



Decision

Matter of: Hawaii Energy Systems, LLC

File: B-419789

Date: May 24, 2021

Rolf A. Klein, for the protester.

Mark Morita, Esq., and Philip Tourangeau, Esq., Department of the Navy, for the agency.

Jonathan L. Kang, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the issuance of justifications and approvals (J&As) for the use of other than full and open competition is dismissed as untimely where the protest was filed after the closing dates for the associated solicitations, and because it fails to state adequate legal and factual arguments concerning the J&As.

DECISION

Hawaii Energy Systems, LLC (HES), of Aiea, Hawaii, protests the issuance of justifications and approvals (J&As) for the use of other than full and open competition in connection with solicitations for requirements in Hawaii and Guam, by the Department of the Navy, Naval Facilities Engineering Command. The protester argues that the agency improperly used the J&As to award contracts to firms at higher prices than what the protester contends it offered or would have offered.

We dismiss the protest.

BACKGROUND

On April 20, 2021, HES filed this protest arguing that the Navy improperly issued J&As for the use of other than full and open competition in solicitations for the agency's requirements in Hawaii and Guam. Protest at 1-2. HES's protest consists of: (1) an email, with the date and addressee omitted, outlining the protester's complaints regarding the Navy's award of two contracts to Johnson Controls Incorporated (JCI); (2) a December 1, 2020, letter to the office of U.S. Senator Brian Schatz concerning the Navy's award of sole-source contracts in Hawaii and Guam; (3) a second December 1,

2020, letter to the office of U.S. Senator Brian Schatz enclosing the four J&As referenced in the first letter; (4) a March 8, 2019, letter from the Small Business Administration (SBA) to the protester's representative, identifying him as the "2019 Hawaii State Small Business Person of the Year"; and (5) the award certificate for the 2019 SBA award.

The Navy filed a request to dismiss the protest on May 4, arguing that the protest is untimely and fails to state adequate legal and factual grounds, and that HES was not an interested party to pursue the protest. Req. for Dismissal at 1-2. HES responded to the agency's request on May 6. Response to Req. for Dismissal at 1-2. For the reasons discussed below, we conclude that the protest is untimely and fails to state adequate legal and factual grounds. We therefore dismiss the protest.

DISCUSSION

HES argues generally that the Navy improperly issued J&As for the purpose of awarding contracts without full and open competition. See Protest, Undated Email, at 1-2. The protester contends that "[a]lthough [the Navy] may have the best of intentions [in] doing this, in practical reality these J&As are having an extremely negative impact on the American Taxpayer as well as ourselves, as the specified J&A Vendors seem to be taking full monetary advantage of this position. . . ." *Id.* at 1.

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act (CICA), 31 U.S.C. §§ 3551-3557. Our Office reviews alleged violations of procurement laws and regulations to ensure that the statutory requirements for full and open competition are met. *Id.* § 3552(a); *Cybermedia Techs., Inc.*, B-405511.3, Sept. 22, 2011, 2011 CPD ¶ 180 at 2. CICA provides that agencies must award contracts on the basis of full and open competition, absent a specific exception. 10 U.S.C. § 2304. For example, and as relevant here, an agency may use other than full and open competitive procedures where "the property or services needed by the agency are available from only one responsible source or only from a limited number of responsible sources and no other type of property or services will satisfy the needs of the agency." *Id.* § 2304(c)(1). When using noncompetitive procedures pursuant to an exception to the requirement for full and open competition in 10 U.S.C. § 2304, agencies are required to execute a written J&A with sufficient facts and rationales to support the use of the cited exceptions. 10 U.S.C. §§ 2304(b), (f)(1)(A); Federal Acquisition Regulation 6.303-1, 6.303-2, 6.304.

The December 1, 2020, letters included in the protest identified four J&As, each of which authorized the use of other than full and open competition based on the exception under CICA for "only one responsible source." See 10 U.S.C. § 2304(c)(1). The first J&A, dated April 15, 2019, approved the use of proprietary specifications for "WebCTRL® web-based building automation system (BAS) by Automated Logic Corporation (ALC)" in connection with a project for an "undersea [special operations forces] Operational Training Facility" in Pearl City Peninsula, Hawaii. Letter from HES to the Office of U.S. Senator Brian Schatz, Dec. 1, 2020, Exh. 1, Navy J&A No. 19-06,

at 1, 5. The second J&A approved the use of proprietary specifications for “the Automated Logic Corporation (ALC) Direct Digital Control (DDC) system, manufactured by Automated Logic Corporation” in connection with a project for “Repairs to Dedicated Central Office & Telecom Cable Vault Expansion” at the Marine Corps Base Hawaii in Kaneohe, Hawaii.¹ *Id.*, Exh. 2, Navy J&A No. 20-23, at 1. The third J&A, dated September 9, 2019, approved the use of brand name specifications for “Automated Logic Direct Digital Control (ALC DDC) Compass software” in connection with a project for “Bachelor Enlisted Quarters,” in Marine Corps Base Hawaii in Kaneohe, Hawaii. *Id.*, Exh. 3, Unnumbered Navy J&A, at 1, 4. The fourth J&A, dated June 29, 2020, approved the use of brand name “[JCI] METASYS Building Automation System commercial equipment on a sole source basis in contract actions requiring interface with the Area-Wide Energy Maintenance System (AWEMS) at Andersen Air Force Base (AAFB), Marine Corps Base Camp Blaz (MCB CB), and Naval Base Guam (NBG).” *Id.*, Exh. 4, Navy J&A No. 20-023, at 1, 13.

HES also referenced two contracts that it contends were awarded to JCI, for “Tridium based [building automation system-direct digital control (BAS-DDC)] system[s]”: (1) an undated “GUAM MCB J-011 Project” contract, and (2) an undated “Wheeler Army Air Force Base Maintenance Hanger” contract. Protest, Undated Email at 1. The protester contends that it offered the same systems as the awardee for these competitions, at a lower price. *Id.*

Timeliness

The Navy contends that HES’s arguments concerning the four J&As and two contract awards identified in its protest are untimely. Req. for Dismissal, at 5-6. We agree. Our Bid Protest Regulations contain strict rules for the timely submission of protests. Our timeliness 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. *Dominion Aviation, Inc.--Recon.*, B-275419.4, Feb. 24, 1998, 98-1 CPD ¶ 62 at 3. Under these rules, a protest based on alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of proposals must be filed by that time. 4 C.F.R. § 21.2(a)(1). Protests based on other than solicitation improprieties must be filed within 10 days of when the protester knew or should have known their basis. *Id.* § 21.2(a)(2).

The Navy states that the first J&A was posted on the System for Award Management website (SAM.gov) as part of a pre-solicitation notice for solicitation No. N62478-19-R-1518, which had a closing date of December 20, 2019. Req. for Dismissal at 5, 8.² The second J&A was posted on SAM.gov prior to the issuance of solicitation Nos. N62478-

¹ The date of the approval for this J&A was redacted. Letter from HES to the Office of U.S. Senator Brian Schatz, Exh. 2, Navy J&A No. 20-23, at 1.

² The request for dismissal included copies of all of the referenced SAM.gov notices. Req. for Dismissal, Exhs. 1-7.

18-D-4022 through 4028, each of which had a closing date of August 13, 2020. *Id.* The third J&A was posted on SAM.gov along with solicitation No. N62742-20-R-1315, which had a closing date of November 14, 2019. *Id.* at 6, 8. The fourth J&A was posted on SAM.gov along with solicitation No. N62742-21-R-1334, which had a closing date of March 31, 2021. *Id.*

With regard to the two contracts that the protester contends were awarded to JCI, the agency notes that the protester does not identify the solicitation or contract numbers for these awards. Req. for Dismissal at 4. For the undated “GUAM MCB J-011 Project,” the agency states that the protester may be referring to solicitation No. N62742-19-R-1313, which resulted in the issuance of a task order on January 6, 2021. *Id.* at 4 n.4. For the undated “Wheeler Army Air Force” project, the Navy states that this appears to be unrelated to any solicitation issued by the agency. *Id.* at 4.

HES’s response to the Navy’s request for dismissal does not specifically address the timeliness of its protest. See Response to Req. for Dismissal, May 6, 2021, at 1-2. Based on our review of the record, we agree with the agency that the protest is untimely. The four J&As were issued in connection with solicitations, and HES’s protest was filed after the closing date for all of the solicitations; therefore the protest is untimely. See 4 C.F.R. § 21.2(a)(1). The protester does not identify the dates for the two awards that it contends were made to JCI, but to the extent the agency was able to potentially identify one of them, the record shows that the task order was issued in January 2021--more than 10 days prior to the filing of the protest on April 21 2021. These challenges are therefore also untimely. See 4 C.F.R. § 21.2(a)(2). Because all of the protester’s arguments are untimely, or otherwise fail to establish that they are timely, we dismiss the protest. See 4 C.F.R. §§ 21.1(c)(5), (e).

Adequate Bases of Protest

The Navy also argues that HES’s arguments fail to state adequate legal and factual grounds of protest. Req. for Dismissal at 3-4. Although we find that the protest is untimely, we also agree that the protest fails to state adequate legal and factual grounds. 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.

With regard to the four J&As identified by HES, the protester does not explain why any of them violate the requirements of CICA or otherwise violate any procurement law or regulation. Similarly, with regard to the two contact awards to JCI, HES does not identify the solicitations under which they were made, or specifically explain whether these awards were made under solicitations issued pursuant to J&As for other than full

and open competition.³ See Protest, Undated Emails, at 1. We therefore conclude that HES fails to state adequate factual and legal grounds of protest in connection with these J&As and awards.⁴ See 4 C.F.R. § 21.5(f).

The protest is dismissed.

Thomas H. Armstrong
General Counsel

³ Additionally, it appears that for the first of the two alleged contract awards to JCI, the protester is not an interested party because it was a prospective subcontractor, rather than the prime contractor for the award. Protest at 1 (“[T]he awarded Mechanical Contractor wanted to use us, as we have a full-time Office on Guam, but he was told by [the Navy] the he had to use Johnson Controls, regardless of the price[.]”). The agency states that, assuming the protest refers to solicitation No. N62742-19-R-1313, HES did not submit a proposal as a prime contractor. Req. for Dismissal at 4 n.4. Only an “interested party” may file a protest with our Office, *i.e.*, an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a)(1). A prospective subcontractor or supplier lacks a “direct” interest in the award of a contract, and is therefore not an interested party to file a protest concerning the terms of a solicitation. *Allied Tube & Conduit*, B-252371, Apr. 27, 1993, 93-1 CPD ¶ 345 at 1.

⁴ In response to the Navy’s request to dismiss the protest, HES requests that our Office “put forth a thorough Investigation” regarding the Navy’s use of J&As and award of sole-source contracts. Response to Req. for Dismissal at 1. Our Office does not conduct such independent investigations as part of our bid protest function. See *Coast to Coast Computer Prods., Inc.*, B-409528.33, Dec. 3, 2014, 2014 CPD ¶ 346 at 6 n.8.