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Decision

Matter of: Deque Systems, Inc.

File: B-415965.4

Date: June 13, 2018

Susan Warshaw Ebner, Esq., Sean D. Lee, Esq., and Jacqueline R. Scott, Esq., Fortney & Scott, LLC, for the protester.

Jeffery M. Chiow, Esq., Robert S. Metzger, Esq., Stephen L. Bacon, Esq., and Lucas T. Hanback, Esq., Rogers Joseph O'Donnell, PC, for Level Access, Inc., the intervenor.

Frank V. DiNicola, Esq., Department of Veterans Affairs, for the agency.

Nora K. Adkins, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging agency's corrective action, which was taken in response to an earlier protest, is dismissed as premature where the protester merely anticipates improper prejudicial agency action.

2. Protester's argument that another firm has an impermissible conflict of interest, and thus should be precluded from competing under solicitation, is dismissed as premature where award has not yet been made.

DECISION

Deque Systems, Inc., a small business located in Herndon, Virginia, challenges the terms of the corrective action undertaken by the Department of Veterans Affairs (VA) in response to Deque's protest (B-415965, B-415965.2, B-415965.3) of the award of a contract to Level Access, Inc., of Vienna, Virginia, pursuant to request for proposals (RFP) No. VA118-18-R-0143 for Section 508 program scanning and services.¹ Deque alleges that the agency's corrective action is improper. The protester also alleges bias on behalf of agency officials and argues that new facts have emerged to establish that there is an organizational conflict of interest (OCI) that the agency has not properly addressed.

¹ Section 508 refers to the Rehabilitation Act of 1973, as amended, which generally requires that agencies' electronic and information technology be accessible to people with disabilities. See 29 U.S.C. § 794d.

We dismiss the protest.

BACKGROUND

The VA Section 508 Office is responsible for determining the accessibility compliance levels of electronic information and technology (EIT) developed, procured, maintained, or used by VA. RFP, amend. No. 5, at 30. Part of this role is to assess the accessibility compliance level of websites, applications, eLearning courses, mobile software in development and sustainment, and various software platforms or collaboration environments/tools. Id. To ensure compliance with the regulations set forth in Section 508, VA requires software and services to assist with the EIT compliance assessments. Id.

The VA issued the solicitation on October 6, 2017, as a small business set-aside for Section 508 accessibility compliance scanning and services including project management; automated and manual testing; dashboard reporting; help desk activities; and training. Id. at 1-2, 33. The RFP stated that award of a fixed-price contract would be made on a best-value tradeoff basis using four evaluation factors: technical, price, past performance, and veterans involvement. Id. at 134, 144.

On January 18, 2018, the agency notified Deque that Level Access was awarded the contract. On January 26, Deque filed a protest with our Office challenging the agency's award decision. Deque's protest alleged the following: (1) the agency's evaluation of the awardee's technical approach was unreasonable because all of the significant strengths and strengths were based on unstated evaluation criteria and applied unequally; (2) the agency's evaluation of the protester's technical approach was flawed because it failed to assign multiple significant strengths and strengths; (3) the agency's evaluation of the awardee's past performance was unreasonable because it failed to follow the RFP criteria, did not include a relative risk evaluation, and failed to individually evaluate prime contractor and subcontractor references; and (4) the agency failed to properly investigate, mitigate, or resolve organizational conflicts of interests of the awardee.² Deque also filed a size status protest with the Small Business Administration (SBA) alleging that Level Access was not a small business eligible for award.

On April 16, the SBA concluded that Level Access was not a small business for the current procurement. See Protest, Enc. No. 2, SBA Size Determination, Apr. 16, 2018, at 10-11. On April 18, a copy of the decision was provided to our Office. Email to GAO, Apr. 18, 2018. Thereafter, on April 19, the GAO attorney assigned to the protest requested that the VA explain the "impact of the SBA's decision on the current GAO protest and the agency's intended action." GAO Email to VA, Apr. 19, 2018, at 1. The

² The protester also alleged a violation of the Procurement Integrity Act which we dismissed as untimely because Deque did not report the alleged violation of the Act to the contracting agency within 14 days after becoming aware of the information or facts giving rise to the alleged violation. See 4 C.F.R. § 21.5(d).

VA responded that its action was “dependent upon the GAO’s determination of this matter.” VA Email to GAO, Apr. 19, 2018, at 1.

On April 20, at the request of agency, the GAO attorney assigned to the protest conducted an outcome prediction alternative dispute resolution (ADR) conference.³ The GAO attorney advised that she would likely draft a decision sustaining the protest based on the agency’s evaluation of the awardee’s past performance. The GAO attorney also advised that she would likely deny all other protest allegations.

On April 23, the VA advised that it would take corrective action in response to the protest. Specifically, the agency stated that it would take the following actions:

[T]he Agency has decided to take the following corrective action. The Agency will reopen the evaluation for the limited purpose of reassessing LA’s [Level Access] and Deque’s past performance (PP) proposals. The Agency will evaluate the PP proposals in strict accordance with the Solicitation, to include how it defined a major subcontractor. The new PP evaluations (i.e., the PP evaluation reports) will be presented to the Source Selection Authority (SSA). The SSA will then render a new award determination in full consideration of those revised PP evaluation reports.

Agency Notice of Corrective Action, Apr. 23, 2018, at 1.

On April 25, our Office dismissed the protest, concluding that the agency’s proposed corrective action rendered the protest academic. Deque Sys., Inc., B-415965 et al., Apr. 25, 2018 (unpublished decision.) In the decision, we noted that the protester objected to the dismissal of the protest, asserting that Level Access was not eligible for consideration in this procurement because the Small Business Administration determined that the Level Access is not a small business concern for the applicable size standard of \$27.5 million. Protester’s Objection to Corrective Action, Apr. 24, 2018, at 1. Our decision advised that Deque’s objections “raise separate potential protest grounds; to the extent the protester wishes to pursue these protest allegations, it must file a separate protest in accordance with our Bid Protest Regulations.” Deque Sys. Inc., supra, at 2 n.3.

On April 30, Deque filed this protest.

³ In an outcome prediction ADR conference, the GAO attorney assigned to the protest will inform the parties as to his or her views regarding whether the protest is likely to be sustained or denied. Bid Protest Regulations, 4 C.F.R. § 21.10(e); see First Coast Serv. Options, Inc., B-409295.4, B-409295.5, Jan. 8, 2015, 2015 CPD ¶ 33 at 3. The purpose of such outcome prediction conferences is to facilitate the resolution of a protest without a formal decision on the merits by our Office.

DISCUSSION

Deque argues that the agency's corrective action is improper because the agency cannot include an ineligible offeror in its reevaluation. Deque argues that since Level Access has been determined to be an other-than-small business for the purposes of this procurement, the only reasonable corrective action would be for the agency to exclude Level Access from further consideration and reevaluate Deque's proposal for contract award. The protester also alleges bias on behalf of agency officials⁴ and argues that new facts have emerged to establish that there is an OCI that the agency has not properly addressed.

As a general matter, the details of corrective action are within the sound discretion of the contracting agency, and an agency may reasonably limit the scope of proposal revisions, provided such limitation is appropriate to remedy the procurement impropriety. Nuclear Prod. Partners, LLC, B-407948.9, September 24, 2013, 2013 CPD ¶ 228 at 7. We note that we have considered the merits of various protests challenging the adequacy of an agency's proposed corrective action. In doing so, in those instances where the agency's proposed corrective action alters or fails to alter the ground rules for the competition (*i.e.*, aspects that apply to all offerors), we have considered a protester's challenge of such to be analogous to a challenge to the terms of a solicitation, thus providing the basis for protest prior to award. See Domain Name Alliance Registry, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 7-8 (protest challenging agency's decision not to reopen discussions). However, in those instances where the agency's proposed corrective action does not alter the ground rules for the competition, we have considered a protester's corrective action preaward challenge to be premature. Nuclear Prod. Partners, LLC, *supra*; SOS International, Ltd., B-407778.2, Jan. 9, 2013, 2013 CPD ¶ 28 at 2. Here, we conclude that Deque's protest complaints challenging the agency's consideration of Level Access's proposal are premature.

Deque argues that the course of corrective action contemplated by the agency--reevaluating the past performance proposals of both Deque and Level Access--will lead to an improper evaluation because the RFP was set-aside for small businesses and Level Access has been determined by the SBA to be other-than-small for this procurement. Contrary to the protester's assertions however, the agency's decision to reevaluate Level Access' past performance proposal does not change the ground rules

⁴ In this regard, Deque alleges that a correspondence asking whether Deque's pricing is valid through September 30, 2018, establishes that the agency has no intent to take proper and prompt corrective action. We do not agree. Government officials are presumed to act in good faith, and 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 allegations based on inference, supposition or unsupported speculation. BAE Sys. Tech. Solutions & Servs., Inc., B-409914, B-409914.2, Sept. 16, 2014, 2014 CPD ¶ 322 at 11. Accordingly, we find these allegations do not provide a valid basis of protest and are therefore dismissed.

of the competition. In this regard, the agency has represented that neither the solicitation's small business set-aside requirement nor the evaluation scheme has changed. Thus, we do not view the ground rules of this procurement to have been changed in a manner that warrants our preaward review. Accordingly, based on the record here, we decline to reach any conclusions, at this time, as to the reasonableness of the agency's evaluation and award decision, and we dismiss Deque's protest regarding those matters as premature.⁵ If Deque is not selected for award, it may raise its challenges to the agency's reevaluation at that time.

Deque's protest also alleges that new facts have emerged to establish that there is an OCI that the agency has not properly addressed. Again, these allegations are premature.

As a general rule, a protester is not required to protest that another firm has an impermissible OCI until after that firm has been selected for award. Liquidity Servs., Inc., B-409718 et al., July 23, 2014, 2014 CPD ¶ 221 at 9; REEP, Inc., B-290688, Sept. 20, 2002, 2002 CPD ¶ 158 at 1-2. We have, however, applied a different rule where a solicitation is issued on an unrestricted basis, the protester is aware of the facts giving rise to the potential OCI, and the protester has been advised by the agency that it considers the potential offeror eligible for award. Honeywell Tech. Solutions, Inc., B-400771, B-400771.2, Jan. 27, 2009, 2009 CPD ¶ 49 at 6; Abt Assocs., Inc., B-294130, Aug. 11, 2004, 2004 CPD ¶ 174 at 2. In such cases, the protester cannot wait until an award has been made to file its protest of an impermissible OCI, but instead must protest before the closing time for receipt of proposals. Abt Assocs., Inc., supra.

We find that, unlike Honeywell, the facts here do not weigh in favor of granting an exception to our general rule. The current OCI allegation was raised for the first time in Deque's corrective action protest. The VA has yet to advise Deque that it has considered and resolved the new OCI concerns regarding Level Access. Thus, we find no basis to require Deque to file a protest at this time. Moreover, treating protests such as this one as premature may avoid unnecessary litigation, since the allegedly conflicted firm may not be the eventual awardee, either because it loses the competition, is found ineligible for award under the small business set-aside procurement, or is found to have an impermissible conflict of interest. REEP, Inc., supra. Unless the firm with the alleged conflict of interest is actually selected for award, the protester has not suffered any competitive prejudice; we will not sustain a protest

⁵ We also note that Level Access has challenged the SBA's other-than-small business finding at the SBA's Office of Hearings and Appeals.

absent a showing of such prejudice. Id., citing, McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). Accordingly, we find that the protester's new OCI allegations are premature.

The protest is dismissed.

Thomas H. Armstrong
General Counsel