



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-415267.13; B-415267.14

Date: March 19, 2018

David M. Snyder, AeroSage, LLC; David M. Snyder, SageCare, Inc., for the protesters. Jared M. Miller, 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

Protests are dismissed where they are untimely or fail to state a valid basis of protest.

DECISION

AeroSage LLC, of Tampa, Florida, and SageCare, Inc., also of Tampa, Florida, each a service-disabled veteran-owned small business (SDVOSB), protest various aspects of the structure and award of request for proposals (RFP) No. SPE600-17-R-0218, which was issued by the Defense Logistics Agency (DLA) for various fuel products at locations thought the southeastern United States and partially set aside for award to SDVOSBs. The protesters also allege that the agency failed to comply with the performance stay required by the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(d)(1).

We dismiss the protests.

BACKGROUND

Prior to filing the instant protests, the protesters each had a pending protest of the same procurement at issue here.¹ In those protests, the protesters presented their grounds

¹ These protests were docketed as B-415267.11 (SageCare, filed January 5, 2018) and B-415267.12 (AeroSage, filed January 16, 2018). They were later dismissed on February 27, 2018, after the protesters failed to file comments in response to the agency report, as required by our Bid Protest Regulations. SageCare, Inc.; AeroSage LLC, B-415267.11, B-415267.12, Feb. 27, 2018 (unpublished decision).

as “a protest of the Agency’s improprieties in negotiations and evaluation of protestor’s offers, improper contract terms, quantities, and technical requirements in violation of interagency fuel regulations, and procurement integrity violation prejudicing protestor and limiting ability to obtain certificates of analysis (COA) or best price for the government.” B-415267.11, SageCare Protest, at 1. See almost identical language at B-415267.12, AeroSage Protest, at 1.

On January 30, 2018, in the course of those protests, DLA advised the protesters that the head of the contracting activity had authorized award and performance of contracts under the RFP, in accordance with the Competition in Contracting Act (CICA) of 1984, 31 U.S.C. § 3553(c) and (d). DLA Email, Jan. 30, 2018.

On February 9, the protesters filed the joint protests at issue here challenging DLA’s decision to continue with contract performance. Protest at 4. The protesters also contested various aspects of the structure of the RFP and the agency’s evaluations and awards. Id. at 5-7. After reviewing the joint protests, the GAO attorney assigned to the protest instructed the protesters to indicate whether the February 9 joint protest raised new protest issues or whether the protest grounds were duplicative of those raised in the pending protests, e.g., B-415267.11 and B-415267.12. GAO Email, Feb. 13, 2018.

The protesters summarized the new protest issues (i.e., those not previously raised in protests B-415267.11 and B-415267.12) as allegations of: (1) improper pre-award and post-award notice; (2) violations of Defense Logistics Acquisition Directive (DLAD) 33.104; (3) improprieties with the override of the stay imposed by CICA; (4) problems with award and evaluation, including award made after override of the CICA stay and awards made based on allegedly flawed underlying specifications; (5) general errors in the solicitation (such as unspecified but “erroneous requirements which have just come to light”); (6) flaws in certain specifications in the solicitation, such a failure to follow the “Veterans Benefit Act”; (7) problems with the solicitation’s certification requirement; (8) failing to provide the protester with copies of certain documents; and (9) a faulty solicitation structure such that awards might decrease SDVOSB participation.²

AeroSage/SageCare Email, Feb. 13, 2018. In addition, the protesters provided the following statement regarding their protest grounds: “We do not know what awards were made, when, and why awards were made. Any awards that we might know about were improper and/or have been changed without notice.” Id.

² This description is a general summary of the issues identified as new (and thus unique to protests B-415267.13 and B-415267.14) raised by the protesters. Because each ground is dismissable as described below, the details of each ground are not discussed in detail. To the extent that the protesters simply resubmitted issues first raised in protests B-415267.11 and B-415267.12, those grounds were dismissed in the decision issued in those protests. SageCare, Inc.; AeroSage LLC, B-415267.11, B-415267.12, Feb. 27, 2018 (unpublished decision).

On February 20, DLA requested that we dismiss all of the protest grounds. DLA Response, Feb. 20, 2018. Our Office suspended the deadline for production of the agency report in these protests and instructed the protesters to address the agency's arguments for dismissal. GAO Email, Feb. 21, 2018. As excerpted in part below, the protesters did not substantively respond to the agency's dismissal request:

We [AeroSage and SageCare] do not have sufficient time, given the other demands of [a] responsible small business and the one-sided timeliness and decisions, to respond the Agency comments without an AR [agency report]

We will not be able to provide a response to these comments by COB [close of business], today. Since you've constructive[ly] dismissed them³ without response or documentation, we will have to seek other venue for fair, impartial adjudication of these violations.⁴

AeroSage/SageCare Email, Feb. 22, 2018. The protesters also again raised issues related to other protests that were not consolidated with the protests at issue here. Id.

DISCUSSION

Although the protesters raise a multitude of protest grounds, each ground is dismissable under one or more of the three dismissal bases described below. Furthermore, the protesters failed to substantively respond to the agency's request for dismissal, which contested each of the protest grounds. For these reasons, all of the protest grounds are dismissed.

Untimely Protest Grounds

The protesters challenge various aspects of the solicitation and award, for example, the fact that awards were allegedly made on the basis of "erroneous [solicitation] requirements which have just come to light." AeroSage/SageCare Email, Feb 13, 2018. These challenges are untimely.

On August 9, 2017, DLA issued the solicitation as a combined synopsis/solicitation under the commercial item provisions of Federal Acquisition Regulation (FAR)

³ To the extent that the protester was objecting to our Office's decision not to grant an extension to the deadline for submission of comments in protests B-415267.11 and B-415267.12, that complaint is not relevant to the agency's request for dismissal here.

⁴ Our Office subsequently inquired whether, based on this statement, the protesters were withdrawing the protests. GAO Email, Feb. 23, 2018. The protesters confirmed that, despite the stated intent to move the protest to a different forum, they did not in fact intend to withdraw the protests at issue here. Protesters Email, Feb. 23, 2018.

subpart 12.6. RFP at 1. Final proposals were due by September 19, 2017. *Id.* at 306. These protests were filed on February 9, 2018, *i.e.*, several months after the proposal due date. Thus, to the extent that the protest grounds here, such as issues (4) and (5) above, challenge any aspect of the solicitation, they are untimely and are dismissed. 4 C.F.R. § 21.2(a)(1) (“Protests based upon alleged improprieties in a solicitation . . . shall be filed prior to bid opening or the time set for receipt of initial proposals.”).

Similarly, protest grounds challenging any specific award are also untimely. In this regard, our Bid Protest Regulations provide that all protests other than challenges to a solicitation must be filed within 10 days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2). On January 4, DLA informed AeroSage and SageCare that their proposals were technically unacceptable and that DLA had made award to another SDVOSB. SageCare, Inc.; AeroSage LLC, *supra*, at 2. Thus, the protesters were required to raise challenges to the agency’s evaluation or award under the RFP here by 5:30 p.m. on January 16; hence, raising these challenges on February 9 fails to meet the timeliness requirements for GAO protests.⁵ 4 C.F.R. § 21.2(a)(2).

CICA

Next, the protesters allege that the agency improperly failed to stay performance of the contract notwithstanding the protest, as required by CICA and DLAD 33.104.⁶ Protests at 4-5. In this regard, the protesters argue that “[t]here is no reasonable justification that these awards are urgent or compelling given they are currently available for performance by other proper acquisition vehicles.”⁷ *Id.* The agency contends that “[t]his issue falls outside of GAO’s bid protest function and should be dismissed.”

⁵ Because January 14, 2018, was a Sunday, and January 15 was a federal holiday, the protests could have been timely filed at GAO prior to 5:30 p.m. on January 16. 4 C.F.R. § 21.0(d).

⁶ In general, this provision of the Defense Logistics Acquisition Directive provides internal guidance to DLA’s contracting offices about the procedures to follow after receiving notice of a bid protest at GAO. The protesters do not specify how the agency allegedly failed to comply with any portion of DLAD 33.104.

⁷ The protesters also argue that the agency’s decision to continue with performance was made in “bad faith.” Protest at 4. A protester’s contention that procurement officials are motivated by bias or bad faith must be supported by convincing proof; our Office will not consider such allegations based on mere inference, supposition, or unsupported speculation. Career Innovations, LLC, B-404377.4, May 24, 2011, 2011 CPD ¶ 111 at 7-8. The protesters fail to make allegations that, if true, would provide convincing proof of bad faith. Moreover, even if the protesters could establish bad faith on the part of the agency, our Office has no jurisdiction to consider whether an agency improperly failed to comply with a stay of performance. Serco Inc., B-410676.2, Dec. 12, 2014, 2014 CPD ¶ 371 at 2

Agency Response to Protester's Statement of Issues, Feb. 20, 2018, at 2. The protesters chose not to rebut this argument.

Under CICA, a contracting agency is required to suspend contract performance if it receives notice of a protest from our Office within 10 calendar days of the date of contract award. 31 U.S.C. § 3553(d)(3), (d)(4)(A). However, an agency's failure to adhere to the stay requirement in 31 U.S.C. § 3553(d)(3)(A) is not a valid basis of protest. 4 C.F.R. § 21.6 ("GAO does not administer the requirements to stay award or suspend contract performance under CICA"); Serco Inc., supra, at 2 (whether the agency failed to comply with the stay of performance is not a matter for consideration by GAO). To the extent that the protests challenge the agency's decision to continue with performance, whether under CICA, DLAD 33.104, or any other statute, regulation, or guidance, those allegations are dismissed.

Failure to State a Valid Basis of Protest

The protesters also challenge the agency's decision to make various awards. See, e.g., Protesters' Email, Feb. 13, 2018. However, in summarizing their protest grounds, the protesters also advised our Office as follows: "We do not know what awards were made, when, and why awards were made. Any awards that we might know about were improper and/or have been changed without notice." AeroSage/SageCare Email, Feb. 13, 2018. Our Bid Protest Regulations state that protesters must "[s]et forth a detailed statement of the legal and factual grounds of protest" and require a protester to "clearly state legally sufficient grounds of protest." 4 C.F.R §§ 21.1(c)(4), (f). The regulations also provide for dismissal of protests that fail to satisfy either of these requirements. 4 C.F.R § 21.1(i). The statement above denies knowledge of basic, important facts relevant to the protest grounds and calls into question the existence of a factual predicate for any award-related protest ground. The statement shows that the protesters lack sufficient factual basis for their protests and the protest grounds contesting the basis of award are thus dismissed.

Similarly, the protesters raised several arguments related to lack of notice, such as "[a]wards made with [i]mproper, incorrect, and not provided pre-award and (AeroSage) post-award notice and awards improperly changed without notice." AeroSage/SageCare Email, Feb. 13, 2018. In all instances alleging a problem with notice, the protesters fail to state a sufficient legal basis for these protest grounds or a complete factual predicate. Thus, the protest grounds related to notice are similarly dismissed under 4 C.F.R § 21.1(i).

The protests are dismissed.

Thomas H. Armstrong
General Counsel