



Decision

Matter of: Blue Rose Consulting Group, Inc.

File: B-421229

Date: November 22, 2022

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DIGEST

Protest is dismissed where the matter involved is the subject of litigation before a court of competent jurisdiction.

DECISION

Blue Rose Consulting Group, Inc. (Blue Rose), a historically underutilized business zone (HUBZone) small business concern of Washington, D.C., protests the terms and conditions of the General Services Administration's (GSA) request for proposals (RFP) No. 47QTCB22R0006 for the HUBZone pool of the governmentwide acquisition contract (GWAC) called Polaris, to provide customized information technology (IT) services and services-based solutions. The protester contends that the solicitation's provision related to the consideration of subcontractor capabilities is unduly restrictive of competition. Protest at 2-4.

We dismiss the protest because the matter involved is the subject of litigation before a court of competent jurisdiction.

BACKGROUND

The Polaris GWAC is a multiple-award, indefinite-delivery, indefinite-quantity contract to provide customized IT services. RFP at 3. The Polaris acquisition is divided amongst the following four solicitation set-aside types, or pools: small businesses; woman-owned small businesses (WOSB); service-disabled veteran-owned small businesses (SDVOSB); and HUBZone. Agency Response to Protester's Dismissal Objections at 1.

Each pool has the same RFP number, except for the final digit. For example, the SDVOSB pool is identified as RFP No. 47QTCB22R0007, while the HUBZone pool is RFP No. 47QTCB22R0006. For ease of reference, we will refer to these Polaris solicitations by their identified pools (e.g., HUBZone solicitation). According to the agency, “[a]ll four of these RFPs are nearly identical in their terms, proposal requirements and evaluation criteria.” *Id.*

On October 19, 2022, Blue Rose filed two identical protests with our Office. One protest challenged the terms of the SDVOSB solicitation (B-421230), and the other challenged the terms of the HUBZone solicitation (B-421229). Both protests challenged the same specific RFP provision related to the consideration of subcontractor capabilities (section L.5.4), which is identically stated in both solicitations. On October 20, 2022, the agency notified our Office that other firms had filed pre-award protests before the United States Court of Federal Claims (COFC), challenging the terms of each of the Polaris solicitation pools, with the exception of the HUBZone pool.

Blue Rose requested, and our Office granted, an opportunity to argue that its protest challenging section L.5.4 in the HUBZone solicitation (B-421229) and the SDVOSB solicitation (B-421230), should not be dismissed. Upon review, we dismissed Blue Rose’s protest of the SDVOSB solicitation (B-421230) on November 3, 2022, because the matter involved in Blue Rose’s SDVOSB protest was currently before a court of competent jurisdiction. *Blue Rose Consulting Grp., Inc.*, B-421230, Nov. 3, 2022 (unpublished decision). In this decision, we dismiss Blue Rose’s remaining challenge of the HUBZone solicitation because we conclude that the matter at issue is also currently before a court of competent jurisdiction.

DISCUSSION

In opposing the agency’s request for dismissal, Blue Rose argues the present protest should proceed before GAO, because “the HUBZone RFP is not being litigated in the Court of Federal Claims.” Objection to Dismissal at 2. The protester further contends that the particular solicitation provision the firm challenges (section L.5.4) is also “not at issue in the pending COFC cases.” *Id.* at 3 (emphasis removed). According to Blue Rose, since RFP section L.5.4 is not directly mentioned in the complaints before the COFC, the “facts and issues are simply not the same.” *Id.* Blue Rose consequently claims that “[t]he resolution of the COFC cases will not result in any scenario in which the issues Blue Rose presented . . . will become ‘academic.’” *Id.* at 4. We disagree.

Our Office will not decide a protest where the matter involved is the subject of litigation before a court of competent jurisdiction. 4 C.F.R. § 21.11(b) (“GAO will dismiss any case where the matter involved is the subject of litigation before, or has been decided on the merits by, a court of competent jurisdiction.”); *Oahu Tree Experts*, B-282247, Mar. 31, 1999, 99-1 CPD ¶ 69. Even where the issues before the court are not the same as those raised in our Office by a protester, or are brought by a party other than the protester, we will not consider the protest if the court’s disposition of the matter could render a decision by our Office academic. *Schuerman Dev. Co.*, B-238464.3,

Oct. 3, 1991, 91-2 CPD ¶ 286 at 2-3; *Geronimo Serv. Co.--Recon.*, B-242331.3, Mar. 22, 1991, 91-1 CPD ¶ 321 at 2. Where there is a possibility that the court's consideration of an issue may render a decision by our Office academic, dismissal is appropriate. *Cont'l Serv. Grp., Inc. et al.*, B-416443.3 *et al.*, Nov. 19, 2018, 2018 CPD ¶ 393 at 7 n.5.

Here, we conclude that dismissal is appropriate because the "matter" involved in Blue Rose's challenge to the terms of the HUBZone solicitation is the subject of litigation before a court of competent jurisdiction, and the court's disposition could render any decision by our Office on Blue Rose's protest academic. *Harrington, Moran, Barksdale, Inc.*, B-401934.2, B-401934.3, Sept. 10, 2010, 2010 CPD ¶ 231 at 2 n.2. Blue Rose's present protest argues that the HUBZone solicitation contradicts the governing Small Business Administration (SBA) regulations and is unduly restrictive of competition, because section L.5.4 of the RFP "appears to forbid leveraging the capabilities of a first-tier subcontractor." Protest at 3 (*citing* 13 C.F.R. § 125.2(g)). Quoting section 125.2(g), Blue Rose contends that the SBA regulations direct agencies to consider the capabilities of a first-tier subcontractor where the offeror itself does not possess those capabilities.¹ *Id.* at 3-4.

The protests before the COFC similarly argue that the Polaris set-aside solicitations violate the same SBA regulatory provision, *i.e.*, 13 C.F.R. § 125.2(g). Specifically, Count II of VCH's COFC protest, challenging the small business and SDVOSB solicitation pools, argues that because the solicitation pools do not allow or expressly say that the mentor-protégé joint venture can leverage the experience of its first-tier subcontractor, "the [s]olicitation violates 13 C.F.R. § 125.2(g)." Agency Notice, attach. 1 at 11 (¶ 48). Count II of SHS' COFC protest, challenging the small business and WOSB pools, makes the same argument. Agency Notice, attach. 2 at 11 (¶ 47).

Moreover, even though Blue Rose's protest is about a solicitation pool that is not among the solicitation pools under protest at the COFC, as explained above, the central issue in Blue Rose's protest and the protests at the COFC are the same. All the cases "turn[] on how to interpret Small Business Regulation 13 C.F.R. § 125.2(g)." Response to Dismissal Objections at 1-2. Blue Rose's HUBZone protest and the protesters before

¹ Section 125.2(g) states, in full:

When an offer of a small business prime contractor includes a proposed team of small business subcontractors and specifically identifies the first-tier subcontractor(s) in the proposal, the head of the agency must consider the capabilities, past performance, and experience of each first tier subcontractor that is part of the team as the capabilities, past performance, and experience of the small business prime contractor if the capabilities, past performance, and experience of the small business prime does not independently demonstrate capabilities and past performance necessary for award.

13 C.F.R. § 125.2(g).

the COFC insist that 13 C.F.R. § 125.2(g) requires agencies to permit offerors to rely on a first-tier subcontractor to satisfy the solicitation's requirements. Blue Rose and the COFC protesters premise their arguments on the agency's alleged improper interpretation and misapplication of 13 C.F.R. § 125.2(g). As such, even though the HUBZone solicitation is not specifically being protested before the COFC, the "matter" involved in Blue Rose's HUBZone protest is the subject of litigation before the court. *Int'l Bus. Machs. Corp.*, B-416657.5, B-416657.6, Dec. 11, 2018, 2018 CPD ¶ 420 at 2 (dismissing protest where "Oracle's complaint before the COFC includes arguments that are the same or similar to assertions presented in IBM's protest to our Office.").

Because the issues presented by Blue Rose's protest and the protests at COFC are identical, the court's disposition of the COFC protests could render any decision by our Office on Blue Rose's HUBZone protest academic. *Harrington, Moran, Barksdale, Inc.*, *supra* at 2 n.2. With the protests presently at the COFC, it appears that the court could address whether the regulation, 13 C.F.R. § 125.2(g), allows the agency to prohibit protégé firms from relying on first-tier subcontractors in order to fulfill the Polaris solicitations' past performance requirement. In doing so, the court's disposition would affect the matter of whether 13 C.F.R. § 125.2(g) allows the agency to prohibit offerors from relying on first-tier subcontractors to meet the "Systems, Certifications, and Clearances" requirement (section L.5.4) in the HUBZone solicitation. As the agency correctly points out, any decision from the COFC interpreting 13 C.F.R. § 125.2(g) will likely "have to be implemented in the HUBZone acquisition." Response to Dismissal Objections at 2-3. While that matter remains before the court, GAO will not also decide the question.² *Intuitive Research & Tech. Corp.*, B-416820, Oct. 11, 2018, 2018 CPD ¶ 355 at 2.

Finally, the broad relief sought by the protesters at the COFC also weighs in favor of dismissal. To the extent the court grants the protesters' requested relief to "[p]ermanently enjoin the performance of the award of any contract under the Solicitation," and requires the agency to "revise the Solicitation to comply with applicable law," such a ruling--as the agency correctly notes--could require revising the HUBZone solicitation. Agency Notice, attach. 1 at 14; *id.*, attach. 2 at 14. The court may conclude that corrective action is necessary to address the issues raised by the protesters before the court, and any potential broad corrective action could affect all Polaris solicitation pools. Where the pending court case could render academic any decision of this Office on the matters raised by Blue Rose's HUBZone protest, it would

² We also find no merit to Blue Rose's attempt to frame its challenge to the HUBZone solicitation here as being so restricted in nature that the protests before the COFC would have no relevancy to, or potential impact on, the HUBZone protest here. As noted above, the COFC protesters contend that the agency improperly interpreted and misapplied 13 C.F.R. § 125.2(g)--the very same regulation at issue here.

be inappropriate for our Office to consider it at this time. *Schuerman Dev. Co., supra* at 2-3; *Geronimo Serv. Co.--Recon., supra* at 2-3.³

The protest is dismissed.

Edda Emmanuelli Perez
General Counsel

³ In its opposition to dismissal, Blue Rose conflates pending court litigation with matters that have been previously decided before a court of competent jurisdiction. Thus, the protester mistakenly argues that our Office should “follow the same path” in declining to dismiss its protest as we did in *Veteran Technology Partners III LLC*, B-418461.13, B-418461.20, Feb. 24, 2021, 2021 CPD ¶ 145. Objection to Dismissal at 3-4. In *Veteran Technology*, the agency requested that our Office dismiss a protest challenging the evaluation of the firm’s proposal on the basis that the issue had been previously decided at the COFC. There, we declined to dismiss the protest because the protester’s specific challenge had not previously been presented before the court, and was not part of the court’s consideration in its decision. *Veteran Technology, supra* at 7.

Our regulations distinguish between previous court decisions “on the merits” as in *Veteran Technology*, and the situation here, where the matter is the current “subject of litigation before” the court. 4 C.F.R. § 21.11(b). In instances where a court of competent jurisdiction has issued a decision on the merits, the matters presented before the court are known, and therefore discernable as to whether the allegations in a protest filed with our Office were previously decided on the merits by the court. *Veterans Contracting Grp., Inc.*, B-415747, Jan. 12, 2018, 2018 CPD ¶ 28. Here, in contrast, the court has not issued a decision deciding the protesters’ challenges to the Polaris solicitations on the merits, and the potential impact of the court’s future decision--potentially on the entire Polaris acquisition--is not fully known.