



Decision

Matter of: Silver Investments, Inc.

File: B-419028

Date: October 26, 2020

Robert Martin, Silver Investments, Inc., for the protester.
Melissa McClellan, Esq., Department of Agriculture, for the agency.
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DIGEST

Protest challenging agency's issuance of a lease contract is dismissed as untimely where protester's communications with agency did not constitute an agency-level protest, and the protest was filed more than 10 days after the notice that formed the basis of its protest was received by protester.

DECISION

Silver Investments, Inc., of Red Bluff, California, protests the award of a lease to Cornerstone Community Bank, of Red Bluff, California, under request for lease proposal (RLP) No. 57-9104-19-001, issued by the Department of Agriculture (USDA), Natural Resources Conservation Service, for office space. The protester contends that the award is improper because the awardee's office space did not meet the solicitation's requirements for parking space.

We dismiss the protest as untimely because it was filed more than 10 days after the protester knew, or should have known, the basis for its protest.

BACKGROUND

The USDA issued the RLP on October 9, 2019, for office space within Red Bluff, California. Req. for Dismissal, Tab 1, RLP at 5, 10. The RLP contemplated the award of the lease for 20 years based on the lowest-priced, technically acceptable offer submitted. *Id.* at 5, 27. As relevant here, the RLP indicated that the agency's minimum requirements for the leased property included 6,465 square feet of office space and 59 total parking spaces. *Id.* at 5. The protester submitted its proposal before the proposal due date. Req. for Dismissal at 1.

On March 18, 2020, the agency informed the protester that its initial offer did not meet the RLP's minimum square footage requirement for office space. Req. for Dismissal, Tab 3, Notice of Award at 2. The agency requested that the protester provide a revised proposal within five days. Req. for Dismissal, Tab 2, Examples of Pre-Award Correspondence at 2. In that same correspondence, the protester was notified that if no response was received within that timeframe, the agency would assume that the protester no longer had any "interest in pursuing this procurement." *Id.* Although the protester never submitted a revised proposal, it sent several emails to the agency between March and June contending that its "building m[et] all the requirements set forth in the request" and voicing concerns about the other offerors' properties. *Id.* at 3-7. On July 29, the agency provided the protester with notice that award of the lease had been made to Cornerstone. Req. for Dismissal, Tab 3, Notice of Award at 2.

On August 5, the protester sent an email to various contracting personnel at the USDA. Req. for Dismissal, Tab 10, Email from Protester to Agency, Aug. 5, 2020 (Aug. 5 email). In the email, the protester indicated its concern with the USDA's decision to award the lease to Cornerstone. *Id.* It noted that the awardee's rental space did "not even come close to meeting the minimum requirements" of the solicitation. *Id.* The protester listed all the ways the property failed to meet the solicitation requirements. *Id.* Lastly, the protester stated that it "will be taking legal action because [the agency] did just what [the protester] thought [it] would do, put out minimum requirements then act like they don't matter and lease ground that does not meet the requirements." *Id.* The protester ended the email by stating, "[B]e advised that I will be filing [an] action and naming the people in the fraud." *Id.* at 2.

The protester also left several voicemails for one of the contracting officers on August 6. Voicemails from Protester to Agency, Aug. 6, 2020. In those voicemails, the protester stated that the awardee's property did not meet the solicitation requirements because there were not enough parking spaces and the property was in a floodplain. *Id.* Silver Investments also noted that it would be willing to add indoor office space to its property to meet the minimum square footage requirement noted in the solicitation. *Id.*

The agency responded to the August 5 email and the August 6 voicemails on August 7, stating that the correspondence did not comply with bid protest regulations. Req. for Dismissal, Tab 5, August 7 Letter and Pre-Award Correspondence at 11 (Aug. 7 letter). In that letter, the agency specifically identified the available avenues for the protester to seek a remedy for its complaints regarding the award of the lease, which included the following: (1) filing an agency-level protest--that complies with Federal Acquisition Regulation (FAR) 33.103--with the specifically identified USDA contracting officer; (2) filing a bid protest with the Government Accountability Office; or (3) filing a bid protest with the U.S. Court of Federal Claims. *Id.* The letter concluded by notifying Silver Investments that the agency would not engage in further discussions with the protester with respect to the lease award. *Id.*

The protester filed this protest with our Office on August 20.

DISCUSSION

Prior to the agency report due date, the agency requested that our Office dismiss Silver Investments's protest as untimely because Silver Investments was notified on July 29 that the agency awarded the lease to another firm. Req. for Dismissal at 3. Thus, the protester knew or should have known of the basis for protest at that time. *Id.* The USDA argues that the protest should have been filed with our Office within 10 days of notice of award, or Monday, August 10.¹ *Id.*

The protester objects to the agency's request for dismissal contending that Silver Investments's email to the agency on August 5 constituted the filing of an agency-level protest, thereby extending the time Silver Investments had to file a protest with our Office. Protester's Resp. to Dismissal, Sept. 17, 2020, at 1.

In filing its protest with our Office, the protester never indicated that it had previously filed an agency-level protest. As a result, we asked the agency what its position was in regards to whether the protester had filed an agency-level protest. Electronic Protest Docketing System No. 13. The agency responded that Silver Investments had not filed an agency-level protest. Agency's Resp. to GAO Request at Docket Entry 13 at 1. The agency contends that the August 5 email sent by the protester does not contain the necessary information required by the FAR to be considered an agency-level protest because, among other things, the protester never requested a ruling by the agency or identified the specific relief requested from the agency. *Id.* at 1-2 *citing* FAR 33.103(d)(2). In the alternative, the agency argues that even if the protester's August 5 email could be characterized as an agency-level protest, Silver Investments's protest with our Office would still be untimely because the agency's August 7 email would have clearly constituted initial adverse action by the agency. *Id.* at 2-3. Thus, the protester should have filed the protest within 10 days of the August 7 email; *i.e.*, on or before August 17. *Id.*

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. *Verizon Wireless*, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4. Under these rules, a protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2).

¹ When the last day of the 10-day period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. 4 C.F.R. § 21.0(d). Here, the last day of the period would fall on Saturday, August 8, 2020. Thus, in the agency's view, the period to file a timely protest only would extend to Monday, August 10, 2020.

A matter initially protested to the contracting agency will be considered timely by our Office only if the initial agency protest was filed within the time limits proscribed by our regulations for filing a protest with our Office 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). The FAR requires that an agency-level protest include, among other things, a request for a ruling by the agency and a statement requesting a form of relief. FAR 33.103(d)(2)(v)-(vi). Although a letter or email does not have to state explicitly that it is intended as a protest for it to be so considered--as is the case here--it must, at least, express dissatisfaction with an agency decision and request corrective action. *Western Star Hosp. Auth., Inc.*, B-414198.2, B-414198.3, June 7, 2017, 2017 CPD ¶183 at 6.

Our Office has consistently stated that, to be regarded as an agency-level protest, a written statement must convey the intent to protest by a specific expression of dissatisfaction with the agency's actions and a request for relief. *Id.*; *Masai Techs. Corp.*, B-400106, May 27, 2008, 2008 CPD ¶ 100 at 3; *ILC Dover, Inc.*, B-244389, Aug. 22, 1991, 91-2 CPD ¶ 188 at 2. In contrast, we have explained that a letter that merely expresses a suggestion, hope, or expectation, does not constitute an agency-level protest. *Masai Techs. Corp.*, *supra*. Further, a letter that highlights an aggrieved offeror's intention to file a protest at some future date weighs against characterizing the letter as an agency-level protest. See *Western Star Hosp.*, *supra* at 7 (dismissing protest filed with our Office as untimely where the protester's letter to the contracting officer did not constitute an agency-level protest).

We agree with the agency that the protester's August 5 email does not constitute an agency-level protest.² Although Silver Investments expressed dissatisfaction with the agency's award of the lease to another firm in the email, it did not request a ruling or

² The protester was provided an opportunity to respond to the agency's request for dismissal. In response, the protester simply reargues the merits of its protest but did not otherwise substantively respond to the agency's timeliness concerns. Rather, the protester merely contends that the agency was "quoting [from] the FAR[] to dismiss my protest" and asserts, "do they really expect anyone filing a protest for misconduct like this, to know all the regulations." Resp. to Req. for Dismissal, Sept. 17, 2020, at 2. As we have stated multiple times, a protester's professed lack of actual knowledge of our regulations is not a defense to dismissal of its protest as untimely. *Pacific Propeller, Inc.*, B-229868, Dec. 30, 1987, 87-2 CPD ¶ 649 at 1-2; *All Destinations*, B-233505.3, Dec. 29, 1988, 88-2 CPD ¶ 640 at 1-2. Prospective contractors are on constructive notice of our regulations, because they are published in the Federal Register and the Code of Federal Regulations. *Bill Cole Enterprises, Inc.--Recon.*, B-232691.2, Oct. 19, 1988, 88-2 CPD ¶ 374 at 1. Our regulations are intended to provide for expeditious consideration of procurement actions without unduly disrupting the government's procurement process. To waive our timeliness requirements for the protester's sole benefit would only serve to compromise the integrity of those rules. *Id.* at 1-2.

any specific relief from the agency, as required by the FAR.³ FAR 33.103(d)(2)(v)-(vi); see Req. for Dismissal, Tab 10, Aug. 5 email. Further, the email indicated only that the protester would take legal action at some future date. *Id.* at 1-3 (“I would not make plans of moving, be advised that I will be filing [an] action and naming the people in the fraud.”). Thus, the August 5 email is not an agency-level protest because the contents of the email do not satisfy the requirements necessary for it to be a protest. As such, Silver Investments was required to file its protest with our Office no later than 10 days after it knew or should have known the basis of protest. 4 C.F.R. § 21.2(a)(2). Here, the protester knew or should have known of its basis of protest on July 29, 2020, when the agency notified Silver Investments of its decision to make the award to Cornerstone. The protest, however, was not filed until August 20, 2020--more than 10 calendar days after the protester was notified that award was made to another contractor. Therefore, the protest is untimely. 4 C.F.R. § 21.2(a)(2).

Finally, we note that even if we were to consider the protester’s August 5 email to constitute an agency-level protest--which we do not--Silver Investments’s protest to our Office would still be untimely. As our regulations state, if an agency-level protest was timely filed, a protester has 10 days from initial adverse agency action to file a protest with our Office. 4 C.F.R. § 21.2(a)(3). Adverse agency action includes any action by the agency that prejudices the position taken in a protest filed with the agency. 4 C.F.R. § 21.0(e); see *H.L. Miller Mach. Tools, Inc.*, B-212409, Nov. 3, 1983, 83-2 CPD ¶ 525 at 1 (indicating that agency’s letter to protester from the contracting officer, which rejected protester’s request, constituted initial adverse action); see also *FMB Laundry, Inc.*, B-261837.2, B-261837.3, Dec. 19, 1995, 95-2 CPD ¶ 274 at 3-4 (noting that, in part, agency’s failure to respond to protester’s agency-level protest constituted initial adverse action). The agency’s August 7 letter to Silver Investments clearly notified the protester that, among other things: (1) the protester’s emails and phone calls to the staff did not comply with any bid protest regulations; (2) there were three available remedies to the protester, one of which included *filing an agency-level protest with the contracting officer*; and (3) agency personnel did not intend to engage in further discussions with the protester regarding the lease award. Req. for Dismissal, Tab 5, Aug. 7 Letter at 11.

Here, the agency’s August 7 letter indicated clearly that the USDA did not consider any correspondence from the protester to constitute an agency-level protest (because the

³ The protester also left the agency several voicemails on August 6. Voicemails from Protester to Agency, Aug. 6, 2020. In the voicemails, the protester did not request a specific form of relief from the agency, nor did the voicemails highlight that the protester intended to seek relief or a specific remedy by writing the August 5 email. Even if the protester requested a remedy or specific relief in the voicemails, the voicemails would not constitute an agency-level protest because an agency-level protest must be a “written statement.” See, e.g.; *Impact Resources, Inc.*, B-416093, June 11, 2018, 2018 CPD ¶ 207 at 5; *Western Star Hosp. Auth., Inc.*, *supra* at 6.

correspondence did not comply with the applicable regulations). Moreover, the agency informed the protester that it could file an agency-level protest consistent with the requirements of FAR 33.103, and that agency personnel would not otherwise engage in any further discussions with the protester. Based on these facts, and viewing this situation in the light most favorable to the protester--*i.e.*, that its emails and phone calls were, in fact, an agency-level protest--we find the company was clearly and unequivocally given notice that the agency had taken adverse action in response to any such agency-level protest. Thus, even under the protester's theory of this dispute, to be timely, this protest was required to be filed within 10 days of the August 7 letter from the agency, or not later than August 17. 4 C.F.R. § 21.2(a)(3). Because Silver Investments did not file its protest until August 20, its protest is untimely under all circumstances.

The protest is dismissed.

Thomas H. Armstrong
General Counsel