

Decision

Matter of: McKissack-URS Partners, JV
File: B-406489.2; B-406489.3; B-406489.4
Date: May 22, 2012

Joseph J. Dyer, Esq., Bennett D. Greenberg, Esq., and Joshua C. Drewitz, Esq., Seyfarth Shaw LLP, for the protester.
William Novak, Esq., Paul F. Khoury, Esq., and John R. Prairie, Esq., Wiley Rein LLP, for the intervenor.
Dennis Adelson, Esq., David R. Koeppel, Esq., Colin W. O'Sullivan, Esq., Department of Labor, for the agency.
Eric M. Ransom, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. A debriefing provided pursuant to an architect-engineer procurement conducted under the Brooks Act, 40 U.S.C. §§ 1102-1104 (2006), does not fall within the exception to our general timeliness rules at 4 C.F.R. § 21.2(a)(2) (2010), because such a procurement is not a procurement conducted on the basis of competitive proposals, under which a debriefing is requested and, when requested, is required.
 2. Where the agency has not made a final determination concerning an alleged conflict of interest, a protest based on such an allegation is premature.
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DECISION

McKissack-URS Partners, JV, protest the final selection by the Department of Labor of Parsons Infrastructure & Technology Group, Inc. as the firm with which to negotiate an architect-engineer (A/E) contract under solicitation No. DOL111RP20406, for architect and engineering design and construction management support services.

We dismiss the protest.

Generally, A/E procurements, such as the one at issue in this protest, are conducted pursuant to special procedures established by the Brooks Act, 40 U.S.C. §§ 1102-1104 (2006), as implemented in Federal Acquisition Regulation (FAR)

subpart 36.6, rather than the procedures prescribed in FAR parts 13, 14, or 15. FAR § 36.601-3. Under the “competitive procedures”¹ established by FAR Subpart 36.6, the agency does not issue a solicitation, and competing firms do not submit proposals or quotations. Rather, the agency issues a notice in FedBizOpps inviting capable firms to submit a Standard Form (SF) 330, “Architect-Engineer Qualifications” statement. FAR § 36.603(b). The agency then convenes an A/E evaluation board to review the submitted A/E qualifications statements, and holds discussions with at least three of the highest rated firms. FAR §§ 36.602-2, 36.602-3. The board ranks the firms, and prepares a selection report for the source selection authority (SSA) recommending, in order of preference, at least three firms considered to be the most highly qualified. FAR § 36.602-3. In turn, the SSA makes a “final selection,” which consists of the SSA’s listing, in order of preference, of the most highly qualified firms. FAR § 36.602-4.

Throughout this evaluation process, firms do not submit price information--the Brooks Act process effectively eliminates price from the competition—and instead the competition is based entirely on the firms’ capabilities and qualifications. Powerhouse Design Architects & Engineers, Ltd., B-403174 et al., Oct. 7, 2010, 2010 CPD ¶ 240 at 2 n.2. Following the evaluation, all firms listed in the final selection are considered “selected firms” with which the agency may then negotiate a contract. FAR § 36.602-4. If the agency is not able to negotiate a satisfactory contract at a fair and reasonable price with the most preferred firm, the agency enters into negotiations with the next-ranked selected firm, and so on. FAR § 36.606.

Here, McKissack submitted an SF 330 qualifications statement in connection with this procurement, and was one of the shortlisted firms that the agency selected for discussions. McKissack was then invited to make an oral presentation to the “oral presentation evaluation board” on February 7. On February 27, the SSA made the final selection. McKissack was among the selected firms, however, Parsons, not McKissack, was ranked as the most-preferred firm. On February 28, the agency informed McKissack that Parsons had been selected for the initial contract negotiations. McKissack requested a debriefing from the agency on February 29, and repeated its request on March 2 and March 13, however, the debriefing was not forthcoming. McKissack then filed this protest on March 26.

McKissack states that it filed this protest “as a protective measure,” and is not withdrawing its request for, or waiving its right to, a debriefing and to file a protest within ten days of receiving such a debriefing. In its protest, McKissack argues that

¹ The FAR establishes Brooks Act procedures as a “competitive procedure.” FAR § 36.601-2 and FAR § 6.102(d)(1).

the agency is required to provide it with a debriefing,² that Parsons' employment of a consultant associated with the agency created an improper conflict of interest, that the oral presentation evaluation board was tainted by conflicts of interest and did not meet the required experience standards set forth in the FAR,³ and finally, that the evaluation of McKissack's qualifications statement was unreasonable. We conclude that McKissack's challenge to the qualifications of the oral evaluation board is untimely where it knew the qualifications of the board on February 7, that its allegations regarding conflicts of interest are premature where the agency has undertaken an investigation, and that its challenge to the evaluation is speculative, where without a debriefing, McKissack has no specific information about the evaluation of its qualifications.

Concerning the timeliness of McKissack's challenge of the board's qualifications, our Bid Protest Regulations require that protests not based upon alleged improprieties in a solicitation:

shall be filed not later than 10 days after the basis of protest is known or should have been known (whichever is earlier) with the exception of protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required. In such cases, with respect to any protest ground basis which is known or should have been known either before or as a result of the debriefing, the initial protest shall not be filed before the debriefing date offered to the protester, but shall be filed no later than 10 days after the date on which the debriefing is held.

² FAR § 36.607(b) states in relevant part that "[d]ebriefings of successful and unsuccessful firms will be held after final selection has taken place." We agree with McKissack that FAR § 36.607(b) requires the agency to provide McKissack with a debriefing, however, we note that FAR subpart 36.6 does not specify the timing of such a debriefing and an agency's failure to provide a debriefing is not an issue that we generally will consider because the scheduling of a debriefing is a procedural matter that does not involve the validity of an award. Barnesville Dev. Corp., B-400049, June 30, 2008, 2008 CPD ¶ 132 at 5. Thus, to the extent McKissack is protesting the agency's failure to schedule a debriefing, this aspect of the protest is also dismissed.

³ In this regard, FAR § 36.602-2 specifically requires that A/E evaluation boards be "composed of members who, collectively, have experience in architecture, engineering, construction, and Government and related acquisition matters. Members shall be appointed from among highly qualified professional employees of the agency or other agencies, and if authorized by agency procedure, private practitioners of architecture, engineering, or related professions."

4 C.F.R. § 21.2(a)(2) (2010). McKissack asserts that its challenge to the qualification of the evaluation board is not untimely because the debriefing it is due pursuant to FAR § 36.607(b) is a “required” debriefing within the meaning of our timeliness regulations and, therefore, it should have the right to file a protest concerning any aspect of the procurement other than challenges to the solicitation, such as its challenge to the qualifications of the evaluation board, within 10 days of the date it receives its debriefing.⁴ We disagree, and conclude that the timeliness exception in our Bid Protest Regulations does not apply to debriefings provided in the context of an A/E Brooks Act procurement, and that McKissack was required to file its challenge within ten days of the date it knew or should have known the basis for its protest.

The debriefing exception in our timeliness regulations applies only to protests challenging a procurement conducted on the basis of “competitive proposals” under which a debriefing “is requested and, when requested, is required.” 4 C.F.R. § 21.2(a)(2). The term “competitive proposals” is not defined by our Bid Protest Regulations, nor is it expressly defined by statute or regulation. Rather, it has been coined a “term of art.” Systems Plus, Inc. v. United States, 68 Fed. Cl. 206, 209-210 (2005) (holding that a procurement under the Federal Supply Schedule program, pursuant to FAR Subpart 8.4 was not conducted on the basis of competitive proposals). We conclude that an A/E competition conducted pursuant to the procedures established by the Brooks Act and FAR Subpart 36.6 does not constitute a competition based on “competitive proposals,”⁵ and that the exception in our timeliness rules does not apply.

⁴ We note that the protester’s interpretation of the timeliness regulations would result in the current protest being dismissed as premature, because it was filed prior to the debriefing date offered to the protester. However, as stated above, McKissack has apparently filed this “protective protest” in part to seek clarification on this timeliness issue.

⁵ McKissack contends that our Office should adopt a more expansive interpretation of the term “competitive proposals” in order to advance the policy consideration underlying the debriefing exception, which is to allow firms, such as McKissack, to receive a debriefing before deciding whether or not to file its protest. While it is true that a more expansive interpretation of our regulations would further the policy goal underlying the timeliness exception, our understanding of the term “competitive proposals” is not without bounds. Rather, it is properly understood with the statutory and regulatory framework in which it is used, and from which it was ultimately derived. See 61 Fed. Reg. 39039-01 (July 26, 1996) (explaining that the timeliness rule was adopted to comport with the statutory debriefing and stay provisions of the Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. 103-355, 108 Stat. 3243 (1994), which only apply to procurements conducted on the basis of “competitive proposals”).

In reaching this conclusion, we consider that our Office has previously determined that the use of negotiated procedures in accordance with FAR Part 15--as evidenced by the issuance of a request for proposals--is the hallmark of a procurement conducted on the basis of competitive proposals.⁶ See The MIL Corp., B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 6 (citing, e.g., Peacock, Myers & Adams, B-279327, Mar. 24, 1998, 98-1 CPD ¶ 94); see also, Rhonda Podojil--Agency Tender Official, B-311310, May 9, 2008, 2008 CPD ¶ 94 at 3 (holding that A-76 competition, where the agency issued a solicitation for “proposals” and expressly invoked FAR 15 procedures, was conducted on the basis of competitive proposals for the purposes of the application of the debriefing exception to our timeliness regulations). Where a procurement is not conducted pursuant to these procedures, we have held that the procurement was not one conducted on the basis of competitive proposals, and that the exception to our timeliness rules does not apply. See The MIL Corp., *supra* (holding that procurement conducted pursuant to FAR Subpart 8.4, rather than FAR Part 15, was not conducted on the basis of competitive proposals).

The procurement at issue in this case was not conducted pursuant to FAR Part 15 procedures, but under the Brooks Act and FAR Subpart 36.6. As noted above, these procedures do not provide for the issuance of a solicitation, the preparation of proposals, the submission of prices, or other hallmarks of a FAR Part 15 competition. In fact, in selecting the most qualified firms on the basis of A/E qualification statements under the Brooks Act, FAR Part 15 procedures are expressly not applied pursuant to FAR § 36.601-3(b).⁷ Accordingly, an A/E procurement under FAR subpart 36.6 does not share the characteristics of the FAR Part 15 procurements that we consider to be conducted on the basis of “competitive proposals.”

Additionally, we find FAR § 6.102 instructive in its separation of Brooks Act procedures from “competitive proposals.” FAR § 6.102 describes the “Use of

⁶ Consistent with our understanding in this regard, we have noted that FAR § 6.401(b), “Competitive Proposals” begins with a reference, “See Part 15 for procedures.” See The MIL Corp., *supra*, at 6 n.4.

⁷ To the extent the protester argues that the term “competitive proposals” should be understood to apply to A/E procurements since FAR § 36.607 adopts some of the debriefing procedures of FAR Part 15, we find the argument misplaced. This specifically limited adoption of FAR Part 15 procedures does not otherwise negate the overarching construct of the FAR, which clearly establishes the A/E procurement procedures as separate from those established under FAR Part 15, and which expressly categorize A/E contracting procedures as distinct from those based on “competitive proposals.” See FAR § 6.102 and related discussion *infra*.

Competitive Procedures” under the FAR. FAR § 6.102(b) is entitled “[c]ompetitive proposals,” while FAR § 6.102(d) is entitled “[o]ther competitive procedures.” These sections expressly carve out procurements conducted pursuant to the Brooks Act and FAR Subpart 36.6 from the category of competitions based on “competitive proposals.” Instead, procurements under FAR Subpart 36.6 are specifically highlighted as a form of “other competitive procedures.”⁸

In sum, because we conclude that the debriefing due to McKissack under FAR § 36.607 is not a debriefing in a “procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required,” the exception for such debriefings in our Office’s timeliness regulations does not apply, and McKissack was required to file any protest other than a challenge to the terms of the solicitation within 10 days after the basis of protest is known or should have been known. Where McKissack knew the qualifications of the individuals on the evaluation board at the time of the oral evaluation on February 7, was informed of Parson’s selection as the most highly rated firm on February 27, but did not file its protest until March 26, the protest is untimely and must be dismissed.⁹

⁸ Similarly, FAR Part 15 draws a distinction between the procedures to be used for “competitive proposals” versus the procedures to be used for “other competitive procedures.” Specifically, FAR § 15.502 states in full:

This subpart applies to competitive proposals, as described in 6.102(b), and a combination of competitive procedures, as described in 6.102(c). The procedures in 15.504, 15.506, 15.507, 15.508, and 15.509, with reasonable modification, should be followed for sole source acquisitions and acquisitions described in 6.102(d)(1) and (2).

⁹ McKissack filed a supplemental protest on May 7 alleging that the “evaluation board” lacked the qualifications required by FAR § 36.602-2. McKissack argues that while its challenge to the composition of the “oral presentation evaluation board” may be untimely, its challenge to the “evaluation board” is timely because the agency stated on April 25 that the “oral presentation evaluation board” was also the entire evaluation board. McKissack argues that it could not have known before April 25 that there was only one evaluation board. We disagree. McKissack’s initial protest reflects McKissack’s knowledge that, what it characterizes as an “oral presentation evaluation board,” was the entity that evaluated McKissack’s qualifications under the solicitation. Because McKissack provides no basis to reasonably support a belief that the agency may have used multiple evaluation boards, and such a belief by itself is inconsistent with FAR Part 36.602-3 “Evaluation board functions,” describing the functions of a singular evaluation board, the agency’s confirmation of the singular evaluation board cannot reasonably be viewed as “new facts” giving rise to a new basis for protest.

Turning to McKissack's allegations concerning conflicts of interest, during the course of the protest, the agency informed our Office that it had initiated an investigation into the alleged conflicts of interest, that the investigation had not concluded, and that the agency would not make an award until the investigation was complete. In this context, our Office has concluded that since the agency has not made a final determination concerning the conflict of interest issue, a protest based on such an allegation is premature, and will not be reviewed at this time.¹⁰ See Government Bus. Servs. Group, B-287052 et al., March 27, 2001, 2001 CPD ¶ 58 at 12.

Finally, with regard to McKissack's allegation that its qualifications were improperly evaluated, since it has not yet received a debriefing, it has no detailed information concerning its evaluation, and essentially assumes that no properly conducted evaluation could have ranked another offeror higher than itself. Our Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) and (f) (2011), 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. Id.

In this case, McKissack's challenge to the evaluation does not include sufficient information to establish the likelihood that the agency in this case violated applicable procurement laws or regulations. The protest therefore is dismissed without further action. See Bid Protest Regulations, 4 C.F.R. § 21.5(f).

The protest is dismissed.

Lynn H. Gibson
General Counsel

¹⁰ McKissack filed a supplemental protest on May 14 alleging that the agency, during a conference call on this protest, made comments "implicitly suggesting" that a conclusion on the OCI issues had been reached. We dismiss this supplemental protest as premature. Until the protester has documentation of the agency investigation's conclusions or the agency moves forward with award, the OCI issues are not for review by this Office.