U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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

Comptroller General
of the United States

Decision

Matter of: AeroSage, LLC; SageCare, Inc.

File: B-415267; B-415267.2; B-415267.3; B-415267.4; B-415267.5; B-415267.6; B-415267.7; B-415267.8

Date: December 13, 2017

David M. Snyder, AeroSage, LLC, for the protester.
David M. Snyder, SageCare, Inc., for the protester.
Jared M. Miller, Esq., and Journey L. Beard, Esq., Defense Logistics Agency, for the agency.
Stephanie B. Magnell, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the agency's decision not to set aside the procurement for small businesses is dismissed where the protester does not demonstrate that it is an interested party to challenge the solicitation.

2. Protest challenging the agency's decision not to seek a waiver of the small business nonmanufacturing rule for a procurement of fuel is denied where there is no statutory or regulatory requirement for the agency to do so.

3. Protests alleging violations of the Procurement Integrity Act are dismissed, where the protesters fail to allege facts that, if uncontradicted, would establish evidence of improper agency action.

DECISION

AeroSage, LLC, of Tampa, Florida, a service-disabled veteran-owned small business (SDVOSB), protests the terms of request for proposals (RFP) SPE600-17-R-0218, issued by the Defense Logistics Agency (DLA) for various types of fuel to be delivered to Department of Defense and federal civilian agency customers, including the Department of Veterans Affairs (VA). AeroSage asserts that DLA should have set aside the entire procurement for small businesses, that fuel destined for the VA should have been set aside for procurement from SDVOSBs, and that the agency should have sought a waiver of the small business nonmanufacturer rule. Protest at 1-2. AeroSage and SageCare also contend that the agency improperly released source selection information.[1]

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

BACKGROUND

DLA issued the RFP on August 9, 2017, as a combined synopsis/solicitation under the commercial item provisions of FAR subpart 12.6. Agency Report (AR), Tab 2, RFP, at 1. The RFP seeks proposals to deliver fuel to customers in Customer Organized Group 4, which consists of locations in Alabama, Arkansas, Florida, Georgia, Louisiana, Missouri, Mississippi, North Carolina, and South Carolina. Id. The agency assigned North American Industry Classification System (NAICS) code 324110 to the solicitation, which applies to petroleum refineries. Id. The RFP anticipates award of multiple contracts for periods starting at contract award and ending on September 30, 2020. Id.; Contracting Officer's Statement (COS)/Memorandum of Law (MOL) at 2. The total estimated value of the contract line item numbers (CLINs) is $48,929,230. AR, Tab 4, Small Business Coordination Record, Aug. 3, 2017, at 1.

The RFP includes 116 CLINs, each of which is for a specific type of fuel at a delivery location. COS/MOL at 2. The solicitation permits DLA to accept multiple offers by making award by CLIN or CLIN group, unless otherwise limited by the offeror in its proposal. RFP at 204. As relevant here, 27 of the 116 CLINs are for delivery at VA locations.[2] COS/MOL at 2-3. On August 3, with approval from the Small Business Administration (SBA), the contracting officer set aside three CLINs for competitive award to SDVOSBs, with the remaining CLINs solicited under full and open competition. Id. at 3.

On September 12, prior to the September 19 date for receipt of proposals, AeroSage filed this protest challenging the agency's set-aside decision.

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[1] AeroSage filed protests B-415267 through B-415267.5 and B-415267.7. SageCare filed the protest docketed B-415267.6 and B-415267.8. Throughout this protest, references to the protester and its filings refer to AeroSage, and SageCare is referenced by name when we address B-415267.6 and B-415267.8.

[2] The solicitation initially contained 170 CLINs, but this amount was reduced to 116 CLINs by subsequent solicitation amendments at the time of the initial protest filing. AR, Tab 2, at 263, 266, 268. Amendments issued after the protest further changed the number of CLINs. AeroSage disputes DLA's count of both total CLINs and CLINs destined for VA locations. Comments at 1. This dispute and the number of total CLINs and VA CLINs are not relevant to the protest.

DISCUSSION

Interested Party

AeroSage contends that the agency was required to set aside all of the CLINs for small businesses, and that all of the CLINs for the VA should be set aside for SDVOSBs. Protest at 1, citing [38] U.S.C. §§ 8127-8128.[3] DLA argues that the protest should be dismissed because the protester is not an interested party for the purposes of protesting DLA's decisions regarding small business and SDVOSB set-asides. COS/MOL at 5-6. For the reasons below, we agree with the agency.[4]

Under our Bid Protest Regulations, a protester must be an interested party, i.e., an actual or prospective offeror whose direct economic interest would be affected by the award of a contract. 4 C.F.R. § 21.0(a). Determining whether a party is interested involves consideration of a variety of factors, including the nature of the issued 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 1.

The agency assigned NAICS code 324110, Petroleum Refineries, to the solicitation.[5] RFP at 1. Ordinarily, in order to qualify as a small business concern to provide

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[3] The protester's allegations concern requirements under the Veterans Benefits, Health Care, and Information Technology Act of 2006, which, together with VA's implementing regulations, requires the VA to set aside acquisitions for SDVOSBs where there is a reasonable expectation that offers will be received from at least two SDVOSBs and award can be made at a fair and reasonable price. 38 U.S.C. § 8127(d); Veterans Administration Acquisition Regulation § 819.7005(a).

[4] Although AeroSage and SageCare raise other collateral issues that we do not discuss, we have reviewed all of the protesters' arguments and find that none provides a basis to sustain the protest. For example, AeroSage contends that the RFP improperly bundles requirements. Protest at 1. The Federal Acquisition Regulation (FAR) defines bundling as a combination of "two or more requirements for supplies or services, previously provided or performed under separate contracts . . . into a solicitation for a single contract, a multiple-award contract, or a task or delivery order that is likely to be unsuitable for award to a small business concern[.]" FAR § 2.101. As an initial matter, the protester does not allege--let alone demonstrate--that any of the requirements would be unsuitable for award to a small business. Furthermore, given that the agency is permitted to award contracts on a by-CLIN basis, the protester fails to establish that any requirements are bundled. AeroSage thus fails to allege necessary elements of its arguments, and these protest grounds are dismissed as legally and factually insufficient. 4 C.F.R. § 21.1(c)(4); 4 C.F.R. § 21.1(i).

[5] Questions regarding an agency's designation of a NAICS code are matters for resolution by the SBA, which has exclusive authority over NAICS code determination appeals. See 13 C.F.R. § 121.1102; FAR § 19.303(c). Because an agency's choice of
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manufactured products or other supply items for a procurement assigned a manufacturing or supply NAICS code, an offeror must manufacture or produce the item being procured. 13 C.F.R. § 121.406(a)(1). If the offeror does not manufacture the item, the nonmanufacturer rule provides that a small business nonmanufacturer may offer the item, provided that, among other things, the small business represents that it will supply the product of a domestic small business manufacturer or processor, or that a waiver of this requirement is granted by the SBA. 15 U.S.C. § 637(a)(17); 13 C.F.R. § 121.406(b). The nonmanufacturer rule applies to NAICS code 324110. Id.; FAR § 19.102(f)(1). In this regard, the SBA has concluded that the nonmanufacturer rule, as applied to NAICS code 324110, requires a prospective small business offeror that is not a refinery to offer the product of one or more small business refineries. See AeroSage, LLC, SBA No. SIZ-5820, Mar. 23, 2017, 2017 SBA LEXIS 29.

DLA contends that, if the CLINs here were set aside for small businesses, the nonmanufacturer rule would apply, meaning that nonmanufacturer small business offerors would need to obtain fuel from small business manufacturers or producers. COS/MOL at 3-6. The agency argues that AeroSage is not an interested party to challenge the agency's decision not to set aside the CLINs for small business because "AeroSage has provided no evidence that it can or will provide fuel sourced from a small business." Id. at 6. AeroSage responds that it "certified in annual representations and certifications, submitted offers, negotiation certifications, and pre-, post-award certification that it complies with limitations on subcontracting and applicable NMR [non-manufacturer rule]." Comments at 3.

Our Office does not review whether a firm can meet the nonmanufacturer rule, as such a determination is reserved for the SBA. 4 C.F.R. § 21.5(b)(1); Triad Isotopes, Inc., B-411360, July 16, 2015, 2015 CPD ¶ 220 at 9. We will review, however, whether a protester is an interested party to challenge an agency's decision not to set aside a procurement where the protester concedes that it cannot meet the nonmanufacturer rule or otherwise fails to affirmatively state that it will comply with that rule. See Tom Smith Fire Equip. Co., Inc., B-414349, May 15, 2017, 2017 CPD ¶ 148 at 6-7. Here, there is no evidence in the record that AeroSage represents that it is either a small business under NAICS code 324110 or that it will obtain fuel from qualifying small businesses.[6] We conclude that AeroSage is therefore not an interested party to

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NAICS code is a matter for review by the SBA, our Office will not consider it. 4 C.F.R. § 21.5(b); BlueStar Energy Sols., B-405690, Dec. 12, 2011, 2011 CPD ¶ 275 at 3-4.

[6] Our decision here does not relate to whether AeroSage is a small business, as such a determination is reserved solely for the SBA. 4 C.F.R. § 21.5(b). Instead, our decision relates solely to the protester's representations to our Office as to whether it will comply with the nonmanufacturer rule and its interested party status in these protests. In this regard, AeroSage does not rebut DLA's argument that the protester "has provided no evidence that it can or will provide fuel sourced from a small business." COS/MOL at 6. Furthermore, to the extent that AeroSage argues that it, as a small business, can
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challenge DLA's set-aside decisions. This protest ground is dismissed.[7] 4 C.F.R. § 21.1(i).

Waiver of Nonmanufacturer Rule

In challenging the agency's set-aside decision, AeroSage also effectively argues that the nonmanufacturer rule should not be applied to this procurement because fuel cannot be traced to specific refineries. Comments at 3 ("[With] the reasonable realities of the direct delivery ground fuel market it is impossible to know which refinery petroleum products come from."). The protester thus implies that DLA should have sought a waiver from SBA of the nonmanufacturer rule on the basis that no nonmanufacturer offeror would be able to make accurate representations about its suppliers.

Whether the nonmanufacturer rule should be included in a procurement set aside for small businesses primarily depends on the NAICS code assigned to the procurement by the procuring agency. See BlueStar Energy Sols., supra, at 3. In this regard, "[t]he nonmanufacturer rule applies only to procurements that have been assigned a manufacturing or supply NAICS code." 13 C.F.R. § 121.406(b)(3); see FAR § 19.303(a)(2) ("A concern that submits an offer or [quotation] for a contract where the NAICS code assigned to the contract is one for supplies, and furnishes a product it did not itself manufacture or produce, is categorized as a nonmanufacturer and deemed small if it meets the requirements of [the nonmanufacturer rule]."). As our Office has explained, agencies are not required to seek waivers of the nonmanufacturer rule. AeroSage, LLC, B-414640, B-414640.3, July 27, 2017, 2017 CPD ¶ 233 at 5. The FAR provides that, in a specific solicitation, a contracting officer "may request a waiver" of the requirement that products acquired under small business set-asides be manufactured by small businesses. FAR § 19.102(f)(5). Because this provision is discretionary, an agency's refusal to seek a waiver of the nonmanufacturer rule does not provide a basis to sustain a protest. AeroSage, LLC, supra, at 5; Latvian Connection, LLC, B-412701, Apr. 22, 2016, 2016 CPD ¶ 110 at 4 n.9. We therefore find no basis to conclude that DLA was required to seek a waiver of the nonmanufacturer rule here and deny this protest allegation.

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compete for one of the anticipated contracts, this claim undercuts AeroSage's earlier argument that the requirements are improperly bundled and are thus unsuitable for small businesses. See FAR § 2.101.

[7] AeroSage also argues that the agency failed to provide a copy of a "letter of commitment" explaining how a firm could demonstrate that it was providing the product of a small business refinery. Comments at 2. The protester does not cite any obligation under any procurement law or regulation for the agency to provide an offeror with such a sample of an acceptable letter.

Procurement Integrity Act

AeroSage and SageCare argue that DLA violated the procurement integrity provisions of the Office of Federal Procurement Policy Act, as amended, 41 U.S.C. §§ 2101-2107, known as the Procurement Integrity Act, by sending an email that says that it “may contain” “Source Selection Information.” B-415267.5, Protest, at 3; B-415267.6, Protest, at 3.[8] We dismiss these protest grounds because, as filed with our Office, they do not establish a valid basis for challenging the agency’s action.

Our Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) and (f), require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. Midwest Tube Fabricators, Inc., B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

The Procurement Integrity Act provides, among other things, that a federal government official “shall not knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.”[9] 41 U.S.C. § 2102(a)(1). Here, the protests do not include sufficient information to establish the likelihood that the agency violated applicable procurement laws or regulations. The email attached to the protests, about which the protesters complain, states that it “may contain” “Source Selection Information.” The text in the email highlighted by the protesters provides the email addresses of potential offerors and informs them that the online system is “now open to enter offers.” B-415267.5, Exh. A, at 2; B-415267.6, Exh. A, at 2. Neither AeroSage nor SageCare describes what bid or proposal information or source selection information was improperly released. The protesters thus fail to allege facts that, if uncontradicted,

[8] AeroSage’s protest, B-415267.5, and SageCare’s protest, B-415267.6, both filed on November 20, 2017, are identical in all material respects and raise identical grounds.

[9] Our Bid Protest Regulations provide that we will not review an alleged violation of subsections (a), (b), (c), or (d) of sec. 27 of the Office of Federal Procurement Policy Act, 41 U.S.C. 423, as amended by sec. 4304 of the National Defense Authorization Act for Fiscal Year 1996, Public Law 104-106, 110 Stat. 186, February 10, 1996, where the protester failed to report the information it believed constituted evidence of the offense to the Federal agency responsible for the procurement within 14 days after the protester first discovered the possible violation. 4 C.F.R. § 21.5(d). Because we dismiss the protest grounds for legal and factual insufficiency, we do not consider whether our Office should otherwise review the protest grounds.

would provide evidence of improper agency action. These protest grounds are therefore dismissed without further action. 4 C.F.R. § 21.5(f).

The protests are dismissed in part and denied in part.[10]

Thomas H. Armstrong
General Counsel

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[10] On November 6, DLA issued amendment 0007, which added 14 CLINs to the solicitation and provided a response deadline of November 13. AeroSage protested the time allotted to submit revised proposals as insufficient. B-415267.2, First Supp. Protest, Nov. 9, 2017, at 2. On November 13, DLA issued amendment 0008, which deleted 6 CLINs and extended the response deadline to November 21. DLA requested that we dismiss the challenge in B-415267.2 to the amendment 0007 deadline on the basis that it was rendered academic by the amendment 0008 extension. Req. for Dismissal, Nov. 14, 2017. AeroSage fails to respond to the agency's arguments and instead only expresses concern about the method of notice the agency used to distribute amendment 0007, despite the fact that this method directly provided AeroSage with immediate notice . Resp. to Req. for Dismissal, Nov. 21, 2017, at 1. Because AeroSage fails to explain why the agency's extension of time in amendment 0008 does not render academic its protest of the response deadline set by amendment 0007, we dismiss B-415267.2 as academic. Ferris Optical, B-403012.2, B-403012.3 Oct. 21, 2010, 2010 CPD ¶ 265 at 2.

In addition, we dismiss AeroSage's protest B-415267.7 and SageCare's protest B-415267.8, which were filed on December 4, 2017, and are identical in all material respects. The protest allegations therein largely repeat grounds previously raised, albeit in relation to amendment 0009, which the agency issued during the pendency of this protest. We find nothing within amendment 0009 that renders the repeated grounds newly meritorious. The protests also appear to argue that DLA conducted misleading discussions by refusing to discuss AeroSage's and SageCare's ongoing protests during negotiations. B-415267.7, Protest, at 1; B-415267.8, Protest, at 1. The protesters do not describe any legal theory that would render such refusal improper. The protesters thus fail to provide either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that they will prevail in its claim of improper agency action, and the protest grounds are dismissed. Midwest Tube Fabricators, Inc., supra; 4 C.F.R. § 21.1(c)(4), (f); 4 C.F.R. § 21.1(i).