



Decision

Matter of: The Povolny Group

File: B-414532.3

Date: September 21, 2017

James M. Povolny, for the protester.
Donald C. Mobly, Esq., and Natica Chapman Neely, Esq., Department of Veterans Affairs, for the agency.
Elizabeth Witwer, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's corrective action and new award decision is dismissed as untimely because it was filed more than 10 calendar days after the protester knew, or should have known, of the basis for its protest.

DECISION

The Povolny Group (Povolny), a service-disabled veteran-owned small business (SDVOSB), of West St. Paul, Minnesota, protests the award of a contract to Winspear Construction, LLC (Winspear), an SDVOSB, of Boise, Idaho, under request for proposals (RFP) No. VA260-16-R-0926, issued by the Department of Veterans Affairs (VA) for renovation and expansion of the parking structure at the Boise Veterans Affairs Medical Center in Boise, Idaho. The protester alleges that, in awarding the contract to Winspear, the agency improperly relied upon the Certificate of Competency issued by the Small Business Administration (SBA) finding Winspear responsible for the subject procurement.

We dismiss the protest as untimely.

BACKGROUND

On November 10, 2016, the agency issued the solicitation as a set-aside for SDVOSBs. RFP at 1, 8. The solicitation contemplated the award of a fixed-price contract for the renovation and expansion of the parking structure at the Boise Veterans Affairs Medical Center in Boise, Idaho. Id. The solicitation provided for award to the offeror submitting the lowest-priced, technically acceptable proposal. Id. at 12. To be technically

acceptable overall, a proposal had to receive a rating of acceptable under each of the seven technical factors.¹ Id. at 13. Proposals determined to be unacceptable under any of the seven factors were “ineligible for award.” Id.

In response to the solicitation, the agency received two timely proposals, from Povolny and Winspear. 1st Agency Req. for Dismissal, Apr. 13, 2017, at 1; 2d Agency Req. for Dismissal, Aug. 15, 2017, at 1. The agency determined that Winspear submitted the lowest-priced, technically acceptable proposal, and awarded the contract to that company on March 16, 2017. 2d Agency Req. for Dismissal at 1.

On March 31, Povolny filed a protest with our Office challenging the award to Winspear. Id., Exh. 1, Protest (B-414532). We docketed the protest as B-414532. In its protest, Povolny alleged that the agency unreasonably determined Winspear to be acceptable under two of the seven technical factors.² Id. at 7, 8. Povolny contended that these factors constituted definitive responsibility criteria.³ Id. at 7.

On June 1, as a result of an outcome prediction alternative dispute resolution conference with our Office, the agency notified our Office that it intended to take corrective action. 2d Agency Req. for Dismissal, Exh. 2, Agency Notice, at 1. Specifically, the agency stated that it intended to reevaluate proposals and make a new award decision. Id. at 1-2. The agency also represented that, “[i]f the VA determines an offeror is not responsible, the VA will refer the nonresponsibility determination to the Small Business Administration (SBA) under its Certificate of Competency (COC) procedures.” Id. at 2. As a result of the agency’s notice of corrective action, our Office dismissed the protest as academic on June 5.⁴ The Povolny Grp., B-414532, June 5, 2017 (unpublished decision).

¹ The seven technical factors were: (1) key personnel project manager and/or construction manager; (2) key personnel (onsite) project superintendent; (3) key personnel quality assurance officer; (4) safety-experience modification rating; (5) pre-cast concrete experience; (6) soil nailing experience; and (7) earth moving capabilities. RFP at 13-15.

² Specifically, Povolny alleged that Winspear’s proposal did not meet the criteria set forth in factor 5, pre-cast concrete experience, and factor 7, earth moving capabilities. 2d Agency Req. for Dismissal, Exh. 1, Protest (B-414532), at 8.

³ The agency and the intervenor challenged this contention. On April 28, in response to requests for dismissal filed by both the agency and the intervenor, our Office concluded that, based on the specific solicitation terms here, the technical factors challenged by Povolny constituted definitive responsibility criteria. See J2A² JV, LLC, B-401663.4, Apr. 19, 2010, 2010 CPD ¶ 102. Accordingly, pursuant to 4 C.F.R. § 21.5(c), we found that our Office possessed jurisdiction to review Povolny’s protest.

⁴ On June 20, Povolny filed a request for reimbursement of the costs associated with filing and pursuing its protest. We dismissed the request as academic after the agency

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On June 8, the contracting officer reevaluated Winspear's proposal and determined that the proposal failed to satisfy two of the seven technical factors. 2d Agency Req. for Dismissal at 2. After determining that the factors in question related to "responsibility-type evaluation factors," the contracting officer referred the matter to the SBA for a final determination under its Certificate of Competency program.⁵ Id.

On July 13, the SBA issued a Certificate of Competency to Winspear, concluding that the company was responsible to perform the proposed procurement. 2d Agency Req. for Dismissal, Exh. 3, SBA Certificate of Competency, at 1. The SBA instructed the agency that it was "required to award the contract . . . to the certified concern without requiring it to meet any other requirement of responsibility or eligibility." Id. Accordingly, on July 17, the agency cancelled the stop work order that had been issued to Winspear. 2d Agency Req. for Dismissal at 2.

Importantly, on July 17, the agency informed Povolny by email that the SBA had issued a Certificate of Competency for Winspear and that the agency intended to proceed with award to Winspear. Specifically, the agency's email provided, in pertinent part, as follows:

In response to Protest B-414532 filed with GAO by Povolny, the [Department of Veterans Affairs] took corrective action by referring Winspear to the Small Business Administration (SBA) for a Certificate of Competency (COC). Last week, the SBA issued a COC for Winspear and determined Winspear to be responsible for the subject procurement. As such, the contract award will remain with Winspear.

Additionally, because this procurement followed the Lowest-Priced Technically Acceptable procedures of FAR Part 15, and because Povolny's price proposal did not offer the lowest price to the Government, its technical proposal will not be re-evaluated.

2d Agency Req. for Dismissal, Exh. 4, Email to Povolny.

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informed our Office that it did not dispute the protester's entitlement to costs. The Povolny Grp., B-414532.2, June 29, 2017 (unpublished decision).

⁵ Pursuant to the SBA's regulations, "[a] contracting officer must refer a small business concern to the SBA for a possible COC . . . when the contracting officer . . . [r]efuses to consider a small business concern for award of a contract . . . after evaluating the concern's offer on a non-competitive basis (e.g., a pass/fail, go/no go, or acceptable/unacceptable) under one or more responsibility type evaluation factors (such as experience of the company or key personnel or past performance)[.]" 13 C.F.R. § 125.5(a)(2)(ii). See FitNet Purchasing Alliance, B-410263, Nov. 26, 2014, 2014 CPD ¶ 344 at 6-8, 11.

On August 7, Povolny filed the protest that is at issue here. We docketed this protest as B-414532.3. Povolny challenges the agency's corrective action and new award decision. Specifically, Povolny alleges that the agency should have reevaluated Povolny's proposal as part of its corrective action. Protest at 2. Moreover, Povolny alleges that the agency used the SBA's Certificate of Competency program "as a means to circumvent the GAO decision finding the agency in violation of proper evaluation of Winspear's proposal." *Id.* at 3. In this respect, Povolny argues that the technical factors are not definitive responsibility criteria, but rather, "regulatory requirements imposed and enforced by" the agency. *Id.* (quoting Federal Acquisition Regulation (FAR) § 19.601(b)).⁶ Thus, Povolny concludes that the SBA's Certificate of Competency is not relevant to the question of whether Winspear's proposal satisfied the solicitation's technical factors. *Id.* ("This decision by the SBA is not relevant to the Protest merits" because "the SBA cannot provide [a] determination of specific evaluation criteria or regulatory requirements of the Solicitation."). See also Protester's Resp. to 2d Agency Req. for Dismissal, Aug. 22, 2017, at 3 ("The COC is not relevant in determining Winspear as Responsible to meet Factors 5 and 7 of the Solicitation."). As a result, Povolny asks that our Office decide the grounds raised in its initial protest dated March 30 and find Winspear ineligible for award. Protest at 3.

On August 15, the agency requested dismissal of the protest as untimely. As an exhibit to its request for dismissal, the agency produced a copy of the SBA's Certificate of Competency and the accompanying SBA affirmative findings. 2d Agency Req. for Dismissal, Exh. 3., SBA Certificate of Competency. The agency also provided a copy of its July 17 email to Povolny. *Id.*, Exh. 4, Email to Povolny.

On August 22, Povolny responded that its protest was timely because its challenge to the applicability of the SBA's Certificate of Competency was based upon discussions Povolny asserts it had with officials in two SBA offices on August 3 and 4, respectively, in which the officials allegedly explained the nature of the SBA's review under the Certificate of Competency program. Protester's Resp. to 2d Agency Req. for Dismissal at 3 (The protest was "based on information recently received through investigation of COC requirements with two SBA officers[.]"); Protest at 3 (An official "at the Chicago SBA office confirmed that the SBA will not make a determination of specific past performance or experience requirements."). Povolny further asserts that the SBA's affirmative findings regarding Winspear's responsibility, which were produced by the agency on August 15, support Povolny's protest allegations. Protester's Resp. to 2d

⁶ FAR § 19.601(b) provides:

The COC program empowers the Small Business Administration (SBA) to certify to Government contracting officers as to all elements of responsibility of any small business concern to receive and perform a specific Government contract. The COC program does not extend to questions concerning regulatory requirements imposed and enforced by other Federal agencies.

Agency Req. for Dismissal at 1-2. According to Povolny, the newly obtained information contained in the affirmative findings permits “the protest to continue.” Id. at 3.

DISCUSSION

We dismiss the protest as untimely because it was filed more than 10 calendar days after the protester knew, or should have known, the basis for its protest. Our Bid Protest Regulations contain strict rules for the timely submission of protests. These rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Team People LLC, B-414434, B-414434.2, June 14, 2017, 2017 CPD ¶ 190 at 9-10. Under these rules, a protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2).

Here, the protester knew, or should have known, the bases of protest on July 17 when the agency informed it that: (a) the agency had referred Winspear to the SBA for a Certificate of Competency; (b) the SBA had issued a Certificate of Competency determining Winspear to be responsible for the subject procurement; (c) the agency had decided, as a result, that the contract would remain awarded to Winspear; and (d) Povolny’s proposal would not be reevaluated. 2d Agency Req. for Dismissal, Exh. 4, Email to Povolny. However, the protest was not filed until August 7. Therefore, the protest is untimely.

To the extent the protester claims that it did not understand the scope of the SBA’s review under the Certificate of Competency program and/or the purpose of the program until SBA officials explained this to the protester on August 3 and 4, we note that the SBA’s program is detailed in both the FAR and the SBA’s regulations. FAR subpart 19.6; 13 C.F.R. § 125.5. Because these regulations are published in the Federal Register and the Code of Federal Regulations, all parties, including the protester, are on constructive notice of their provisions. Bob Cummins Constr. Co., B-406812.2, Aug. 28, 2012, 2012 CPD ¶ 243 at 3 n.3; CW Constr. Servs. & Materials, Inc., B-279724, July 15, 1998, 98-2 CPD ¶ 20 at 8 n.7; Techplan Corp., B-234161, May 12, 1989, 89-1 CPD ¶ 452 at 4.⁷

⁷ We do not view the protester’s August 21 response to the agency’s request for dismissal to be a supplemental protest challenging the Certificate of Competency itself under one of the exceptions set forth in our Regulations. 4 C.F.R. § 21.5(b)(2). Rather, in this response, the protester contends that the Certificate of Competency and the SBA’s affirmative findings “support” the initial protest ground regarding the limited scope of the SBA’s review and the inapplicability of the Certificate of Competency to the issue of the awardee’s technical acceptability. Protester’s Resp. to 2d Agency Req. for Dismissal at 1-2. Because we conclude the initial protest is untimely, this newly obtained information allegedly supporting the initial protest ground does not, as the

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Accordingly, the period for filing a protest in response to the notice Povolny received on July 17 was not tolled while the protester sought additional guidance from the SBA regarding the SBA's Certificate of Competency program.

The protest is dismissed.

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protest contends, permit an untimely protest to continue. See Bart & Assocs., Inc., B-414234, B-414234.2, Feb. 24, 2017, 2017 CPD ¶ 75 at 5-6.