

Decision

Matter of: Desert Springs Trout Farm

File: B-420338; B-420338.2

Date: December 9, 2021

Shawn N. Simmons, Desert Springs Trout Farm, for the protester.
Rhea R. Rodriguez, Oregon Department of Fish and Wildlife, for the intervenor.
Nathaniel S. Canfield, Esq., Department of the Army, for the agency.
Michael P. Grogan, Esq., and Edward Goldstein, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest raised subsequent to a post-award debriefing in a simplified acquisition procurement for a commercial item is untimely where the procurement was not one involving a required debriefing--thus the timeliness rules based on protests that challenge a procurement involving a required debriefing are not applicable--and the protest was filed more than 10 days after the bases of protest were known.

DECISION

Desert Springs Trout Farm, a small business of Summer Lake, Oregon, protests the award of a contract to the Oregon Department of Fish and Wildlife (ODFW), under request for quotations (RFQ) No. W9127N21Q0092, issued by the Department of the Army, U.S. Army Corps of Engineers (USACE), for the production and delivery of rainbow trout to be stocked in USACE-managed waters throughout the Willamette River basin in Oregon and Washington. The protester contends that USACE improperly favored and colluded with ODFW during the course of the procurement, and that the awardee failed to submit an adequate subcontracting plan.

We dismiss the protest.

The agency issued the RFQ on August 23, 2021, under the commercial item acquisition and simplified acquisition procedures of Federal Acquisition Regulations (FAR) parts 12 and 13, seeking the production and delivery of rainbow trout to various locations in the Willamette River basin. Req. for Dismissal, exh. 1, RFQ at 16, 49.¹ The RFQ provided

¹ Our citations to the record correspond to the Adobe PDF document page numbers.

for award on a lowest-price, technically acceptable basis, with recent and relevant experience as the sole non-price evaluation factor. *Id.* at 50-51. While not part of the stated evaluation criteria, the RFQ required other than small businesses to submit a small business subcontracting plan. *Id.* at 13, 42.

On September 30, USACE notified the protester that ODFW received award of the purchase order; while Desert Spring's quotation was found to be acceptable, it was not the lowest priced. *Id.*, exh. 2. On October 1, the protester requested a debriefing, which the agency provided in writing on October 5. *Id.*, exh. 3. Desert Springs submitted additional questions in response to USACE's initial debriefing, to which the agency provided a written response on October 29. *Id.*, exh. 4. The protester filed the instant protest on November 3.

Desert Springs challenges the agency's conduct of the competition, contending that USACE provided ODFW with an unfair competitive advantage that resulted in a flawed award decision. Protest at 1. In this regard, the protester argues that because USACE conveyed the Leaburg Hatchery--a large fish hatchery, built by USACE in 1953, to raise rainbow trout to stock lakes created by USACE hydroelectric projects--to ODFW for free, as was required by law, Desert Spring was unable to compete with ODFW on an equal basis. Protest at 7-12. Additionally, the protester argues that because ODFW, purportedly not a small business, failed to approach Desert Springs to serve as a small business subcontractor, ODFW must have failed to submit a subcontracting plan and is thus ineligible for award. Protest at 12-14.

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 bid protests is to ensure that the statutory requirements for full and open competition are met. *Pacific Photocopy & Research Servs.*, B-278698, B-278698.3, Mar. 4, 1998, 98-1 CPD ¶ 69 at 4. Our Bid Protest Regulations contain strict rules for the timely submission of protests. These timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without disrupting or delaying the procurement process. *The MIL Corp.*, B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 5; *Dominion Aviation, Inc.--Recon.*, B-275419.4, Feb. 24, 1998, 98-1 CPD ¶ 62 at 3. As relevant here, our Regulations require that protests not based upon alleged improprieties in a solicitation "shall be filed not later than 10 days after the basis of protest is known or should have been known (whichever is earlier), with the exception of protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required." 4 C.F.R. § 21.2(a)(2).

The agency argues that because this procurement was conducted as a commercial item acquisition pursuant to the procedures of FAR part 13, a debriefing was not required. Req. for Dismissal at 2. As such, USACE contends that because the protest was not filed until November 3, more than 10 days after Desert Springs knew or should have known of its bases of protest, the protest is untimely under 4 C.F.R. § 21.2(a)(2). *Id.* In response, the protester argues that because "the solicitation here did not explicitly state

that the procurement would be conducted under FAR Part 13[.]” Desert Springs was not “put on notice that it was not entitled to the debriefing exception” under our Office’s Regulations. Resp. to Req. for Dismissal at 3.

Based on the record before us, we conclude Desert Springs’s protest is untimely. The solicitation clearly provides that the agency was conducting a commercial item acquisition pursuant to the simplified acquisition procedures of FAR part 13. Indeed, the RFQ included FAR provision 52.212-1 (Instructions to Offerors--Commercial Items), and explicitly stated in the evaluation criteria that USACE “will use the evaluation procedures[,] under FAR part 13[.]” RFQ at 16, 49. As such, we find no merit in the protester’s contentions that the solicitation was somehow equivocal as to what procedures USACE would be utilizing in conducting this procurement.²

The award of a purchase order under FAR part 13 does not require a debriefing, but may require a brief explanation of the basis for the agency’s award decision. To that end, FAR section 13.106-3(d) provides, “[i]f a supplier requests information on an award that was based on factors other than price alone, a brief explanation of the basis for the contract award decision shall be provided (see FAR 15.503(b)(2)).”³ See also *Divakar Techs., Inc.*, B-402026, Dec. 2, 2009, 2009 CPD ¶ 247 at 5 n.5. Moreover, while FAR provision 52.212-1(l)--the text of which was included in this RFQ--provides a list of required information the agency must furnish an unsuccessful vendor “if a post-award debriefing is given,” the FAR provision does not mandate that an agency actually provide a debriefing.⁴ See also *Gorod Shtor*, B-411284, May 22, 2015, 2015 CPD ¶ 162 at 3.

Accordingly, because USACE conducted the competition as a commercial item acquisition under FAR part 13, the debriefing it provided to the protester was not required. As such, under our Office’s Regulations (where the debriefing exception is inapplicable), Desert Springs was required to file its protest no later than 10 days after its bases of protest were known. Because Desert Springs knew or should have known

² We find similarly unpersuasive Desert Springs’s argument that its protest was timely filed because the agency’s notice of award failed to state that a debriefing was not required, as provided in FAR provision 52.212-1(l). Resp. to Req. for Dismissal at 3. Even if such a statement were required to be included in the award notice--the protester cites to no authority or regulation to suggest it was--the solicitation specifically included the very language Desert Springs argues would have put the firm on notice that a debriefing was not required. See RFQ at 16.

³ As opposed to FAR section 15.506(d), FAR section 15.503(b)(2) informs contracting officers what information shall be furnished to unsuccessful vendors in a FAR part 13 “brief explanation.” FAR 13.106-3(d); 15.503(b)(2).

⁴ While the information furnished under FAR provision 52.212-1(l) is essentially the same as required under FAR section 15.506(d), providing a debriefing is permissive, not compulsory.

its bases of protest no later than the date it was notified of the award to ODFW-- September 30--the firm's protest filed with our Office on November 3 is untimely.⁵

Concurrent with its response to the agency's request for dismissal, the protester also filed a supplemental protest. In this regard, the protester diverts from its original argument (contending that the statutorily required USACE conveyance of Leaburg Hatchery gave ODFW an unfair competitive advantage) to alleging that the agency and the awardee are colluding to postpone the conveyance of the Leaburg Hatchery until the purchase order is finalized. Supp. Protest at 2. The protester buttresses this argument with two pillars. First, the protester contends it was "[t]ipped off" to the "extended collusion" between USACE and ODFW based on learning, through county taxation and assessment records, that USACE remains the owner of record for the Leaburg Hatchery. *Id.* at 3. From this, and only this, Desert Springs deduces that "only once the noticed award to ODFW is confirmed will ODFW accept the offered transfer of Leaburg[.]" *Id.* at 2. Second, the protester focuses on the agency's phrasing, in its request for dismissal, that the conveyance of the Leaburg Hatchery was "mandated" by law. *Id.* at 3. In Desert Springs's view, USACE deployed this descriptor to "shroud[] the status of [the] Leaburg [Hatchery] in mystery" and obfuscate the fact that USACE "did not convey Leaburg, but kept the offer open[.]" to tip the competitive balance for ODFW. *Id.* at 2-3.

Our Regulations 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. 4 C.F.R. § 21.1(c)(4), (f); § 21.5(f). 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. Here, the fact that USACE has yet to transfer title of the Leaburg Hatchery to ODFW, without more, fails to state a legally cognizable claim that USACE conducted a flawed procurement or steered the award of this purchase order to ODFW.⁶ The

⁵ Desert Springs argues that it only learned the basis for its allegation concerning ODFW's unfair competitive advantage (based on USACE's transfer of ownership of the Leaburg Hatchery) though USACE's failure to answer Desert Springs's debriefing questions. Resp. to Req. for Dismissal at 3-4. We disagree. The agency's decision not to answer Desert Springs's question regarding who owns the Leaburg Hatchery provides no new information or evidence to support or refute the protester's allegation.

⁶ The supplemental protest is also untimely. Protests based on other than alleged improprieties in a solicitation must be filed no later than 10 days after the protester knew or should have known its basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Here, the protester contends that it was "alerted" to the collusion between USACE and ODFW via references (in the agency's request for dismissal) to the fact that the conveyance of the Leaburg Hatchery was "mandated" by law. Supp. Protest at 2. However, Desert Springs acknowledges in its initial protest that it was aware of the mandate by a law enacted on December 27, 2020. Protest at 4 (citing Consolidated

protester offers no other evidence or information, save naked assertions of agency misconduct, to support its allegation. Moreover, government officials are presumed to act in good faith and we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. See *Silynx Communications, Inc.*, B-310667, B-310667.2, Jan. 23, 2008, 2008 CPD ¶ 36 at 8. Accordingly, we dismiss Desert Springs's supplemental protest because it fails to state a valid basis of protest. 4 C.F.R. § 21.5(f).

The protest is dismissed.

Edda Emmanuelli Perez
General Counsel

Appropriations Act, 2021, Pub. Law No. 116-260, Div. AA, Water Resources Development Act of 2020, 134 Stat. 2615 (2020)). Accordingly, Desert Springs's supplemental protest, filed on November 3, 2021--more than 10 months after it knew the conveyance was mandated by law--is untimely.