



Decision

Matter of: BDO Public Sector, LLC

File: B-421677.2

Date: October 3, 2023

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This version has been approved for public release.

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DIGEST

Protest challenging agency’s decision to cancel a solicitation is dismissed as untimely where the protest was filed with our Office more than 10 days after the protester received initial notice of adverse agency action in the protester’s underlying agency-level protest.

DECISION

BDO Public Sector, LLC (BDO), a large business of McLean, Virginia, protests the agency’s decision to cancel request for proposals (RFP) No. IRV-23-23, issued by the Central Intelligence Agency (CIA) for financial consulting support services. The protester argues that the agency lacks a reasonable basis to cancel the solicitation, and contends that the cancellation is therefore a pretext to avoid resolving BDO’s agency-level protest allegation of multiple organizational conflicts of interest (OCIs) on the part of the only other competitor to submit a proposal (Deloitte Consulting LLP).

We dismiss the protest as untimely.

BACKGROUND

Using the procedures of Federal Acquisition Regulation subpart 16.5, the agency issued the “Lightsaber II” solicitation to holders of the CIA’s “SHEPHERD-Business Advisory Services (BAS)” multiple award indefinite-delivery, indefinite-quantity (IDIQ) contract seeking proposals for the provision of financial consulting support services for the agency’s working capital fund. Req. for Dismissal at 1. In response to the solicitation, the agency received two offers submitted by BDO and Deloitte. Protest exh. 2,

Debriefing Letter at 4.¹ On May 9, 2023, the agency selected BDO's approximately \$55 million proposal for task order award. *Id.*; Req. for Dismissal at 1. Deloitte filed a protest with our Office challenging the award to BDO. Req. for Dismissal at 1. In response to the protest, the agency submitted a notice of corrective action indicating the CIA's intent to rescind the award to BDO, request revised proposals, conduct a new evaluation, and make a new award decision. *Id.* As a result of the agency's decision to take corrective action, we dismissed Deloitte's protest as academic. *Deloitte Consulting LLP*, B-421677, June 12, 2023 (unpublished decision).

As a result of Deloitte's protest, BDO became aware of "multiple OCIs" on Deloitte's part. Req. for Dismissal ex. A, Agency-Level Protest at 3. During the agency's implementation of corrective action, the CIA requested revised proposals from both Deloitte and BDO, which BDO viewed as an indication of the agency's belief that Deloitte was eligible to compete under the solicitation despite the apparent OCIs. *Id.* at 6. On June 27, BDO filed an agency-level protest challenging the CIA's determination that Deloitte was eligible to compete for the Lightsaber II task order "notwithstanding Deloitte's having several [OCIs]." *Id.* at 3. Specifically, BDO argued that due to Deloitte's work on another CIA contract--the "SCAMANDER" contract--Deloitte had two unmitigatable impaired objectivity OCIs. *Id.* at 6. Further, BDO maintained that Deloitte's work on the SCAMANDER contract gave rise to an additional unequal access to information OCI, which created an unfair competitive advantage for Deloitte under the Lightsaber II competition. *Id.* at 8-9. In its agency-level protest, BDO requested as relief that the CIA "determine Deloitte is ineligible for award." *Id.* at 10.

On August 21, the CIA emailed BDO's counsel, informing them that the firm's agency-level protest had been resolved, and that the agency was undertaking a required information security review before releasing the written decision to BDO. Req. for Dismissal ex. B, Email from CIA to BDO at 16. In addition, the email advised BDO of the outcome of its protest, explaining that: "BDO's Agency-level protest is sustained in part. The Agency will cancel the solicitation, resolicit its requirement in a manner that suits its best interests, and evaluate offerors for potential OCIs, including as raised in the protest." *Id.* Also on August 21, BDO's counsel requested and received permission from the agency to share with the firm the outcome of the agency-level protest. *Id.*

After completing the necessary security review, the CIA transmitted the full agency-level protest decision to BDO on September 1. Req. for Dismissal at 2. The agency-level protest decision did not reach a conclusion on the merits of BDO's arguments regarding Deloitte's multiple alleged OCIs. Rather, the CIA found that "any OCI inquiry during acquisition planning for LIGHTSABER II may not have been sufficient." Req. for Dismissal ex. C, Agency-Level Protest Decision at 23. As a result of this finding, the CIA concluded: "To the extent that the protest calls for cancellation of the

¹ BDO submitted its protest exhibits as a single consecutively paginated Adobe PDF file, and the agency also submitted its request for dismissal exhibits in the same manner. Our citations to the two sets of exhibits refer to the PDF files' consecutive pagination numbers.

LIGHTSABER II award, the protest is sustained. The Agency will cancel the LIGHTSABER II solicitation, resolicit its requirement in a manner that suits its best interests, and, as part of the evaluation of proposals, evaluate any offerors from the SHEPHERD-BAS base IDIQ pool of awardees for potential OCIs, including as raised in the protest.” *Id.* at 26.

On September 11, BDO filed this protest with our Office challenging the CIA’s decision to cancel the solicitation.² Protest at 1.

DISCUSSION

BDO maintains that, in the agency-level protest decision, the CIA “agreed that it had not conducted a sufficient analysis of Deloitte’s OCIs,” but rather than performing the required analysis, the CIA instead “arbitrarily decided to cancel the Solicitation.” Protest at 1. BDO contends that the CIA’s decision to cancel the solicitation “does not provide the relief requested in BDO’s agency-level protest,” “lacks sufficient justification, is disproportionate to the problem, and, is unreasonable under established GAO precedent.” *Id.* at 1-2. Based on these contentions, BDO argues that the CIA’s decision to cancel the solicitation “is pretextual and an attempt to avoid further review of the underlying OCIs.” *Id.* at 2. The CIA requests that we dismiss BDO’s protest as untimely “because BDO had actual knowledge of the Agency’s initial adverse action on *August 21, 2023*, when” the CIA notified BDO’s counsel of the agency’s intent to cancel the solicitation, but BDO “did not file its GAO protest until *September 11, 2023*--more than 10 days after BDO received this actual notice.” Req. for Dismissal at 2-3. For the reasons explained below, we agree that dismissal is appropriate under our regulations.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These 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. *Lifecare Mgmt. Partners*, B-297078, B-297078.2, Nov. 21, 2005, 2006 CPD ¶ 8 at 10-11. When 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). The term “adverse agency action” means “*any* action or inaction by an agency that is prejudicial to the position taken in a protest filed with the agency.” 4 C.F.R. § 21.0(e) (emphasis added).

The agency asserts that “BDO’s protest repeatedly identifies that the ‘adverse agency action’ it now challenges is the Agency’s stated ‘[i]nten[t] to cancel the Solicitation and resolicit the opportunity.’” Req. for Dismissal at 3. In support of this assertion, the agency points to multiple statements in BDO’s protest in which the protester challenges the cancellation decision, including the protester’s characterization of the challenged

² The value of the task order at issue in the protest exceeds \$10 million. Accordingly, this protest is within our jurisdiction to hear protests of task orders placed under civilian agency IDIQ contracts. 41 U.S.C. § 4106(f)(1)(B), (f)(2).

adverse agency action in the “Timeliness & Mandatory Suspension of Performance” section of BDO’s protest. *Id.* at 3-4, *citing* Protest at 1, 7, 12. In this section, BDO states: “On September 1, 2023, BDO received a decision in its agency-level protest indicating that the Agency intends to cancel the Solicitation and resolicit the opportunity. This protest is timely filed within 10 days of BDO’s learning of adverse agency action.” Protest at 12. The agency explains, however, that BDO “was given actual notice of this (now challenged) initial adverse agency action--cancelling the Lightsaber II [solicitation] and resoliciting the opportunity--on August 21, 2023.” Req. for Dismissal at 3. The CIA contends that timeliness of a protest to our Office following an agency-level protest is “measured from when the protester is on notice that the contracting activity will not undertake the requested corrective action rather than from the receipt of a subsequent formal denial of the agency level protest.” *Id.* at 4. Thus, the CIA argues the September 1 “receipt of the formal, written determination is not the starting gun for timeliness where, as here, the Agency announced its initial adverse action earlier via a different method” on August 21. *Id.*

BDO responds that it did not have actual or constructive knowledge of any agency action or inaction that was prejudicial to the position BDO took in its agency-level protest until it received the full agency-level protest decision on September 1. Resp. to Req. for Dismissal at 1. BDO maintains that the CIA’s August 21 email did not constitute actual or constructive knowledge of an adverse agency action because it informed BDO that its agency-level protest was “sustained in part.” *Id.* at 2. The protester asserts that based on this statement “BDO had every reason to believe that the Agency had made some favorable decision regarding Deloitte’s OCIs and its eligibility to perform the work described in the Solicitation,” a “false impression” that BDO claims it “labored under” until it received the full agency-level protest decision on September 1 and “saw, for the first time, that the Agency had avoided reaching the merits of any part of BDO’s protest.” *Id.*

As an initial matter, we note that whether the agency resolved the OCI allegations raised in BDO’s agency-level protest does not have any bearing on the propriety of the decision to cancel the solicitation. Indeed, BDO argues in its protest to our Office that the CIA’s decision to cancel the solicitation “is disproportionate to the problem.” Protest at 1-2. Therein lies the crux of BDO’s argument--that the CIA took the wrong corrective action in response to BDO’s agency-level protest. Based on the August 21 email, however, BDO knew the agency was taking the “disproportionate” action of cancelling the solicitation, and any forthcoming information about the CIA’s resolution of the OCI allegations in BDO’s agency-level protest would be irrelevant to whether cancellation was the appropriate corrective action in response to such allegations.

Further, we find BDO’s reliance on the August 21 email’s statement that the firm’s agency-level protest was “sustained in part” to be both selective and misplaced. As noted above, BDO’s agency-level protest alleged multiple OCIs on Deloitte’s part and specifically requested as relief that the CIA find Deloitte ineligible to compete under the solicitation due to those OCIs. Notwithstanding the statement that BDO’s agency-level protest was “sustained in part,” the August 21 email’s subsequent provisions that the

agency would cancel, resolicit, and then “evaluate offerors for potential OCIs, including as raised in the protest,” plainly indicated that the agency was not providing the relief requested in BDO’s agency-level protest--*i.e.*, the agency was not disqualifying Deloitte from further competition. Rather, the CIA’s August 21 email made clear that potential OCIs, including the multiple Deloitte OCIs alleged in BDO’s agency-level protest, would not be evaluated until after the requirement was recompeted. In light of BDO’s agency-level protest position that Deloitte’s participation in the competition created an unfair competitive advantage that was prejudicial to BDO, when BDO learned on August 21 that the CIA did not intend to resolve the OCI allegations until further competition inclusive of Deloitte proceeded, the protester knew, or should have known, that the CIA was taking action adverse to BDO.

Adverse agency action is not limited to a written denial of an agency-level protest. See 4 C.F.R. § 21.0(e). For example, when a firm first challenges the terms of a solicitation through an agency-level protest, our decisions have long and consistently found that the agency’s action proceeding with the procurement (*e.g.*, opening of bids or receipt of proposals) constitutes initial adverse agency action even where the agency has not yet issued a decision on the firm’s pending protest. See *e.g.*, *Briar Meads Capital-BMC-15-Westwood of Lisle, LLC*, B-420800, B-420800.2, Sept. 7, 2022, 2022 CPD ¶ 235 at 8 (finding that agency action in accepting final proposal revisions without addressing the issue raised in firm’s agency-level protest or revising the solicitation “was undeniably prejudicial to the protester’s position and constituted adverse agency action”); *Impact Resources, Inc.*, B-416093, June 11, 2018, 2018 CPD ¶ 207 at 6 (finding that selection of an apparent successful offeror constituted notice that award would be forthcoming without provision of the solicitation amendment relief requested in agency-level protest); *FMB Laundry, Inc.*, B-261837.2, B-261837.3, Dec. 19, 1995, 95-2 CPD ¶ 274 at 3-4 (“where a protest concerning an alleged solicitation impropriety has been filed with the contracting agency and the agency proceeds to receive proposals without taking corrective action requested in the agency-level protest, closing constitutes initial adverse agency action on the protest”); *Southwest Marine of San Francisco, Inc.--Req. for Recon.*, B-229654.2, Jan. 19, 1988, 88-1 CPD ¶ 49 at 2 (affirming finding that closing date for receipt of proposals constituted “initial adverse agency action” for an agency-level protest challenging the solicitation’s terms).

In the case of solicitation challenges, our decisions have explained that receipt of proposals constitutes initial adverse agency action because once the contracting agency proceeds with receipt of proposals, the protester is on notice that the contracting agency will not undertake the corrective action requested in the agency-level protest. *DAI, Inc.*, B-408625, B-408625.2, Nov. 6, 2013, 2013 CPD ¶ 259 at 3. Consequently, timeliness of any “follow-on” protest to our Office is measured from this point of initial adverse agency action, rather than from receipt of any subsequent formal denial of the agency-level protest. *Id.*; *MLS-Multinational Logistic Servs., Ltd.*, B-415782, B-415708.2, Mar. 7, 2018, 2018 CPD ¶ 105 at 4 (finding protester’s GAO protest to be untimely because it was not filed within 10 days of closing date for proposal receipt, even though the protester argued no initial adverse agency action occurred until protester learned that its agency-level protest had been denied).

While the agency-level protest here was a post-award challenge, rather than a solicitation challenge, we find the situation analogous to our decisions discussed above because BDO was put on notice that the agency would not undertake the corrective action requested by the firm prior to receipt of a formal decision on its agency-level protest. Accordingly, as BDO did not file its protest with our Office until September 11, more than 10 days after it received notice of initial adverse agency action, the protest is untimely. See *e.g.*, *Silver Investments, Inc.*, B-419028, Oct. 26, 2020, 2020 CPD ¶ 332 at 2, 5-6 (finding that agency correspondence to the protester clearly indicated agency did not consider protester's communication to the agency to constitute an agency-level protest and would not engage in further discussions with the protester with respect to its communications resulting in the protester "clearly and unequivocally [being] given notice that the agency had taken adverse action in response to any such agency-level protest" the protester believed it had filed); *Scientific Instrument Center, Inc.*, B-223429, Aug. 21, 1986, 86-2 CPD ¶ 210 at 1-2 (finding that agency's verbal notification to protester that it would remain with the previously selected awardee constituted initial adverse agency action on a protest first filed with the contracting agency); *Cascade Pacific Int'l*, B-220616, Dec. 10, 1985, 85-2 CPD ¶ 646 at 3 (dismissing protest as untimely where protester's contention that it did not know the basis of its protest because the agency-level protest decision was misleading was based on an unreasonable reading of that decision).

The protest is dismissed.

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General Counsel