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Decision

Matter of: Odyssey Systems Consulting Group, Ltd.

File: B-418440.8; B-418440.9

Date: November 24, 2020

David S. Cohen, Esq., John J. O'Brien, Esq., and Daniel J. Strouse, Esq., Cordatis LLP, for the protester.

Colonel Patricia S. Wiegman-Lenz and Kyle E. Gilbertson, Esq., Department of the Air Force, for the agency.

April Y. Shields, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's pending corrective action in response to an earlier protest is dismissed where the protest fails to state a valid basis of protest, and where a supplemental protest is premature and attempts to resurrect allegations that were rendered academic by the corrective action.

DECISION

Odyssey Systems Consulting Group, Ltd., of Wakefield, Massachusetts, protests the agency's pending corrective action following its prior protest of the issuance of a task order under fair opportunity proposal request (FOPR) No. FA8622-20-F-8236, by the Department of the Air Force for advisory and assistance services to support the agency's medium altitude unmanned aircraft systems program office.

We dismiss the protest.

BACKGROUND

The agency issued the FOPR on September 16, 2019, to holders of the General Services Administration's One Acquisition Solution for Integrated Services Small Business multiple-award, indefinite-delivery, indefinite-quantity (IDIQ) contracts. The procurement was conducted pursuant to Federal Acquisition Regulation section 16.505 procedures. The estimated value of the task order over the possible 5-year period of performance is \$248,000,000. *Sumaria Sys., Inc.--Costs*, B-418440.3, July 16, 2020, 2020 CPD ¶ 240 at 2 (and internal citations).

The FOPR provided for award to the highest technically rated offeror with a realistic and reasonable price (HTRO-RRP), based on two evaluation factors: contractor rating system (technical) and cost/price. For the first factor, the FOPR established criteria for assigning up to 68,000 possible evaluation points, based on 32 subfactors. The FOPR provided that each offeror was to self-score its proposal against these 32 subfactors and submit, among other things, a self-scoring matrix worksheet and work samples to be used as substantiating data. *Sumaria Sys., Inc.--Costs, supra*, at 2 (and internal citations). Offerors were required to provide at least two government points of contact for each work sample, and the FOPR advised that the agency “reserves the right to contact the points of contact [] provided in the work sample . . . for any or all criteria during validation of self-scores.” *Id.* at 6 (and internal citations); see also FOPR Instructions, Oct. 1, 2019, at 1 (also advising that, “[i]f necessary, the Government will make a reasonable effort to contact the Government [points of contact] provided”).

On or before October 18, the agency received proposals from three offerors: Odyssey, Sumaria Systems, Inc., and a third offeror. The agency conducted an evaluation and selected Odyssey for award. Sumaria filed a protest with our Office on January 31, 2020, and a supplemental protest on March 12. On March 24, the agency took corrective action, and we dismissed the protest as academic. *Sumaria Sys., Inc.*, B-418440, B-418440.2, Mar. 25, 2020 (unpublished decision).

The agency conducted a reevaluation and made a new award decision, selecting Sumaria for award. Odyssey filed another protest with our Office on July 28, and a supplemental protest on August 3. On August 19, the agency again took corrective action, and we dismissed that protest as academic. *Odyssey Sys. Consulting Grp., Ltd.*, B-418440.4, B-418440.6, Aug. 20, 2020 (unpublished decision). The agency’s notice of corrective action advised that it had decided to take the following actions:

[T]he agency will reevaluate offerors’ technical proposals under technical subfactor 3.1.12¹ and will reassess all other areas of the offerors’ technical evaluations to ensure that they were performed in accordance with the solicitation. The Air Force will then make a new award decision in accordance with the solicitation. If Sumaria remains the [HTRO-RRP], the Air Force will lift the stay on Sumaria’s contract; if it is not, the Air Force will terminate the award and award to the newest HTRO-RRP. The Air Force may take any additional corrective action it deems appropriate.

¹ As noted above, the FOPR established criteria for assigning points based on 32 subfactors. For subfactor 3.1.12, the FOPR provided that, with regard to the work samples submitted, the agency would consider the number of positions that performed direct support for special access programs. FOPR Evaluation Criteria, Oct. 1, 2019, at 10.

Id. at 1, quoting Notice of Corrective Action, B-418440.4, B-418440.6, Aug. 19, 2020, at 1.

These protests followed.²

DISCUSSION

On August 31, Odyssey filed a protest with our Office challenging the agency's pending corrective action. After the agency filed a request for dismissal, arguing that the protest was legally and factually insufficient, Odyssey filed a supplemental protest on September 16, raising numerous evaluation and award decision challenges. The agency then filed another request for dismissal, arguing, among other things, that Odyssey's supplemental protest is premature given that "corrective action is still ongoing, the agency is still finalizing evaluation documentation, and the agency has yet to make a new award decision." Req. for Dismissal of Supp. Protest, Sept. 21, 2020, at 4. The protester filed responses to the requests for dismissal.

We have reviewed all of Odyssey's arguments, including those that are in addition to, or variations of, those specifically discussed below. Based on our review, we dismiss Odyssey's protests.

Odyssey's Protest (B-418440.8)

Odyssey first argues that the agency's pending corrective action is "unreasonable because it does not permit offerors to revise their proposals" to update points of contact for the work samples, and some of Odyssey's points of contact are now "unavailable." Protest at 8-9. Odyssey's argument is based on its belief that "it is extremely likely that the Air Force will have to validate work samples in the current round of this procurement." *Id.* at 13.

The agency argues that Odyssey "fundamentally misread the agency's intended corrective action" in that "nowhere did the agency's intended corrective action mention contacting [points of contact], as contemplated by Odyssey's protest." Req. for Dismissal, Sept. 14, 2020, at 2-3. The agency argues, further, that Odyssey's protest should be dismissed as legally and factually insufficient because it is "based solely on the speculative assertion that the agency will be re-contacting its [points of contact] during corrective action." *Id.* at 5. In this regard, the agency explains that "this is not what the agency stated it would do, and not what the agency did" during this pending round of corrective action. *Id.*

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557. Our role in resolving

² Odyssey's protests are within our jurisdiction to hear protests of task orders placed under civilian agency multiple-award IDIQ contracts valued in excess of \$10 million. 41 U.S.C. § 4106(f)(1)(B).

bid protests is to ensure that the statutory requirements for full and open competition are met. *Cybermedia Techs., Inc.*, B-405511.3, Sept. 22, 2011, 2011 CPD ¶ 180 at 2. To achieve this end, our Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) and (f), 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. 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. *Midwest Tube Fabricators, Inc.*, B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

Odyssey's protest does not contain sufficient information to establish the likelihood that the agency in this case violated applicable procurement laws or regulations. We agree with the agency that Odyssey's protest is based on the protester's misreading of the agency's notice of corrective action, which did not contemplate contacting the points of contact provided in the proposals. The plain language of the agency's notice of corrective action contemplates a reevaluation under a single subfactor³ and "reassess[ment of] all other areas of the offerors' technical evaluations to ensure that they were performed in accordance with the solicitation." *Odyssey Sys. Consulting Grp., Ltd.*, *supra*, at 1, quoting Notice of Corrective Action, *supra*, at 1. In other words, the record does not support Odyssey's contention, on which its protest is founded, that "it is extremely likely that the Air Force will have to validate work samples" during this pending round of corrective action.⁴ Protest at 13.

Nonetheless, Odyssey continues to press that our Office should consider the merits of its various arguments and recommend the agency "permit offerors to revise their proposals as requested in this protest." Protest at 15; Response to Req. for Dismissal, Sept. 16, 2020, at 4-5. We note that agencies have broad discretion to take corrective

³ With regard to subfactor 3.1.12, we note that, as the agency points out, "Odyssey's protest does not even claim its allegedly unavailable [points of contact] would affect a reevaluation under that subfactor." Req. for Dismissal at 3.

⁴ Even if the agency's pending corrective action had contemplated reevaluating other subfactors, we think Odyssey's underlying contention that the agency would be required to contact points of contact is still insufficient. Odyssey has not pointed to any requirement that the agency must allow proposal revisions under these circumstances. We noted in a previous decision about this procurement that the FOPR permits, but does not require, the agency to contact the points of contact provided in the work samples. See *Sumaria Sys., Inc.--Costs*, *supra*, at 6, citing FOPR Evaluation Criteria at 4 (advising that the agency "reserves the right to contact the points of contact [] provided in the work sample . . . for any or all criteria during validation of self-scores"). In this regard, we are persuaded by the agency's argument that its "discretion to contact [points of contact] is directly in accord with the solicitation, and Odyssey can point to nothing that mandated the agency contact [points of contact] during the evaluation or its limited corrective action." Req. for Dismissal at 3.

action where the agency determines that such action is necessary to ensure a fair and impartial competition. See, e.g., *American Warehouse Sys., LLC*, B-412543, Mar. 1, 2016, 2016 CPD ¶ 66 at 3; *Domain Name Alliance Registry*, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 8. Whether an agency's compliance with such authorities for implementing corrective action coincides with a protester's desired relief is not generally a basis for challenging the agency's actions. See, e.g., *Government Contracting Servs., LLC*, B-416696.2, May 6, 2019, 2019 CPD ¶ 170 at 5. While Odyssey believes "there were very good reasons why the Air Force should decide to take this additional step," Response to Req. for Dismissal at 5, the protester has not established a basis for challenging the agency's corrective action beyond advocating for its desired relief.⁵

In sum, Odyssey's protest does not contain sufficient information to establish the likelihood that the agency's pending corrective action violates applicable procurement laws or regulations. Under these circumstances, Odyssey's protest is dismissed.

Odyssey's Supplemental Protest (B-418440.9)

After receiving the agency's request for dismissal of its initial protest, Odyssey filed a supplemental protest that, in the protester's words, "revive[s] virtually all of the protest grounds that were previously asserted" in its prior protests, including various evaluation challenges.⁶ Req. to Use Protected Material in a Follow-on GAO Protest, Sept. 14, 2020, at 1; see also Supp. Protest at 2 (stating that its supplemental protest "reasserts the protest grounds" from its prior protests). Odyssey claims that its supplemental protest is based "against the reassessment performed during the [agency's] corrective action, based on the description of the reassessment contained in the agency's request for dismissal dated September 14, 2020." Supp. Protest at 1.

The agency argues that Odyssey's supplemental protest is inconsistent with our Bid Protest Regulations; among other things, it is premature, given that the agency's corrective action is ongoing. The agency also points out that Odyssey's supplemental protest is "an almost complete rehash of its [prior] protest . . . a filing which preceded the agency's current corrective action." Req. for Dismissal of Supp. Protest at 1.

⁵ We also note that the agency already appears to be addressing some of Odyssey's concerns. For example, the agency represents that it is "agreeing to review the evaluation documentation for any discrepancies," Req. for Dismissal at 2, which seems appropriate to address Odyssey's prior protests that questioned "contradictory information" in the record and communications that were "difficult to reconcile." Protest at 13.

⁶ For example, Odyssey argues that the agency unreasonably evaluated Odyssey's proposal by, among other things: decrementing Odyssey's score under various subfactors; applying unstated evaluation criteria; and providing insufficient explanation and various "contradictions and discrepancies in the validation record." See Supp. Protest at 4-44.

We have previously considered the timing of protests challenging the propriety of an agency's proposed corrective action. *Quotient, Inc.*, B-416473.4, B-416473.5, Mar. 12, 2019, 2019 CPD ¶ 106 at 4 (and internal citations). We have considered a challenge to the way in which the agency will conduct its corrective action and recompetition to be analogous to a challenge to the terms of a solicitation, thus providing a basis for protest that must be raised prior to the closing time for receipt of proposals. See *Domain Name Alliance Registry, supra*, at 7-8; see also 4 C.F.R. § 21.2(a)(1). We have also considered that a challenge to the agency's evaluation judgments is premature when the agency is undergoing corrective action and has not yet made an award decision. See *360 IT Integrated Sols.; VariQ Corp.*, B-414650.19 *et al.*, Oct. 15, 2018, 2018 CPD ¶ 359 at 10.

Here, Odyssey is challenging the agency's evaluation judgments even though, as the agency asserts, "corrective action is still ongoing, the agency is still finalizing evaluation documentation, and the agency has yet to make a new award decision." Req. for Dismissal of Supp. Protest at 4. While Odyssey attempts to recast its complaints as a challenge to the "ground rules for [the agency's] corrective action," it represents that its supplemental protest is directed "against the reassessment performed during the [agency's] corrective action"--that is, an outcome that has not yet been finalized. Response to Req. for Dismissal of Supp. Protest, Sept. 23, 2020, at 4; Supp. Protest at 1. Under these circumstances, Odyssey's supplemental protest is dismissed as premature.

Nonetheless, Odyssey advances multiple reasons for why its protest should be considered, all of which we reject.

For example, Odyssey contends that the agency's "evaluation methodology can only result in award to Sumaria" because, according to the protester's view of the agency's pending corrective action, "the award decision to Sumaria [is] a foregone conclusion." Response to Req. for Dismissal of Supp. Protest at 6. Odyssey argues, therefore, that its supplemental protest should be considered timely "because the agency clearly announced its intent on September 14 [in the request for dismissal] to follow a course of action adverse to Odyssey's interests, which Odyssey was required to protest within 10 days." *Id.* at 8-9.

As noted above, agencies have broad discretion to take corrective action where the agency determines that such action is necessary to ensure a fair and impartial competition. See, e.g., *American Warehouse Sys., LLC, supra*, at 3; *Domain Name Alliance Registry, supra*, at 8. When an agency takes corrective action, the interest to be served is the integrity of the procurement system. The mere possibility that the agency's corrective action could result in the selection of an offeror other than Odyssey for award is unobjectionable.

Moreover, Odyssey's contention that the agency's corrective action "can only result in award to Sumaria," Response to Req. for Dismissal of Supp. Protest at 9, reflects the protester's misunderstanding of the procurement and the agency's pending corrective

action. For example, based on the agency's commitment to reevaluate subfactor 3.1.12, which is worth a maximum of 1,000 points, Odyssey contends that, "no matter how the evaluation of this subfactor turns out, it cannot alter the procurement result since the evaluated difference between the Odyssey and Sumaria proposals was 2692.62 points." Supp. Protest at 2 n.1. The protester's theory does not address, however, the existence of the third offeror in the competition. Moreover, even were we to find persuasive Odyssey's attempt to predict the outcome of the agency's corrective action--which we do not--we have explained that when a firm has been notified that the agency is considering taking an action adverse to the firm's interests, but has not made a final determination, the firm need not file a "defensive protest," since it may presume that the agency will act properly. *American Multi Media, Inc.--Recon.*, B-293782.2, Aug. 25, 2004, 2004 CPD ¶ 158 at 3; see also *SOS Int'l, Ltd.*, B-407778.2, Jan. 9, 2013, 2013 CPD ¶ 28 at 2 (viewing protester's assertions of improper evaluation as premature, given that an award decision had not yet been made).

Notwithstanding the absence of a final determination here, Odyssey argues that we should consider its protest based on our decision in *Blue Origin, LLC*, B-408823, Dec. 12, 2013, 2013 CPD ¶ 289. Odyssey argues that, "[j]ust as in *Blue Origin, LLC*, here, the agency, on September 14 [*i.e.*, prior to award], clearly announced how it intended to evaluate proposals and, as discussed above, this evaluation methodology can only result in award to Sumaria." Response to Req. for Dismissal of Supp. Protest at 9. That decision, however, had "an unusual procedural posture" and involved several circumstances not found here. *Blue Origin, LLC, supra*, at 8. There, our Office found a protest "not speculative or premature, because [the agency] effectively has announced how it intends to evaluate proposals . . . [and] timely because it was filed within 10 days of Blue Origin being advised--through an adverse ruling on its agency-level protest--of [the agency's] position regarding its interpretation of the [solicitation]." *Id.* at 9. We also found that "[t]he most efficient, least intrusive alternative is for our Office to consider the issue now rather than to wait until the acquisition proceeds to a source selection decision." *Id.* We do not reach those same conclusions here.

As another example, Odyssey argues that its supplemental protest is appropriate for review because, in its view, the agency has now revealed details about its pending corrective action that would not have rendered Odyssey's prior protests academic. In this regard, Odyssey contends that, while it is not asserting that an agency's corrective action is required to address all of a protester's allegations, "it must address enough of them to render the entire protest academic." Response to Req. for Dismissal of Supp. Protest at 3-4, 4 n.2, *citing Mythics, Inc.; Oracle America, Inc.*, B-418785, B-418785.2, Sept. 9, 2020, 2020 CPD ¶ 295 at 4-5 (declining to dismiss protest where the agency's proposed corrective action did not appear appropriate based upon the particular circumstances of the acquisition and protest). Here, Odyssey raises the following flawed premise:

Had the agency's Corrective Action Notice[] informed GAO that its reassessment for all subfactors, other than 3.1.12, would consist of nothing more than relying on the original evaluation documentation, the

protest would not have been rendered academic. Odyssey and GAO would have understood, at that time, that regardless of how the agency came out on the reevaluation of subfactor 3.1.12, the decision to award to S[u]maria will remain unchanged. In such a situation, the protest to the remaining evaluation subfactors would have necessarily gone forward to determine if the evaluation of those subfactors was reasonable.

Response to Req. for Dismissal of Supp. Protest at 3.

We disagree. Our Office may dismiss protests as academic in any number of circumstances. *The Jones/Hill Joint Venture--Recon.*, B-286194.2, Dec. 8, 2000, 2000 CPD ¶ 203 at 3 (describing various circumstances under which we may dismiss protests as academic). Of relevance here, we may dismiss a protest as academic where the corrective action, while not addressing the issues raised by the protester, appears appropriate based upon the particular circumstances of the acquisition and protest. *Id.*, citing *S. Tech., Inc.--Recon. and Costs*, B-278030.3, Apr. 29, 1998, 98-1 CPD ¶ 125; see also *Quotient, Inc.*, *supra*, at 3 (stating that an agency's corrective action need not address every protest issue, but must render the protest academic), citing *SOS Int'l, Ltd.*, *supra*, at 2.

Not only is Odyssey's argument based, again, on its mischaracterization of the agency's pending corrective action, Odyssey also errs in its contention that the agency's subsequent assertions would have altered our decision to dismiss its prior protests. The agency has committed to making a new award decision and, as we explained in our decision dismissing Odyssey's prior protests: "Where, as here, an agency undertakes corrective action that will supersede and potentially alter prior procurement actions, our Office will generally decline to rule on a protest challenging the agency's prior actions on the basis that the protest is rendered academic." *Odyssey Sys. Consulting Grp., Ltd.*, *supra*, at 2; see also, e.g., *HP Enter. Servs., LLC--Recon.*, B-413382.3, Jan. 26, 2017, 2017 CPD ¶ 32 at 3 (explaining protest was properly dismissed as academic on the basis that the agency's pending corrective action "would supersede and potentially alter its prior source selection decision").

Odyssey's arguments also do not support maintaining its attempt to "revive" its prior protests. Req. to Use Protected Material in a Follow-on GAO Protest, Sept. 14, 2020, at 1; see also, e.g., *HP Enter. Servs., LLC--Recon.*, *supra*, at 7 (explaining that a protest "that was once academic is not revived by subsequent agency action or inaction"). While we appreciate Odyssey's desire that our Office issue a decision resolving all of its concerns, "we simply will not proceed to consider matters that, under the circumstances, may well make no difference in the procurement's outcome." *The Jones/Hill Joint Venture--Recon.*, *supra*, at 3.

In conclusion, we note again the agency's assertion that the "corrective action is still ongoing, the agency is still finalizing evaluation documentation, and the agency has yet to make a new award decision." Req. for Dismissal of Supp. Protest at 4. If, in the future, the agency takes concrete action that may properly form the basis for a valid bid

protest, the protester may file a new protest with our Office at that time, consistent with our Bid Protest Regulations.

The protest is dismissed.

Thomas H. Armstrong
General Counsel