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Decision

Matter of: Air Resources Helicopters, Inc.

File: B-418317

Date: February 5, 2020

Jeremy R. Cook, Esq., Cohn Kinghorn, PC, for the protester.
Azine Farzami, Esq., Department of Agriculture, for the agency.
Young H. Cho, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of the terms of a solicitation alleging that an agency reneged on representations made only to the protester about corrective action that was more favorable to the protester--that the protester contends was offered as an inducement for the company to withdraw an earlier protest--is dismissed where the protester fails to show that the terms of the solicitation violate procurement law or regulation.

DECISION

Air Resources Helicopters, Inc., of Murrieta, California, protests the terms of solicitation No. 12024B19R9814, issued by the Department of Agriculture, U.S. Forest Service (USFS), for exclusive-use type III helicopter service. The protester argues that the solicitation failed to include five line items that the agency represented would be included as an inducement for Air Resources to withdraw a prior protest.

We dismiss the protest because, as filed with our Office, it does not establish a valid basis for challenging the agency's actions.

BACKGROUND

On October 16, 2018, the agency issued solicitation No. 1243N919Q0001 (not the current solicitation), under Federal Acquisition Regulation (FAR) parts 12 and 15, for type III light helicopter service for USFS Region 8, which encompasses 13 southern region states and Puerto Rico. The solicitation included 10 contract line item numbers (CLIN), each specifying a geographic host base and mandatory availability period. Solicitation No. 1243N919Q0001 at 2-24. The solicitation contemplated the award of multiple fixed-price (with economic price adjustment), indefinite-delivery, indefinite-

quantity contracts for a maximum of one base year and three option periods. Id. at 1. In December 2018, the agency made 10 awards--one for each CLIN--to several offerors, including Air Resources.

After the agency provided debriefings to unsuccessful offerors, three different disappointed offerors filed protests (B-417190, B-417190.2, and B-417190.3) with our Office. Prior to the agency report due date for the protests, the agency notified our Office, on December 19, 2018, that it had identified errors in its evaluation and intended to take corrective action by reevaluating all the proposals and making a new source selection decision for all 10 CLINs. Notice of Corrective Action (B-417190.1-3). Based on the agency's proposed corrective action, we dismissed the three protests as academic.

In February 2019, after the agency had completed its reevaluation and made new awards, Helicopter Express, Inc., one of the prior protesters, filed a protest with our Office (B-417190.4), challenging the agency's award of five of the solicitation's 10 CLINs. Two of the challenged CLINs had been awarded to Air Resources.¹ B-417190.4 Protest, at 4-10. On March 14, prior to the agency report due date for that protest, the agency advised our Office, that it had, again, identified errors in the evaluation of proposals, and that it intended to take corrective action this time by terminating "the current awards for the [five] protested line items, re-issue[ing] the solicitation, and mak[ing] a new source selection decision." Notice of Corrective Action (B-417190.4). Our Office dismissed the B-417190.4 protest as academic on March 15.

On March 25, the agency notified Air Resources (because Air Resources had been awarded two of the five challenged CLINs) that, upon further review, the agency had decided to reevaluate the proposals received for the five CLINs challenged in the B-417190.4 protest--rather than re-issue the solicitation, as proposed in the notice of corrective action--and make awards for the five challenged CLINs based on the reevaluation. Protest, exh. E, Agency March 25 Email to Air Resources.

On May 14, the agency terminated the contracts for the two CLINs that had previously been awarded to Air Resources under solicitation No. 1243N919Q0001. B-418317 Protest, exh. B., B-417190.5 Protest, at 3. Air Resources filed a protest with our Office on May 22, alleging that the agency's termination of its contracts was not "justified," and arguing that, to be reasonable, the agency needed to terminate all 10 of the awarded CLINs, including the contract awards of the five CLINs that not been previously challenged in the B-417190.4 protest. Air Resources' protest was docketed as B-417190.5. Id. at 3-5.

Subsequent to the filing of the B-417190.5 protest, the record indicates that the contracting officer sent an email to Air Resources on June 11, 2019, and represented that the agency: (1) would not terminate awards of the five non-challenged CLINs, but would also not exercise the option periods on those five awarded CLINs; (2) would not

¹ Air Resources intervened in Helicopter Express's B-417190.4 protest.

rescind the termination of any of the five challenged CLINs awarded (including the two CLINs awarded to Air Resources); and (3) would resolicit for 10 CLINs, as well as certain additional CLINs not previously solicited. The agency requested that, based on these representations, Air Resources consider withdrawing its B-417190.5 protest.² B-418317 Protest, exh. C., Notice of Withdrawal of B-417190.5 Protest and attachment. Air Resources withdrew its protest on June 22. Id. In its notice of withdrawal, the protester included a copy of the contracting officer's email communication to Air Resources. Id.

On November 22, the agency issued a new solicitation (No. 12024B19R9814) for exclusive-use type III light helicopters services for Region 8. Protest, exh. A. Similar to the previous solicitation (No. 1243N919Q0001), the new solicitation provided several CLINs, each specifying a geographic host base and mandatory availability period. See Solicitation No. 1202B19R9814 at 2-28. Instead of 10 CLINs, the new solicitation provided for nine CLINs, five of which were the CLINs that had been previously challenged by Helicopter Express in the B-417190.4 protest. The remaining four CLINs were new and had not been previously included in solicitation No. 1243N919Q0001. Compare id. with Solicitation No. 1243N919Q0001 at 2-24. The new solicitation did not, however, include the five non-challenged CLINs that had been awarded under the prior solicitation. Protest at 4. Additionally, in subsequent conversations with the agency, Air Resources was informed that the agency intended to exercise the first option periods on the contracts awarded for those five non-challenged CLINs. Id.

On November 30, Air Resources filed this protest with our Office.

DISCUSSION

Although this protest is ostensibly a challenge to the terms of the solicitation issued on November 22, the protester essentially alleges that the agency made representations to induce Air Resources to withdraw its earlier protest (B-417190.5), and that the new solicitation issued by USFS breaches those representations by failing to include the five CLINs that were awarded under the earlier solicitation, but were not challenged. The protester does not otherwise argue that the terms of the solicitation violate procurement laws or regulations. Air Resources also contends that the agency's decision to exercise the option periods on those five non-challenged CLINs is in direct contravention to the agency's prior representations.³ Protest at 1-4.

² Our Office was neither a party to, nor was it included in, any of the communications between the parties at the time.

³ The protester further argues that it seeks to reinstate its May 22, 2019 protest (B-419170.5), incorporating (in its entirety) the statement of legal and factual grounds submitted with its May 2019 protest, and repeating its request for relief. Protest at 4. Our Office does not reinstate withdrawn protests. A protest that was withdrawn cannot be "revived" by subsequent agency action. Instead, the subsequent action gives rise to a new basis for protest. Chase Supply, Inc., B-411528.2, B-411529.2, Dec. 7, 2015,

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984 (CICA), 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. Cybermedia Techs., Inc., B-405511.3, Sept. 22, 2011, 2011 CPD ¶ 180 at 2. To achieve this end, 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.

Air Resources' protest, as filed, does not establish a valid basis for challenging the agency's actions. Here, the protester contends that "contrary to the representation made to Air Resources to induce Air Resources to withdraw its [o]riginal [p]rotest, the [n]ew [so]licitation did not include the five [CLINs] that Air Resources had protested" Protest at 4. To the extent the contracting officer's communication to the protester on June 11 established an enforceable agreement between the agency and Air Resources --a matter about which we express no opinion--the agency's alleged violation of the agreement is not a valid basis of protest. Our bid protest jurisdiction is limited to deciding protests "concerning an alleged violation of a procurement statute or regulation." 31 U.S.C. § 3552. Thus, in cases such as this, we will not consider an argument concerning compliance with an agreement except to the extent the protest asserts that an alleged breach resulted in a prejudicial violation of procurement laws or regulations. See Abba Int'l, Inc., et al., B-311225.4, Feb. 2, 2009, 2009 CPD ¶ 28 at 7 (finding that the agency's alleged violation of a settlement agreement is not a valid basis of protest). The protester here has not shown that the agency's alleged breach of the agreement resulted in a violation of procurement laws or regulations. Therefore, to the extent the protester's argument is based on an alleged violation of the agreement between the parties, it will not be considered by our Office.⁴ Id.; American Mktg. Assocs., Inc.--Recon., B-274454.4, May 14, 1997, 97-1 CPD ¶ 183 at 2-3.

2015 CPD ¶ 384 at 6. Also, on June 11, 2019, the agency expressly communicated to Air Resources that it would not reconsider its decision to terminate the two CLINs that had been awarded to Air Resources in December 2018. The agency similarly communicated to Air Resources that it did not intend to terminate the five non-contested CLINs awarded to other offerors under solicitation No. 1243N919Q0001. To the extent Air Resources now desires to challenge these decisions--several months after becoming aware of its basis of protest--its arguments are clearly untimely. 4 C.F.R. § 21.2(a)(2); Will Tech., Inc.; Paragon TEC, Inc., B-413139.4 et al., June 11, 2018, 2018 CPD ¶ 209 at 7-8.

⁴ For the record, other than its argument that the agency reneged on an agreement, the protester has not argued that the solicitation terms, on their face, violate a procurement law or regulation.

Finally, although the protester also contends that it is challenging the agency's decision to exercise the option periods on the five CLINs that were awarded under the earlier solicitation, but were not previously challenged, Air Resources does not challenge the reasonableness of the agency's decision to exercise the options.⁵ Air Resources' challenge to the terms of the solicitation is based solely on the fact that the solicitation's terms are inconsistent with the agency's prior representations about its prior corrective action. Air Resources' protest, as filed with our Office, does not include sufficient information to establish the likelihood that the terms of the solicitation violated applicable procurement law or regulations. Accordingly, this protest is dismissed. Abba Int'l Inc., et al., supra at 7; see also, Computer Cite, B-412162.3, July 15, 2016, 2016 CPD ¶ 186 at 4.

The protest is dismissed.

Thomas H. Armstrong
General Counsel

⁵ Our Office will review challenges to the exercise of an option to ensure that the agency properly made that decision and did not exercise an option under circumstances where a new competition should have been conducted. See, e.g., Test Sys. Assocs., Inc., B-244007.6, Mar. 29, 1993, 93-1 CPD ¶ 274 at 4-5. The contracting officer is accorded broad discretion in making this decision, and our Office, therefore, will not question the decision to exercise an option, rather than conduct a new procurement, unless it is shown to be unreasonable or contrary to applicable regulations. PR Newswire Assoc., LLC, B-401692, Nov. 5, 2009, 2009 CPD ¶ 223 at 2-3; Sippican, Inc., B-257047.2, Nov. 13, 1995, 95-2 CPD ¶ 220 at 2.