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Decision

Matter of: Vistronix, LLC

File: B-416916.2

Date: July 29, 2019

Damien C. Specht, Esq., and James Tucker, Esq., Morrison & Foerster LLP, for the protester.

Kathleen D. Martin, Esq., Department of State, for the agency.

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DIGEST

Protest challenging agency's exclusion of protester from task order competition due to an organizational conflict of interest is dismissed as untimely when filed more than ten days after the agency informed the protester that the agency was rescinding its task order award due to an unmitigatable organizational conflict of interest.

DECISION

Vistronix, LLC, of Reston, Virginia, protests its exclusion from competition for the service delivery outreach and operations support (SDO2) task order, issued under solicitation No. 19AQMM18R0065 through the National Institutes of Health's CIO-SP3 governmentwide acquisition contract for server and software deployment services for the Department of State's Office of Consular Systems and Technology. The protester contends that the agency erred in concluding that it had an unmitigatable organizational conflict of interest (OCI), and that, with appropriate mitigations, it should remain eligible to compete for the task order.

We dismiss the protest because it is untimely.

BACKGROUND

On September 29, 2018, the agency issued the SDO2 task order to Vistronix, LLC, which is a subsidiary of Arctic Slope Regional Corporation Federal Holding Company, LLC, (ASRC Federal). Request for Dismissal at 3. On September 30, the agency issued the service transition support (STS) task order to NetCentric Technology, LLC, which is a subsidiary of Vistronix, LLC. Id. On October 2, Peraton, Inc., filed a protest

with our Office concerning the award of the SDO2 task order to Vistrionix. Id. Peraton alleged that the award was improper because of unmitigated or unmitigatable impaired objectivity and unequal access to information OCIs. Id. Specifically, among other things, Peraton contended that the STS task order would involve NetCentric evaluating work performed by Vistrionix, its parent company, under the SDO2 task order. Peraton's Protest at 15-21. On October 3, 2018, Advanced Software Systems, Inc. filed a protest with our Office challenging the issuance of the STS task order, and later filed a supplemental protest that involved OCI allegations similar to those alleged by Peraton. Request for Dismissal at 4.

Subsequently, the agency represented that it would take corrective action by conducting an OCI investigation and reviewing other protest grounds, and our Office dismissed the OCI protests on that basis.¹ Id. at 3-4 n. 3-4. Relevant to this protest, the corrective action notice in Peraton's protest indicated that, following the OCI investigation, the agency reserved the right to reaffirm the award, or, in the alternative, would reassess the award determination and issue a new source selection decision if necessary. Corrective Action Notice at 1.

On October 29, the agency informed Vistrionix and NetCentric that the agency was investigating a possible impaired objectivity OCI related to NetCentric's performance of the STS task order. See Request for Dismissal, exh. A, Email from Contracting Officer to Vistrionix, Oct. 29, 2018. Specifically, the agency noted that the STS task order involved both evaluating work performed by Vistrionix under the SDO2 task order, and potentially making recommendations that could result in additional work for Vistrionix. Id. Additionally, the agency indicated that it was investigating a potential unequal access to information OCI because NetCentric would, in the course of performing the STS task order, have unfair access to proprietary materials of Vistrionix's competitors. Id. The agency solicited information from NetCentric and Vistrionix regarding the OCI, and both firms filed detailed responses. See Id.; Request for Dismissal, exh. B, Email from Contracting Officer to Netcentric, Oct. 25, 2018.

On January 31, 2019, the agency sent an email to NetCentric, indicating that the OCI investigation was still ongoing, but asking if Vistrionix would consider withdrawal from the SDO2 competition to resolve the OCI issue without any further delay. Request for Dismissal, exh. C, Email from Contracting Officer to Netcentric, Jan. 31, 2019 at 1. The agency indicated that, if Vistrionix were prepared to withdraw, performance by NetCentric under the STS task order could begin immediately. Id. On February 21, an official at ASRC Federal responded requesting an opportunity for discussion, but declining to withdraw Vistrionix's proposal. Request for Dismissal, exh. D, Email from ASRC Federal to Contracting Officer, Feb. 7, 2019 at 1.

¹ While the OCI protest ground in Advanced Software Systems's protest was dismissed as academic, the remainder of Advanced Software Systems's protest was denied on the merits. See Advanced Software Systems, Inc., B-414892.2, et al., Jan. 7, 2019, 2019 CPD ¶ 143 at 1 n. 1.

On March 27, the agency concluded that the SDO2 and STS task orders involved overlapping services such that there was an inherent conflict, which would prevent affiliated companies from performing both task orders. Request for Dismissal at 6. On April 10, the agency sent an email to Vistrionix, informing Vistrionix that the agency had completed its OCI review, and concluded that “a conflict of interest exists that cannot be mitigated. Therefore, the award of [the SDO2 task order] will be rescinded.” Protest, exh. E, Email from Contracting Officer to Vistrionix, Apr. 10, 2019. On the same day, the agency sent an email to NetCentric informing it that the OCI investigation had concluded, and that the stop work order on the STS contract would be lifted, but that modifications would be forthcoming concerning the period of performance and the OCI language in the task order. Request for Dismissal, exh. E, Email from Contracting Officer to Netcentric, Apr. 10, 2019.

On April 11, Vistrionix sent a detailed set of questions to the agency inquiring, among other things, about the specific nature of the OCI that the agency found, and whether it remained eligible to compete for the SDO2 task order. See Protest, exh. F, Vistrionix Questions Concerning OCI Finding at 1-2. On April 24, the agency responded to Vistrionix’s questions, providing more detail about the agency’s findings and confirming that Vistrionix would not be eligible to compete for the SDO2 task order. Protest, exh. G, Agency Response to Questions at 1-3.

On May 3, Vistrionix filed an agency-level protest concerning the agency’s OCI decision, and on May 9, the agency dismissed that protest as untimely. Request for Dismissal at 8. On May 20, 2019, this protest followed.²

DISCUSSION

The protester contends that the agency erred in concluding that an OCI exists, and, in the alternative, proposed several mitigations that the protester believes would, separately or in combination, effectively mitigate any OCI that may exist. Protest at 13-19. Accordingly, the protester argues that it should remain eligible to compete for the SDO2 task order.³ Id. For the reasons discussed below, we conclude that this protest is untimely.

² The SDO2 task order is valued at \$164,675,833, and, accordingly, this protest is within our jurisdiction to hear protests of task orders placed under civilian agency IDIQ contracts valued in excess of \$10 million. 41 U.S.C. § 4106(f)(2).

³ Our Regulations provide that an interested party may protest the termination of a contract, if the protest alleges that the termination was based on improprieties in the award of the contract. 4 C.F.R. § 21.1(a). Here, however, the protester represents that it is not challenging the agency’s decision to rescind its task order, but rather its exclusion from the ongoing competition. Protester’s Response to Request for Dismissal at 6 n.4.

Procedural Matter

As a preliminary matter, Peraton sought to intervene in the instant protest, alleging that it should be acknowledged as an intervenor because it was competing for this procurement and believed that it had a substantial prospect of receiving award if Vistrionix's protest were denied. Peraton's Response to Protester's Objection to Intervention at 1-3. Additionally, Peraton noted that it had filed the prior protest that prompted the agency's OCI investigation, which it argued weighed in favor of acknowledging it as an intervenor. Id. at 4. We declined to acknowledge Peraton as an intervenor in this protest.

This protest, challenging Vistrionix's exclusion from the SDO2 competition prior to a new award, is directly analogous to other varieties of pre-award protest in which we do not typically admit intervenors, such as protests contesting a protester's exclusion from the competitive range, or protests of the scope of an agency's corrective action. As our descriptive guide notes, permitting intervention in a pre-award protest is generally the exception, not the rule. Bid Protests at GAO: A Descriptive Guide, GAO-18-510SP (May, 2018) at 15. For example, where an offeror protests its exclusion from the competitive range, we have generally admitted intervenors only in limited circumstances, such as where the intervenor was the only other offeror, where an agency established a competitive range including only one offeror, or where the intervenor was the apparent awardee. See, e.g., Bannum Inc., B-411074.5, Oct. 10, 2017, 2017 CPD ¶ 313 (intervenor was only other offeror); Enterprise Services, B-414513.2, et al., July 6, 2017, 2017 CPD ¶ 241 (competitive range included only the intervenor); The Austin Company, B-291482, Jan. 7, 2003, 2003 CPD ¶ 41 (intervenor was the apparent awardee). In these decisions, the underlying circumstances clearly established that the intervenor appeared to have a substantial prospect of receiving award if the protest was denied. By contrast, Peraton's allegations that it has a substantial prospect of receiving award are only supported by the facts that its proposal was lower-priced and possibly higher-rated than Vistrionix's proposal, coupled with the fact that it was the incumbent contractor. Peraton's Response to Protester's Objection to Intervention at 3. These facts are insufficient to establish that Peraton has a substantial prospect of receiving award if Vistrionix's protest were denied.

With respect to Peraton's argument concerning the specific history of this case, we likewise see no basis to acknowledge Peraton as an intervenor. While Peraton is correct that it was previously an interested party to bring a protest concerning Vistrionix's OCI, the legal standards applied to determine whether a party is interested to protest a procurement and whether a party is permitted to intervene in an ongoing protest are entirely separate as a regulatory matter. Compare 4 C.F.R. § 21.0(a)(1) with (b)(1). In this case, the prior procurement history has no bearing on the question of whether Peraton is an intervenor as contemplated by our Regulations. Accordingly, we concluded that Peraton failed to establish that it "appear[ed] to have a substantial prospect of receiving an award" in the sense contemplated by our Regulations. See 4 C.F.R. § 21.0(b)(1).

Timeliness of OCI Challenge

The agency argues that this protest is untimely, because the protester's agency-level protest was also untimely. See Request for Dismissal at 8-12. Specifically, the agency notified the protester on April 10 that there was an unmitigatable conflict of interest, and that the SDO2 task order would be rescinded. Id. at 11. The agency contends that this email, at the latest, provided the protester with knowledge of its basis of protest. Id. at 11-12. Because the protester's agency-level protest was not filed until May 3, more than 10 days after April 10, the agency contends that the agency-level protest was untimely. Id.

Under our Bid Protest Regulations, a matter initially protested to the contracting agency will be considered timely by our Office only if the agency protest was filed within the time limits provided by our Regulations, unless the contracting agency imposes a more stringent time for filing, in which case the agency's time for filing will control. 4 C.F.R. § 21.2(a)(3). In this case, no party suggests that the agency's regulations impose a more stringent time for filing, so the timeliness rules provided by our Regulations are appropriately applied to the protester's agency-level protest. Where, as here, the protester is challenging its exclusion from the competition, the protester was required to file its agency-level protest within ten days of when it knew or should have known it was excluded from the competition. See 4 C.F.R. § 21.2(a)(2)

The protester contends that its agency-level protest was timely because the agency's April 10 email did not clarify which of the several alleged OCIs the agency found to be unmitigatable, and, more significantly, did not specifically indicate that the protester was excluded from the corrective action source selection for the SDO2 task order. Protester's Response to Request for Dismissal at 6-7. According to the protester, our prior decisions have concluded that a protester need not protest an agency's OCI findings prior to award unless the agency has made it clear that the protester is excluded from the competition.⁴ Id. at 4-5 (citing Guident Techs., Inc., B-405112.3,

⁴ Alternatively, the protester argues that its agency-level protest was timely because its protest is analogous to a challenge to the terms of the solicitation, and, unlike GAO's Bid Protest Regulations, the Federal Acquisition Regulation (FAR) contains no provision concerning the timeliness of agency-level protests of alleged solicitation improprieties where no closing time has been established. Protester's Response to Request for Dismissal at 6-7 (citing FAR § 33.103(e)). The protester contends that, because the agency has not set a new time for the receipt of proposals and the agency-level protest was filed prior to award, the agency-level protest was therefore timely under the FAR, and this protest should also be considered timely. Id.

First, we do not agree that this protest represents a challenge to the terms of the solicitation because the decisions relied on by the protester for that proposition are inapposite. The decisions cited by the protester involved protesters challenging OCI findings concerning other offerors, or protesters challenging OCI determinations that affected the terms under which the protester would be able to compete in an ongoing
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June 4, 2012, 2012 CPD ¶ 166 at 6 n.4; Abt Assocs., Inc., B-294130, Aug. 11, 2004, 2004 CPD ¶ 174 at 2; and Gov't Bus. Servs. Grp., B-287052, et al., Mar. 27, 2001, 2001 CPD ¶ 58 at 12). In this regard, the protester notes that the April 10 email did not indicate that the protester was excluded from the ongoing competition, and the agency had not ruled out a waiver of the OCI. Protester's Response to Request for Dismissal at 6-7. In sum, the protester maintains that agency did not clearly indicate that the protester was excluded from the competition until the agency responded to the protester's questions on April 24. Id. Since the protester filed its agency-level protest within ten days of April 24, the protester argues that its protest is timely.

We find the protester's arguments to be unpersuasive. The April 10 email clearly indicated that the agency had found an unmitigatable OCI and the agency was rescinding Vistrionix's task order on that basis. See Protest, exh. E, Email from Contracting Officer to Vistrionix, Apr. 10, 2019. Additionally, the agency's corrective action notice indicated that the agency would either reaffirm the existing award, or reassess the award and make a new source selection decision, if necessary. See

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procurement. See, e.g., Honeywell Tech. Solutions, Inc., B-400771; B-400771.2, Jan. 27, 2009, 2009 CPD ¶ 49 at 5-6 (OCI protest was due by the date set for receipt of proposals where the protester had notice before the date of proposal submission that the agency had determined that another offeror was eligible for award notwithstanding an alleged OCI); A Squared Joint Venture, B-413139; B-413139.2, Aug. 23, 2016, 2016 CPD ¶ 243 at 9 (where agency expressly informed offeror that it had an OCI and that the OCI would preclude it from award unless the offeror implemented mitigations, protest of agency's OCI determination was due by the date set for receipt of proposals). Those cases are clearly distinguishable from the present case because, here, the protester is not challenging the ground rules of an ongoing competition, but rather the agency's decision to specifically exclude it from the competition entirely. On these facts, the protest should have been filed within ten days of when the protester knew or should have known it was excluded. 4 C.F.R. § 21.2(a)(2).

Second, even were this case a challenge to the terms of the solicitation, we would reach the same result. As noted above, our Regulations provide that a matter initially protested to a contracting agency will be considered timely by our Office only if the agency protest was filed within the time limits provided by our Regulations, unless the contracting agency imposes a more stringent time for filing, in which case the agency's time for filing will control. See, e.g., Knight Point Systems, LLC, B-414802, Sept. 20, 2017, 2017 CPD ¶ 306 at 5 (citing 4 C.F.R. § 21.2(a)(3)). Where, as here, no closing time has been established, our Regulations provide that challenges to the terms of the solicitation must be filed within ten days. 4 C.F.R. § 21.2(a)(1). Even accepting, for the sake of argument, the protester's reading of the relevant FAR provisions, those provisions would impose a less stringent timeliness standard than that provided by our Regulations and so would not displace the timeliness requirements of our Regulations.

Corrective Action Notice at 1. Against that factual background, it is unclear why the agency would rescind the task order if Vistronix were still potentially eligible for award of that task order--that is to say, the agency's decision not to reaffirm the task order indicated that the agency felt it necessary to make a new source selection to an offeror other than Vistronix. Furthermore, the agency gave no indication whatsoever that it intended to waive the OCI or that Vistronix was otherwise still eligible to compete for the task order; rather, the agency communicated that it was rescinding the task order because there was an OCI that "cannot be mitigated" with no further comment. See Protest, exh. E, Email from Contracting Officer to Vistronix, Apr. 10, 2019. While the protester may have been subjectively uncertain concerning its exclusion from the competition, such uncertainty was not reasonable on these facts, which overwhelmingly suggest that the protester had been excluded from the competition for the SDO2 task order on the basis of an OCI.

Likewise, the protester's argument that it did not know the nature of the OCIs that formed the basis of the agency's decision is unavailing. Specifically, the agency sent the protester a notice of investigation that outlined the scope of the agency's investigation, and gave the protester detailed notice of the nature of the two categories of OCIs (impaired objectivity and unequal access to information) under investigation. Request for Dismissal, exh. A, Email from Contracting Officer to Vistronix, Oct. 29, 2018. This is reinforced by the fact that the protester and its subsidiary understood the nature and scope of the potential OCIs well enough to respond substantively to the agency's investigation notice. See Protest, exh. C, Vistronix Response to OCI Review Request, and exh. D, Netcentric Response to OCI Review Request.

More significantly, on January 31, 2019, in the course of its investigation, the agency sent an email to Netcentric indicating that the agency had concerns that an impaired objectivity OCI, specifically, might exist and could not be mitigated successfully. Request for Dismissal, exh. C, Email from Contracting Officer to Netcentric, Jan. 31, 2019. Notwithstanding that the protester may have been uncertain about the specific contours of the agency's OCI findings, the protester knew that the agency had definitively taken adverse action on the basis of one or both of the previously identified OCIs. Our decisions have repeatedly concluded that a protester need not await perfect knowledge before filing a protest. See, e.g., Valkyrie Enters., LLC, B-414516, June 30, 2017, 2017 CPD ¶ 212 at 3-4 n.2.

On April 10, the protester knew, or should have known, that the agency had excluded it from competition for the SDO2 task order on the basis of an unmitigatable OCI. The protester's April 24 agency-level protest was not filed within 10 days of April 10, and was therefore untimely. Accordingly, we conclude that the instant protest is also untimely. See 4 C.F.R. § 21.2(a)(3).

The protest is dismissed.

Thomas H. Armstrong
General Counsel