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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: AeroSage LLC

File: B-411235.3; B-411719

Date: September 18, 2015

David M. Snyder, AeroSage LLC, for the protester.
Jeanne S. Morris, Esq., and David W. Altieri, Esq., Department of Veterans Affairs, for the agency.
Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests challenging acquisition by the Department of Veterans Affairs (VA) of fuel oil pursuant to a federal civilian agency fuel purchase agreement entered into between VA and the Defense Logistics Agency are dismissed; because the acquisition does not involve the issuance of a solicitation, the award of a contract pursuant to a solicitation, or the issuance of a delivery order under a previously awarded contract, Government Accountability Office lacks jurisdiction to consider the protests.

DECISION

AeroSage, LLC, of Tampa, Florida, protests the proposed acquisition of fuel oil by the Department of Veterans Affairs (VA) at various locations throughout the northeast United States.[1] AeroSage alleges that the agency improperly has failed to reserve these acquisitions for service-disabled, veteran-owned small businesses (SDVOSBs) pursuant to the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127-8128.

We dismiss the protests.

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[1] AeroSage's protests concern the acquisition of fuel oil for delivery to VA facilities located in Coatesville, Pennsylvania, Erie, Pennsylvania, White River Junction, Vermont, Augusta, Maine, Albany, New York, Canandaigua, New York and Providence, Rhode Island.

The record shows that the VA will be acquiring the fuel oil pursuant to the terms of an interagency reimbursable agreement executed in connection with the Defense Logistics Agency (DLA) fuel program, a mandatory, wholesale supply source that agencies are required to use. See Federal Acquisition Regulation (FAR) § 8.002; Federal Property Management Regulations (FPMR), 41 C.F.R. part 101-26.6. Specifically, VA will execute a Federal Civilian Agency Fuel Purchase Agreement between the agency and DLA. Agency Report (AR), B-411719, exh. 2, Various Documents Relating to the DLA Federal Fuel Acquisition Program, at 8-13. Pursuant to the terms of that agreement, DLA contracts for the various energy requirements of the customer agency (in this case VA), issues delivery orders on behalf of the customer agency, manages vendor performance in connection with those contracting activities and pays for the fuel that it acquires under the resulting delivery orders awarded by DLA using the Defense Working Capital Fund. See 10 U.S.C. § 2208.

To meet its requirements for fuel oil, VA submits an order to a system called the Enterprise Business System (EBS).[2] As described in VA materials provided to its acquiring activities and included in the record here, the nature of the acquisition process under the EBS is as follows:

> All contracting actions are performed by DLA Contracting Officers. Fuel orders are placed by the VA Station through DLA's web-based ordering system [EEBP]. After the order is placed a DLA Contracting Officer will issue a delivery order to the Fuel Vendor. DLA will pay the vendor directly and then bill the VA Station monthly for any fuel deliveries made during the billing period.
>
> DLA requires its customers to enter into a Fuel Purchase Agreement before it will assign the customer an account in its ordering and acceptance systems. Employees authorized to have ordering and acceptance system accounts are designated in the Fuel Purchase Agreement POC [point of contact] attachment.

AR, B-411719, exh. 2, Various Documents Relating to the DLA Federal Fuel Acquisition Program, at 35.

In short, DLA enters into indefinite-delivery, indefinite-quantity (IDIQ) type contracts with fuel vendors and purchases various energy supplies through the issuance of delivery orders against those contracts. When a participating agency requires

[2] The order is submitted using a DLA web-based ordering system known as the DLA Enterprise External Business Portal (EEBP). AR, B-411719, exh. 2, Various Documents Relating to the DLA Federal Fuel Acquisition Program, at 20.

supplies, the participating agency submits an order to DLA using DLA's web-based ordering system. DLA fulfills that order (by issuing a delivery order against its preexisting IDIQ contracts) and bills the participating agency.

In both of its current protests, as well as another protest filed by AeroSage (B-411666, et al.), the parties have directed our attention to DLA solicitation No. SP0600-13-R-0238-0001. AR, B-411666, et al., exh. 6. That is the solicitation DLA uses to award the IDIQ contracts, under which it subsequently meets the requirements of the participating agencies, including VA, through DLA's issuance of delivery orders. AeroSage also protested the terms of solicitation No. SP0600-13-R-0238-0001, maintaining that that solicitation violated the requirements of the Veterans Benefits, Health Care, and Information Technology Act of 2006, but it subsequently withdrew that protest (B-411666, et al.). [3]

AeroSage's current protests challenge the VA's acquisition of fuel oil using the arrangement described above. AeroSage alleges that the VA is required to set aside its acquisitions for fuel oil for SDVOSBs because there is a reasonable expectation that at least two SDVOSBs can meet the agency's requirements. AeroSage further contends that DLA is merely acting as VA's "agent" in awarding the underlying contracts, against which--AeroSage contends--the VA will issue delivery orders for its requirements. AeroSage appears to suggest that VA is required to acquire its fuel oil requirements through issuance of its own solicitations, after performing market research to determine whether such solicitations should be set aside for SDVOSBs. [4]

We dismiss the protests because our Office lacks jurisdiction to consider them. Under the Competition in Contracting Act (CICA), 31 U.S.C. §§ 3551-3557, our Office's jurisdiction is limited to considering protests involving solicitations issued by

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[3] Our records also show that AeroSage filed another protest against a different DLA solicitation, request for proposals No. SP0600-15-R-0211, and also specifically complained about certain line items under that solicitation for provision of energy products to various VA locations, maintaining that those requirements also should have been set aside for SDVOSB concerns. B-411750, B-411750.2. AeroSage also withdrew that protest.

[4] If the VA was acquiring its fuel oil requirements using a VA contract, AeroSage may be correct in its contention that the VA is obligated, pursuant to the Veterans Benefits, Health Care, and Information Technology Act of 2006, to engage in market research to determine whether or not it is required to set aside an acquisition for SDVOSBs. However, the statute, by its terms, is limited expressly to situations where VA is awarding contracts; nothing in the language of the statute requires VA to engage in a contract action where it can satisfy its requirements by some other means. 38 U.S.C. § § 8127-8128.

federal agencies and awards made or proposed under those solicitations. As relevant here, CICA defines a protest as a written objection by an interested party to any of the following: 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; or a termination or cancellation of an award of such a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract. 31 U.S.C. § 3551(1). Our Office also has jurisdiction to consider protests challenging the issuance of task or delivery orders under multiple-award, IDIQ contracts where the protest either alleges that the order increases the scope, period, or maximum value of the contract under which the order is issued, or challenges the issuance of an order valued in excess of $10 million. 41 U.S.C. § 4106(f)(1); 10 U.S.C. § 2304c(e)(1)(B).

Here, AeroSage's protests concern current or prospective action on the part of VA that does not involve the issuance of a solicitation, the award of a contract, or the issuance of a delivery order against a previously awarded contract. As described above, VA will satisfy its requirements by issuing an order to DLA using that agency's EBS. That order is not a delivery order issued against a preexisting contract, nor is it the award of a contract. Rather, it is the issuance of an order pursuant to the Federal Civilian Agency Fuel Purchase Agreement entered into between VA and DLA.

Our conclusion is corroborated by the terms of the Purchase Agreement itself, which describes agency employees that can place an order pursuant to the agreement. The agreement describes such agency points of contact as follows:

> EEBP Sales Order Request
>
> (a) [The agency employee] Places request for delivery of fuel from specified contract sources linked to Federal Activity Address codes and employee information provided to DLA Energy.
>
> (b) <u>These employees do not need to be contracting officials. You are actually placing a "request for fuel" or requisition for fuel. DLA Energy's contracting officer will issue an official contract order to the vendor based on this request.</u>

AR, B-411719, exh. 2, Various Documents Relating to the DLA Federal Fuel Acquisition Program, at 15 (emphasis supplied).

Because the actions or prospective actions of VA in placing these orders does not involve the issuance of a solicitation, or the award of a contract, or issuance of a delivery order under a preexisting contract, our Office lacks jurisdiction to consider AeroSage's protests.

The protests are dismissed.

Susan A. Poling
General Counsel