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Decision

Matter of: Tom & Jerry, Inc.

File: B-417531; B-417531.2

Date: July 30, 2019

Matthew Moriarty, Esq., Shane J. McCall, Esq., Nicole D. Pottroff, Esq., and Robert D. Kampen, Esq., Koprince Law LLC, for the protester.
Major Jason W. Allen, Captain Richard Hagner, and Scott N. Flesch, Esq., Department of the Army, for the agency.
Lois Hanshaw, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of an agency's decision to perform requirements in-house rather than to contract for them is dismissed where such decisions are a matter of executive branch policy.

DECISION

Tom & Jerry, Inc., of Kansas City, Kansas, challenges the Department of the Army's decision to hold a Yellow Ribbon Reintegration Program (Yellow Ribbon) event in Atlanta, Georgia from May 3 to 5, 2019.¹ The protester contends that the Yellow Ribbon work has been performed in the past through procurements that were set aside under the Small Business Administration's (SBA) 8(a) Business Development Program (8(a) program), and that the Army's award of a sole-source contract to a large business for this work was improper because the agency cannot remove this work from the 8(a) program without first obtaining the SBA's agreement.

We dismiss the protest.

The Yellow Ribbon program is designed to prepare and sustain soldiers in the U.S. Army Reserve and their families during all phases of the deployment cycle. Agency Report (AR) Tab 2, Contracting Officer's Statement (COS), at 3. During Yellow Ribbon events, families gain practical, useful information on how to maintain closeness and

¹ The protest did not identify a specific solicitation or contract number.

leverage resources during frequent relocation, long separations, and repeated reunions. Id.

To conduct this Yellow Ribbon event, the Army intended to use its own internal capabilities and secured hotel and meeting space within the Crowne Plaza Atlanta-Airport Hotel (Crowne Plaza).² AR, Tab 12, Statement of Program Manager, at 1. The hotel shuttle, offered to all guests, and an Army Reserve bus provided transportation, and audio-visual equipment was provided by Army Reserve units and technically supported by Army Reserve soldiers. Id. Additionally, the Army arranged for travel and hotel accommodations for all attendees via the Defense Travel System (DTS).³ AR, Tab 21, Yellow Ribbon Welcome Package, at 1. Attendees also received per diem to purchase their own meals. AR, Tab 22, DTS Guide May 3-5, 2019, at 2.

On May 1, Tom & Jerry protested to our Office, asserting that the agency awarded a sole-source contract to Crowne Plaza for the performance of this Yellow Ribbon event in violation of the “once 8(a), always 8(a)” rule, under 13 C.F.R. § 124.504(d)(1),⁴ which states that where a procurement is awarded as an 8(a) contract, its follow-on or renewable acquisition must remain in the 8(a) program unless SBA agrees to release it

² The Army explains that Yellow Ribbon events are provided for pre-deployment and post-deployment personnel and the attendees at the Yellow Ribbon event in Atlanta were pre-deployment personnel. AR, Tab 12, Statement of Program Manager, at 1. The Army further explains that the pre-deployment attendees at the Atlanta Yellow Ribbon event were initially scheduled to attend an event in Denver from May 1 to 6 that was to be performed through a contract awarded under request for quotations No. W91247-19-Q-1888 (RFQ 1888), which was issued on April 5, 2019. COS at 3. On April 11, Tom & Jerry protested the terms of RFQ 1888 to our Office; that protest was docketed as B-417474 and was dismissed on July 11. See Tom & Jerry, Inc., B-417474, July 11, 2019 (unpublished decision). The Army states that pre-deployment personnel who were previously scheduled to attend the Denver event were transferred to the event in Atlanta. AR, Tab 19, Email from Army to Yellow Ribbon Attendees, Apr. 23, 2019. In this regard, the Army stated that there was “an urgency” for soldiers deploying within the next 30 to 45 days to attend a pre-deployment event because they could not be deferred to future dates. COS at 5. Thus, the agency states that it conducted the Yellow Ribbon event in Atlanta using in-house assets and without issuing a solicitation or awarding a contract. Id.

³ The DTS is the Army’s online travel system for making hotel, flight, and ground transportation reservations and creating travel orders, including per diem and miscellaneous travel systems. COS at 3.

⁴ Section 8(a) of the Small Business Act authorizes SBA to contract with other government agencies and to arrange for the performance of those contracts by awarding subcontracts to socially and economically disadvantaged small businesses. 15 U.S.C. § 637(a). The Act affords SBA and contracting agencies broad discretion in selecting procurements for the 8(a) program. Id.

for non-8(a) competition.⁵ Protest at 7. Essentially, Tom & Jerry argues that the Army must award this work as a procurement contract set aside for 8(a) small businesses because some previous Yellow Ribbon events have been procured through the 8(a) program.

The agency contends that the protester's allegations are incorrect because the agency performed the contract using its in-house capabilities and neither issued a solicitation, nor awarded a contract for this event. Memorandum of Law at 7-8. The agency also states that Tom & Jerry's challenge to the Army's decision to use its own non-contract capabilities must be dismissed. As explained below, we agree.

Our Office generally does not review agency decisions to perform requirements in-house rather than to contract for them, because such decisions are a matter of executive branch policy. Desktop Alert, Inc., B-417170, January 24, 2019, 2019 CPD ¶ 29 at 2. Further, the limited exceptions to this rule, such as cases where an agency utilizes the procurement system to aid in its determination, by issuing a competitive

⁵ On June 10, the protester raised a supplemental protest, asserting that it learned on May 31 that the agency was improperly fragmenting the Yellow Ribbon work by separately purchasing items like food and hotel accommodations to avoid compliance with certain procurement procedures and regulations. Comments and Supp. Protest at 11. On June 12, the agency requested dismissal of this ground as untimely, asserting that its May 16 request for dismissal indicated that the Army individually purchased these items. Request for Dismissal at 4 (June 12, 2019). In response, the protester stated that the supplemental protest ground "was discussed previously in [its] Response to Dismissal Request [dated May 20, 2019] and Objection to Agency's 5-Day Letter [dated May 28, 2019]." Response to Dismissal Request at 1 (June 13, 2019). As a general matter, protests of other than alleged solicitation improprieties must be filed within 10 calendar days of when the protester knew or should have known of its bases for protest. 4 C.F.R. § 21.2(a)(2). Thus, by the protester's own admission, it knew of this basis of protest by at least May 20, yet waited more than 10 days to file a supplemental protest. Accordingly, we dismiss the supplemental protest as untimely.

solicitation for the purpose of comparing the costs of in-house performance with the costs of contracting, are not at issue here. Id.

The protest is dismissed.⁶

Thomas H. Armstrong
General Counsel

⁶ The protester also argues that we should review this protest as a timely allegation that the agency is improperly using a cooperative agreement or other nonprocurement instrument, where a procurement contract was required by law. Comments and Supp. Protest at 9; see e.g., Energy Conversion Devices, Inc., B-260514, June 16, 1995, 95-2 CPD ¶ 121. We disagree. In this regard, the protester has not identified, and the record does not show, that the agency used a cooperative agreement or other nonprocurement instrument to perform this event.