



Decision

Matter of: AeroSage, LLC

File: B-416429; B-416429.2; B-416429.3; B-416429.4

Date: July 25, 2018

David M. Snyder for the protester.
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DIGEST

1. Protest of the terms of the solicitation is dismissed, where the protester challenges the terms almost two years after the closing date for receipt of proposals.
2. Protest challenging various aspects of the award of the protester's contract and the issuance of delivery orders to it under the contract is dismissed because the protester does not meet the definition of "interested party" under the Competition in Contracting Act and GAO's Bid Protest Regulations.
3. Protest challenging the termination of contract line item numbers and delivery orders is dismissed because GAO does not have jurisdiction over matters of contract administration.

DECISION

AeroSage, LLC, of Tampa, Florida, protests the actions taken by the Defense Logistics Agency (DLA) with respect to contract No. SPE600-16-D-8524, which was awarded under request for proposals (RFP) No. SPE600-16-R-0223, and certain delivery orders issued to AeroSage under the contract. AeroSage argues that DLA, among other things, improperly solicited and awarded contracts under the RFP, improperly issued certain delivery orders to AeroSage, and improperly terminated the delivery orders and certain contract line item numbers in the protester's contract.

We dismiss the protest.

BACKGROUND

On April 1, 2016, DLA issued the RFP for the supply of various types of petroleum products to locations in the southeastern United States for 54 federal agencies. RFP at 3; Protest at 2. The RFP contemplated the award of fixed-price requirements-type contracts with economic price adjustments. RFP at 4. The RFP contained over 600 contract line item numbers (CLIN); offerors were permitted to submit offers on as many or as few CLINs as they wished.

Prior to the August 10, closing date for receipt of final proposal revisions, AeroSage protested the agency's request for information relating to the protester's responsibility and size status. Protest (B-413515). We dismissed the protest because DLA had referred the matter to the Small Business Administration for consideration. AeroSage LLC, B-413515, Oct. 21, 2016 (unpublished decision).

On September 29, DLA awarded contract No. SPE600-16-D-8524 to AeroSage. The contract contained 31 CLINs. Supp. Protest, June 20, 2018, Attach. B.4, AeroSage Contract, at 9-32. As relevant here, CLINs 0006 and 0007 provided for the delivery of gasoline, containing no ethanol, to Grand Isle and Venice, Louisiana, respectively. Id. at 14-15.

On December 15, 2017, DLA issued delivery order No. SPE605-18-F-CJ81 (-CJ81) to AeroSage for delivery under CLIN 0007 to Venice, Louisiana, on December 16. Protest, Attach. B, Order No. -CJ81. That same day, AeroSage advised DLA that it would not accept the delivery order for the following reasons: (1) the delivery order inaccurately identified AeroSage as a small disadvantaged business; (2) DLA failed to provide at least 48 hours' notice as required by the RFP; (3) AeroSage's contract included clauses and requirements, such as the requirement for ethanol-free gasoline, that were not included in the RFP; and (4) DLA provided inaccurate estimated annual requirements. Protest, Attach. E, AeroSage E-mail, Dec. 15, 2018 (2:42 p.m.), at 1-3. DLA terminated the delivery order. Protest, Attach. F, Delivery Order No. -CJ81 mod. 1.

On January 25, 2018, DLA issued delivery order No. SPE605-18-F-DR21 (-DR21) to AeroSage for delivery under CLIN 0006 to the U.S. Coast Guard Station at Grand Isle, Louisiana. Protest, Attach. A, Order No. -DR21. The delivery order included a period of performance between January 27 and 29. Id. at 2. AeroSage did not make the delivery. Protest, Attach. C, Notice of Partial Termination, at 2.

On May 23, DLA notified AeroSage that it was terminating CLINs 0006 and 0007 of AeroSage's contract based on AeroSage's failure to perform. Id. at 1. On May 30, AeroSage protested to our Office.

DISCUSSION

AeroSage raises multiple arguments concerning DLA's actions with respect to the requirements contract and associated delivery orders.¹ For example, AeroSage argues that DLA improperly solicited and awarded its contract and the delivery orders issued under the contract. Protest at 2-4. AeroSage also argues that DLA improperly terminated its delivery orders and CLINs 0006 and 0007 of its contract. Id. at 5-6.

With respect to the solicitation, AeroSage argues that DLA improperly bundled the fuel delivery contracts and was required to reserve all of the fuel acquisitions for small businesses. Protest at 3. AeroSage also argues that the solicitation included incorrect and outdated bid and delivery parameters and incorrect specifications. Id.

These protest grounds are untimely. Our Bid Protest Regulations specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1); see AmaTerra Envtl. Inc., B-408290.2, Oct. 23, 2013, 2013 CPD ¶ 242 at 3. Here, AeroSage's protest was filed on May 30, 2018, almost two years after the closing time for submission of proposals. Therefore, AeroSage's challenges to the terms of the solicitation are untimely.

To the extent that AeroSage is challenging aspects of the award of its own contract and the issuance of delivery orders to it under the contract (e.g., the requirement for ethanol-free gasoline), the protester is not an interested party. Under the Competition in Contracting Act and our Bid Protest Regulations, an interested party means 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. 31 U.S.C. § 3551(2)(A); 4 C.F.R. § 21.0(a)(1). Here, as the contract awardee, AeroSage cannot establish that it is an interested party because it is no longer an actual or prospective offeror for the purpose of challenging the terms of its own award. See Aegis Defense Services, LLC, B-412755, Mar. 25, 2016, 2016 CPD ¶ 98 at 4 (statutory definition of an interested party expressly bars protests where the protester is the awardee of the challenged contract); see also Trailboss Enters., Inc. v. United States, 111 Fed. Cl. 338, 340 (2013) (protester challenging the terms of its own contract is not an interested party). On this basis, we dismiss AeroSage's allegations that DLA improperly awarded its contract and associated delivery orders.

¹ We have considered all of AeroSage's arguments and find that none of them provide a valid basis for protest. For example, AeroSage alleges that DLA is overcharging the U.S. Coast Guard for the assisted acquisitions of fuel. Supp. Protest, June 20, 2018, at 1. In essence, AeroSage is asking our Office to conduct an investigation of DLA's billing practices. Our Office does not conduct investigations as part of our bid protest function. RMI, B-405409, Oct. 20, 2011, 2011 CPD ¶ 224 at 3 n.5.

AeroSage also argues that DLA improperly terminated its delivery orders and contract CLINs 0006 and 0007.² Protest at 4-6. We dismiss these protest grounds because they raise matters of contract administration over which we do not exercise jurisdiction.

Our Office considers bid protest challenges to the award or proposed award of contracts. 31 U.S.C. § 3552. Therefore, we generally do not review matters of contract administration, which are within the discretion of the contracting agency and for review by a cognizant board of contract appeals or the Court of Federal Claims. 4 C.F.R. § 21.5(a). We will, however, review the propriety of a contract termination where it flows from a defect that the contracting agency perceived in the award process. In such cases, we examine the award procedures that underlie the termination action for the limited purpose of determining whether the initial award was improper and, if so, whether the corrective action taken is proper. American Material Handling, Inc., B-406739, Aug. 14, 2012, 2012 CPD ¶ 234 at 3.

AeroSage argues that GAO has jurisdiction over its protest because it is protesting a termination “based in whole or in part on improprieties concerning the award of the contract.” AeroSage Response to Dismissal Request, June 12, 2018, at 1 (citing to 31 U.S.C. § 3551). The agency argues that AeroSage failed to deliver under both delivery orders and had no reasonable excuse for its non-performance. Request for Dismissal, June 7, 2018, at 1. The agency cites to its notice of partial termination, which states, for example, that AeroSage acknowledged an amendment in the solicitation that the line items at issue here had a no ethanol requirement and this requirement was incorporated into the contract. Protest, Attach. C, Notice of Partial Termination, at 2-3. The agency contends that this protest allegation should be dismissed because it is a matter of contract administration.

The record shows that AeroSage’s terminations were the result of the protester’s failure to perform the delivery orders. See, e.g., Protest, Attach. C, Notice of Partial Termination, at 2-3; Attach. E, AeroSage E-mail, Dec. 15, 2018 (2:42 p.m.), at 1-3. AeroSage has failed to show that the basis for the terminations was due to the agency’s conclusion that there was a defect in the award process. Compare with AutoFlex, Inc., B-415926, Apr. 19, 2018, 2018 CPD ¶ 145 at 3 (no basis to object to agency’s contract termination in response to an agency-level protest); American Material Handling, Inc.,

² AeroSage also protests the termination of CLIN 0027. Supp. Protest, June 8, 2018, at 1-2. DLA states that the contract modification erroneously deleted CLIN 0027 and another modification has been issued to correct the error. DLA Request for Dismissal, June 12, 2018.

supra (agency properly terminated protester's contract where the solicitation omitted a mandatory clause). Accordingly, this protest allegation is dismissed.

The protest is dismissed.

Thomas H. Armstrong
General Counsel