



Decision

Matter of: Western Star Hospital Authority, Inc.

File: B-414198.2; B-414198.3

Date: June 7, 2017

Johnathan M. Bailey, Esq., Bailey & Bailey, PC, for the protester.
George P. Farley, Esq., Department of the Army, for the agency.
Pedro E. Briones, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

1. Protest of the award of a short-term contract on a sole-source basis pending implementation of corrective action is dismissed as untimely where the protest was filed more than 10 days after the protester learned of the award.
 2. Protest of the agency's elimination of the protester's proposal from award consideration is denied where the protester expressly refused to extend its proposal acceptance period as requested and the proposal could not be revived because it would compromise the integrity of the competitive bidding system.
-

DECISION

Western Star Hospital Authority, Inc. (WSHA), of Atlanta, Georgia, protests various actions taken by the Department of the Army under request for proposals (RFP) No. W15QKN-17-R-1002 for emergency medical technician (EMT) services. WSHA challenges the Army's sole-source award of a 5-month interim contract for the required services, pending implementation of corrective action in response to a previous protest by WSHA. WSHA contends that the award reflects a lack of planning and failure to implement corrective action promptly. WSHA also challenges the subsequent rejection of its proposal, arguing that the Army unreasonably determined that WSHA refused to extend the acceptance period and revive its expired proposal as requested by the agency.

We dismiss the protests in part and deny them in part.

BACKGROUND

The instant challenges represent WSHA's second and third protests under this procurement. WSHA had previously challenged the initial evaluations and award under the RFP, but subsequently withdrew that protest (B-414198) after the Army proposed to take corrective action. Here, in protest B-414198.2, WSHA challenges the Army's award of a (second) sole-source interim contract pending the agency's continuing implementation of the proposed corrective action. WSHA also challenges, in protest B-414198.3, the rejection of its expired proposal on the basis that WSHA did not extend its acceptance period and revive the proposal. Although WSHA's earlier protest is not at issue here, for clarity in discussing the subsequent actions that are at issue, we summarize the relevant terms of the solicitation and the initial evaluation and award.

The RFP was issued on November 1, 2016, as a set-aside for small business concerns and sought proposals for 24-hour, 7-day per week ambulance and EMT services at Fort Dix, New Jersey. RFP at 1, 65; Performance Work Statement § C.1.1. The RFP stated that the agency would use a lowest-price, technically acceptable selection process to award a fixed-price contract for a 5-day phase-in period, a base year, 3 option years, and a 6-month option period. RFP at 3, 33, 70, 79; RFP amend. 1, at 1-9. For each performance period, offerors were to propose fixed unit prices and total prices for contract line item numbers (CLINs) corresponding to services provided on a specified number of weekdays, weekend days, and holidays.¹ The RFP provided that the offeror agreed to hold its offer firm for 120 calendar days from the date specified for receipt of offers (November 18). RFP amend. 2, at 2.

The Army received a number of proposals by the November 18 deadline, including from WSHA and Logistical Customer Service, Inc. (LCS), of Dunn, North Carolina (the incumbent).² See Request for Dismissal, B-414198.3, at 2. As relevant to its previous protest (B-414198), WSHA's proposal offered prices for the weekday and holiday CLINs, but did not offer prices for the weekend CLINs; rather, the proposal stated that

¹ For example, for the base year, offerors were to propose a unit price (per day) and total price for providing services on 253 weekdays (CLIN No. 0002), 102 weekend days (CLIN No. 0003), and 10 holidays (CLIN No. 0004), respectively. RFP at 80; Sched., at 33-46 (hereinafter, weekday, weekend, and holiday CLINs, respectively); RFP amend. 1, at 2-9. However, the RFP incorporated Defense Federal Acquisition Regulation Supplement (DFARS) provision 252.204-7011, Alternative Line item Structure, which permits offerors to propose an alternative CLIN structure. RFP at 74; see DFARS § 252.204-7011.

² No protective order was requested by the protester or issued by our Office. Accordingly, our discussion of some aspects of the procurement record is necessarily general in nature in order to avoid reference to non-public information. Our conclusions, however, are based on our review of the entire record, including the nonpublic information.

weekend prices were included in the weekday CLINs. See Agency Report (AR), Tab 16, WSHA Price Proposal, Sched., at 34-43. The Army awarded the contract to LCS on December 8 and informed WSHA that its proposal was rejected as noncompliant with the RFP's instructions that offerors propose prices for all CLINs. Request for Dismissal, B-414198.3, at 2; AR, Tab 1a, Rejection Notice, Dec. 8, 2016.

After receiving a written debriefing, WSHA filed protest B-414198 with our Office on December 12 challenging the rejection of its proposal. Prior to submitting an agency report in response to the protest, the Army advised the parties that it intended to take corrective action. AR, Tab 6, Notice of Corrective Action. The agency stated that it would re-admit WSHA to the competition and evaluate its proposal; establish a competitive range and open discussions with offerors, if necessary; and issue a new award decision.³ Id. WSHA subsequently withdrew its protest on January 25, 2017.

On January 30, the Army sent a letter to WSHA requesting that it acknowledge that it wished to remain in the competition. AR, Tab 11b, Contracting Officer's (CO) Letter to WSHA, at 1. The letter stated that if WSHA wished to be considered for award, the agency would evaluate all proposal information submitted to date and that no other submissions or changes would be considered at that time. Id. WSHA responded on that same date (January 30), acknowledging that it wished to remain in the competition by executing and returning the letter to the contracting officer, as instructed. Id. at 2.

On March 18, the 120-day acceptance period of all proposals (including WSHA's) expired according to the terms of the solicitation. See RFP amend. 2, at 2; AR, Tab 16, WSHA Price Proposal, at 93; Tab 19b, Rejection Notice, Mar. 31, 2017, at 2 (indicating that the acceptance period expired March 18).

At issue here (in protest B-414198.2), the Army, on March 24, posted on the Federal Business Opportunities website (FedBizOps) a Notice of Justification and Approval to issue a short-term, sole-source contract to LCS to prevent a break in services until the new selection process, i.e., corrective action, is concluded.⁴ AR, Tab 9b, J&A.

³ The Army suspended performance of LCS' new contract and subsequently terminated the contract for the convenience of the government. See AR, Tab 9b, Justification and Approval (J&A), at 3, 5. However, to avoid a break in service during the pendency of WSHA's protest B-414198, the Army modified LCS' current (i.e., the incumbent) contract to exercise an option to extend the period of performance from December 29, 2016, through March 23, 2017. See id. This first extension is not at issue here.

⁴ Specifically, the J&A provided for modifying LCS' current contract again to provide for a second extension (from March 24 through August 23) during the ongoing corrective action. AR, Tab 9b, J&A, at 2. The J&A stated that the continuation of services through a sole-source award of a short-term contract was in the best interest of the government because, among other things: (1) using the incumbent contractor eliminated the need for a phase-in period that a new contractor would require; (2) the costs of such a phase-in period would not be recouped by the government; (3) conducting discussions
(continued...)

Also at issue here (in protest B-414198.3), on Monday, March 27, the contracting officer requested that offerors extend the acceptance period for their offers through August 31, because the agency was currently evaluating proposals. See Request for Dismissal, B-414198.3, at 2. The email to WSHA stated:

[t]he proposal submission's validity is approaching⁵ and the Government is still conducting evaluations. The Government is requesting that the proposal validity be extended until August 31, 2017. Please provide a response as soon as possible but no later than March 30, 2017.

AR, Tab 11c, CO Email to WSHA, Mar. 27, 2017, at 1.

On that same date (March 27), WSHA responded as follows:

I would object to that, however[,] I will get with my law partner and we will ask GAO to take a second look at this matter. I will get back with you as soon as I speak to [protester's counsel]. However I'm going to ask GAO for Intervention.

AR, Tab 11d, WSHA Email to CO, Mar. 27, 2017, at 1 (hereinafter, March 27 Objection).

WSHA did not extend its proposal's acceptance period as requested (or "get back with" the contracting officer) by the Thursday, March 30 deadline. See Request for Dismissal, B-414198.3, at 3; Protester's Response to Requests for Dismissal (Response), at 1-3.⁶

On Friday, March 31, the Army sent a rejection letter to WSHA stating, among other things, that there had been no further communication from WSHA since its March 27 objection email; that the government no longer had a valid proposal from WSHA since it failed to extend the proposal acceptance date; and that WSHA was therefore excluded

(...continued)

with offerors following the protest (B-414198) did not leave adequate time to compete an interim contract; (4) the short duration of the instant contract would limit the number of contractors available for such a competition; and (5) no other contractors were found that currently have the training, certifications, and knowledge of the work site to begin performance. See id. at 3.

⁵ The acceptance period of WSHA's proposal had actually expired on March 18, as stated above. (The parties use the terms "validity" and "acceptance period" interchangeably.)

⁶ The Army submitted separate requests for dismissal for the instant protests. WSHA submitted a combined response to both requests.

from further consideration for contract award. AR, Tab 19b, Rejection Notice, Mar. 31, 2017, at 1-2.

On Monday, April 4, WSHA filed protest B-414198.2, addressed below.

On that same date (April 4), WSHA submitted a letter to the contracting officer extending the acceptance period of its proposal until August 31. AR, Tab 9d, WSHA Proposal Extension.

On Tuesday, April 5, WSHA filed protest B-414198.3, also addressed below.

DISCUSSION

WSHA protests the Army's award of the interim contract to LCS on a sole-source basis (B-414198.2), as well as the agency's rejection of WSHA's proposal (B-414198.3). We have considered all of WSHA's arguments and find that none provides a basis to sustain the protests.

Sole-Source Interim Contract (B-414198.2)

WSHA protests the award of the 5-month sole-source contract and claims that the Army did not determine whether other offerors, including WSHA, could provide the required services. Protest, B-414198.2, at 2-3. WSHA maintains that EMT services are readily available in the place of performance (New Jersey) and that the Army could compete the requirement without interrupting services during implementation of corrective action. See id. at 1-3. WSHA also complains that "[t]he corrective action that the agency proposed in January 2017 should have been completed long ago [and that] it is the lack of advance planning and movement on that corrective action which has created the need for" the sole-source award. Id. at 3. According to WSHA, "[g]iven the very simple issues presented in Western Star's protest [*i.e.*, evaluating several non-separately priced CLINs], there is no reason why such corrective action should have taken the 60 days that have already elapsed, much less a further five months."⁷ Id. at 2-3.

The Army maintains that the protest should be dismissed as untimely, because it was filed more than 10 days after the agency posted the J&A on FedBizOps on March 24. Request for Dismissal, B-414198.2, at 2-3. We agree. Under our Bid Protest Regulations, a protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Here, as the Army correctly points out, WSHA's protest is untimely since it was filed on April 4, or 11 days after the agency posted the notice and J&A to issue the sole-source contract.

⁷ As indicated above, before the agency proposed to take corrective action, WSHA's proposal had been rejected for not proposing prices for the solicitation's weekend CLINs. See AR, Tab 1a, Rejection Notice, Dec. 8, 2016.

Nevertheless, in response to the Army's request for dismissal, WSHA asserts--for the first time--that its protest is timely filed within 10 days of when WSHA received the agency's March 31 rejection letter. Response at 2-3. In this respect, WSHA contends that its March 27 objection to the contracting officer constituted an agency-level protest of the sole-source award, and that the March 31 rejection letter represented the Army's denial of the agency-level protest. Id. Thus, according to WSHA, its April 4 protest is timely filed within 10 days of when WSHA learned of the Army's adverse agency action.⁸ Id.

WSHA's new timeliness arguments are unavailing, at best. Notably, WSHA's April 4 protest states, expressly (but incorrectly), that it is filed within 10 calendar days of when the Army issued the March 24 notice of the sole-source award. Protest, B-414198.2, at 1 ("The agency issued a notice of its intent to award this sole source interim contract via notice published in Fedbizopps.gov on March 24, 2017. This protest is filed within 10 calendar days of that date and is therefore timely."). Nothing in WSHA's April 4 protest mentions the alleged agency-level protest. Id. at 1-5. In fact, the protest, inexplicably, makes no mention whatsoever of the contracting officer's March 27 request that WSHA extend the acceptance period of its proposal; WSHA's March 27 objection thereto; or the agency's March 31 rejection letter. Id. Moreover, WSHA's subsequent, April 5 protest (B-414198.3) to our Office, which we address (and deny) below, describes WSHA's March 27 objection as "an objection to the undue delay in implementing corrective action" and "an objection to the fact that the corrective action that the agency proposed in January 2017 should have been completed long ago." Protest, B-414198.3, at 1-3. The subsequent (April 5) protest also fails to mention the alleged agency-level protest. Id.

Regardless of its intent, WSHA's March 27 objection does not constitute an agency-level protest. The Federal Acquisition Regulation (FAR) requires that an agency-level protest contain, among other things, a request for a ruling by the agency. FAR § 33.103(d)(2)(v). Although a letter or e-mail does not have to state explicitly 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. Masai Techs. Corp., B-400106, May 27, 2008, 2008 CPD ¶ 100 at 3. Our Office has long explained that, to be regarded as an agency-level protest, a written statement must convey the intent to protest by a specific expression of dissatisfaction with the agency's actions,

⁸ Our rules provide that 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). The term "adverse agency action" means 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).

and a request for relief. Coulson Aviation (USA), Inc., B-411525, B-411525.2, Aug. 14, 2015, 2015 CPD ¶ 272 at 5.⁹

Here, although WSHA's March 27 objection expressed dissatisfaction with the request that the firm extend the acceptance period of its proposal, the email did not request any response or relief from the agency; instead, the email only suggested that WSHA would file a protest with GAO. AR, Tab 11d, March 27 Objection, at 1. Without more, such a communication did not constitute an agency-level protest. See Great Sw. Constr., Inc., B-252917, Apr. 14, 1993, 93-1 CPD ¶ 322 at 2-3 (dismissing protest filed with our Office as untimely where the protester's letter to the contracting officer was not an agency-level protest, because it did not request any response or relief from the agency, but only stated that the facts should be presented to GAO for a ruling). Accordingly, we dismiss protest B-414198.2 as untimely because it was filed more than 10 days after WSHA learned of its basis of protest. See 4 C.F.R. § 21.5(e).

Rejection of WSHA's Proposal (B-414198.3)

WSHA also protests the subsequent rejection of its proposal.¹⁰ As a threshold matter, the Army requests that our Office dismiss the protest because, according to the agency, WSHA is not an interested party since it did not extend its proposal acceptance period and thus has no valid proposal pending under the RFP. Request for Dismissal, B-414198.3, at 3.

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556, only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. Bid Protest Regulations, 4 C.F.R. § 21.0(a)(1). Determining whether a party is interested involves consideration of a variety of factors, including the nature of issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. RELM Wireless Corp., B-405358, Oct. 7, 2011, 2011 CPD ¶ 211 at 2.

We find that WSHA is an interested party to challenge the rejection of its proposal. Here, the nature of the issue presented and the remedy requested by WSHA are such that, if WSHA were to prevail in its protest, our Office would recommend that the Army re-admit the protester to the competition. See MKB Mfg. Corp., B-208451, Mar. 1, 1983, 83-1 CPD ¶ 204 at 2 (noting that the protester is an interested party because the

⁹ Contrary to WSHA's selective reading, our decisions have not stated that "[a]ll that is required is an expression of objection in writing to the Contracting Officer[.]" See Response at 2, citing, inter alia, Coulson Aviation (USA), Inc., supra, at 5.

¹⁰ We consider protest B-414198.3 timely because it was filed on April 5, which is within 10 days of when WSHA received the March 31 notice of rejection. See 4 C.F.R. § 21.2(a)(2).

issue in the protest is the validity of the alleged extension, therefore a successful protest could result in qualifying the protester for award); Isometrics, Inc., B-204556, Apr. 13, 1982, 82-1 CPD ¶ 340 at 3-4 (noting that, although it refused to extend its bid, the protester is an interested party where the relief requested would permit the protester an opportunity to rebid); Yardney Elec. Div., B-201846, June 2, 1981, 81-1 CPD ¶ 440 at 2 (declining to dismiss protest where, even though the protester refused to extend its bid acceptance period, the nature of the issue, and the requested remedy of cancellation and resolicitation, are such that the protester has established direct and substantial interest). In short, we agree with WSHA that, although the Army frames its argument in terms of whether WSHA is an interested party, the agency is really arguing the merits of the protest, that is, whether WSHA properly extended its proposal. See Response at 2. Accordingly, we decline to dismiss protest B-414198.3 because WSHA is an interested party to pursue the protest.

With respect to the merits of the protest, WSHA asserts that the Army misinterpreted WSHA's March 27 objection as an unwillingness to extend its proposal. Protest, B-414198.3, at 2. WSHA contends that the March 27 objection "was not an express or implied refusal to extend its pricing, [but] an objection to the undue delay in implementing corrective action." Id.

Contrary to WSHA's assertions, we find that its March 27 objection was an express refusal to extend the acceptance period and revive its proposal. By its plain terms, WSHA's March 27 communication unequivocally objected to the contracting officer's request that it extend its proposal validity until August 31, 2017. An offeror that declines, in writing, an agency request to extend its offer acceptance period, has unequivocally removed itself from the competition. See Kumasi Ltd./Kukawa Ltd.-- Recon. et al., B-247975.12 et al., Sept. 27, 1993, 93-2 CPD ¶ 195 at 5; Marc Indus., B-243517, June 6, 1991, 91-1 CPD ¶ 542 at 2-3 (offeror that declines in writing, stating that there was no acceptable reason for extending the acceptance period, precludes any possibility for award); SuPessor, Inc., B-232748, Nov. 29, 1988, 88-2 CPD ¶ 534 at 1-2.

Moreover, WSHA failed to communicate any intent, either expressly or by implication, to extend its offer by the March 30 deadline and remain in the competition.¹¹ Our Office has long explained that when an agency requests an extension of an offer's acceptance period, the burden of ensuring agency receipt of the extension is on the offeror. See Brickwood Contractors, Inc., B-290444, July 3, 2002, 2002 CPD ¶ 121 at 7, citing Discount Mach. & Equip., Inc., B-244392, Oct. 15, 1991, 91-2 CPD ¶ 334 at 3; Trojan Industries Inc., B-220620, Feb. 10, 1986, 86-1 CPD ¶ 143 at 5 ("When an agency requests an extension, it is the responsibility of a bidder that desires to extend its bid to communicate assent, either by insuring that an express extension in fact is received by the agency, or through conduct from which the agency reasonably can infer the bidder's

¹¹ In fact, it was not until April 4 that WSHA submitted a letter expressly extending the acceptance period of its proposal.

intention to extend the bid.”); see also Huega USA, B-234351, June 9, 1989, 89-1 CPD ¶ 545 at 3 n.3.

In rare instances, agencies may infer an extension of a bid or offer acceptance period, where the bidder has taken some affirmative step that provides clear evidence of its intent to extend, and the contracting agency has been fully aware of this action. Discount Mach. & Equip., Inc., *supra*. For example, an offeror that pursues an agency-level or GAO protest provides evidence of its intent to extend its offer acceptance period and to be bound by the offer if the protest were sustained. East West Research, Inc., B-237844, Feb. 28, 1990, 90-1 CPD ¶ 248 at 3; Carothers Constr., Inc., B-235910, Oct. 11, 1989, 89-2 CPD ¶ 338 at 1 n.1. Generally, a party’s active participation in a bid protest tolls its bid acceptance period until the protest is resolved. Native Res. Dev., Inc., B-246597.2, B-246597.3, July 13, 1992, 92-2 CPD ¶ 15 at 9.

Here, because the March 27 objection was not an agency-level protest as discussed above, the Army could not reasonably infer from the communication that WSHA intended to extend its offer and remain in the competition.¹² See Trojan Industries Inc., *supra*. In any event, even assuming, for the sake of discussion, that the objection amounted to an agency-level protest that the Army has unduly delayed implementing corrective action, as WSHA suggests, such a protest would fail to state a valid basis for protest. See Computer Cite, B-412162.3, July 15, 2016, 2016 CPD ¶ 186 at 4-5 (dismissing protest of the length of time that it has taken the agency to complete corrective action because it fails to allege a cognizable basis of protest).

We therefore agree with the Army that WSHA’s March 27 objection and subsequent actions amounted to an outright rejection of the agency’s request that WSHA extend its proposal. See Request for Dismissal, B-414198.3, at 3; Global Auto., Inc., B-406828, Aug. 3, 2012, 2012 CPD ¶ 228 at 4.

Nonetheless, WSHA argues that since it provided an extension “only four business days” later, accepting the proposal at this point would not prejudice competitors or compromise the integrity of the competitive bidding system. See Response at 3. The Army disputes this, arguing that it would prejudice the other offerors who extended their proposal acceptance dates, because the agency has commenced discussions with those offerors.¹³ Request for Dismissal, B-414198.3, at 3. WSHA responds that it

¹² As discussed above, WSHA, in its response to the Army’s requests for dismissal, recasts its March 27 objection as an agency-level protest. WSHA contends that the agency-level protest “only makes any sense if WSHA had every intention of remaining in the competition and would make no sense if WSHA intended to withdraw its proposal.” Response at 3.

¹³ WSHA questions whether the Army actually began discussions between Thursday, March 30 (the deadline set by the contracting officer for offerors to extend their expired proposals) and Tuesday, April 4 (when WSHA extended its proposal). Response at 3.

“cannot possibly gain any advantage” from having its proposal considered, because “WSHA would never be privy” to the other offerors’ discussion questions and it is not uncommon for an offeror to be re-admitted into a competitive range after successfully protesting its elimination. Response at 3-4.

Here, too, we agree with the Army. Where a proposal has expired, we have recognized that an offeror may extend its acceptance period and revive its proposal if doing so would not compromise the integrity of the competitive bidding system. BioGenesis Pac., Inc., B-283738, Dec. 14, 1999, 99-2 CPD ¶ 109 at 6. Circumstances that compromise the system’s integrity include an offeror’s express or implied refusal of a request to extend its offer, and a subsequent request to revive the proposal subject to the offeror’s own interests. Global Auto., Inc., *supra*; AGP/GENtech Inc., B-216268, Dec. 17, 1984, 84-2 CPD ¶ 674 at 3-4 (reviving a bidder’s expired bid would adversely affect the integrity of the competitive bidding system and prejudice other bidders, where other bidders offered the requested acceptance period, but the bidder initially refused to extend the acceptance period and later granted an extension as its own interests dictate). An offeror’s compliance with the requested acceptance period is required so that all offerors share the same business risks of leaving their bids or proposals open for acceptance by the government for the same amount of time. *See* Global Auto., Inc., *supra*, at 3-4. An offeror who is allowed to specify a shorter acceptance period would enjoy an unfair competitive advantage, because it would be able to refuse the award after its bid acceptance period expired should it decide that it no longer wanted the award, for example, because of unanticipated cost increases, market fluctuations, shortages, or better profit opportunities elsewhere. *Id.* at 4.

Under the circumstances here, where WSHA expressly refused to extend the acceptance period of its proposal, while other offerors did extend their acceptance period as requested, we conclude that the Army cannot revive WSHA’s proposal without compromising the integrity of the competitive bidding system. *Id.* (protester could not revive its expired proposal where offeror expressly refused to extend its proposal acceptance period because it would compromise the integrity of the competitive bidding system). In sum, we find that the Army properly removed WSHA’s proposal from consideration for award, and we deny protest B-414198.3 accordingly. *See id.*; Kumasi Ltd./Kukawa Ltd.--Recon., *supra*.

The protests are dismissed in part and denied in part.

Susan A. Poling
General Counsel