

United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** Adams and Associates, Inc.

**File:** B-409680; B-409681

**Date:** April 22, 2014

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Lindsay Simmons, Esq., and Katherine A. Calogero, Esq., Jackson Kelly PLLC, for the protester.

David R. Koepfel, Esq., Peter J. Dickson, Esq., and Savannah Wilson, Esq., Department of Labor, for the agency.

Nora K. Adkins, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Protests challenging the agency's decision to set aside two solicitations for small businesses are dismissed as untimely challenges to the solicitations' terms where the protests were not filed prior to the closing date for receipt of proposals.
  2. Protests filed with our Office, after the conclusion of bid protests that were filed at the U.S. Court of Federal Claims and appealed to the U.S. Court of Appeals for the Federal Circuit, are dismissed where the decision by the courts constituted a final adjudication on the merits with respect to the procurement, and the effect of such a judgment extends to both matters that were decided, as well as those that could have been brought before the court by the protester; such decisions bars further reconsideration of the merits of those issues by our Office.
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### DECISION

Adams and Associates, Inc., of Reno, Nevada, protests the terms of request for proposals (RFP) Nos. DOL121RP20475 and DOL12QA20003, which were issued by the U.S. Department of Labor, Employment and Training Administration for the operation of the Gadsden Job Corps Center in Gadsden, Alabama, and the Shriver Job Corps Center in Ayer, Massachusetts. The protester, a large business and the incumbent contractor at the Gadsden and Shriver Centers, asserts that the agency improperly restricted the solicitations to small businesses.

We dismiss the protests as untimely.

The Gadsden RFP was issued on May 8, 2012, and the Shriver RFP was issued on December 14; both were issued as small business set-aside procurements. Amendment three to the Gadsden solicitation, which was issued on June 29, modified the closing date for receipt of proposals to July 13. Amendment four to the Shriver solicitation, which was issued on February 20, 2013, modified the closing date for receipt of proposals to March 5.

Adams filed two bid protests at the U.S. Court of Federal Clams (COFC) challenging the terms of the Gadsden and Shriver solicitations in 2012. Adams argued that the agency improperly restricted both competitions to small businesses. In each case, the court denied Adams' motion for judgment on the administrative record and granted the government's cross-motion for judgment on the administrative record. See Adams & Assocs., Inc. v. United States, 109 Fed. Cl. 340 (Fed. Cl. Feb. 28, 2013); Adams & Assocs., Inc. v. United States, No. 121-409C (Fed. Cl. Mar. 27, 2013) (Oral Op. & Order). The court held in both cases that Adams failed to establish that the U.S. Department of Labor's decision to designate the contracts for the operation of the Gadsden and Shriver Job Corps Centers as small business set-asides were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Id. Adams appealed the two COFC decisions to the U.S. Court of Appeals for the Federal Circuit (CAFC) on April 8, 2013. See Adams & Assocs., Inc. v. United States, 741 F.3d 102, 107-08 (Fed. Cir. 2014). On January 27, 2014, the CAFC affirmed both the COFC decisions. Id. Adams filed a timely petition for rehearing en banc, which was denied on March 14. Id. On March 27, the agency issued a notice advising of the anticipated award dates for various Job Corps centers, including Gadsden and Shriver.

On April 4, 2014, Adams filed the instant protest with our Office asserting, as it had in its bid protests at the courts, that the agency improperly set aside the Job Corps center requirements for small businesses in violation of the Workforce Investment Act (29 U.S.C. § 2887), the Small Business Act (15 U.S.C. § 644(a)), and the Federal Acquisition Regulation (FAR § 19.502-1). Adams also argued that the agency's decision to set aside the procurements violated the Consolidated Appropriations Act of 2014 (H.R. 3547, 113th Congress).

Based upon our review of the record, we find that Adams' arguments with regard to the agency's violation of the Workforce Investment Act, Small Business Act, and the FAR are untimely challenges to the terms of the solicitations. Our Bid Protest Regulations contain strict rules for the timely submission of protests. They require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of proposals be filed before that time. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2014).

Here, Adams was aware that the solicitations were set-aside for small businesses at the time the RFPs were issued on May 8, 2012 (Gadsden) and December 14

(Shriver) respectively but waited to file its protests with our Office until April 4, 2014. Thus, the protester's challenges to the solicitations set-aside requirements are untimely.

The protester nonetheless asserts that, although it did not file its protests with our Office until after the closing dates for the solicitations, each of its protest grounds were timely filed with our Office because its protest bases were the subject of litigation before a court of competent jurisdiction when it filed with the COFC and subsequently appealed those decisions to the CAFC. Adams argues that, had it filed with our Office during the pendency of these proceedings we would have dismissed its protests because they were before a court of competent jurisdiction. See 4 C.F.R. § 21.11(b). In effect, the protester asserts that its filings with the COFC and CAFC tolled the timeliness requirements of our Office. We do not agree.

While the protester is correct that our Office will dismiss a protest where another protest addressing the same issues is pending before a court of competition jurisdiction, the completion of the proceedings before the court does not automatically restart the time for filing a protest with our Office. Instead, we must consider how the court's decision affects any subsequently-filed protest before our Office. Where, as here, a decision by the COFC (including an appeal before the CAFC) constitutes a final adjudication on the merits with respect to the procurement, such a decision bars further reconsideration of the merits of those issues by our Office. See Warvel Prods., Inc., B-281051.5, July 7, 1999, 99-2 CPD ¶ 13 at 8. Here, because the COFC and CAFC decisions were adjudicated by the COFC and CAFC in the agency's favor, we will not reconsider Adams' claims with regard to the agency's violation of the Workforce Investment Act, the Small Business Act, and the FAR.

Similarly, Adams' challenge to the solicitation based upon its assertion that the set-aside violated the Consolidated Appropriations Act of 2014 is not a matter that we will consider. In this regard, Adams states in its protests that the Act was passed on January 18, 2014, and that the provisions of that Act direct the agency to reconsider its decision to set aside the procurements for small businesses.<sup>1</sup> This matter, however, could have been brought before the COFC and CAFC. As of January 18, the date the Act was passed, the CAFC had yet to issue its opinion on Adams' appeals of the COFC decisions in Gadsden or Shriver. The protester did not, however, file new protests with COFC regarding the Consolidated Appropriations Act of 2014. Additionally, the agency asserts, and the protester does not dispute, Adams' petition to the Federal Circuit for a rehearing en banc on February 5 cited the House Report language for the Consolidated Appropriations

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<sup>1</sup> The Consolidated Appropriations Act, 2014 became public law on January 17, 2014 (Pub. Law 113-76, H.R. 3547).

Act, 2014 to support its position that the agency's set-aside was improper. The Circuit Court denied Adams' petition on March 14.

As our Office has held with regard to a final adjudication by a court of competent jurisdiction, the effect of such a judgment extends to both matters that were decided, as well as those that could have been brought before the court by the protester. Warvel Prods., Inc., *supra*. Accordingly, we find Adams' arguments regarding the Consolidated Appropriations Act of 2014 either were or could have been the subject of the proceedings before the COFC and CAFC.

Finally, Adams asserts that its protest is timely because it could not have filed its protest until it knew what the agency planned to do in response to the Consolidated Appropriations Act and the CAFC's opinion. In this regard, the protester argues that the agency's intention was not known until the agency issued its procurement plan on March 27, 2014. The procurement notice published by the agency on this date provided "Award Dates" for "Ongoing Procurements" (Gadsden--April 14, 2014; Shriver--May 14, 2014), and for "Upcoming Procurements" provided the "Anticipated RFP Release Date, Anticipated RFP Closing Date, and Anticipated Award Date" for various Job Corps centers broken down by region. See Agency Notice (Mar. 27, 2014).

We do not agree with the protester that the agency's March 27 notice--which simply announced the agency's anticipated award dates for the Gadsden and Shriver Job Corps centers--restarted the time for which it could file its protest. As discussed above, the COFC and CAFC adjudicated the protester's set-aside arguments in favor of the agency; the agency was under no obligation to amend or otherwise consider amending the solicitations it had issued in 2012. As also discussed above, for purposes of our Office's review, the courts' resolution includes the arguments the protester raised or could have raised regarding the Consolidated Appropriations Act of 2014. To the extent the protester contends that it is now timely to challenge the agency's decision not to take further action in response to the CAFC's decision or the Consolidated Appropriations Act of 2014, we find no merit to this argument.

The protest is dismissed.

Susan A. Poling  
General Counsel