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Decision

Matter of: Loyal Source Government Services, LLC

File: B-420959.14

Date: June 7, 2024

Samuel B. Knowles, Esq., Thomas E. Daley, Esq., Christie M. Alvarez, Esq., and David R. Lacker, Esq., DLA Piper LLP (US), for the protester.

Roger A. Hipp, Esq., and Pavan Mehrotra, Esq., Department of Homeland Security, for the agency.

Kyle E. Gilbertson, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging terms of solicitation is dismissed as academic where agency proposes to amend solicitation and allow vendors to submit quotations responding to amended terms.

2. Protest challenging the adequacy of agency's Procurement Integrity Act (PIA) investigation and mitigation is denied where record shows the agency's actions were reasonable and consistent with the requirements of the Federal Acquisition Regulation.

DECISION

Loyal Source Government Services, LLC (Loyal Source), of Orlando, Florida, protests the amended terms of request for quotations (RFQ) No. 70B03C22Q00000081, issued by the Department of Homeland Security (DHS), United States Customs and Border Protection (CBP), for medical screening services. The protester challenges the solicitation's terms and alleges that the agency has failed to adequately mitigate procurement integrity violations.

We dismiss the protest in part and deny the protest in part.

BACKGROUND

The agency issued the RFQ on August 2, 2022, to holders of the Department of Veterans Affairs (VA) Federal Supply Schedule (FSS) Contract 621 I, Professional and Allied Healthcare Staffing Services, pursuant to the procedures of Federal Acquisition

Regulation (FAR) subpart 8.4. Contracting Officer's Statement (COS) at 2, 4; Agency Report (AR), Tab 8a, RFQ amend. A23 at 2.¹ The solicitation seeks to procure medical screening services for persons in CBP custody at over 80 locations along the southwestern United States border. RFQ at 65. The RFQ contemplates the issuance of a single task order with a potential 5-year period of performance, inclusive of options. *Id.* at 31, 96. The task order's estimated value over the entire performance period is \$2 billion. COS at 1. The agency will make award on a "best value" basis, using five evaluation factors in descending order of importance: (1) staffing; (2) corporate experience; (3) technical approach and capabilities; (4) past performance; and (5) price. RFQ at 150-51.

This procurement has been a long and contentious one resulting in several protests before our Office. On September 28, 2022, the agency awarded a task order to Vighter, LLC. COS at 2. Loyal Source, along with two other vendors, challenged that award in three separate post-award protests (B-420959 *et al.*). In response to those protests, the agency advised our Office that it intended to take corrective action by issuing a new source selection decision. *See, e.g., Loyal Source Gov't Servs., LLC, B-420959.3, Nov. 14, 2022 (unpublished decision).* As a result, we dismissed the protests as academic. *Id.*

To implement its corrective action, the agency issued amendment A08. *Loyal Source Gov't Servs., LLC, B-420959.6, Mar. 31, 2023, 2023 CPD ¶ 86 at 2.* On December 30, Loyal Source filed a protest (B-420959.6) challenging the terms of amendment A08. *Id.* Our Office denied Loyal Source's protest on March 31, 2023. *Id.* at 1.

The agency subsequently distributed a "clarification notice" detailing the font type and size requirements for quotations, which was protested (B-420959.7) by another vendor. We dismissed that protest as academic when the agency informed our Office that it would take corrective action to amend the RFQ and allow for the submission of revised quotations. *Sterling Med. Assocs., Inc., B-420959.7, July 3, 2023 (unpublished decision).* Loyal Source then filed another protest (B-420959.8) challenging the agency's decision to take corrective action. We dismissed that protest, concluding Loyal Source was not an interested party to challenge the agency's proposed corrective action. *Loyal Source Gov't Servs., LLC, B-420959.8, July 19, 2023 (unpublished decision)* (finding "Loyal Source is not an interested party to maintain this protest because the protester has not identified cognizable competitive prejudice resulting from CBP's decision to take corrective action in Sterling Medical's pre-award protest," and that without such showing of prejudice, "Loyal Source lacks the direct economic interest required to be an interested party under these circumstances.").

Through amendment A12 to the RFQ, the agency established a two-phase mandatory "down-select" evaluation process. COS at 3; RFQ at 127-128. Loyal Source submitted

¹ Citations are to the Adobe PDF page numbers. The agency amended the solicitation 23 times. Unless otherwise noted, references to the RFQ are to the amendment A23 version found at tab 8a of the agency report.

its phase I quotation on September 5, and the agency invited the firm to phase II of the competition. Protest at 12. After the agency made its phase I down-select decision, two vendors challenged their exclusion from phase II.²

The agency then issued additional RFQ amendments, which resulted in protests from Loyal Source and another vendor, Sterling Medical Associates, Inc. Sterling Medical subsequently withdrew its protest (B-420959.11). COS at 4. We dismissed Loyal Source's protest (B-420959.12), challenging the terms of amendment A15, after CBP stated it would again take corrective action by amending the solicitation. *Loyal Source Gov't Servs., LLC*, B-420959.12, Dec. 20, 2023 (unpublished decision).

Most recently, on February 21, 2024, CBP issued amendment A23 to the RFQ. AR, Tab 8, RFQ amend. A23 at 1. That amendment established March 4 as the due date for phase II quotations. RFQ at 1. Before that deadline, Loyal Source filed this protest.

DISCUSSION

Loyal Source raises a number of pre-award allegations, the gravamen of which challenges the terms of the solicitation, as amended, as well as claiming that the agency has failed to mitigate procurement integrity violations that have competitively prejudiced the protester. Protest at 12-22, 29-33. Although we do not specifically address all of Loyal Source's arguments, we have fully considered them and conclude that none furnishes a basis to sustain the protest.³

Challenges to the Solicitation

Loyal Source asserts two broad challenges to the terms of the RFQ. First, the protester contends that the amended solicitation contains contradictory, ambiguous, and unreasonable requirements. Protest at 12-16. Second, Loyal Source argues that the

² We denied Central Care, Inc.'s, protest challenging its phase II exclusion. *Central Care, Inc.*, B-420959.9, B-420959.13, Jan. 11, 2024, 2024 CPD ¶ 24. Another protester, Caduceus Healthcare, Inc., withdrew its protest (B-420959.10). COS at 4.

³ For example, Loyal Source also alleged that the agency failed to identify and neutralize organizational conflicts of interest (OCIs) arising from [DELETED]'s, teaming arrangement with another firm. Protest at 22-29. The agency requested that we dismiss these OCI challenges as premature since "the agency has neither selected an awardee, nor made a determination with respect to any possible OCI, nor made a determination whether to waive any such OCI." Req. for Partial Dismissal at 1. We agree. A protester's allegation that another firm has a conflict of interest is generally premature when filed, as it was here, before an award has been made. *REEP, Inc.*, B-290688, Sept. 20, 2002, 2002 CPD ¶ 158 at 1-2. Considering the agency has not yet made a final determination concerning these alleged OCIs, we dismissed Loyal Source's OCI challenges as premature. *Id.*; Notice of Resolution of Req. for Partial Dismissal at 1-2.

solicitation contains provisions that are inconsistent with customary commercial practices. *Id.* at 16-22. Prior to the agency report due date, the agency advised our Office that it had decided to take partial corrective action. The agency proposed to amend the RFQ to address both allegations challenging the solicitation's terms and conditions.⁴ Notice of Partial Corrective Action at 1-4.

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. *Honeywell Tech. Sols., Inc.*, B-407159.4, May 2, 2013, 2013 CPD ¶ 110 at 3. As a general rule, agencies have broad discretion to take corrective action where the agency has determined that such action is necessary to ensure a fair and impartial competition. *Northrop Grumman Info. Tech., Inc.*, B-404263.6, Mar. 1, 2011, 2011 CPD ¶ 65 at 3. We have consistently stated that the details of implementing corrective action are within the sound discretion and judgment of the contracting agency, and we will not object to any particular corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. *Id.*; *DGC Int'l*, B-410364.2, Nov. 26, 2014, 2014 CPD ¶ 343 at 3.

Here, the agency's decision to further amend the solicitation to clarify its requirements and allow vendors to submit quotations responding to that amended solicitation renders academic Loyal Source's protest grounds challenging the solicitation's terms. *Veterans Choice Med. Equip., LLC*, B-415583, Dec. 12, 2017, 2017 CPD ¶ 382 at 3 (finding that agency's decision to amend solicitation to clarify how it will evaluate proposals renders challenges to the initial solicitation academic).

Loyal Source objects to dismissal of these allegations on the basis that the agency's proposed changes are, in its view, inadequate and fail to resolve those protest grounds. Resp. to Notice of Partial Corrective Action at 1-2. Notwithstanding protester's objections, the agency's corrective action to amend the RFQ renders academic Loyal Source's challenges to the RFQ's terms. *Veterans Choice Med. Equip., supra*. The agency asserts that the protester's objections are premature because they "consist of speculation that the agency's corrective action will fail to execute its corrective action plan in a way that fully addresses the protest," particularly in light of the fact that "the agency has not yet carried out its plan to reconsider and amend the solicitation." Resp. to Protester Resp. to Notice of Partial Corrective Action at 2-3. We agree. If the agency takes concrete action in the future that may properly form the basis for a valid protest,

⁴ With regards to the first protest allegation, the agency stated that it would amend the solicitation by either "(1) amending the agency-provided staffing plan to eliminate inconsistencies with state law; (2) withdrawing the agency-provided staffing plan and directing quoters to provide their own staffing plans; or (3) declaring that state law is preempted for purposes of this contract." Notice of Partial Corrective Action at 2. The agency also intended to amend the solicitation to respond to each of Loyal Source's specific contentions outlined under the protester's second protest allegation--the details of which are lengthy and do not need to be restated here. *Id.* at 2-4.

such as issuing an amended solicitation with terms or conditions that are legally objectionable, Loyal Source may file a protest with our Office at that time, consistent with our Bid Protest Regulations. See *Quotient, Inc.*, B-416473.4, B-416473.5, Mar. 12, 2019, 2019 CPD ¶ 106 at 3-4 (dismissing challenge to corrective action where the corrective action rendered the earlier protest academic and where the challenge is otherwise premature). Accordingly, these allegations are dismissed.

Procurement Integrity Act (PIA) Violation

Loyal Source argues that the agency failed to adequately mitigate disclosures that violate the PIA and competitively prejudice Loyal Source. Protest at 29-33. Specifically, the protest includes two news articles and two letters to congressional committees from the Government Accountability Project (GAP), a non-profit organization, that Loyal Source contends include “non-public information about the evaluation under this Solicitation and disparaging and inaccurate information about Loyal Source’s past performance under the incumbent contract.”⁵ *Id.* at 11, 29-30 (citing exhs. D.1-D.4). As a result of these disclosures, the protester contends that the agency “must either cancel the procurement or implement appropriate and adequate mitigation.” *Id.* at 33. While the agency concedes certain PIA violations have transpired, it responds that the agency has “complied with the FAR and mitigated the violations.” Memorandum of Law (MOL) at 3, 8.

The procurement integrity provisions of the Office of Federal Procurement Policy Act, as amended, 41 U.S.C. §§ 2101-2107, known as the PIA, provide, among other things, that a federal government official “shall not knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.” 41 U.S.C. § 2102(a)(1). This prohibition applies to anyone who “(i) is a present or former official of the Federal Government; or (ii) is acting or has acted for or on behalf of, or who is advising or has advised the Federal Government with respect to, a Federal agency procurement.” *Id.* at § 2102(a)(3)(A). The disclosure of source selection information during a procurement is improper and an agency may take remedial steps if it reasonably determines that the disclosure harmed the integrity of the procurement process. *Health Net Fed. Servs., LLC*, B-401652, Oct. 13, 2009, 2009 CPD ¶ 213 at 5.

The FAR sets forth the requirements for an agency to investigate potential PIA violations. FAR 3.104-7. A contracting officer who receives or obtains information of a possible PIA violation “must determine if the reported violation or possible violation has

⁵ These exhibits include a June 2, 2023, USA Today article; a November 19, 2023, Washington Post article; as well as November 30, 2023, and February 16, 2024, letters submitted by GAP to congressional committees. Protest, exhs. D.1-D.4. While the protester’s comments also reference an August 25, 2023, Washington Post article as “Protest, Ex. D.5,” that article was not attached to the protest, nor was there a “Ex. D.5” included anywhere in the protest filed with our Office. See Comments at 2 n.1; Electronic Protest Docketing System No. 1 (Protest).

any impact on the pending award or selection of the contractor.” FAR 3.104-7(a). If the contracting officer concludes that a violation impacts the procurement, the contracting officer is required to report the matter to the head of the contracting activity (HCA). FAR 3.104-7(a)(2). The HCA must then review all available information and take appropriate action, such as: (1) advising the contracting officer to proceed with the procurement; (2) beginning an investigation; (3) referring information to appropriate criminal investigative agencies; (4) concluding that a violation occurred; or (5) recommending to the agency head that a violation has occurred and void or rescind the contract. FAR 3.104-7(b).

Background

On November 28, 2023, Loyal Source notified the contracting officer of reported events that the firm believed violated the PIA. COS at 4; Protest, exh. E.2 at 2. Specifically, Loyal Source stated that remarks in a November 19 Washington Post article, entitled “Medical provider vying for border contract faces scrutiny after girl’s death,” confirmed that “at least three CBP officials have violated the Procurement Integrity Act by divulging sensitive, source selection information pertaining to the on-going CBP procurement.” Protest, exh. E.2 at 2-3. The Washington Post article indicated, among other things, that Loyal Source was a “finalist” among a “half-dozen companies” for the procurement. Protest, exh. D.3 at 2. The article also stated that a “CBP advisory board did not recommend Loyal Source for the next round of consideration, but the agency’s procurement office overruled the board’s findings,” according to “three CBP officials.” *Id.* at 4.

On December 11, shortly after the contracting officer received this information from Loyal Source, the Head of Contracting Activity (HCA) for CBP prepared a memorandum for the DHS Chief Procurement Officer (CPO), entitled “Procurement Integrity Violation Determination and Temporary Transfer Request.” AR, Tab 9, HCA Memorandum at 1. The memorandum explained that, in accordance with FAR section 3.104-7, the HCA had reviewed “all information available” concerning the alleged violation of the PIA. *Id.* Based on that review, the HCA determined that the November 19 Washington Post article “appears to involve the unauthorized disclosure of procurement sensitive information by Government officials,” including source selection information, and that the disclosure “constitutes a violation of the Procurement Integrity Act.” *Id.* In light of this violation, the HCA (1) directed the CBP contracting officer to “pause the procurement,” and (2) referred the matter to CBP’s Office of Professional Responsibility (OPR) for further investigation.⁶ *Id.* The agency explains that OPR’s investigation is “ongoing” and is currently examining “the potential violation and misconduct of CBP personnel.” AR, Tab 12, Contracting Officer (CO) Memorandum at 1.

⁶ OPR is the office in CBP responsible for ensuring compliance with agency-wide programs and policies relating to corruption; investigating criminal and serious misconduct or mismanagement allegations; and executing CBP’s internal security and integrity awareness programs. AR, Tab 17, CBP OPR Website at 1.

In addition, CBP's HCA decided that it was in the "best interest" of the government for the procurement to be removed from CBP and transferred up to DHS headquarters (HQ), Office of the CPO, "to manage the source selection phase and award the new contract." AR, Tab 9, HCA Memorandum at 1-2. In the HCA's opinion, this transfer "will protect the integrity of the continuing procurement action and ensures that this essential procurement moves forward while the investigation into the violation and misconduct of CBP personnel is underway." *Id.* at 2.

The DHS CPO immediately approved the HCA's request to remove the acquisition from CBP and transfer it up to DHS HQ, subject to certain conditions. AR, Tab 9, HCA Memorandum at 2. The CPO conditioned the transfer's approval with the understanding that the DHS Office of Procurement Operations (OPO) will "review the solicitation, pending litigation and requirements to validate the current CBP procurement strategy or revise if/as appropriate." *Id.*; MOL at 2. The DHS CPO further advised that "if significant risks are identified through the review process, changes may be needed which may affect the timeline to award and preservation of funds." AR, Tab 9, HCA Memorandum at 2.

Concurrent with the acquisition's transfer from CBP, a new contracting officer was selected from DHS OPO to replace the CBP contracting officer. COS at 1. On February 2, 2024, amendment A21 to the RFQ informed vendors of the agency's change to the designated contracting officer. AR, Tab 6, RFQ amend. A21 at 1-3. At this juncture, DHS OPO, an office which reports to the DHS CPO, had replaced CBP as the contracting activity responsible for the acquisition under the current solicitation. MOL at 2.

After the transfer, the new DHS contracting officer made changes to the evaluation team "to mitigate the impact that potential violations and/or misconduct directly associated with the PIA will have on the active solicitation." AR, Tab 12, CO Memorandum at 1. For example, the "contracting office, general counsel, policy, technical, and price representatives have been identified and selected within DHS, HQ to replace those evaluation team resources within CBP." *Id.* The DHS contracting officer also designated a new source selection official from DHS's Office of the Chief Information Officer and appointed two personnel from DHS's Office of Health Security to serve as technical evaluators. *Id.*; AR, Tab 11, Evaluation Plan at 3. The contracting officer noted that these DHS technical evaluators "have been vetted and cleared through OPR to ensure there are no active conflicts with the ongoing PIA investigation." AR, Tab 12, CO Memorandum at 1.

The agency explained, as a result of these personnel changes, no CBP personnel will "serve as Phase II evaluators or as the designated selection official."⁷ *Id.* Further, to limit any potential for improper dissemination of information, the agency's phase II

⁷ The contracting officer explains that CBP's sole involvement will be limited to the participation of one non-voting CBP advisor to the phase II technical evaluation team. AR, Tab 12, CO Memorandum at 1; AR, Tab 11, Evaluation Plan at 3.

evaluation plan mandates that “[n]o information regarding the evaluation process, including the status of the evaluation, shall be discussed with individuals outside of the evaluation team.” AR, Tab 11, Evaluation Plan at 12. The agency believes these measures “mitigate potential adverse impacts from possible PIA violations and/or misconduct currently being investigated by OPR,” but the contracting officer acknowledges that “further mitigation efforts” may become necessary in the future. AR, Tab 12, CO Memorandum at 2. According to the DHS contracting officer, should additional PIA violations or acts of misconduct be identified, this may result in “significant solicitation revisions or even formal cancellation of the active solicitation.” *Id.*

Challenges to PIA Investigation

Loyal Source contests the adequacy of the agency’s PIA investigation. The protester argues that the agency failed to consider all information related to its alleged PIA violations, objecting that the agency’s analysis appears to only address instances described in the Washington Post article. Comments at 7. For example, Loyal Source maintains that the CBP HCA’s memorandum only referenced the November 19 Washington Post article and did not discuss any procurement integrity issues in an August 25, 2023, Washington Post article; a November 30, 2023, Washington Post article;⁸ or the November 30, 2023, and February 16, 2024, congressional letters by GAP.⁹ *Id.*

Regarding the information in the August 25 Washington Post article, Loyal Source never in fact notified the agency that the article evidenced a potential PIA violation. While Loyal Source sent a September 7 letter to the CBP contracting officer that included a footnote with an internet link to the article--the letter noted nothing more than that the article “speaks to a lack of professionalism, at a minimum, and *may be improper.*” Protest, exh. E.1 at 2, 4 (emphasis added). Thus, to the extent Loyal Source had intended the September 7 letter to constitute notice of a PIA violation, this allegation was legally insufficient.¹⁰ *Alpine Cos., B-419831 et al.*, June 8, 2021, 2021 CPD ¶ 227

⁸ The protester has failed to establish when or how it raised the November 30 Washington Post article to the contracting officer’s attention, as that article is neither mentioned within, nor attached to, Loyal Source’s protest. See Protest at 37.

⁹ Loyal Source raised or otherwise referenced these various news articles and GAP letters to the contracting officer throughout late 2023 and early 2024. Specifically, Loyal Source referenced the August 25, 2023, Washington Post article in a September 7 letter to the contracting officer (protest, exh. E.1); the November 19 Washington Post article in a November 28 letter (protest, exh. E.2); and the November 30 and February 16, 2024, GAP congressional letters in December 14 and February 27 letters, respectively (protest, exhs. E.3, C.5).

¹⁰ To the extent Loyal Source’s protest now intends to raise a PIA violation from information contained in the August 25 article, the allegation is untimely. Under our
(continued...)

at 7 (finding general “concerns” insufficient to timely raise PIA violation). We find that Loyal Source did not expressly notify the agency of a PIA violation until its November 28 letter to the contracting officer, discussing the November 19 Washington Post article, and asserting that the article “confirms a violation of the Procurement Integrity Act (‘PIA’) by at least three CBP officials.” Protest, exh. E.2 at 2.

Furthermore, regarding the GAP letters to Congress, the CBP’s HCA issued her memorandum before Loyal Source ever notified the contracting officer about these letters. That is, the HCA’s December 11 memorandum preceded Loyal Source’s December 14 letter to the contracting officer, which included a copy of the first (November 30) GAP letter to Congress. Protest, exh. E.3 at 2. Finally, that the protester faults the HCA for not considering--in her December 11, 2023, memorandum--a February 16, 2024, GAP letter to Congress, is illogical on its face. Protest, exh. D.1 at 2.

Here, notwithstanding the on-going nature of the agency’s OPR investigation, we find that the agency took appropriate action to address the alleged PIA violations in the protester’s November 28, 2023, letter in accordance with section 3.104-7 of the FAR. Upon receiving notification from Loyal Source of the public disclosure of source selection sensitive information in late 2023, the CBP HCA reviewed all available information, and agreed with Loyal Source that a PIA violation had occurred. AR, Tab 9, HCA Memorandum at 1. The HCA immediately acted by (1) initiating an investigation; (2) referring information to OPR; (3) concluding that a violation had happened; and (4) implementing mitigation measures to allow the procurement to continue, including transferring the acquisition to an entirely different contracting activity (DHS OPO), under DHS HQ. *Id.* at 1-2. The FAR expressly contemplates that the HCA may “[b]egin an investigation,” “[r]efer the information disclosed to appropriate criminal investigative agencies,” and “[c]onclude that a violation occurred,” which is exactly the “appropriate action” taken by the HCA here. FAR 3.104-7(b). Moreover, even when a PIA violation has found to have occurred, the FAR explicitly contemplates that an agency can nevertheless deem it appropriate to proceed with the procurement. FAR 3.104-7(a).

While Loyal Source argues it submitted other news articles and congressional letters to the agency, which in its view, “raise additional procurement integrity issues,” the protester fails to explain why its concerns are not being adequately addressed by the agency’s ongoing investigative efforts. Comments at 8. The record reflects that the agency is continuing to consider these procurement integrity issues through its ongoing OPR investigation into “possible PIA violations” and misconduct by CBP personnel. AR, Tab 12, CO Memorandum at 1-2. Even though the protester argues that the agency’s

regulations, we will not review an alleged PIA violation “where the protester failed to report the information it believed constituted evidence of the offense to the Federal agency responsible for the procurement within 14 days after the protester first discovered the possible violation.” *Matson Navigation Co.*, B-416976.2 *et al.*, Jan. 24, 2019, 2019 CPD ¶ 69 at 11-12 (citing 4 C.F.R. § 21.5(d)).

documented investigation thus far should have discussed additional sources of information, the protester's disagreement with the adequacy of the agency's ongoing review, without more, does not demonstrate that the agency is conducting its investigation in a manner that is inconsistent with the requirements of FAR section 3.104-7.¹¹ *DynCorp Int'l LLC*, B-411126.4 *et al.*, Dec. 20, 2016, 2017 CPD ¶ 333 at 23.

Challenges to PIA Mitigation

Loyal Source also challenges the agency's PIA mitigation, arguing that the agency "has not met its obligation to mitigate the impact on the procurement and the competitive prejudice to Loyal Source." Protest at 32. In the protester's view, the agency "must either cancel the Solicitation, or, at a minimum, conduct a reasonable investigation, including identifying and removing the individuals within CBP who are biased against Loyal Source." Comments at 17.

We find the agency's mitigation measures to be a reasonable response to the improper disclosures the agency has to date determined to be violations of the PIA. In this regard, once Loyal Source informed the agency of the alleged violations, the HCA conducted an initial investigation, and took immediate steps to ensure that any CBP officials who may have violated the PIA would not be in any position to either evaluate or "be responsible for selecting the awardee." MOL at 4. The agency reasoned it could sufficiently mitigate any impact from the improper disclosures by transferring the procurement to DHS HQ and removing all CBP officials--except for one serving in a non-voting advisory role--from the acquisition.¹² AR, Tab 12, CO Memorandum at 1. Presently, the new contracting officer, voting technical evaluators, and source selection official all work for DHS components outside of CBP.¹³ *Id.*; AR, Tab 11, Evaluation Plan at 3.

While Loyal Source argues that the agency "has not identified and removed all of the CBP employees who are making improper disclosures," the agency has already transferred the acquisition away from CBP and, through its ongoing OPR investigation, is in the process of identifying CBP employees involved in any PIA violations.

¹¹ To the extent Loyal Source's allegations challenge the conduct or aspects of the agency's ongoing investigation, such allegations are premature. *IBM Corp.*, B-415798, Mar. 27, 2018, 2018 CPD ¶ 130 at 9.

¹² Loyal Source does not allege the non-voting CBP official violated the PIA.

¹³ The agency's transfer of the acquisition also mitigates any impact arising from Mr. X, the former contracting officer's representative (COR) on Loyal Source's incumbent contract. Loyal Source alleges that Mr. X was the "impetus for much of the scrutiny Loyal Source is now facing." Protest, exh. E.3 at 2-3. Not only did the agency transfer the acquisition from CBP in late 2023, but the contracting officer had also removed Mr. X from his role as the incumbent contract COR in April 2022. MOL at 2-3. Considering these measures, the agency reasonably concluded that "Mr. [X] is no longer in a position to affect this acquisition in any way." *Id.* at 5.

Comments at 13. The mere fact that the agency has not yet ascertained the identity of all CBP individuals involved in the violation does not demonstrate that the agency's mitigation efforts are inadequate to address any improper disclosures.

Loyal Source's current protest posture is particularly unavailing given the firm itself previously advocated for the same mitigation measures that the agency implemented. In its November 28, 2023, letter to the contracting officer regarding the November 19 Washington Post article, Loyal Source wrote that it "respectfully requests that, at a minimum, the individuals involved in the source selection process--including the advisory boards--*be replaced.*" Protest, exh. E.2 at 4 (emphasis added). In a later February 2024 letter, Loyal Source reiterated its request that CBP "investigate the matter and either cancel the procurement, disqualify offerors, *or re-constitute the evaluation board.*" Protest, exh. C.5 at 3 (emphasis added). Only now does the protester claim that the mitigation measure--that it requested, and the agency implemented--is somehow inadequate. Accordingly, we find no support for the protester's position and conclude its arguments here to be without merit. See *Phoenix Mgmt., Inc.*, B-405980.7 *et al.*, May 1, 2012, 2012 CPD ¶ 219 at 5 (finding no basis to conclude that the agency acted unreasonably where it "appointed a new evaluation panel").

Nor do we find that the agency was required to cancel the procurement, as Loyal Source insists, because the protester has failed to show that it was competitively prejudiced by the disclosures. Comments at 17. Even where a protester shows an actual PIA violation, our inquiry does not end there. Rather, the question becomes whether the violation created an unfair advantage by disclosing competitively useful information. *QinetiQ N. Am., Inc.*, B-405163.2 *et al.*, Jan. 25, 2012, 2012 CPD ¶ 53 at 11. An unfair competitive advantage is a necessary element of a procurement integrity allegation since it relates to the resulting prejudice. *Id.* Where an agency chooses not to cancel the procurement after an improper disclosure, we will sustain a protest based on the disclosure only where the protester demonstrates that the recipient of the information received an unfair advantage, or that it was otherwise competitively prejudiced by the disclosure. *S&K Aerospace, LLC*, B-411648, Sept. 18, 2015, 2015 CPD ¶ 336 at 8.

At the outset, we note that the agency has not foreclosed the possibility of canceling the solicitation, should future circumstances warrant such action. The DHS contracting officer explains that if the agency later concludes additional PIA violations or acts of misconduct have taken place, the agency reserves the right to implement further mitigation, including "formal cancellation of the active solicitation." AR, Tab 12, CO Memorandum at 2.

On this record, however, we find no support for the protester's contention that the disclosures have provided other vendors with an unfair advantage, or that the statements have given rise to "ongoing competitive prejudice." Protest at 29. For example, Loyal Source argues that certain disclosures include "baseless, inaccurate, and misleading allegations pertaining to Loyal Source's performance under its

incumbent contract.” Protest at 30; Comments at 2. While the protester vehemently disputes any negative characterization of its incumbent performance, the PIA specifically prohibits the release of “contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.” 41 U.S.C. § 2102(a)(1).

The release of information related to an incumbent contract does not satisfy this definition. See *S&K Aerospace, LLC, supra* at 6; *Tetra Tech, Inc.*, B-419012, B-419012.2, Oct. 27, 2020, 2020 CPD ¶ 333 at 3 (“As we have previously stated, the release of information regarding a prior incumbent contract does not meet this definition.”); *Mitchco Int’l, Inc. v. United States*, 26 F.4th 1373, 1383 (Fed. Cir. 2022) (concluding cost or pricing information pertaining to incumbent contract did not qualify as “contractor bid or proposal information,” agreeing with GAO decisions that have “routinely held that this type of information is not subject to the PIA.”). Although Loyal Source seeks to categorize any disparaging comments made about its incumbent work as PIA violations, the protester does not explain how such descriptions fall within the purview of the PIA. Comments at 2-6; 41 U.S.C. § 2101(2), (7); *Engineering Support Pers., Inc.*, B-410448, Dec. 24, 2014, 2014 CPD ¶ 89 at 6 (concluding information derived from, or generated during, performance of incumbent contracts or task orders was not “contractor bid or proposal information” or “source selection information”).

In any event, the protester has not shown how such disclosures conveyed an unfair advantage to other vendors or competitively prejudiced Loyal Source in this procurement for the follow-on requirement. Comments at 16. While Loyal Source argues the statements ascribed to CBP personnel show a bias to “award to a vendor other than Loyal Source,” the protester does not elaborate how any disclosed information will be competitively useful to other vendors under this RFQ. Protest at 31. Aside from generally asserting that it has “suffered competitive prejudice,” Loyal Source fails to explain why the agency’s transfer of the acquisition to a higher-level department contracting office does not adequately mitigate the concerns of bias against Loyal Source. *Id.* at 33. Indeed, the protester’s PIA allegations revolve around the conduct of CBP personnel, not DHS HQ officials. Comments at 2 (alleging that “multiple CBP officials carried out unauthorized and improper disclosures.”). Loyal Source does not allege any bias on the part of DHS personnel, or argue that the newly appointed DHS contracting officer, evaluation team, or source selection official have violated the PIA. *Kemron Env’tl. Servs., Inc.*, B-299880, Sept. 7, 2007, 2007 CPD ¶ 176 at 4 (noting that because protester “was not competitively harmed by the disclosure, there is no basis for finding the agency’s actions objectionable based on harm to the procurement system.”). On this record, we find no basis to sustain Loyal Source’s protest.

The protest is dismissed in part and denied in part.

Edda Emmanuelli Perez
General Counsel