



Decision

Matter of: AeroSage, LLC

File: B-417289.2

Date: May 14, 2019

David M. Snyder, AeroSage, LLC, for the protester.
Matthew Vasquez, Esq., and May Sena, Esq., Defense Logistics Agency, for the agency.
Heather Self, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly cancelled a solicitation and resolicited the same fuel requirement to avoid making award to the protester is dismissed for failing to set forth a legally sufficient basis of protest where the protester's allegations are without factual support.
 2. Protest challenging term in request for quotations requiring vendors to provide written acceptance of a government offer in two hours or less is denied where the term is reasonable in light of the short time between receipt of quotations and delivery.
 3. Protest of an agency's failure to implement the statutorily required stay of award is dismissed because it is not a matter for consideration by GAO.
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DECISION

AeroSage, LLC, a service-disabled veteran-owned small business of Tampa, Florida, protests the terms of request for quotations (RFQ) No. SPE605-19-Q-0256, issued by the Defense Logistics Agency (DLA) for diesel fuel. The protester argues the agency improperly issued RFQ No. SPE605-19-Q-0256 in lieu of making award to the protester under a prior solicitation¹ for the same fuel requirement. The protester also challenges

¹ AeroSage also protests the agency's actions in making award under a prior RFQ it alleges was cancelled and resolicited--RFQ No. SPE605-19-Q-0253. AeroSage's challenge to the award under RFQ No. SPE605-19-Q-0253 was before our Office as a separate protest docketed as B-417289.1, which we denied in part and dismissed in

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the RFQ's term providing that the agency may require a vendor receiving an offer from the agency to provide written acceptance of the offer in two hours or less. Finally, the protester alleges the agency violated the Competition in Contracting Act by failing to withhold award or stay contract performance.²

We deny the protest in part and dismiss the protest in part.

BACKGROUND

The agency issued the RFQ as a small business set-aside on February 8, 2019, pursuant to the commercial item and simplified acquisition procedures of Federal Acquisition Regulation (FAR) parts 12 and 13. Agency Report (AR), Tab 1, RFQ, at 1. The RFQ sought quotations for delivery of 10,000 gallons of diesel fuel to Fort Drum, New York. Id. at 2. The RFQ contemplated a single fixed-price purchase order being offered to the vendor evaluated as providing the best value to the government on the basis of three evaluation factors listed in descending order of importance: (1) technical specifications, (2) past performance, and (3) price.³ Id. at 1-2. The RFQ established the time for receipt of quotations as 10:00 a.m.⁴ February 11, with delivery for the

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part on April 24, 2019. Accordingly, our decision here addresses only AeroSage's challenge to the issuance and terms of RFQ No. SPE605-Q-19-0256.

² AeroSage also contends that the agency's actions in both procurements are part of a "four-year pattern of impropriety, designed to steer awards to favored vendors at significant cost to the government to retaliate prejudicially against the protester." Protest at 3. As a general matter, government officials are presumed to act in good faith, and a protester's contention that procurement officials were motivated by bias or bad faith must be supported by convincing proof. Cyberdata Techs., Inc., B-417084, Feb. 6, 2019, 2019 CPD ¶ 34 at 6. We will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Id. The burden of establishing bad faith is a heavy one. Evidence establishing a possible defect in an agency's actions generally is not sufficient in itself to establish that the agency acted in bad faith; the protester must also present facts reasonably indicating, beyond mere inference and suspicion, that the actions complained of were motivated by a specific and malicious intent to harm the protester. Lawson Envtl. Servs., LLC, B-416892, B-416892.2, Jan. 8, 2019, 2019 CPD ¶ 17 at 5 n.5. AeroSage fails to make allegations that, if true, would provide convincing proof of bad faith.

³ While the RFQ includes technical and past performance evaluation factors, it did not include any technical specifications other than listing the type of fuel required--diesel, nor did the RFQ include instructions regarding submission of past performance information. RFQ at 2. AeroSage does not protest this apparent defect in the solicitation.

⁴ All times referenced herein are Eastern Standard Time.

required fuel due the next day. Id. at 2-3. AeroSage filed its protest with our Office immediately prior to the time set for receipt of quotations.⁵

DISCUSSION

AeroSage first challenges the issuance of RFQ No. SPE605-19-Q-0256, arguing that the agency issued this RFQ for the same fuel requirement previously solicited under RFQ No. SPE605-19-Q-0253 to avoid making award to AeroSage under the prior solicitation. Protest at 2.

Our Bid Protest Regulations require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. 4 C.F.R. §§ 21.1(c)(4) and (f). These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. AeroSage LLC, B-415893, B-415894, Apr. 17, 2018, 2018 CPD ¶ 142 at 4-5; Midwest Tube Fabricators, Inc., B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

Here, the record contradicts AeroSage's allegations. Specifically, the record establishes that RFQ Nos. SPE605-19-Q-0253 and SPE605-19-Q-0256 were separate procurements for two distinct fuel deliveries to Fort Drum, that awards were made to two different vendors under the two separate RFQs, and that Fort Drum received two fuel deliveries from the two different vendors. More specifically, the agency issued RFQ No. SPE605-19-Q-0253 on February 5, awarded a purchase order to Infinite Energy Corp.

⁵ At 10:00 a.m. on February 11, AeroSage initially filed this pre-award challenge to the issuance and terms of RFQ No. SPE605-19-Q-0256 as a supplemental protest in its post-award challenge to the agency's actions under RFQ No. SPE605-19-Q-0253 (B-417289.1). We required AeroSage to refile its pre-award challenge to the issuance and terms of RFQ No. SPE605-19-Q-0256 as a separate protest. Notice of Refiling Requirement and Electronic Protest Docketing System Filing Fee Determination, Feb. 14, 2019. After the close of business on February 14, AeroSage refiled its protest challenging the issuance and terms of RFQ No. SPE605-19-Q-0256. AeroSage's February 14 refiling included additional information that was not part of its original February 11 filing. Id. The additional information largely expands upon AeroSage's original February 11 protest arguments. To the extent the additional information can be read to include new protest arguments beyond those contained in the protester's original February 11 filing, such new arguments are untimely because they were filed after the time set for receipt of quotations. Our timeliness rules specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial submissions be filed before that time. 4 C.F.R. § 21.2(a)(1); see AmaTerra Env't'l. Inc., B-408290.2, Oct. 23, 2013, 2013 CPD ¶ 242 at 3.

on February 7, and the vendor delivered the ordered diesel fuel to Fort Drum the same day. Request for Dismissal, at attach. 1, Declaration of Contracting Officer (CO), at 1 ¶ 3, Feb. 13, 2019. The agency issued RFQ No. SPE605-19-Q-0256 on February 8, awarded a purchase order to East River Energy, Inc., and the vendor delivered the ordered diesel fuel to Fort Drum on February 12. AR, Tab 3, Declaration of CO, at 1 ¶ 3, Mar. 12, 2019; Comments, at attach. B, Agency's Notice of Corrective Action in Protest B-417289.3, Mar. 20, 2019. AeroSage's contention that the agency resolicited the fuel requirement of RFQ No. SPE605-19-Q-0253 under RFQ No. SPE605-19-Q-0256 is not supported by the facts, and therefore dismissed for failing to state a valid basis of protest.

Next, AeroSage challenges the terms of RFQ No. SPE605-19-Q-0256, arguing that the requirement for a vendor to provide written acceptance of a government offer in two hours or less is unreasonable because it is insufficiently short. Protest at 2. As relevant, the RFQ included the following provision:

DLA Energy may require a vendor to sign the SF1449 [purchase order] prior to being offered this delivery. This would be sent by email and may have a response window of as little as two (2) hours. Upon request, the vendor must return the signed SF1449 by the deadline specified.

RFQ at 3.

As a general matter, contracting agencies have broad discretion in establishing the time frames for various types of solicitation responses, to include establishing initial response times, see, e.g., Military Agency Servs. Pty., Ltd., B-290414 et al., Aug. 1, 2002, 2002 CPD ¶ 130 at 5-6, or setting response times to a request for final proposals, see, e.g., FRC Int'l., Inc., B-255345, Feb. 18, 1994, 94-1 CPD ¶ 125 at 2-3. The time period for a vendor to respond to an agency's request for written acceptance of a government's offer, in response to an RFQ, is no exception.⁶ The only requirement in such cases is that the time frame be reasonable, and otherwise consistent with applicable law and regulation.

⁶ A vendor's submission in response to an RFQ is a quotation, and a quotation is not a submission for acceptance by the government to form a binding contract. FAR § 13.004(a); Computer Assocs. Int'l., Inc.--Recon., B-292077.6, May 5, 2004, 2004 CPD ¶ 110 at 3. A vendor's quotation is purely information, and in the RFQ context, it is the government that makes the offer. Id. According to the FAR, an agency may ask a vendor to accept an offer in writing. FAR § 13.004(b); see also FAR § 13.302-3(a) ("When it is desired to consummate a binding contract between the parties before the contractor undertakes performance, the contracting officer shall require written (see 2.101) acceptance of the purchase order by the contractor."). The FAR, however, does not establish a period of time for an agency to leave open a government offer for acceptance.

The FAR does not establish a specific period of time for an agency to leave open a government offer for acceptance, thus the only pertinent question is whether the acceptance period established by the agency in this case (up to two hours) was reasonable.⁷ What constitutes a reasonable opportunity to respond will depend on the circumstances of the individual acquisition, and, as noted above, the decision as to the appropriate response time lies within the discretion of the contracting officer. AeroSage, LLC, B-417289.1, Apr. 24, 2019, 2019 CPD ¶ ____ at 4-5 (denying protest of agency's requirement for vendor to provide written acceptance of government's offer in less than three hours where the amount of time provided was not unreasonable under the circumstances of the procurement, including that the agency required performance on the next day); cf., Military Agency Servs. Pty. Ltd., supra, at 2-3 and 5-6 (denying protest challenging 35 minute response time for an RFQ where services were required to be performed the next day).

Here, we conclude that the two hour response time for acceptance of an offer from the agency was not unreasonable under the circumstances. The record establishes that the RFQ required delivery of the solicited fuel to be performed the day after receipt of quotations, and that in establishing the two hour acceptance response time the contracting officer considered the short delivery turnaround as well as that the offer and acceptance for simplified acquisitions of fuel deliveries typically is conducted quickly via e-mail. RFQ at 2-3; AR, Tab 3, Declaration of CO, at 1 ¶ 4, Mar. 12, 2019. AeroSage's challenge amounts to nothing more than disagreement with the agency's exercise of its discretion, and is denied accordingly. See Wittenberg Weiner Consulting, LLC, B-413460, Oct. 31, 2016, 2016 CPD ¶ 319 at 3; Gallup, Inc., B-410126, Sept. 25, 2014, 2014 CPD ¶ 280 at 5.

Finally, in its comments, AeroSage argues that the agency violated the Competition in Contracting Act (CICA), 31 U.S.C. §§ 3551-3557, by failing to withhold award or stay contract performance. Comments at 1. Under CICA, a contracting agency may not award a contract after it receives notice of a protest from our Office. 31 U.S.C. § 3553(c)(1). If award has already been made a contracting agency is required to withhold authorization to start performance or suspend contract performance that has begun if it receives notice of a protest from our Office within 10 calendar days of the date of contract award. 31 U.S.C. § 3553(d)(3)(A). Based on the record, it appears AeroSage may be correct that the agency failed to withhold award or suspend contract performance after receiving notice of the protest from our Office. However, an agency's

⁷ AeroSage contends that the RFQ's two hour offer acceptance provision violates the Defense Logistics Acquisition Directive (DLAD), which AeroSage asserts requires "two days' notice of a delivery/purchase order acceptance." Protest at 2. AeroSage does not cite to a specific DLAD provision containing such a requirement, nor are we aware of any such requirement. The agency represents that no such requirement exists in the DLAD. Agency Memorandum of Law at 2.

failure to comply with the statutory stay requirement is not a valid basis of protest. 4 C.F.R. § 21.6 (“GAO does not administer the requirements to withhold award or suspend contract performance.”); AeroSage LLC: SageCare, Inc., B-415267.13, B-415267.14, Mar. 19, 2018, 2018 CPD ¶ 114 at 5; Serco, Inc., B-410676.2, Dec. 12, 2014, 2014 CPD ¶ 371 at 2-3 (whether the agency failed to comply with the stay of performance is not a matter for consideration by GAO).⁸ Consequently, AeroSage’s objection to the agency’s failure to withhold award or suspend contract performance is dismissed.

The protest is denied in part and dismissed in part.

Thomas H. Armstrong
General Counsel

⁸ A protester desiring to seek enforcement of CICA’s stay provisions must request relief from a court of competent jurisdiction--currently the U.S. Court of Federal Claims. See e.g., AT&T Corp., B-414886 et al., Oct. 5, 2017, 2017 CPD ¶ 330 at 3 n. 7 (noting that the agency overrode the stay of contract performance during the pendency of the protest, and that the protester challenged the override by seeking declaratory and injunctive relief at the U.S. Court of Federal Claims); Chapman Law Firm Co., LPA, B-296847, Sept. 28, 2005, 2005 CPD ¶ 175 at 3 n. 3 (noting that the protester unsuccessfully challenged the agency’s stay override at the U.S. Court of Federal Claims); Altos Federal Group, Inc., B-294120, July 28, 2004, 2004 CPD ¶ 172 at 2 (noting that the agency initially stayed performance but subsequently overrode the stay of performance, and the protester filed suit in the U.S. Court of Federal Claims seeking reinstatement of the stay).