



Decision

Matter of: Continental Service Group, Inc.; FMS Investment Corp.; TPUSA, Inc.;
Pennsylvania Higher Education Assistance Agency

File: B-416443.3; B-416443.4; B-416443.5; B-416443.6

Date: November 19, 2018

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DIGEST

Protests are dismissed where the matter involved is the subject of litigation before a court of competent jurisdiction.

DECISION

Continental Service Group, Inc. (ConServ), of Fairport, New York, and FMS Investment Corp., of Rolling Meadows, Illinois, protest the terms of request for proposals (RFP) No. 91003118R0024, issued by the Department of Education (DOE), for business process operations (also known as components E & F) as part of the agency's overarching two-phased procurement of a Next Generation Financial Services (NextGen) Environment. ConServ and FMS primarily allege that the agency in the challenged Phase II solicitation, which was only open to offerors selected after the first phase of the procurement, materially and prejudicially changed the scope of the services being acquired from those described in the Phase I solicitation. Additionally, TPUSA, Inc., of Murray, Utah, and Pennsylvania Higher Education Assistance Agency (PHEAA), of Harrisburg, Pennsylvania, protest the agency's decision to eliminate their respective proposals from the Phase II competition.

We dismiss the protests because the subject matter of the protests, specifically the agency's NextGen Environment procurement, is currently pending before a court of competent jurisdiction.

BACKGROUND¹

For the purposes of the NextGen Environment procurement, DOE is utilizing its flexible procurement authority pursuant to 20 U.S.C. § 1018a, as implemented by Education Federal Acquisition Regulation § 3415.302-70(b). Pursuant to 20 U.S.C. § 1018a(d), DOE is authorized to use a two-phase source-selection procedure for the procurement of property or services. Specifically, in Phase I, the contracting officer is required to publish a notice of the procurement in accordance with 41 U.S.C. § 1708 and sections (e), (f), and (g) of 15 U.S.C. § 637, except that the notice shall include only the following: (i) a general description of the scope or purpose of the procurement that provides sufficient information on the scope or purpose for sources to make informed business decisions regarding whether to participate in the procurement; (ii) a description of the basis on which potential sources are to be selected to submit offers in the second phase; (iii) basic information, such as information on the offeror's qualifications, the proposed conceptual approach, costs likely to be associated with the proposed conceptual approach, past performance of the offeror, and other information requested by the contracting officer; and (iv) any additional information that the contracting officer determines appropriate. 20 U.S.C. § 1018a(d)(2). Phase II, which is restricted to the sources selected in Phase I, is to be conducted on a competitive basis in accordance with the applicable procurement provisions of Title 41 of the U.S. Code. Id. at (d)(3).

On February 20, 2018, DOE issued the solicitation for Phase I. The Phase I RFP identified 9 components, A-I, that DOE intended to procure for the NextGen Environment, and vendors were invited to provide a response for one, multiple, or all components. Components A, B, G, H, and I sought the development and implementation of information technology platforms and other technology tools and solutions used in servicing financial aid products across the student aid lifecycle. Phase I RFP at 7-8. The agency, however, subsequently cancelled its request with respect to components A, B, and H. See GC Servs. Ltd. P'ship, supra, at 3 n.2. Components C, D, E, and F, on the other hand, involve the processing and servicing of borrower accounts, with components C and D focusing on technology platforms, and components E and F focusing on the non-automated business operations required in servicing accounts, which include customer engagement and outreach, contact center support, and loan processing. Phase I RFP at 7, 16-18.

¹ In light of the narrow issue presented, namely whether the subject matter of the protests is currently pending before a court of competent jurisdiction, our discussion of the relevant background for this procurement is necessarily brief. Additional discussion regarding DOE's NextGen procurement is included in our decision in GC Servs. Ltd. P'ship, B-416443, B-416443.2, Sept. 5, 2018, 2018 CPD ¶ 313.

Relevant to the protests at issue, TPUSA and PHEAA submitted Phase I proposals in response to components E and F, while ConServ and FMS did not. On September 24, DOE announced the issuance of three Phase II solicitations. First, DOE issued RFP No. 91003118R0023 for a future state core platform (Component C). Second, the agency issued RFP No. 91003118R0022 for transitional core processing and related support activities (Component D) (hereinafter, the D RFP). And, third, the agency issued RFP No. 91003118R0024 for business process operations (Components E & F) (hereinafter, the E&F RFP). TPUSA and PHEAA, along with seven other offerors that submitted Phase I proposals, were invited to submit Phase II proposals under the E&F RFP. E&F RFP, ¶ L-1.2. Following submission of their respective initial past performance volumes in response to the E&F RFP, DOE notified TPUSA and PHEAA that their respective proposals were eliminated from further consideration. See TPUSA Protest, exh. H, Email Exchange Between DOE and TPUSA, at 3; PHEAA Protest, exh. D, Email from DOE, at 1.

On October 8, ConServ filed a pre-award protest with our Office challenging the terms of the E&F RFP. Specifically, ConServ alleges that the agency violated the competition requirements of the Competition in Contracting Act (CICA) when it improperly included student loan default recovery services in the Phase II E&F RFP where the Phase I solicitation did not reasonably apprise potential offerors that the agency intended to procure such services under the NextGen Environment procurement. ConServ asserted that such a change in the scope of the services required DOE to amend the Phase I solicitation to include such services and allow interested parties an opportunity to compete. See, e.g., ConServ Redacted Protest at 22.

On October 9, FMS filed a pre-award protest with our Office also challenging the terms of the E&F RFP. FMS primarily raises materially similar protest allegations to those raised by ConServ. See FMS Redacted Protest at 18-23. Additionally, FMS alleges that the agency's proposed bundling of default recovery services with other services under the E&F RFP violates the competition requirements of CICA, and creates inimitable impaired organizational conflicts of interest. See id. at 24-27.

On October 26 and 29, respectively, TPUSA and PHEAA filed protests with our Office. Both protesters primarily challenge the agency's decision to exclude their proposals from further consideration based on the agency's determination that the protesters' initial proposals did not comply with the terms of the E&F RFP.

On November 6, a disappointed prospective offeror which filed a pre-award protest with our Office challenging the terms of the D RFP notified our Office of the filing of potentially related litigation before the United States Court of Federal Claims. Specifically, that protester notified our Office that Navient Solutions, LLC, filed a pre-award protest with the court challenging the agency's NextGen procurement. Specifically, Navient alleges that DOE's cancellation of Components A, B, and H, all of which sought integrated technology-related components, was so material as to

fundamentally change the scope and purpose of the agency's NextGen Environment procurement. Navient alleges that the agency's failure to amend the Phase I RFP after the cancellation of significant portions of the scope of work violated CICA, the Federal Acquisition Regulation (FAR), and 20 U.S.C. § 1018a. Navient asserts that the removal of these three components from the Phase I solicitation required DOE to cancel the Phase I RFP, issue a new RFP reflecting the agency's true requirements, and to solicit new proposals, or, alternatively, to amend the Phase I solicitation and reopen the competition to allow for the submission of revised proposals. See Redacted Complaint (Nov. 5, 2018), Navient Solutions, LLC v. United States, No. 18-1679C (Fed. Cl., Wheeler, J.), ¶¶ 3-5, 58-76.

Additionally, Navient challenges the scope of the Phase II D RFP. Specifically, Navient alleges that the agency's Phase II D RFP materially differs from the requirements described in the Phase I solicitation. In this regard, Navient alleges Components E and F of the Phase I solicitation included business process operations, while the Phase I description for Component D was limited to technology solutions (i.e., core processing, related middleware, and rules engine). Navient alleges that the Phase II D RFP improperly includes substantial loan servicing business operations services that the agency removed from Components E and F of the Phase I RFP. Navient similarly alleges that these changes violate the requirements of CICA, 20 U.S.C. § 1018a, and the FAR because the Phase I RFP was inadequate to apprise offerors of what services the agency was intending to acquire under the Phase II D RFP. As with its challenges with respect to the other components, Navient alleges that the agency's procurement errors with respect to Component D requires DOE to cancel the Phase I RFP, issue a new RFP reflecting the agency's true requirements, and to solicit new proposals, or, alternatively, to amend the Phase I solicitation and reopen the competition to allow for the submission of revised proposals. Id., ¶¶ 8-10, 44-46, 77-91.

Based on these alleged errors, Navient requests that the court, among other relief, issue: (1) a declaratory judgment declaring that DOE's failure to amend the Phase I solicitation is arbitrary, capricious, an abuse of discretion, and otherwise in violation of applicable law; (2) an injunction requiring DOE to cancel and issue a new solicitation, or, alternatively, to amend the Phase I solicitation and permit proposals from new offerors; and (3) an injunction prohibiting DOE from procuring student loan processing and servicing environment services under the current solicitation. Id., Prayer for Relief, ¶¶ 1-4.

DISCUSSION

On November 7, our Office notified the parties of our concerns with respect to the impact of Navient's protest before the Court of Federal Claims on the propriety of our Office continuing to develop these four protests, and provided the parties with an opportunity to address the issue. In this context, our Regulations provide that we will not decide a protest where the matter involved is the subject of litigation before a court of competent jurisdiction. Bid Protest Regulations, 4 C.F.R. § 21.11(b). Even where the issues before the court are not the same as those raised in our Office by a protester, or

are brought by a party other than the protester, we will not consider the protest if the court's disposition of the matter would render a decision by our Office academic. Schuerman Dev. Co., B-238464.3, Oct. 3, 1991, 91-2 CPD ¶ 286 at 2-3; Geronimo Serv. Co.--Recon., B-242331.3, Mar. 22, 1991, 91-1 CPD ¶ 321 at 2.²

In response to our notice, ConServ, FMS, and TPUSA submitted responses arguing that dismissal of their respective protests was not warranted.³ ConServ and FMS primarily argue that Navient's protest does not implicate the same concerns as those identified by ConServ and FMS with respect to Components E and F, and the potential relief granted by the court in response to Navient's protest could be limited in nature and not overlap with the relief requested by ConServ and FMS. TPUSA objects to dismissal on the basis that its protest is materially distinct from Navient's protest before the court, as TPUSA's protest challenges the agency's evaluation of Phase II proposals, while Navient's protest primarily challenges the terms of the Phase I solicitation. Here, we find dismissal of the protests is appropriate pursuant to 4 C.F.R. § 21.11(b).⁴

Specifically, we find that the subject matter of the protests before our Office is currently pending before the court. With respect to the protests of ConServ and FMS, we note that the issues raised in their protests, specifically their challenges to the alleged material changes to the requirements in the Phase II E&F RFP, are not identical to Navient's challenges. Navient's challenges primarily relate to the impact on the other components resulting from the agency's cancellation of Components, A, B, and H in the

² We previously dismissed, pursuant to 4 C.F.R. § 21.11(b), the protest before our Office challenging the terms of the D RFP. See Higher Education Loan Authority of the State of Missouri, B-417078, Nov. 8, 2018 (unpublished decision).

³ PHEAA and the agency did not respond to our notice.

⁴ The protesters raise other collateral arguments. While our decision does not specifically address each argument, we have carefully reviewed them and find that none provides a basis to support our continued development of the protests. For example, ConServ argues that dismissal is not appropriate because it selected our Office as its protest forum and has already invested time and resources into the protest before our Office. ConServ Br. at 4. While we recognize that the parties have expended resources pursuing their protests before GAO, we have nevertheless previously rejected such arguments as a basis for retaining jurisdiction over a protest when the subject matter is pending before a court of competent jurisdiction. See, e.g., Geronimo Serv. Co.--Recon., supra, at 2-3. Additionally, ConServ argues that we should defer our decision on this issue, proceed with simultaneous development of the record in this case, and await further developments at the court (e.g., whether a request for dismissal is filed). ConServ Br. at 4-5. This argument is without merit, as it is entirely inconsistent with the purpose of 4 C.F.R. § 21.11(b), which is designed to eliminate the potential for overlapping proceedings and conflicting resolutions. In this regard, continuing to develop the record to then ultimately dismiss the protest at a later date would result in significant inefficiencies and costs for the parties and our Office.

Phase I RFP and on similar alleged material changes to Component D in the Phase II D RFP. Notwithstanding the protesters' arguments, we conclude that Navient's protest allegations are premised on the agency's alleged improper material changes to the scope of the requirements of the Phase I solicitation. Specifically, the crux of Navient's various protest allegations is that DOE is violating applicable procurement law where it solicited Phase I proposals on one basis, reduced the field of competition on that basis, and is now seeking to materially alter the scope of the Phase II procurements. Navient's protest grounds, therefore, are substantially similar in nature to those alleged by ConServ and FMS before our Office.

In this regard, we also find no merit to the protesters' efforts to cast Navient's protest as being restricted in nature to the cancellation of Components A, B, and H, with no relevance to or potential impact on Components E and F. It is readily apparent that Navient's protest is not a challenge to the agency's partial cancellation of the Phase I RFP. Rather, Navient's argument is that the partial cancellation of the three components fundamentally changed the scope and nature of the remaining components, such that the agency was required to cancel the entirety of the Phase I solicitation, or to amend the solicitation and reopen the Phase I competition. For example, Navient alleges that:

The removal of Components A, B, and H removed much of the integration work and [identity access management] activities and radically changed the scope and nature of the Phase I solicitation. Without Components A, B, and H, the RFP provided a much smaller scope of work with less emphasis on overall integration. The Phase I proposals were therefore based on a fundamentally different scope of work than the current scope.

Redacted Complaint (Nov. 5, 2018), Navient Solutions, LLC v. United States, No. 18-1679C (Fed. Cl., Wheeler, J.), ¶ 37; see also id. at ¶ 63 (alleging that the agency failed to conduct adequate market research following the cancellation of components A, B, and H to determine whether offerors would be "interested and capable of responding to the materially changed requirements in different capacities").

Similarly, we find no merit to the protesters' argument that Navient's challenge to the Phase II D RFP does not present potentially intertwining issues involving Components E and F of the Phase I RFP. Navient explicitly alleged that: "[o]nce the agency substantially changed the scope by adding requirements to component D for Phase II that had previously been within the scope of components E and F, the agency's actions were contrary to CICA and the FAR." Id., ¶ 80. Thus, Navient unequivocally raises challenges before the court regarding the appropriate and relative scopes of Components D, E, and F. Therefore, we find no merit to the protesters' narrow interpretation of Navient's protest allegations before the court.

Additionally, the requested remedies, predominately being either cancellation of the affected solicitations, or the amendment and reopening of the Phase I solicitation, are common across the ConServ, FMS, and Navient protests. In this regard, to the extent

the court adjudicates Navient's protest grounds challenging the propriety of the changes to the Phase I RFP or the change in scope between the Phase I and Phase II solicitations, such a ruling would obviate the need for our consideration of ConServ's and FMS' similar protest allegations with respect to Components E and F. Further, deference to the court's resolution of the similar protest issues also obviates the risk of an inconsistent resolution of the issues between the forums. See, e.g., Robinson Enters.--Request for Recon., B-238594, Apr. 19, 1990, 90-1 CPD ¶ 402 at 2 (affirming dismissal of a protest challenging the protester's exclusion from the competitive range where a second disappointed offeror filed a protest in court challenging the agency's evaluation of proposals because the potential relief our Office could grant in the dismissed protest, i.e., reevaluation of proposals, was virtually identical to the remedies that could be granted by the court in the second protest); Snowblast-Sicard, Inc., B-230983.2, Aug. 30, 1989, 89-2 CPD ¶ 190 at 2 (similarly dismissing a protest filed before our Office when a second disappointed offeror's protest filed before a court requested the same remedy of re-solicitation of the requirements).⁵

Similarly, the broad relief sought by Navient before the Court counsels in favor of dismissal of the protests filed by TPUSA and PHEAA. While we recognize that Navient is pursuing a challenge to the terms of the Phase I solicitation, and TPUSA and PHEAA are challenging the agency's evaluation of Phase II proposals, to the extent the Court grants Navient its requested relief of directing the agency to either cancel or amend and reopen the Phase I RFP, such a determination would render a decision by our Office on the propriety of the agency's valuation of Phase II proposals as academic.

⁵ Both ConServ and FMS argue that dismissal is not warranted because the court, in the event it were to sustain Navient's protest, might fashion narrow relief which may not impact Components E and F, thus not ultimately making a decision by our Office on ConServ's and FMS' protest academic. Even assuming for the sake argument that this could be true, the argument fails because it would flip the standard for dismissal under 4 C.F.R. § 21.11(b) on its head. In this regard, the standard is whether the court's consideration of an issue may render a decision by our Office academic. Thus, where this is a possibility, dismissal is appropriate for the prudential considerations discussed herein. In contrast, the protesters effectively argue that dismissal is not appropriate unless it is assured that any remedy fashioned by the court would in fact render a decision by our Office academic. Such a result would vitiate the entire purpose of 4 C.F.R. § 21.11(b). Additionally, to the extent the court does not resolve a question on the merits or grant relief rendering a question presented in these dismissed protests academic, the protesters could file new protests with our Office in accordance with our Bid Protest Regulations.

Thus, dismissal is appropriate under the prudential considerations of 4 C.F.R. § 21.11(b). Schuerman Dev. Co., supra; Geronimo Serv. Co.--Recon., supra.

The protests are dismissed.

Thomas H. Armstrong
General Counsel