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Decision

Matter of: Bart & Associates, Inc.

File: B-414234, B-414234.2

Date: February 24, 2017

David S. Cohen, Esq., John J. O'Brien, Esq., Daniel Strouse, Esq., and Amy J. Spencer, Esq., Cohen Mohr LLP, for the protester.

John Cornell, Esq., Joshua Kranzberg, Esq., Mark Allen, Esq., Eric Crane, Esq., and Beth Sturgess, Esq., Department of Homeland Security, for the agency.

Christian B. Nagel, Esq., Ronald Fouse, Esq., and James J. Holt, Esq., McGuire Woods LLP, for ERPSI, the intervenor.

Nora K. Adkins, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest submitted within 10 days after the reinstatement of GAO's civilian agency task order protest jurisdiction, but more than 70 days after submitting a letter of concern to the agency's contracting officer and almost 80 days after receiving a debriefing, is dismissed as untimely because the reinstatement of GAO's jurisdiction did not restart the protester's 10-day deadline to file a bid protest at GAO.

2. Supplemental protest based on information obtained by protester in connection with an untimely initial protest is dismissed as untimely.

DECISION

Bart & Associates, Inc., of McLean, Virginia, protests the Department of Homeland Security, United States Customs and Immigration Services' (USCIS) issuance of task orders to Enterprise Resource Planned System International (ERPSI), of Laurel, Maryland, and NCI Information Systems, Inc., of Reston, Virginia, pursuant to solicitation No. HSSCCG-16-R-00027-02 for flexible agile software development (FADS) II services. The protester challenges the agency's evaluation of Bart's technical demonstration and past performance, and argues that the agency's best-value tradeoff decision failed to follow the solicitation's weighting scheme.

The protest is dismissed.

BACKGROUND

The solicitation was issued on March 28, 2016, pursuant to the fair opportunity ordering procedures of Federal Acquisition Regulation (FAR) § 16.505, to all EAGLE II¹ functional category one contract holders. Solicitation at 1, 21. The solicitation sought services to provide Agile development teams for information technology development projects across USCIS. *Id.*, Performance Work Statement, at 22. The solicitation contemplated the award of up to four fixed-priced task orders for a 6-month base period with two 6-month option periods on a best-value tradeoff basis based on six evaluation factors: technical approach, management and staffing approach, corporate experience of the prime contractor, technical demonstration, past performance, and price. Solicitation at 8, 11, 18.

Multiple offerors submitted proposals in response to the solicitation, including Bart, ERPSI, and NCI. The agency conducted a best-value tradeoff and selected the proposals of ERPSI and NCI as the best value.

Bart received notice of the task order awards on September 30.² Bart received a debriefing on October 5. On October 13, Bart sent a “letter of concern” to the contracting officer. Agency Report (AR), Tab 19, Bart Letter of Concern, at 1-4. While Bart’s letter was not labelled as a protest, the letter explained that Bart had concerns with the agency’s evaluation and award decision, and requested that DHS make a third award to Bart. *Id.* Bart did not contact the agency following its submission and it did not receive a response from the contracting officer.

On December 23, Bart filed a protest with our Office.

¹ The Enterprise Acquisition Gateway for Leading-Edge Solutions (EAGLE) is a multiple-award indefinite-delivery, indefinite-quantity (IDIQ) contract vehicle, specifically designed as the preferred source of information technology services for the majority of the Department of Homeland Security’s enterprise infrastructure and initiatives. See EAGLE Ordering Guide, https://www.dhs.gov/xlibrary/assets/opnbiz/CPO_EAGLEOrderGuide.pdf (last visited Feb. 23, 2017).

² On October 1, our Office’s jurisdiction to consider protests of civilian agency task and delivery order contracts entered into under section 4103 of Title 41 expired. See *Ryan Consulting Grp., Inc.*, B-414014, Nov. 7, 2016, 2016 CPD ¶ 324 at 2. On December 14, the President signed into law the GAO Civilian Task and Delivery Order Protest Authority Act of 2016 (the Act), Pub. L. No. 114-260, 130 Stat. 1361 (2016), codified at 41 U.S.C. § 4106(f)(3). The Act reinstated GAO’s jurisdiction over protests of task and delivery order orders placed under civilian agency IDIQ contracts.

DISCUSSION

The protester challenges the agency's evaluation of its technical demonstration and past performance. The protester also alleges that the agency's best-value tradeoff decision failed to follow the solicitation's weighting scheme. After receiving the agency report in response to its initial protest, the protester filed supplemental protests. The supplemental protests challenge multiple aspects of the agency's evaluation of ERPSI. For example, the protester alleges that ERPSI's proposal violated the terms of the solicitation and the agency's evaluation of ERPSI's proposal was unreasonable and unequal.

We dismiss Bart's initial protest because the protest was not timely filed with our Office; Bart's supplemental protest is also dismissed because the allegations raised therein are based upon information obtained by the protester in connection with its untimely initial protest.

As stated above, Bart received the notice of task order awards on September 30 and received its debriefing on October 5. The protester filed a letter of concern with the contracting officer on October 13. The record demonstrates that Bart made no attempt to contact the agency to follow-up on its October 13 letter. On December 23, Bart filed its protest with our Office.

The protester asserts that its December 23 protest was timely filed with our Office because the protest was filed within 10 days of the reinstatement of our task order protest jurisdiction. In this regard, Bart argues that it was unable to file a bid protest with GAO at the time it received its debriefing on October 5 because the statutory authority vesting GAO with jurisdiction to hear protests challenging task orders under IDIQ contracts awarded by civilian agencies had expired. Thus, Bart asserts that it first became aware of its jurisdictional basis of protest at the passage of the Act on December 14 and filed within 10 days of this date in accordance with 4 C.F.R. § 21.2(a)(2). We disagree.

Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2), require that a protest be filed within 10 days of when a protester knew or should have known of its basis for protest. While our Office had no jurisdiction to consider a protest filed within 10 days of the issuance of the task order awards, this fact does not alter or affect the basis for Bart's protest. In this regard, the underlying action being challenged by Bart is the agency's evaluation and ultimate award decision. Specifically, Bart challenges the agency's evaluation of Bart's technical demonstration and past performance, and argues that the agency's best-value tradeoff decision failed to follow the solicitation's weighting scheme. These bases of protests were known on October 5, when Bart received its debriefing. Accordingly, we find that it is the agency's award of the task orders, and not the reinstatement of our protest

jurisdiction, which forms the basis for Bart's protest.³ Since Bart learned of its basis to protest approximately two and a half months before its December 23 filing with our Office, its protest was not timely filed.

As we stated in a similar decision by our office, HP Enter. Servs., LLC--Recon., B-413382.3, Jan. 26, 2017, 2017 CPD ¶ 32 at 7, we recognize that this conclusion denies Bart a forum to protest the task order awards. This result, however, is necessitated by the express statutory bar in place at the time Bart received notice of the awards and its debriefing.⁴ Id. In light of these statutory requirements and the requirements found in our Bid Protest Regulations, we cannot consider Bart's December 23 submission.

Bart also alleges that its protest is timely filed because it never received adverse agency action on the letter of concern it delivered to the agency on October 13. In this regard, Bart acknowledges that it did not style its letter as a bid protest, but argues that its letter to the contracting officer should be treated as an agency-level protest because it expressly identified flaws in the agency's evaluation and procurement process and expressly requested that a third award be made to Bart.⁵

³ For the same reasons, we disagree with the protester's assertion that our decision in Nationwide Pharmaceutical LLC--Recon., B-413489.2, et al., Nov. 25, 2016, 2016 CPD ¶ 339 at 6-7, has application here. That decision considered whether a change of legal requirements would impact the agency's obligations under the applicable statutes or regulations during the course of the procurement. See id. Whereas here, the passage of the Act simply restored GAO's jurisdiction to hear civilian agency task and delivery order protests over \$10 million, and did not impact the underlying statutory or regulatory obligations applicable to agencies in awarding task or delivery orders.

⁴ Bart also alleges that its protest is timely because Congress intended the Act to apply retroactively to protests that could have been filed prior to the Act's enactment date during the sunset period of October 1 through December 13. In support of this argument Bart, cites to a September 21, committee report from the House Committee on Oversight and Government Reform that stated that the bill would "ensure there is no gap in GAO's existing authority to hear protests of civilian task and delivery order contract awards[.]" Protest at 3 (quoting H.R. REP. NO. 114-779, at 3 (2016)). As we stated in our HP Enter. Servs., LLC--Recon. decision, we do not agree that the Act applies retroactively to provide GAO with jurisdiction to consider civilian agency task order protests that were filed or could have been filed during the time our Office's jurisdiction had otherwise lapsed. See HP Enter. Servs. LLC—Recon., supra at 6 ("the language of the act provides no support for HPES's argument that it was intended to apply retroactively").

⁵ We need not reach the question of whether Bart's letter was an agency level protest (See Coulson Aviation (USA), Inc., B-411525, B-411525.2, Aug. 14, 2015, (continued...))

Therefore, the protester argues that even if our Office does not agree that the 10-day period should have started on December 14, when the Act was passed, the protest remains timely filed in accordance with 4 C.F.R. § 21.2(a)(3). Again, we disagree.

A protester has an affirmative obligation to diligently pursue the information that forms the basis of its protest; a protester may not passively await information providing a basis for protest. Waterfront Techs., Inc., B-403638.3, Feb. 22, 2011, 2011 CPD ¶ 49 at 2. In addition, a protester may not delay filing a protest with our Office until it eventually receives a decision from the contracting agency. Excel Enviro., B 242577, Jan. 28, 1991, 91-1 CPD ¶ 77 at 1-2. Rather, a protester may wait only a reasonable length of time for a contracting agency's response before filing a protest. Id. In this regard, our Office has found that waiting 90 days to file a protest with our Office after filing an agency-level protest is not reasonable. Id. As explained below, we find that the protester's delay of 71 days to file a protest with our Office is not reasonable based upon the circumstances of this case and we dismiss the protest.

Bart acknowledges that after receiving its debriefing on October 5, it was aware that the statutory authority vesting GAO with jurisdiction to hear protests challenging task orders under IDIQ contracts awarded by civilian agencies had lapsed. Thus, Bart submitted a letter of concern to the contracting officer on October 13, in part, because Bart knew it could not file a protest at GAO.

After submitting its letter of concern to the contracting officer, the record shows that Bart took no steps to obtain any additional information about its concerns. Indeed, there is no evidence in the record of any contact with the agency regarding receipt or consideration of the letter. After 71 days passed--and after GAO's jurisdiction to hear these protests was reinstated--Bart filed its protest with our Office.

Based on these circumstances, even if we were to find that the letter of concern constituted an agency-level protest, we find that Bart did not diligently pursue its protest grounds. Indeed, it is apparent that the only action that prompted the protester to file with our Office was the passage of the Act, which as stated above, did not reset Bart's 10-day clock for when it knew or should have known the basis of its protest. Accordingly, we conclude that the protester's initial protest to our Office is untimely for lack of diligent pursuit.

Because we find that Bart's initial protest was untimely, it follows that the protester's supplemental protests are also untimely because these arguments are based on

(...continued)

2015 CPD ¶ 272) because we find, as explained herein, that Bart failed to diligently pursue the basis of its protest with our Office.

information contained in the agency's report in response to Bart's untimely initial protest. See General Physics Fed. Sys., Inc., B-274795, Jan. 6, 1997, 97-1 CPD ¶ 8 at 3-4 (finding untimely additional protest grounds that were based upon information in the agency's report in response to the protester's untimely initial protest.). Considering these grounds to be timely raised would be inconsistent with our goal of resolving protests expeditiously, without unduly disrupting or delaying the agency's procurement process. See Dominion Aviation, Inc.--Recon., B-275419.4, Feb. 24, 1998, 98-1 CPD ¶ 62 at 3.

The protest is dismissed.

Susan A. Poling
General Counsel