



Decision

Matter of: AeroSage, LLC

File: B-418292; B-418292.2, B-418292.5, B-418292.6

Date: February 27, 2020

David M. Snyder for the protester.
Jacqueline Neumann, Esq., Matthew Vasquez, Esq., May Sena, Esq., and Howard M. Kaufer, Esq., Defense Logistics Agency, for the agency.
Kenneth Kilgour, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the agency failed to provide sufficient time for offerors to submit proposals is denied because the record does not demonstrate that the amount of time provided was unreasonable.
 2. Protest challenging the agency's use of a requirements contract in this procurement is denied because the record does not demonstrate that the agency's exercise of discretion in selecting the contract type was unreasonable.
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DECISION

AeroSage, LLC, of Tampa, Florida, protests the terms of request for proposals (RFP) No. SPE605-20-R-0200, issued by the Defense Logistics Agency (DLA) for various types of fuel to be delivered to Department of Defense and federal civilian agency customers. The protester also challenges other aspects of the agency's conduct of the procurement.

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

BACKGROUND

The RFP, issued on October 3, 2019, as a combined synopsis/solicitation under the commercial item provisions of Federal Acquisition Regulation (FAR) subpart 12.6, sought proposals to deliver fuel to customers in Arizona, California, Nevada, and Utah. Agency Report (AR), Tab 6, RFP, at 1. The RFP anticipated award of fixed-price requirements contracts and included FAR clause 52.216-21, Requirements. Id. at 50.

Contracts would have an ordering period from the date of award through August 31, 2024. Id. at 1. The RFP advised offerors that each line item would be evaluated and awarded independently from all other line items. RFP at 100. Award would be made to the offeror(s) with the lowest-priced, technically acceptable proposal(s), with price and technical capability the two evaluation factors. Id. at 100-101. The agency assigned North American Industry Classification System (NAICS) code 324110 to the solicitation, which applies to petroleum refineries. Id. at 2.

The RFP standard for an acceptable technical capability rating was as follows:

An offer will be deemed technically acceptable if it meets the requirements of the Solicitation including the requirement schedule in Attachment A-- Schedule, product specification requirements in Section C, and delivery requirements in Section F. To show that the offer meets the requirements of the Solicitation, the offeror must submit a specification sheet, certificate of analysis, or certificate of quality demonstrating that the offeror is capable of providing product that meets the specifications identified in Section C of the Solicitation. An offeror only needs to submit one specification sheet, certificate of analysis, or certificate of quality per product offered, and need not submit such documentation from every source of supply. In addition, for biodiesel line items, the offeror shall provide a copy of its B100 supplier's EPA registration letter and a letter from the supplier stating that the product offered will be provided from their terminal/refinery.

Id. at 101.

In addition, the RFP advised offerors that the government would need to determine the responsibility of any potential contractor in accordance with FAR subpart 9.1. Id. The RFP provided that the government might conduct pre-award surveys in making a responsibility determination, but the government would conduct such pre-award surveys for new vendors with no prior contractual history with DLA. Id. The RFP further advised that the government might request an offeror provide commitment letters from its suppliers and copies of its transportation agreements with its subcontractors, and encouraged, but did not require, that offerors submit such documents with their proposals. Id.

The RFP contained over 350 contract line item numbers (CLINs), 12 of which were set aside for service-disabled veteran-owned small businesses (SDVOSB), and 188 of which were set aside for small businesses. See AR, Tab 6.A, RFP attach. A; AR, Tab 6.F, RFP attach. F. The remaining line items were unrestricted, and were not set aside in any way. RFP at 2.

The RFP advised offerors that, if they proposed to furnish an item that they did not themselves manufacture and wanted to be considered for a set-aside award, they must

comply with the nonmanufacturer rule in 13 C.F.R. § 121.406.¹ Id. The RFP stated that FAR clause 52.219-6, Notice of Total Small Business Set-Aside, applied to the line items identified in RFP attachment F as small business set-asides. Id. Under paragraph (d) of that clause, a small business concern can provide the end item of any firm for a contract at or below the simplified acquisition threshold, but must provide an end item that a small business has manufactured, processed, or produced in the United States or its outlying areas for a contract exceeding the simplified acquisition threshold. Id. at 51. The RFP further provided that FAR clause 52.219-27, Notice of Service-Disabled Veteran-Owned Small Business Set-Aside, applied to the line items identified in RFP attachment F as SDVOSB set-asides. Id. at 2. Pursuant to paragraph (g) of that clause, an SDVOSB providing an end item it did not manufacture must provide an end item that a small business has manufactured, processed, or produced in the United States or its outlying areas unless that requirement has been waived by the SBA. Id. at 53.

Each of the 12 line items set aside for SDVOSBs was for delivery of fuel to Department of Veterans Affairs (VA) locations. See RFP attachment F at 1. Prior to award, DLA requested a waiver of the nonmanufacturer rule for the 12 VA line items, which the SBA granted on August 29. AR, Tab 5, SBA Nonmanufacturer Rule Waiver, Aug. 29, 2019. The RFP advised offerors that the SBA had waived the nonmanufacturer rule for the 12 VA line items set aside for SDVOSBs. RFP at 2.

The contracting officer documented his set-aside decision in the Small Business Coordination Record, DD Form 2579. AR, Tab 4, Small Business Coordination Record. The contracting officer set aside for SDVOSBs the 12 line items for VA locations, in accordance with 38 U.S.C. §§ 8127-8128 and its implementing regulations, VA Acquisition Regulation subpart 819.70. Id. at 4. Although the contracting officer determined that there were no small refineries from which SDVOSBs could provide fuel at fair and reasonable prices, the waiver of the nonmanufacturer rule permitted DLA to set those line items aside for SDVOSBs. Id.

In addition, the contracting officer set aside for small businesses 188 line items with estimated values below the simplified acquisition threshold, because the nonmanufacturer rule did not apply to those line items. Id. at 3. Regarding the remaining line items, the contracting officer determined that he did not have a reasonable expectation that two or more small businesses would submit offers at fair and reasonable prices. Id. at 4. The contracting officer noted that, under the nonmanufacturer rule, small businesses would be required to provide the product of a small business manufacturer, but that there were no refineries in the region that could provide the required products while meeting the size standard. Id.

¹ The nonmanufacturer rule provides that the offer of a nonmanufacturer small business concern may be considered, provided, among other things, that the small business concern represents that it will supply the product of a domestic small business manufacturer or processor, or that a waiver of this requirement is granted by the Small Business Administration (SBA).

Section C of the RFP incorporated 17 DLA clauses relating to the specifications for the fuel products solicited, and the full text of these clauses was provided in RFP attachment G. See AR, Tab 6.G, RFP attach. G. Each clause identified the applicable specification to which awardees would be required to conform for the relevant fuel product. For example, clause Cl6.08-I, Turbine Fuel, Aviation (Jet A), requires that “Jet A shall conform to the requirements of ASTM D 1655, Standard Specification for Aviation Turbine Fuels, except as modified” by the clause. Id. at 1.

The deadline for proposal submissions was November 19. RFP at 1.

AeroSage’s Objections and the Amendments to the RFP

On October 7, 4 days after issuance of the RFP, AeroSage contacted DLA and requested the following: a spreadsheet with “bid data”; a copy of the SBA’s waiver of the nonmanufacturer rule for the 12 SDVOSB set-aside line items; an explanation for why only 12 of 20 line items for VA fuel requirements were set aside for SDVOSBs; an extension of the deadline for receipt of proposals to January 15, 2020; and a copy of the “bundling/consolidation justification” for the procurement. AR, Tab 8, Email from Protester to Agency, Oct. 7, 2019. The contracting officer responded the next day, explaining that the RFP contained only 12 VA fuel requirements and granting none of AeroSage’s requests. AR, Tab 9, Email from Contracting Officer to Protester, Oct. 8, 2019.

On October 21, DLA issued amendment 0001 to the RFP, providing three attachments-- I, J, and K. AR, Tab 10, RFP amend. 0001, at 2. Attachment I was a Microsoft Excel document containing certain information regarding each line item in a table format, including the type of fuel, delivery address, and the base reference price. Attachment J replaced attachment B, which had previously provided the base reference prices for each line item. Attachment K replaced attachment F, which had set out the line items set aside for SDVOSBs and small businesses. RFP attach. K. While attachment K placed the line items in numerical order and provided slightly different information regarding the line items, it did not add or remove any line items from the set-asides.

The following day, October 22, AeroSage emailed DLA with “updated objections,” asserting that the spreadsheet provided with amendment 0001 did not include sufficient information. AR, Tab 11, Email from AeroSage to Agency, Oct. 22, 2019. AeroSage again requested a copy of the SBA’s waiver of the nonmanufacturer rule and asserted that the solicitation contained 30 VA fuel requirements, all of which should be set aside for SDVOSBs. Id. at 2-3. AeroSage requested an even longer extension of the deadline for receipt of proposals, until February 28, 2020. Id. at 3. AeroSage asserted that the solicitation was “bundled and consolidated,” and that rather than awarding requirements contracts, the solicitation was “in fact and in practice a [blanket purchase agreement/basic ordering agreement] BPA/BOA.” Id. at 4. Aero Sage asserted that the solicitation did not comply with 41 C.F.R. § 101-26.602 and that it was required to contain FAR clause 52.216-32, Task-Order and Delivery-Order Ombudsman. Id.

AeroSage asserted that the solicitation was governed by the Economy Act² and requested a copy of the documentation establishing that the acquisition would save government funds. AR, Tab 11, Email from AeroSage to Agency, Oct. 22, 2019, at 4. AeroSage claimed that the solicitation must require a small business subcontracting plan for unrestricted requirements. Id. Lastly, AeroSage requested that all small business set-asides be made SDVOSB set-asides. Id.

The contracting officer denied all of AeroSage's objections and requests. AR, Tab 12, Objection Denial Letter, Oct. 29, 2019. On November 19, prior to the closing time for receipt of proposals, AeroSage filed this protest.

DISCUSSION

AeroSage asserts several challenges to the reasonableness of the agency's conduct of this procurement. As explained below, we deny two of the allegations, and we dismiss the remaining challenges.

AeroSage contends that it had insufficient time to respond to the solicitation. Protest at 1. The protester argues that complex and varied fuel tax rules--which could change substantially over the 5 years of the contract and are often dependent on individual order parameters--hinder the efforts of small businesses to submit proposals with accurate prices in the limited time available. Id. at 2.

The FAR requires an agency acquiring commercial items to "establish a solicitation response time that will afford potential offerors a reasonable opportunity to respond." FAR § 5.203(b); Richen Mgmt., LLC, B-410903, Mar. 10, 2015, 2015 CPD ¶ 105 at 2. A reasonable opportunity depends on "the circumstances of the individual acquisition, such as the complexity, commerciality, availability, and urgency." FAR § 5.203(b). The contracting officer has the discretion to determine the time allotted for proposal preparation, and GAO will not object to that determination unless it is shown to be unreasonable. Coulson Aviation (USA), Inc., B-411306 et al., July 8, 2015, 2015 CPD ¶ 214 at 11; Financial Asset Mgmt. Sys., Inc., B-409722.9, Apr. 24, 2015, 2015 CPD ¶ 145 at 6. The protester has the burden to show the time allotted was inconsistent with statutory requirements, was unreasonable, or precluded full and open competition. See AeroSage, LLC, B-415893, B-415894, Apr. 17, 2018, 2018 CPD ¶ 142 at 5; Coyol Int'l Grp., B-408982.2, Jan. 24, 2014, 2014 CPD ¶ 40 at 2.

The RFP was issued on October 3, and proposals were due on November 19. RFP at 1. The RFP thus provided a 47-day response time for receipt of initial proposals. DLA received offers in response to the RFP from dozens of offerors, most of which were small businesses, including AeroSage and a firm sharing common ownership with AeroSage--SageCare, Inc. AR, Tab 16, List of Offerors. AeroSage has failed to

² Under the Economy Act, a major organizational unit within an agency may order goods or services from a major organizational unit within the same agency or another agency, provided certain requirements are met. See 31 U.S.C. § 1535(a)(1)-(4).

provide factual or legal grounds as to why the RFP's response time was unreasonable, inconsistent with statutory requirements, or precluded full and open competition, and therefore, its protest that the response time was insufficient is denied.

AeroSage objects to the type of contracts to be awarded. The RFP contemplated the award of requirements contracts and included FAR clause 52.216-21, Requirements. RFP at 50. AeroSage asserts that "[t]hese requirements type contracts are [basic ordering agreements/blanket purchase agreement indefinite delivery vehicles (BOA/BPA IDVs)]," and that "[t]his is a multiple award indefinite delivery indefinite quantity contract." Protest at 2.

The determination of the best method of accommodating an agency's needs is primarily within the agency's discretion. Repaintex Co., B-415390.4, B-415390.5, June 21, 2018, 2018 CPD ¶ 227 at 3. The selection of a contract type is the responsibility of the contracting agency, and our role is not to substitute GAO's judgment for the contracting agency's, but instead to review whether the agency's exercise of discretion was reasonable and consistent with applicable statutes and regulations. URS Fed. Support Servs., Inc., B-407573, Jan. 14, 2013, 2013 CPD ¶ 31 at 4. A protester's disagreement with the agency's judgment does not show that the agency's judgment is unreasonable. Data Monitor Sys., Inc., B-415761, Mar. 6, 2018, 2018 CPD ¶ 79 at 4. A requirements contract is "appropriate for acquiring any supplies or services when the Government anticipates recurring requirements but cannot predetermine the precise quantities of supplies or services that designated Government activities will need during a definite period." FAR § 16.503(b)(l).

AeroSage does not allege that the government's fuel requirements are not recurring, nor does AeroSage allege that the government can predetermine the precise quantity of fuel it will need in advance. See Protest at 2. Rather, AeroSage objects that the government "does not and has not provided the consideration of ordering all requirements against this ordering vehicle." Id. As noted above, the RFP includes FAR clause 52.216-21, Requirements. RFP at 50. Paragraph (c) of that clause provides, "[e]xcept as this contract otherwise provides, the Government shall order from the Contractor all the supplies or services specified in the Schedule that are required to be purchased by the Government activity or activities specified in the Schedule." FAR clause 52.216-21(c). Thus, the protester's contention that the government will not purchase all its requirements from the awarded contractors is not supported by the language of the RFP. AeroSage has failed to demonstrate the agency's exercise of discretion in selecting a requirements contract in this procurement was unreasonable, and this allegation is therefore denied.

Throughout its protest, AeroSage asserts that the RFP contains "blatant bundling and consolidation," that it bundles the requirements to artificially exceed the simplified acquisition threshold, and that the RFP is a "consolidated BOA solicitation." Protest at 2-3. Under the Small Business Act, contracting agencies are required to "avoid unnecessary and unjustified bundling of contract requirements that precludes small business participation in procurements as prime contractors" to the maximum extent

practicable. 15 U.S.C. § 631(j)(3). The Small Business Act defines “bundling of contract requirements” as “consolidating 2 or more procurement requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract that is likely to be unsuitable for award to a small-business concern.” 15 U.S.C. § 632(o)(2).

Here, the RFP provided that each line item would be evaluated and awarded independently from all other line items. RFP at 100. Therefore, AeroSage cannot establish that the RFP either bundles or consolidates requirements. See, e.g., AeroSage, LLC, B-416381, Aug. 23, 2018, 2018 CPD ¶ 288 at 3 n.2 (noting that, “given that the solicitation permits the agency to award contracts on a by-CLIN basis, the protester further fails to establish factually that any requirements are bundled”); AeroSage LLC; SageCare, Inc., B-416279, July 16, 2018, 2018 CPD ¶ 243 at 3 n.4 (same); AeroSage, LLC; SageCare, Inc., B-415267 et al., Dec. 13, 2017, 2017 CPD ¶ 383 at 3 n.4 (same). Because this allegation is factually deficient, in that AeroSage’s assertion that the requirement is bundled is contradicted by the terms of the solicitation, the allegation is dismissed for failure to state a valid basis of protest.

AeroSage alleges that all VA requirements, including resoliciting existing long-term contracts, should be set aside for Center for Verification and Evaluation (CVE) verified SDVOSBs, in accordance with the Veterans First Contracting Program (VFCP). The protester contends that the solicitation does not require SDVOSBs to be VA CVE verified.³ Protest at 2. The solicitation here explicitly contradicts the protester’s contention.

DLA explained that it interpreted “VA CVE verified” to mean that an SDVOSB must be listed as verified in the VA’s Vendor Information Pages (VIP) database. AR at 9, citing 38 C.F.R. § 74.1 (“Center for Verification and Evaluation (CVE) is an office within the U.S. Department of Veterans Affairs (VA) . . . and maintains the VIP database”). The VIP database is a database of businesses eligible to participate in VA’s Veteran-Owned Small Business Program. RFP amendment 0004 states that to “be eligible for award for the line items set-aside for SDVOSBs,” the “SDVOSB submitting an offer must be listed as verified in the Department of Veteran Affairs Vendor Information Pages (VIP) database, <https://www.vip.vetbiz.va.gov/>.” RFP amend. 0004, at 2. Because this allegation is also factually deficient, in that the alleged flaw in the solicitation is

³ To the extent AeroSage is arguing that the solicitation includes additional VA requirements that should be set aside for SDVOSBs, AeroSage fails to state factually sufficient grounds for protest. Bid Protest Regulations 4 C.F.R. §§ 21.1(c)(4), (f); 21.5(f). The RFP contained 12 line items for VA locations, and each of those line items was set aside for SDVOSB offerors. RFP attachment K, at 1. AeroSage’s protest did not identify any additional VA line items that it contends should have been set aside for SDVOSBs.

contradicted by the terms of the solicitation, this allegation is likewise dismissed for failure to state a valid basis of protest.⁴

AeroSage contends that the use of “assisted acquisitions” is “inefficient” and “cumbersome.”⁵ Protest at 2. The protester also asserts that the procurement was governed by the Economy Act. Id. at 8. The thrust of the protester’s complaint appears to be that assisted acquisitions should save the government money, and the way that DLA procures fuel for other agencies wastes money. The agency contends that the Economy Act does not apply to this procurement and that DLA has independent authority to procure petroleum products on behalf of military departments, other components within the Department of Defense, and civilian agencies. AR at 12-13. The protester does not rebut DLA’s assertion of independent authority. See Comments at 4. In its comments the protester merely reiterates that the ordering procedures in use result in higher fuel costs to the government. Id. Even if true, the protester’s allegation would provide no basis on which to sustain the protest, and we thus dismiss the allegation as failing to provide a valid basis of protest. See AeroSage, LLC, B-416381, supra, at 11; AeroSage LLC; SageCare, Inc., B-416279, supra, at 7 (same).

AeroSage further asserts that all the requirements solicited under the RFP should be set aside for SDVOSBs to rectify DLA’s failure to achieve its small business set-aside goals. Protest at 2. An agency’s alleged failure to meet its set-aside goals does not dictate that any particular procurement should be set aside. AeroSage LLC; SageCare, Inc., B-416279, supra, at 6 n.8. We dismiss this allegation for failure to state a valid basis of protest.

AeroSage also complains that the agency failed to provide it with a copy of the SBA’s nonmanufacturer rule waiver. Protest at 1. Under the SBA’s regulations, when the SBA has waived the nonmanufacturer rule, the contracting officer must provide written notification to potential offerors of any waivers being applied to a specific acquisition at the time a solicitation is issued. 13 C.F.R. § 121.1206(a). Here, the RFP advised offerors that “the SBA has waived the non-manufacturer rule requirement for the 12 line items set aside for SDVOSBs under this Solicitation.” RFP at 2. Because SBA’s regulations require the contracting officer to provide offerors with written notification of the waiver, but do not require the agency to provide the actual waiver to potential

⁴ In its comments on the agency report, AeroSage does not address the agency’s argument. Rather, AeroSage contends that there are requirements not included in this solicitation that should be resolicited and awarded to VIP CVE SDVOSBs. This allegation concerns alleged improper conduct in other procurements and is therefore not for GAO’s consideration here.

⁵ It is not entirely clear what the protester means by “assisted acquisitions,” although we note that FAR § 17.502-1 describes the use of assisted acquisition procedures by federal agencies in the acquisition of goods and services.

offerors, AeroSage has failed to allege a violation of procurement law or regulation, and therefore this allegation is dismissed as failing to state a valid basis of protest.⁶

AeroSage contends that the RFP was required to contain FAR clause 52.216-32, Task-Order and Delivery-Order Ombudsman. Protest at 2. Specifically, AeroSage states, “[t]his is a multiple award indefinite delivery indefinite quantity contract (textbook definition) requiring FAR clause 52.216-32 Ombudsman to correct this blatant bundling and consolidation.” Id. Use of FAR clause 52.216-32 in solicitations and contracts is prescribed by FAR §16.506(j), which directs that FAR clause 52.216-32 be inserted into “solicitations and contracts when a multiple-award indefinite-delivery indefinite-quantity contract is contemplated.”

The RFP did not contemplate the award of multiple-award indefinite-delivery, indefinite-quantity contracts; the RFP repeatedly stated that requirements contracts would be awarded. RFP at 2, 4, 18, 50. As noted above, the RFP included FAR clause 52.216-21, Requirements, which explicitly states “[t]his is a requirements contract.” Id. at 50. Because the RFP did not contemplate award of multiple-award indefinite-delivery, indefinite-quantity contracts, the RFP was not required to contain FAR clause 52.216-32, and the allegation that the RFP failed to include this clause is dismissed for failure to state a valid basis of protest.

AeroSage asserts, with no citations to the RFP or any other supporting evidence, that “[b]id and delivery parameters are and have been historically unreliable, inaccurate, exaggerated, and outdated making it unreasonably difficult for legitimate small businesses to get best price bids.” Protest at 2. AeroSage does not identify any specific information in the RFP that it contends is inaccurate. Therefore, Aero Sage fails to state a factually sufficient basis of protest and the allegation is dismissed on that basis. 4 C.F.R. § 21.1(c)(4). To the extent that the protester is arguing that the agency’s estimates are “historically” unreliable, such a claim is not for GAO’s consideration, because it does not concern the agency’s conduct of this procurement.

Supplemental Protests

The protester filed three supplemental protests, each of which, as we explain below, we dismiss.

AeroSage’s first supplemental protest asserted that on December 20 the agency sent “improper opening discussions letters” that failed to provide “opportunity for meaningful discussion on equal with other offer containing denial of our timely pre-offer deadline agency solicitation protest objections adverse action and unacceptable rating.” First Suppl. Protest, Dec. 23, 2019, at 1-2. The protester included more detailed allegations in its response to the agency. See id. attach. 6, Letter from Protester to Agency, date unclear.

⁶ The agency provided the actual waiver as part of its agency report. AR, Tab 5, SBA Waiver of Nonmanufacturer Rule, Aug. 29, 2019.

The protester complained generally about the inadequacy of the time provided for discussions and the submission of final proposal revisions; responses to the discussion letters were due December 27, and final proposal revisions were due January 6, 2020. See id. at 1-2, 6. The agency requested dismissal of this supplemental protest, asserting that the protester failed to provide a sufficient factual basis for these supplemental protest allegations. The protester responded to the agency's request with "Timely and Detailed Specific Improprieties in December 20, 2019 Negotiations." Response to Request for Dismissal. The response reiterated the prior supplemental allegations.

AeroSage has the burden of demonstrating that the agency's deadlines are unreasonable, and the protester has again failed to meet that burden. Otherwise, the protester challenges various document requirements. First Suppl. Protest, attach. 6, Letter from Protester to Agency, date unclear, at 2-4. The protester also failed to demonstrate that the agency's request for documents was unreasonable. As we note below, the record contains no substantive response by the protester to the agency's defense of the reasonableness of solicitation's documentation requirements. We agree with the agency that the protester failed to state valid bases of protest.

In its second supplemental protest, AeroSage challenged the agency's failure to include its proposal in the competitive range. Second Suppl. Protest, Jan. 14, 2020, at 1. AeroSage's proposal was excluded from the competitive range for the following reasons: AeroSage failed to submit a specification sheet, certificate of analysis, or certificate of quality as required by the solicitation, which rendered AeroSage's proposal technically unacceptable; AeroSage failed to confirm its understanding that any award made under the solicitation would result in a binding requirements contract with economic price adjustment; and, based on AeroSage's response to the discussion letter, it was unclear whether AeroSage agreed that an award would result in a binding contract. AR, Tab 26, AeroSage Notice of Removal from Competitive Range, Jan. 10, 2020.

AeroSage does not assert that it submitted specification sheets, certificates of analysis, or certificates of quality, or that it was unreasonable for DLA to exclude AeroSage from the competitive range for its failure to submit those documents based on the technical evaluation criteria in the RFP. Nor does Aero Sage contend that it confirmed that binding requirements contracts would result from the solicitation. We thus have no basis on which to conclude that the agency unreasonably removed the protester's proposal from the competitive range.

Instead, AeroSage argues that it was improper for the agency to exclude the protester's proposal from the competitive range because proceeding with the creation of the competitive range while this protest was pending violated the Competition in Contracting Act (CICA) automatic stay provisions. Second Suppl. Protest at 1-2. CICA provides that "a contract may not be awarded in any procurement after the Federal agency has received notice of a protest with respect to such procurement from the Comptroller

General and while the protest is pending.” 31 U.S.C. § 3553(c)(1). GAO, however, does not administer the requirement to withhold award. 4 C.F.R. § 21.6. Accordingly, an agency’s alleged failure to comply with the requirement to withhold award fails to state a valid basis of protest.⁷ See AeroSage, LLC; SageCare, Inc., B-415267.13, B-415267.14, Mar. 19, 2018, 2018 CPD ¶ 114 at 5.

On January 29, the agency notified our Office that it had overridden the CICA stay in this procurement. Letter from Agency to GAO, Jan. 29, 2020. AeroSage filed its third and final supplemental protest challenging the reasonableness of the agency’s justification for overriding the stay. Third Suppl. Protest, Jan. 31, 2020, at 2. The sufficiency of the agency’s justification for issuing the stay is not a matter for GAO’s consideration. See 4 C.F.R. § 21.6 (stating that GAO does not administer the requirements to withhold award or suspend contract performance under CICA).

The protest is denied in part and dismissed in part.⁸

Thomas H. Armstrong
General Counsel

⁷ Moreover, the removal of AeroSage from the competitive range while its protests were pending before GAO did not violate CICA. As we have previously noted, on its face section 3553(c)(1) only prohibits the agency from awarding a contract resulting from the protested procurement. AeroSage LLC, B-410648.2, B-410648.3, Mar. 20, 2015, 2015 CPD ¶ 111 at 3. That is, although an agency generally may not award a contract while a pre-award protest is pending, an agency is not required to suspend the closing date for the receipt of proposals or its evaluation of offerors’ proposals. LifeCare Mgmt. Partners, B-297078, B-297078.2, Nov. 21, 2005, 2006 CPD ¶ 8 at 10 n.16.

⁸ We consider two of AeroSage’s allegations to have been abandoned. The protester asserts that all orders and CLINS are below the simplified acquisition threshold. Thus, they should all be set aside for small business concerns. Protest at 2. The agency provided a substantive response to this allegation, demonstrating with reference to the protester’s own proposal that AeroSage’s claim is unsupported by the record. See AR at 15. The protester failed to respond to the agency’s defense of its conduct, see Comments at 4, and so we consider this allegation to have been abandoned. Jacobs Tech., Inc., B-413389, B-413389.2, Oct. 18, 2016, 2016 CPD ¶ 312 at 5. Similarly, AeroSage asserts that “[a]ny direct, indirect, or obtuse requirement for [a certificate of analysis (COA)], transportation/supplier agreements, Bio-diesel certificates are unnecessary and do not provide any meaningful accurate information prior to a specific order when the source, price, quantity, and availability/allocation of fuel is known.” Protest at 2. The agency offered a substantive explanation of why it was reasonable for the agency to require that the offers contain each of the required documents. See AR at 16-17. The protester failed to respond to the agency’s defense of its requirement, see Comments at 5, and we consider this allegation to have been abandoned, as well.