explained below--setting aside the question of whether Rotair could have validly protested the presolicitation notice in this instance through the filing of its September 30

letter of objections to the agency⁵--we find that on November 28, Rotair filed an agency-level protest challenging the terms of the final solicitation, when it sent the agency an email that reincorporated and reasserted all of the September 30 objections to the presolicitation notice.

The September 30 letter clearly conveys the hallmarks of a protest by expressing dissatisfaction with the agency's actions and making a request for relief. For example, in the letter, which the protester called a "formal objection" letter, the protester states that it has provided the letter to the agency "as a formal notice of its objections to the Government's basis for attempting to unlawfully restrict competition to Boeing." AR, Exh. 32, Rotair Formal Objection Letter at 2. The protester also specifically articulates its grounds of protest, first stating its belief that it "has been and currently is fully capable of producing each of the [parts]." *Id.* The protester further argues that the agency is incorrect to believe "that the Government has no legal right to provide the technical data" to other manufacturers because "the Government received 'unlimited rights' in the data" and the Government therefore by law "has a right to disclose drawings to third parties (including competitors of Boeing)." *Id.* Lastly, the protester stated that it found it "strange that the Government has sought to bundle these two items together, considering the Government's recent efforts (this year) to procure the arm assembly alone. There does not appear to be a basis for this bundling decision." *Id.*

Rotair's letter also requested relief and corrective action from the agency. Specifically, the protester stated "we request the Government issue the [s]olicitation in an unrestricted fashion (or at the very least provide a copy to Rotair and permit it to compete for the work)." *Id.* The protester reiterated its request for relief at the end of the letter, requesting that the solicitation "be made available to Rotair and Rotair should be permitted to compete for the work," and further requesting that the agency procure each of the two parts separately. *Id.*

⁵ As noted above, the protester takes the view that it could not have protested the presolicitation noticed in this case citing, *e.g.*, *Onix Networking Corp.*, B-411841, Nov. 9, 2015, 2015 CPD ¶ 330 at 5 (stating that a protest challenging the terms of a presolicitation agency request for information would be premature, since no solicitation had yet been issued). Our Office has also explained, however, that there is a limited exception to this general rule in the context of intended sole-source procurements. Where an agency publishes to the government-wide point of entry a notice of its intent to enter into a sole-source contract and does not invite or request responses from other potential sources, we have found that a prospective offeror is required to file a protest within 10 days of that announcement in order to be timely. See *Tyonek Eng'g & Agile Mfg., LLC*, B-419775 *et al.*, Aug. 2, 2021, 2021 CPD ¶ 263 at 8; *AGMA Sec. Serv., Inc.*, B-418647, June 24, 2020, 2020 CPD ¶ 223 at 3. Because we find the protest to be untimely for the reasons discussed herein, our Office need not decide whether the protest also was untimely because it was not filed within 10 days of the issuance of the presolicitation notice.

On November 28, Rotair reincorporated and reasserted all of the above-mentioned objections when it sent a follow-up email to DLA stating that “[s]ince issuing the attached objection letter to the presolicitation . . . we have noted that the solicitation has been issued.” AR, Exh. 33, Email from Rotair to DLA, Nov. 28, 2022 at 1-2. The protester further stated that it had not received “formal acknowledgement of our concerns addressed within the objection letter.” *Id.* at 2. The protester’s actions in this regard thus constitute a protest of the solicitation. Though the protester argues that the November 28 follow-up email was still merely an objection to the presolicitation notice, we conclude that this argument lacks merit. By November 28, the solicitation had been active for nearly two months, and encompassed the same requirements the protester objected to in the presolicitation notice. At the time the protester sent its follow-up email on November 28, the presolicitation notice no longer had any significant bearing on the procurement, so the protester’s reasserted objections at that time can reasonably be construed only as pertaining to the active solicitation. Thus, we find the protester’s objection letter, as conveyed to the agency on November 28, was an agency-level protest of the solicitation.

Adverse Agency Action

Next, Rotair argues that DLA’s November 29 response was not adverse agency action. Specifically, the protester argues that the response was not prejudicial to the protester’s position, and did not attempt to address any of the issues the protester raised in its objection letter. Resp. to Req. for Dismissal at 5. The protester alleges that the agency provided a “generic response” that did not refuse to address the protester’s concerns, but rather, simply pointed the protester to the appropriate agency for raising its concerns. *Id.* at 6.

DLA contends that its response to Rotair constituted adverse agency action because it did not provide the relief requested by the protester in its objection letter. Agency Resp. to Req. for Dismissal at 6. The agency notes that it did not represent that it would view the protester as an approved source for the parts, and further did not represent that it would amend the solicitation to either allow competition on a full and open basis, or unbundle the parts requirements. *Id.*

Our regulations define the term “adverse agency action” to mean any action or inaction on the part of a contracting agency that is prejudicial to the position taken in a protest filed there. 4 C.F.R. § 21.0(e). The timeliness of a protest with our Office is thus measured from this point rather than from the receipt of a subsequent formal denial of the agency-level protest. *Scopus Optical Indus.*, B-238541, Feb. 23, 1990, 90-1 CPD ¶ 221 at 2. In this respect, 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.

We find that DLA’s response to Rotair on November 29 constituted adverse agency action. As explained above, “adverse agency action” can be any agency action or

inaction that is prejudicial to the position taken in an agency level protest. 4 C.F.R. § 21.0(e). Here, the agency's response to the protester's letter was prejudicial to the protester's position. The protester raised arguments challenging the government's belief that Boeing was the only approved source for the parts due to data ownership rights, the protester's status as an approved source, and the agency's decision to bundle the parts into the same procurement. By choosing not to address any of these issues, and instead directing the protester to the proper source approval authority for the parts in question, the agency's response indicated that it would not grant the relief requested by the protester. Further, the agency referenced previous correspondence between the Army and the protester, in which the Army explained that, absent any change to the current posture, the protester could no longer bid on procurements involving the arm assembly, as the agency was unable to distribute a complete technical data package for this item because Boeing had marked parts of it as proprietary.

Thus, DLA's response was prejudicial to Rotair's position, as it demonstrated that the agency could not allow the protester to compete under the solicitation as written because the protester was not an approved source. The response also indicated that the agency was proceeding with the procurement in the manner prescribed by the solicitation, as nothing in the agency's response suggested an intent to amend the solicitation or otherwise unbundle the procurement. Thus, we find the agency's action was "adverse agency action" as defined by our regulations, and as applicable to our timeliness rules.

Accordingly, because we find Rotair filed an agency-level protest on November 28, and DLA took adverse agency action on November 29, our regulations required the protester to file its protest with our Office by December 9 in order to be considered timely. Because the protester did not file its protest with our Office until January 9, the protest is untimely. See *Dominion Aviation, Inc.--Recon.*, *supra* at 3.

Remaining Protest Ground

Rotair also alleges that its protest with our Office included a protest ground not covered in its formal objection letter to DLA, specifically, its argument that the agency improperly cancelled a previously issued solicitation for only arm assemblies, which had been the subject of an earlier protest with our Office. Resp. to Req. for Dismissal at 7. In this regard, the protester argues that cancellation of the previous solicitation "was not an independent procurement decision but a pretext to improperly bundle the [a]rm [a]ssembly and [b]ell [c]rank requirements to sole source this requirement to Boeing." Protest at 15. Because the objection letter, and the agency's November 29 response, did not address this protest ground, the protester argues the request for dismissal should be denied in its entirety. *Id.* We disagree.

As stated above, our regulations contain strict rules for the timely submission of protests. Under these rules, a protest, other than one alleging improprieties in a solicitation, must be filed not later than 10 days after the protester knew, or should have

known, of the basis of protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Our Office has explained that a challenge to the cancellation of a solicitation is subject to the 10-day timeliness rule. *Alliance Technology Group, LLC*, B-418558, June 16, 2020, 2020 CPD ¶ 198 at 4. In situations where a protester argues that an agency's cancellation of a solicitation is a mere pretext to avoid awarding a requirement on a competitive basis, or to avoid resolving a protest, our Office has found that a protest may still be timely even if filed more than 10 days after the protester learned of cancellation of the solicitation. *Id.* at 5. To be timely in that situation, however, we have stated that a protest must still be filed within 10 days of the protester learning the basis for its argument that cancellation of the solicitation was a pretext. *Id.*

Rotair became aware of the agency's cancellation of the previous solicitation for only the arm assembly part by September 20, through its correspondence with the agency. Protest at 15; see Protest, exh. 17, Email from DLA to Protester, Sept. 20, 2022. On September 19, the protester emailed the agency asking whether the arm assembly solicitation was "still open and active." Protest, exh. 17, Email from Protester to DLA, Sept. 19, 2022. The next day, the agency responded that the solicitation "was canceled in entirety." Protest, exh. 17, Email from DLA to Protester, Sept. 20, 2022.

Based on this exchange, we find that Rotair had knowledge of DLA's cancellation of the arm assembly solicitation by no later than September 20. Though the protester contends that the arm assembly solicitation remained active on SAM.gov until December 2022, the agency plainly represented on September 20 that this solicitation "was canceled in entirety." Protest, exh. 17, Email from DLA to Protester, Sept. 20, 2022. To be timely, any protest challenging the agency's cancellation of the previous solicitation was thus required to be filed with our Office within 10 calendar days of that time.⁶

To the extent that Rotair argues that cancellation of the previous solicitation was a mere pretext to avoid awarding a contract on a competitive basis, we similarly find this protest ground untimely. As explained above, the agency issued the solicitation for the current procurement bundling the arm assembly and bell crank requirements on September 30. Once the protester had knowledge of both the cancellation of the previous solicitation, and DLA's new, bundled solicitation, it had learned the basis of its argument that

⁶ Additionally, our Office has consistently interpreted the timeliness rules in our regulations to require protesters to diligently pursue any information which may form the basis of a protest, or else risk our Office finding its protest to be untimely. See *Battelle Memorial Institute*, B 420403, B 420403.2, March 10, 2022, 2022 CPD ¶ 64 at 4-5. To the extent the protester was confused or took issue with the arm assembly solicitation remaining active on SAM.gov even after the agency stated on September 20 that the solicitation had been cancelled, it was required to diligently pursue information relating to this basis of protest. Absent any other attempts to address the discrepancy between the agency's statement and the information on SAM.gov with either the agency or our Office, we find that by waiting until January 2023 to raise this issue, the protester failed to diligently pursue this protest ground, and it is thus untimely.

cancellation of the old solicitation was improper or otherwise a mere pretext to avoid awarding a contract to Rotair or another offeror on a competitive basis. The protester claims as much in its protest. See Protest at 5 (stating that after issuing the presolicitation notice, “[i]t seemed as if . . . DLA had yet again found a way to exclude [Rotair] and other small business manufacturers of these parts from the procurement . . . DLA was attempting to ensure that no other manufacturer besides [Boeing] could be a viable source for the procurement”). Therefore, in order to be considered timely, this basis of protest also needed to be filed with our Office within 10 days of September 20--several months earlier than January 9, 2023.

The protest is dismissed.

Edda Emmanuelli Perez
General Counsel