



Decision

Matter of: AeroSage, LLC; SageCare, Inc.

File: B-415607; B-415607.2; B-415607.3

Date: January 3, 2018

David M. Snyder, AeroSage, LLC; David M. Snyder, SageCare, Inc., for the protesters. Aharon King, Tayrona Oil, Inc., for the intervenor. Jared M. Miller, Esq., Defense Logistics Agency, for the agency. Evan D. Wesser, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest filed more than 40 days after the protester's owner and president had actual notice of the protester's non-selection for award is dismissed because it is untimely.
 2. Protest that an agency unreasonably failed to amend the solicitation to alter the delivery schedule is denied where the protester failed to establish any competitive prejudice.
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DECISION

AeroSage, LLC, a small business, of Tampa, Florida, and SageCare, Inc., a small business, of Tampa, Florida, protest the award of a contract to Tayrona Oil, Inc., a small business, of West Palm Beach, Florida, under purchase request No. 71150203, issued by the Defense Logistics Agency (DLA), for 5,000 gallons of fuel to the Milwaukee Veterans Administration Medical Center (MVAMC). The protesters primarily allege that DLA unreasonably modified the purchase request's delivery schedule without issuing an amendment.

We dismiss SageCare's protest and deny AeroSage's protest.

BACKGROUND

On October 5, 2017, the MVAMC placed a purchase request with DLA for 5,000 gallons of fuel for delivery on Friday, October 13. Agency Report (AR), Tab 2, Purchase Request, at 1. On October 10, the DLA contracting specialist emailed potential offerors a request for quotations. The contracting specialist sent one request to Tayrona, and

one to the owner and chief executive officer of both AeroSage and SageCare.¹ AR, Tab 4, Request for Quotation to Tayrona, at 1; Tab 5, Request for Quotation to AeroSage/SageCare, at 1. The request (1) represented that the procurement was being conducted as a small business set-aside, (2) confirmed that delivery was for 5,000 gallons of fuel on Friday, October 13, (3) requested quotations by no later than 11:30 a.m. on Thursday, October 12, and (4) provided that award would be made on a lowest-priced, technically-acceptable basis. AR, Tab 4, Request for Quotation to Tayrona, at 1; Tab 5, Request for Quotation to AeroSage/SageCare, at 1. In response to questions from AeroSage and Tayrona, DLA clarified that the procurement was actually set aside for service-disabled, veteran-owned small businesses. AR, Tab 7, AeroSage Quotation, at 1-2; Tab 8, Tayrona Quotation, at 2.

DLA timely received quotations from the three firms that it had solicited, Tayrona, AeroSage, and SageCare. AR, Tab 6, SageCare Quotation; Tab 7, AeroSage Quotation; Tab 8, Tayrona Quotation. Tayrona submitted the lowest-priced quotation of \$2.3487 per gallon, and did not take any exceptions to the applicable terms of the solicitation. AR, Tab 8, Tayrona Quotation, at 1. The contracting specialist represents that he notified Tayrona via telephone on the morning of October 12 that its quotation was selected for award. AR, Tab 11, Contracting Specialist's Decl., at 2. Shortly after contacting the awardee, however, the contracting specialist represents that he was contacted via telephone by an official with the Department of Veterans Affairs indicating that the delivery had to be rescheduled for Tuesday, October 17. *Id.* The contracting specialist contacted Tayrona via telephone to confirm whether the company would agree to the revised delivery schedule at the same awarded price, and the awardee confirmed. *Id.*

Following that telephone conversation, the contracting specialist then emailed Tayrona to confirm that DLA was going to award the order to Tayrona and indicated that the delivery date was now Tuesday, October 17. AR, Tab 9, Email from DLA to Tayrona, at 1. The contracting specialist then emailed AeroSage and SageCare respectively to indicate that neither firm submitted the lowest-priced, technically acceptable quotation. Those emails also indicated that the delivery date was now Tuesday, October 17. AR, Tab 10, Email from DLA to AeroSage, at 1; Request to Dismiss SageCare's Protest, exh. No. 1, Email from DLA to SageCare at 1.²

Following receipt of the notice, AeroSage filed an agency-level protest with DLA on October 12. The primary protest allegation raised by AeroSage was "[t]he contracting

¹ Both AeroSage and SageCare are owned and operated by the same individual, as noted in several of our prior decisions. See, e.g., SageCare, Inc.; AeroSage, LLC--Recon., B-414168.4 et al., July 13, 2017, 2017 CPD ¶ 224 at 3-4; AeroSage, LLC, B-414314, B-414314.2, May 5, 2017, 2017 CPD ¶ 137 at 2, 7.

² The notice to SageCare was emailed to the SageCare president's AeroSage email account. As discussed above, the same individual owns and is the chief executive officer of both companies.

officer solicited the RFQ for requirement delivery for Oct[ober] 13, 2017, but awarded the purchase order for delivery four days later, October 17, 2017 prejudicing the protester by changing the date, and thus the pricing uncertainty of the delivery.” AeroSage Protest, attach., Agency-Level Protest, at 1. On Monday, October 23, AeroSage filed the instant protest with our Office.

On November 22, SageCare filed a request to intervene in AeroSage’s protest. On the same day, our Office denied the request to intervene on the basis that SageCare was a disappointed offeror, not the awardee of the protested contract.³ We further explained that “[t]o the extent that SageCare, a disappointed offeror, believes that there were errors in the procurement, SageCare must file its own protest subject to our Bid Protest Regulations.” Email from GAO (Nov. 22, 2017) at 1. SageCare subsequently filed its protest on November 24.

DECISION

AeroSage and SageCare both primarily allege that the agency unreasonably modified the solicitation’s delivery schedule without issuing an amendment. For the reasons that follow, we dismiss SageCare’s protest because it is untimely, and deny AeroSage’s protest because the protester has failed to establish competitive prejudice.⁴

³ Under our Bid Protest Regulations, intervenor “means an awardee if the award has been made.” 4 C.F.R. § 21.0(b)(1).

⁴ AeroSage raises other collateral arguments. While our decision does not specifically address every argument, we have considered all of the protester’s additional assertions and find that none provides a basis on which to sustain the protest. For example, AeroSage also challenged the sufficiency of the requested Federal Acquisition Regulation (FAR) § 13.106-3(c) post-award notice provided by DLA because it did not disclose the awardee’s proposed price, and alleged that the agency engaged in bad faith by failing to timely resolve AeroSage’s agency-level protest. See AeroSage Protest at 1-2. Neither of these arguments states legally or factually sufficient bases of protest. First, even accepting AeroSage’s contention that the agency’s post-award notice did not comply with the FAR’s applicable requirements, such a failure would only be procedural in nature, and we will not sustain a protest of an agency’s failure to comply with such procedural requirements absent prejudice to the protester. See, e.g., Jenco Marine, Inc., B-278929.7, Feb. 11, 1999, 99-1 CPD ¶ 32 (denying protest that an agency failed to provide a required pre-award notice to a small business concern where, notwithstanding such failure, the protester still filed a timely size appeal). Here, the awardee’s price was irrelevant to AeroSage’s timely protest relating to the modification of the solicitation’s delivery schedule. Similarly, whether the agency reasonably considered AeroSage’s agency-level protest is not properly for our consideration because such post-award conduct has no bearing on the validity of the challenged underlying procurement or award.

SageCare

DLA moved to dismiss SageCare's November 24 protest as untimely because it was filed more than 10 days after the protester's owner and president had actual knowledge that SageCare had not been selected for award and of the change to the delivery schedule. Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, 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).

In response, SageCare seems to measure the timeliness of its protest from when SageCare's president received the awardee's price information through the agency report submitted in response to AeroSage's protest. See SageCare Opp. to Request for Dismissal at 1, 3. DLA's October 12 notice to SageCare's president, however, clearly indicated that the protester's quotation was not the lowest-priced, technically-acceptable quotation, and that delivery was moved to Tuesday, October 17. Request to Dismiss SageCare's Protest, exh. No. 1, Email from DLA to SageCare at 1. Thus, the protester was aware of the material facts relevant to its asserted protest ground related to the modification of the delivery schedule as of October 12. Its November 24 protest, filed more than 40 days later, is untimely, and therefore the protest is dismissed.⁵

AeroSage

AeroSage argues that the agency unreasonably changed the solicitation's delivery schedule without amending the solicitation and allowing all offerors to compete against the new schedule. The protester contends that "[a] four day change in a solicitation time can both dramatically impact price/availability and the risks quoters are able to accept to provide best prices to [the] government." AeroSage Comments at 1; see also id. at 3 ("AeroSage was prejudiced in this solicitation with a significant change in the solicitation prior to award.").⁶

We have generally recognized that when the government changes its requirements prior to award, it must notify all offerors of the changed requirements and to afford them an opportunity to respond to the revised requirements. See, e.g., Triad Logistics Servs.

⁵ To the extent SageCare attempts to rely on the "debriefing" exception to the timeliness rule set forth above, this procurement was conducted pursuant to the simplified acquisition procedures in FAR Part 13, which do not require debriefings. See Gorod Shtor, B-411284, May 22, 2015, 2015 CPD ¶ 162 at 3.

⁶ The agency argued that the change in delivery schedule was a matter of contract administration. As discussed above, however, the change occurred after proposals were submitted and evaluated, but before the contract award was formally made on October 13. Therefore, we do not find that the schedule change can reasonably be considered as a matter of contract administration.

Corp., B-406416, Mar. 19, 2012, 2012 CPD ¶ 118 at 2, recon. denied, B-406416.2, June 19, 2012, 2012 CPD ¶ 186; Aqua-Flo, Inc., B-283944, Dec. 30, 1999, 99-2 CPD ¶ 116 at 3; Diversified Computer Consultants, B-230313, B-230313.2, July 5, 1988, 88-2 CPD ¶ 5 at 9. Moreover, a contract's period of performance is generally considered to be a material solicitation requirement. Triad Logistics Servs. Corp., supra.

Our Office will not sustain a protest, however, unless the protester demonstrates a reasonable possibility of prejudice, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. Id. at 3; Aqua-Flo, Inc., supra. Here, the protester has offered no evidence that it was in fact prejudiced by the agency's failure to amend the delivery schedule by four days through the issuance of an amendment. The protester has not asserted that, let alone substantiated how, it would have reduced its unit pricing by an amount that would have overcome the awardee's price advantage. AeroSage's unsupported speculation that the change in delivery schedule could have impacted its proposed price is insufficient to establish competitive prejudice.

The protests are denied in part and dismissed in part.

Thomas H. Armstrong
General Counsel