



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Mitchco International, Inc.

File: B-418481.3; B-418481.4

Date: June 9, 2020

Alan Grayson, Esq., for the protester.

Ronald Herrmann, Esq., Gregory O'Malley, Esq., and Scott N. Flesch, Esq., Department of the Army, for the agency.

Kasia Dourney, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that that an agency improperly entered into discussions solely with the awardee, a state licensing agency (SLA), in a procurement conducted pursuant to the Randolph-Sheppard Act, 20 U.S.C. § 107 *et seq.*, is dismissed as untimely where this possibility was apparent from the solicitation, and the protester failed to challenge the terms of the solicitation before award.

2. Protest that the awardee violated the procurement integrity provisions of the Office of Federal Procurement Policy Act, 41 U.S.C. §§ 2101-2107, known as the Procurement Integrity Act, is dismissed as legally and factually insufficient where the protester's allegations, even if unrebutted, fail to establish a violation of law by the agency.

DECISION

Mitchco International, Inc. (Mitchco) of Saint Matthews, Kentucky, protests the award of a contract to the Kentucky Office of Vocational Rehabilitation (KOVV), under request for proposals (RFP) No. W9124J-19-R-0018, issued by the Department of the Army for full food services for the dining facilities at Fort Knox, Kentucky. The protester alleges that the agency conducted unequal discussions and evaluated the awardee's technical and price proposals in a manner that was flawed. Mitchco also challenges the awardee's status as a state licensing agency (SLA), and claims it violated the Procurement Integrity Act.

We dismiss the protest.

BACKGROUND

The RFP, issued on October 29, 2019, sought proposals for full food services at the Army base in Fort Knox, Kentucky. Req. for Dismissal, exh. 1, RFP at 94. Although the solicitation was set aside for small businesses, it advised that the procurement would be conducted pursuant to the Randolph-Sheppard Act (RSA), and the SLA would be permitted to compete and would be entitled to priority in the selection process.¹ *Id.* at 1, 78, 87.

Specifically, the RFP stated that if “the [SLA] is determined to be in the [c]ompetitive [r]ange, then the SLA will be afforded the priority,” as delineated in the RSA. *Id.* at 87; Req. for Dismissal, exh. 3, RFP’s amend. 0001 at 4. Under the RSA’s implementing regulations, if a designated SLA submits an offer found to be within the competitive range for the acquisition, the agency will enter into negotiations solely with the SLA, except for limited circumstances not applicable here. 34 C.F.R. § 395.33; Army Regulation 210-25 ¶ 6. b.(1)(b). In its answers to questions submitted by offerors, related to the SLA, the Army also indicated that the SLA would have priority in this procurement, as mandated by the RSA, and that the Army was “not aware of any other State Licensing Agencies in Kentucky besides the Kentucky Office of Vocation Rehabilitation/Blind Services Division.” Req. for Dismissal, exh. 4, attach. O to RFP’s amend. 0001, questions 9, 67.

In the event that the RSA priority did not result in award to the SLA, award was to be made on a lowest-priced, technically acceptable basis, considering technical capability, past performance, and price. RFP at 1, 87.

On December 2, 2019, Mitchco submitted a timely proposal. Req. for Dismissal, Contracting Officer’s Statement (COS) ¶ 5. On January 6, 2020, Mitchco was notified that while its proposal was included in the competitive range, so was the proposal of the KOVR, an SLA; accordingly, the KOVR would receive priority under the RSA. *Id.* ¶ 7. On January 7, prior to award, Mitchco requested a debriefing. *Id.* ¶ 8.

On February 10, the Army awarded the contract to the KOVR and its teaming partner, Southern Food. Supp. Req. for Dismissal at 4. On the same day, Mitchco received a written debriefing. On February 12, Mitchco submitted follow-up questions to the agency, which the agency deemed to be additional questions related to the debriefing, as defined in the enhanced debriefing provisions of section 818 of the National Defense Authorization Act for Fiscal Year 2018. *Id.* at 4; see 10 U.S.C. § 2305(b)(5)(B)(vii). Before the Army responded to the protester’s questions, Mitchco protested to our Office (B-418481). Because the protest was filed before the debriefing was completed, we

¹ The RSA establishes a priority for blind persons represented by an SLA in the award of contracts for, among other things, the operation of vending facilities, including cafeterias, in federal buildings. See 20 U.S.C. § 107; 34 C.F.R. § 395.33(a).

dismissed that protest as premature. *Mitchco Int'l, Inc.*, B-418481, Feb. 28, 2020 (unpublished decision).

On February 13, 2020, Mitchco filed a small business size protest with the agency, challenging the award to the KOVR. Supp. Req. for Dismissal, exh. 7. Specifically, Mitchco argued that: 1) the Commonwealth of Kentucky was not a small business concern; and 2) the exception for SLAs under the RSA did not apply, as the Department of Education had not designated the KOVR as an SLA.² *Id.* at 1.

On March 4, 2020, the Army concluded Mitchco's enhanced debriefing by responding in writing to its questions. COS ¶ 14. This protest followed.

DISCUSSIONS

The protester raises several different protest grounds. Specifically, Mitchco argues that although the Army concluded that both the KOVR's and its own proposal were in the competitive range, it "conducted discussions and may have accepted proposal revisions [only] from [the] KOVR," and not from Mitchco. Protest at 2-5. Mitchco also alleges that the KOVR's proposal is not technically acceptable, and its price proposal "fails the test of price realism." *Id.* at 5-8. Further, Mitchco contends that the KOVR and its teaming partner, Southern Food, violated the PIA.³ *Id.* at 8-12. In addition, Mitchco alleges that the KOVR is not an SLA, and that the KOVR and Southern Food submitted a "sham RSA proposal." *Id.* at 12-15; 15-17. In its supplemental protest, Mitchco challenges the Army's "failure . . . to terminate the contract award at issue here," after the Small Business Administration (SBA) "sustained the protester's small business size protest against the awardee." Supp. Protest at 1.

The Army asks our Office to dismiss the protest, maintaining that it is untimely; legally insufficient, *i.e.*, fails to state a valid basis of protest; and involves a dispute that is not within the bid protest jurisdiction of our Office. Req. for Dismissal at 4-5; Supp. Req. for Dismissal at 7-13. On this record, we agree.

With regard to the protester's first argument, Mitchco challenges the Army's decision to enter into discussions solely with the SLA after it concluded that both the SLA and Mitchco were in the competitive range, contending that this "preferential treatment of

² The record reveals that the second assertion is factually incorrect. Supp. Exh. 1, April 10, 2020 Email from Department of Education. Specifically, on April 10, 2020, the Department of Education confirmed that the KOVR has been "the designated SLA for the State of Kentucky" since October 18, 2018. *Id.* at 1.

³ Mitchco alleges that the KOVR and Southern Food improperly obtained Mitchco's proprietary procurement information related to the Fort Knox effort. Protest at 8-12. Specifically, Mitchco contends that the KOVR and Southern Food misappropriated its billing, pricing, and staffing and payroll information. *Id.* at 11.

[the] KOVR is inconsistent with the Federal Acquisition Regulation” (FAR) provisions on discussions and submission of revised proposals. Protest at 3 (citing FAR 15.306(c), (d); FAR 15.307(b)). The Army contends that this ground of protest, filed after the closing date for receipt of proposals, is an untimely challenge to the terms of the solicitation.

Our regulations contain strict rules for the timely submission of protests. The 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. *CDO Techs., Inc.*, B-416989, Nov. 1, 2018, 2018 CPD ¶ 370 at 5; *Dominion Aviation, Inc.--Recon.*, B-275419.4, Feb. 24, 1998, 98-1 CPD ¶ 62 at 3. Specifically, protests of alleged apparent solicitation improprieties must be filed prior to the closing time for receipt of quotations. See 4 C.F.R. § 21.2(a)(1); *Allied Tech. Group, Inc.*, B-402135, B-402135.2, Jan. 21, 2010, 2010 CPD ¶ 152 at 9 n.10.

Mitchco disagrees with the Army’s characterization of this protest ground as untimely and argues, citing our regulations on timeliness of protests, that “[t]he impropriety of denying Mitchco discussions and proposal revisions was not ‘apparent prior to . . . the time set for receipt of initial proposals.’” Opp. to Req. for Dismissal at 5 (citing 4 C.F.R. § 21.2(a)(1)).

We agree with the agency. It was apparent from the RFP, as amended, and from the Army’s answers to offerors’ questions prior to the closing time for receipt of proposals, that an SLA, and not a small business concern, would have priority in this procurement, should “the SLA . . . be in the [c]ompetitive [r]ange.” See RFP at 87; Req. for Dismissal, exh. 2, RFP’s amend. 0001 at 3; Req. for Dismissal, exh. 3, attach. O to RFP’s amend. 0001, at question 9. Accordingly, the offerors were on notice that, consistent with the RSA and its implementing regulations, this “priority” meant that the agency would initially hold discussions solely with the SLA. *Id.*; 34 C.F.R. § 395.33; Army Regulation 210-25 ¶ 6. b.(1)(b).

If Mitchco objected to the specific terms of the solicitation--for example, if the company wished to protest that “preferential treatment of [SLA] is inconsistent with the Federal Acquisition Regulation”--it was required to raise this challenge prior to the time set for receipt of proposals, *i.e.*, December 2, 2019. Mitchco, however, did not file its protest challenging the SLA priority under the RFP until after it knew that its proposal had not been selected for the award. Accordingly, we view this protest ground as an untimely challenge to the terms of the solicitation, and dismiss it.

Mitchco further alleges--without providing any supporting rationale or explanation of what the agency did wrong--that the Army’s evaluation of the KOVR’s technical and price proposals was flawed.⁴ Protest at 5-8. The protester’s assertions rely in large

⁴ For example, Mitchco asserts that the KOVR and Southern Food, its teaming partner, do not have a signed, written contract; that Southern Food could “walk[] away” from its

(continued...)

part on statements a representative of the awardee allegedly made to Mitchco's staff during a worksite visit at Fort Knox in November 2019. *Id.* at 6.

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984. See 31 U.S.C. §§ 3551-3557. Our role in resolving bid protests is to review whether a procurement action constitutes a violation of a procurement statute or regulation. 31 U.S.C. § 3552. To achieve this end, 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. See, e.g., *Midwest Tube Fabricators, Inc.*, B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

Here, Mitchco has failed to allege a cognizable basis of protest. Although Mitchco complains that the agency did not reasonably evaluate the KOVR's technical and price proposals, the protester has provided no specific factual support for its claims. The protester's allegations are based on speculation and devoid of any clear statement or detail as to what exactly the agency did wrong, or how the KOVR's proposal violated the terms of the RFP. See *CAMRIS Int'l, Inc.*, B-416561, Aug. 14, 2018, 2018 CPD ¶ 285 at 5 ("The protester's assertion of improper agency action alone, without any supporting explanation or documentation, does not satisfy [our bid protest requirement that protesters state legally sufficient grounds of protest]."). As such, the protester's allegations are legally insufficient. Our Office will not find improper agency action based on conjecture or inference. See *Raytheon Blackbird Techs., Inc.*, B-417522, B-417522.2, July 11, 2019, 2019 CPD ¶ 254 at 3-4 (protest allegation was speculative because it was not supported by any evidence); see also *Mark Dunning Indus., Inc.*, B-413321.2, B-413321.3, Mar. 2, 2017, 2017 CPD ¶ 84 at 2 (a protest allegation that is speculative fails to state a valid basis of protest). Accordingly, we dismiss this protest ground.

With regard to the alleged PIA violations, Mitchco contends that the KOVR and Southern Food improperly obtained Mitchco's proprietary procurement information related to the Fort Knox effort. Protest at 8-12. Specifically, Mitchco claims that the KOVR and Southern Food employees attended a site visit at Fort Knox in November 2019, and attempted to solicit "proprietary information" from Mitchco staff performing the

(...continued)

obligations under the contract at any point; and that the KOVR does not have "capability . . . to provide cafeteria food services itself." Protest at 8. Mitchco also speculates--relying solely on alleged representations made by Southern Food's staff to Mitchco--that "labor categories specified for this work" in the KOVR's proposals were improper, and ignored the service occupations identified in the "Collective Bargaining Agreement." *Id.* at 6-7. Finally, Mitchco alleges that the KOVR's "bizarre proposed cafeteria staffing also fails the test of price realism." *Id.* at 7.

incumbent contract, who were present at the site, “about how to manage and perform the requirement.” *Id.* at 10. Moreover, Mitchco alleges that it recently learned that the KOVR deliberately provided to Southern Food proprietary documents related to Mitchco’s billing, pricing schedule, and staffing and payroll, among others. *Id.* at 11.

The Army also requests dismissal of this protest ground, arguing that it fails to state a legally or factually sufficient basis of protest. The crux of the agency’s argument here is that Mitchco’s allegations, even if proven, are insufficient to establish a violation of the PIA where the protester does not allege any improper conduct or involvement on the part of the government, or current or former government personnel. Req. for Dismissal at 11-12. At worst, Mitchco’s allegations present a private dispute that our Office does not consider as part of its bid protest function. *Id.* Accordingly, the Army argues that in the absence of any cognizable PIA violation, this ground of Mitchco’s protest does not state a valid basis of protest.

As already noted above, the requirements of 4 C.F.R. §§ 21.1(c)(4) and (f) that a protest include a detailed statement of the legal and factual grounds of protest require either evidence or allegations sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claims of improper agency action. *Midwest Tube Fabricators, Inc., supra.* Here, we find that Mitchco’s PIA allegations fail to state a legally or factually sufficient basis of protest, because the protester fails to make any credible allegation of government misconduct, or misconduct by a person who was acting for or on behalf of the government. See 41 U.S.C. § 2102(a)(3).

The procurement integrity provisions of the Office of Federal Procurement Policy Act, as amended, 41 U.S.C. §§ 2101-2107, known as the Procurement Integrity Act, provide 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). Here, the allegations involve a private dispute between private parties that is not for our consideration as part of our bid protest function. See, e.g., *University of Maryland*, B-416682, Oct. 24, 2018, 2018 CPD ¶ 366 at 4-5 (dismissing for failing to state a valid basis of protest an allegation that a competitor obtained access to the protester’s confidential information in the absence of any alleged government involvement); *Ellwood Nat’l Forge Co.*, B-402089.3, Oct. 22, 2010, 2010 CPD ¶ 250 at 3-4 (same, where information was obtained by a former employee and consultant of the protester who subsequently became a consultant to the awardee). Thus, we find that Mitchco’s protest fails to allege any wrongdoing on the part of the government, and therefore fails to state a legally sufficient allegation of a PIA violation. This protest ground is dismissed.

Mitchco’s remaining allegations, contending that the KOVR is not an SLA for Kentucky, that it submitted a “sham” RSA proposal, and, for that reason, should not have SLA priority, as contemplated by this procurement, are contradicted by the record, and

outside of our bid protest jurisdiction as compliance with the RSA is the province of the Department of Education.⁵

At the outset, we note that the record specifically contradicts Mitchco's allegations in this regard. Specifically, on April 10, 2020, the Department of Education, Rehabilitation Services Administration, which has exclusive authority regarding oversight and compliance with the RSA, see 34 C.F.R. § 395 *et seq.*, confirmed that the KOVR is "the designated SLA for the State of Kentucky" since October 18, 2018. Supp. Exh. 1, April 10, 2020 Email from Department of Education at 1.

Moreover, "where, as here, Congress has vested oversight and final decision-making authority in a particular federal official or entity, we will not consider protests involving issues subject to review by that official or entity." *Georgia Business Enterprise Program-Vocational Rehabilitation Agency*, B-416182.2, Nov. 23, 2018, 2018 CPD ¶ 400 at 3; see also, e.g., *High Point Sec., Inc.--Recon. and Protest*, B-255747.2, B-255747.3, Feb. 22, 1994, 94-1 CPD ¶ 169 at 2 (determinations by the SBA under the certificate of competency program pursuant to 15 U.S.C. § 637(b)(7)); *ARA Envtl. Servs., Inc.*, B-254321, Aug. 23, 1993, 93-2 CPD ¶ 113 at 1 (protest of award under the Javits-Wagner-O'Day Act, 41 U.S.C. §§ 8501-8506). Accordingly, because these protest grounds involve potential violations of the RSA, which, as stated above, are matters under exclusive authority of the Department of Education, we will not consider them under our bid protest function.

Finally, with respect to Mitchco's supplemental protest ground, challenging the Army's "failure . . . to terminate the contract award at issue here," after the SBA sustained its small business size protest against the awardee, the preference embodied in the RSA takes precedence over small business preferences. See *Intermark, Inc.*, B-290925, Oct. 23, 2002, 2002 CPD ¶ 180 at 2 (concluding that the RSA is given priority over the SBA set-asides in food service procurements governed by the RSA); see also *Department of the Air Force--Recon.*, B-250465.6 *et al.*, June 4, 1993, 93-1 CPD ¶ 431 at 13.

Mitchco, however, fails to provide any legal support for its contention that the SBA set-aside language in the RFP trumps the RSA priority. For that reason, we find this protest

⁵ The RSA directs the Secretary of Education to designate state agencies responsible for training and licensing blind persons, 20 U.S.C. § 107a(a)(5), and provides that "[i]n authorizing the operation of vending facilities on Federal property, priority shall be given to blind persons licensed by a State agency." 20 U.S.C. § 107(b).

ground, too, fails to state a proper legal and factual basis for protest.

The protest is dismissed.

Thomas H. Armstrong

General Counsel