Decision

Matter of:  Financial Management Consulting--Reconsideration

File:    B-409592.2

Date:    September 12, 2014

Jesse Bryant Jr., Financial Management Consulting, for the protester.
Aretha Suggs, Federal Railroad Administration, for the agency.
Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration is denied where request fails to demonstrate that Government Accountability Office’s prior decision contained errors of fact or law, or present new information, that would warrant reversal or modification of prior decision.

DECISION

Financial Management Consulting (FMC), of Nuevo, California, requests reconsideration of our decision in Financial Management Consulting, B-409592, Mar. 18, 2014. In that decision, we dismissed FMC’s protest filed in connection with request for proposals (RFP) No. DTFR53-13-R-00122, issued by the Federal Railroad Administration (FRA) for independent financial advisor support services.

We deny the request.

FMC’s protest raised three issues. First, FMC argued that the agency improperly failed to notify the firm of its exclusion from the competitive range for the subject acquisition in a timely manner. Second, FMC argued that the solicitation improperly did not include complete sample data for a sample task order to which offerors were required to respond in their proposals. Third, FMC argued that the agency did not apply fair and equitable technical measurements in evaluating proposals because of the lack of complete sample data in the solicitation.

In our prior decision, we dismissed FMC’s first allegation because we concluded that, even if the agency improperly had failed to provide the protester with timely notice of its exclusion from the competitive range, the agency’s actions had no
bearing on FRA’s decision not to award FMC a contract. In this regard, we pointed out that FMC was entitled to raise any challenge to the agency’s evaluation of proposals once it was provided actual notice of its exclusion from the competitive range. We further noted that FMC had been provided a debriefing by the agency once it was advised of its exclusion from the competitive range, but that FMC did not challenge any of the agency’s substantive conclusions relating to the evaluation of its proposal.

We dismissed as untimely FMC’s other two allegations—that the solicitation did not include complete sample data, and that the agency did not apply fair and equitable technical measurements in the evaluation of proposals because of the absence of complete sample data. We stated that FMC’s contention that the solicitation did not include complete sample data amounted to a challenge to the terms of the RFP and was untimely because it was not filed prior to the deadline for submitting proposals, as required by our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2014). We concluded that FMC’s contention that the agency did not apply fair and equitable technical measurements in evaluating proposals because of the absence of complete sample data in the RFP also was untimely because it was based on the solicitation impropriety that FMC had not timely challenged.

In its request for reconsideration, FMC takes issue with all of our bases for dismissing its protest. We note at the outset that, in order to prevail on a request for reconsideration, the requesting party either must show that our prior decision contains errors of fact or law, or present information not previously considered, that would warrant reversal or modification of the prior decision. 4 C.F.R. § 21.14(a); Department of Veterans Affairs--Recon., B-405771.2, Feb. 15, 2012, 2012 CPD ¶ 73 at 3. Repetition of arguments previously made during our earlier consideration of the protest, or disagreement with our prior decision, do not provide a basis for our Office to reconsider our earlier decision. Vinculum Solutions, Inc.--Recon., B-408337.3, Dec. 3, 2013, 2013 CPD ¶ 274 at 2. FMC has not met this standard.

As to its first protest basis, FMC argued in its original protest, and again in its request for reconsideration, that the agency’s failure to provide it with prompt notice of its elimination from the competitive range deprived it of the opportunity to request a pre-award debriefing pursuant to Federal Acquisition Regulation (FAR) § 15.505. According to the protester, FAR § 15.505 contemplates providing disappointed offerors information in a pre-award debriefing that is not available to a disappointed offeror in a post-award debriefing.

We find no merit to this aspect of FMC’s request. First, the protester has not explained what information it believes it could have obtained in connection with a pre-award debriefing request that was not actually provided to FMC during its debriefing. In this connection, FAR § 15.505 provides that, during a pre-award debriefing, an offeror is entitled only to information concerning the agency’s
evaluation of significant elements of the firm’s proposal and a summary of the rationale for eliminating the offeror from the competition.

The record here shows that, although FMC was only afforded a post-award debriefing, the information required to be provided pursuant to FAR § 15.505, in fact, was provided to FMC. Specifically, the record shows that FMC was advised that the agency identified three discrete weaknesses in the FMC proposal. First, the agency found that FMC’s proposal reflected a lack of understanding of the work required under the solicitation, included a significant number of spelling and grammatical errors, had sentences that did not make sense and was difficult to follow. Second, the agency found that FMC’s proposal reflected no railroad experience. Third, the agency found that FMC’s proposal did not lay out a comprehensive financial analysis plan, and only made reference to not having enough information. Post-Award Debriefing, at 1. The record therefore shows that, despite the timing of FMC’s debriefing, FMC was provided all of the information it would have received during a pre-award debriefing.

Second, and more fundamentally, FMC’s protest to our Office did not take issue with any of the agency’s substantive evaluation findings, but instead complained only about the procedural sufficiency of the agency’s actions in failing to provide FMC prompt notice of its elimination from the competitive range. As we noted in our prior decision, even if the agency’s actions arguably were procedurally improper, those actions did not affect the propriety of the agency’s award decision. In the final analysis, the agency identified three specific weaknesses in the FMC proposal that provided the underlying basis for eliminating it from consideration, and FMC has not challenged those findings. Thus, even if the agency erred procedurally in not providing FMC prompt notice of its elimination from the competitive range, that error had nothing to do with the underlying basis for eliminating the FMC proposal from the competition, and by extension, did not affect the propriety of the agency’s source selection decision. We therefore deny this aspect of FMC’s request for reconsideration.

As to FMC’s second protest issue concerning the lack of complete sample data in the RFP, FMC maintains that it was protesting the evaluation of its proposal after what it characterizes as the agency’s intentional omission of the necessary sample data in the RFP. According to the protester, this element of its protest is cognizable under 4 C.F.R. § 21.2(a)(2) of our Bid Protest Regulations, which requires a protester to file in our Office within 10 days of when the protester knows or should know of its basis for protest. In this regard, FMC argues that this aspect of its protest relates to the agency’s improper elimination of its proposal from consideration after FMC attempted to respond to the deficient RFP. FMC therefore contends that this aspect of its protest was not an untimely challenge to the terms of the RFP, but, rather, a challenge to the agency’s elimination of its proposal from consideration.
We find no merit to this aspect of FMC’s request for reconsideration. Notwithstanding FMC’s characterization of this issue as relating to the evaluation of its proposal, its original letter of protest complained only that the agency’s evaluation did not follow procedures contained, not just in the solicitation, but also in what it described as other applicable regulation and authorities. FMC’s protest allegation, in its entirety, provided as follows:

Secondly, the FRA contracting officer and/or SSEB [source selection evaluation board] did not follow/apply the procedures contained in the solicitation, applicable regulations, and other applicable authorities. Specifically, because complete sample data for a 49 [C.F.R. part] 260 Application was not provided for the Sample Task Order for Lincoln Central Railroad, in the FRA solicitation.

Letter of Protest at 1 (underlined and italicized emphasis in original; bold emphasis added).

While the allegation makes reference to an alleged failure on the part of the agency to follow or apply the procedures contained in the solicitation, it is clear that FMC’s actual protest allegation relates to the absence of complete sample data that FMC believed was required to be included in the RFP. FMC complained that proposals were misevaluated “. . . because complete sample data for a 49 [C.F.R. part] 260 Application was not provided for the Sample Task Order . . . .” Letter of Protest at 1 (emphasis in original). Thus, notwithstanding FMC’s characterization of the issue, its actual concern related to the absence of information that it thought should have been included in the solicitation.

We note that agencies are required to evaluate proposals based solely on the criteria included in the solicitation, FAR § 15.303(b)(4), and because the RFP here did not include the complete sample data that FMC thought was necessary for a proper evaluation of proposals, it would have been improper for the agency to have evaluated proposals using such data. It follows that, notwithstanding FMC’s characterization of the issue, in fact, it is a challenge to the terms of the RFP. Since FMC’s real concern related to the absence of information in the RFP that it considered necessary for a proper evaluation of proposals, its allegation was a challenge to the terms of the RFP. Such contentions are required to be raised prior to the deadline for submitting proposals. 4 C.F.R. § 21.2(a)(1). Since FMC’s protest allegation was not raised until after the deadline for submitting proposals, we properly dismissed it as untimely. We therefore deny this aspect of FMC’s request for reconsideration.

Finally, FMC’s third allegation also was properly dismissed as untimely. As with its second allegation, FMC’s third protest allegation—that the agency did not apply fair and equitable technical measurements in evaluating proposals—was based on the absence in the RFP of the complete sample data that FMC thought should have
been included in the solicitation. Again, although this allegation is couched in terms of an evaluation error, it actually is a challenge to the terms of the RFP, specifically, the absence of complete sample data in the RFP. We therefore deny this aspect of FMC's request for reconsideration.

The request for reconsideration is denied.

Susan A. Poling
General Counsel