



Decision

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Matter of: AlliantCorps, LLC

File: B-415744.2

Date: April 4, 2018

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R. Montana Erickson, Esq., and Michael L. Torres, Esq., Department of the Navy, for the agency.
Stephanie B. Magnell, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging a violation of the Procurement Integrity Act is dismissed, where the protest fails to describe a sufficient factual basis for the alleged violation.
 2. Protest that the agency should consider certain past performance despite the terms of the solicitation is an untimely challenge to the terms of the solicitation; similarly, entering into discussions with offerors does not preempt the solicitation terms.
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DECISION

AlliantCorps, LLC¹ (Alliant) protests the corrective action taken by the Department of the Navy, Naval Air Systems Command, in response to Alliant's earlier protest of the award of task order² No. N61340-18-F-0018 to DKW Communications, Inc. (DKW), of

¹ Alliant is a small business joint venture whose partners include FEDITC, LLC, Conceptual MindWorks Inc., Spectrum, COMSO, Double Apex, and X-EETO. Protest at 3. For this procurement, Alliant teamed with Zenetex, LLC, the incumbent prime contractor. B-415744, Protest, Exh. B, Alliant Cost/Price Report, at 12.

² The value of the task order was approximately \$62.9 million, which exceeds the \$10 million threshold for GAO bid protest jurisdiction. 41 U.S.C. § 4106(f)(1)(B); B-415744, Protest, Exh. A, Alliant Debrief Slides, at 22.

Washington, District of Columbia, which was issued under the General Services Administration Alliant Small Business Governmentwide Acquisition Contract and sought software maintenance services for naval pilot training simulation systems. Here, Alliant alleges that DKW, the prior awardee and a current competitor, improperly received Alliant's bid and proposal information, resulting in a violation of the Procurement Integrity Act. In addition, the protester asserts that the agency failed to conduct meaningful discussions as part of the corrective action.

We dismiss the protest.

BACKGROUND

The task order procurement, issued on June 22, 2017, was set aside for small businesses and conducted pursuant to Federal Acquisition Regulation § 16.505. Request for Task Order Proposals (RFTOP) at 248. The RFTOP anticipated award to the small business whose proposal offered the best value to the agency, considering the factors of past performance, management, and price. Id. at 247-249. As relevant to this protest, under the past performance factor offerors were permitted to submit up to three contract references for the prime offeror. Id. at 229. Submission of contract references for other entities, including proposed subcontractors and joint venture owners, was not permitted. Id. at 229, 250. The RFTOP advised offerors that “[a]ny past performance contract deemed to be Not Relevant will receive no further consideration, with no opportunity to submit a replacement, even if the Government requests revised proposals.” Id. at 250-251. Proposals were due by 12:00 p.m. on July 31, and among the offerors were Alliant and DKW. Id. at 1.

On November 14, the Navy made award to DKW. B-415744, Protest, Exh. A, Alliant Debrief Slides, at 22; Req. for Dismissal, Feb. 2, 2018, at 1.

On November 21, DKW wrote to Navy personnel regarding the transition of contract performance. The DKW email provided a link to a website where individuals could apply to work on the new contract and included the following message:

We are well on our way as far as staffing/transitioning for the contract. This includes establishing a website for incumbent staff to apply and join our team, and learn more about DKW. Please share the below website address with incumbent staff so they can begin the application/transition process if they have not already started.

Protest, Exh. 7, DKW Email to Navy, Nov. 21, 2017.

After being advised on November 21 that it was not selected for award, Alliant requested a debriefing, which the Navy conducted on November 28. Protest, Exh. 3, Alliant Ltr. to Navy Contracting Officer, at 1.

After the November 28 Alliant debriefing, the Navy forwarded the DKW email to “personnel working on the incumbent contract for Alliant’s subcontractor Zenentex” so

that contractor employees could “apply for [their] future positions.” Protest at 5; id., Exh. 8, Navy Emails at 1. The email contained the following note: “For immediate action!!!! Hopefully [another individual] already gave [the DKW employment application electronic link] to you or [the] company did.” Protest, Exh. 8, Navy Emails, at 1.

On November 29, Alliant protested the award to DKW, challenging, among other things, the Navy’s past performance evaluation. See generally B-415744, Protest.

On November 30, the Navy requested that our Office dismiss the protest on the basis of its proposed corrective action, as it intended to “amend the existing solicitation to clarify the government’s requirements, open negotiations, obtain and evaluate revised proposals, and make a new source selection decision.” B-415744, Notice of Corrective Action, Nov. 30, 2017, at 1. Our Office dismissed the protest on the basis that the agency’s proposed corrective action rendered the protest academic. AlliantCorps, LLC, B-415744, Dec. 7, 2017 (unpublished decision).

On December 8, Alliant notified the contracting officer of an alleged violation of the Procurement Integrity Act. Req. for Dismissal at 1.³ The protester asserted that “direct labor rates and cost or pricing data that form the basis for Alliant’s proposal (indeed, they are included in the proposal) have improperly been furnished to DKW at the direction of the Navy, and DKW has knowingly obtained bid and proposal information in violation of the Procurement Integrity Act.” Protest, Exh. 3, Alliant Ltr. to Navy Contracting Officer, Dec. 8, 2017, at 2. Alliant argued it was competitively harmed when the Navy encouraged incumbent contractor employees to use DKW’s electronic employment application link. The protester asserted that it initially “enjoyed a significant cost advantage over DKW,” which would be eroded in corrective action if DKW revised its price on the basis of the self-disclosed incumbent personnel salaries. Id. at 1-2. Alliant requested, as a remedy, that DKW be excluded from the competition. Id. at 2.

On January 23, 2018, the agency issued amendment 0004 to the solicitation, provided evaluation notices to Alliant and DKW, and advised the offerors that revised proposals were due by 9:00 a.m. on February 2. Amend. 0004, Jan. 23, 2018; Protest, Exh. 1, Evaluation Notices; Exh. 2b, Navy Email to Alliant., Jan. 29, 2018, at 1.

On February 1, Alliant filed this pre-award protest contesting the agency’s corrective action.

On February 2, the agency requested that we dismiss the protest in its entirety on the basis that the allegations relating to the Procurement Integrity Act were legally and factually insufficient and that the allegations regarding past performance were untimely solicitation challenges. Req. for Dismissal, Feb. 2.

³ The letter is dated December 6, Protest, Exh. 3, and thus the date cited by the agency apparently refers to the agency’s date of receipt. The difference in the dates is not relevant to this protest.

DISCUSSION

Procurement Integrity Act

Alliant contends that the agency's emails encouraging incumbent employees to apply for positions with the new contractor violated the Procurement Integrity Act. Protest at 4-6. The Navy requests dismissal of Alliant's allegations of a Procurement Integrity Act violation on the basis that the claim as described in the protest is legally and factually deficient. Req. for Dismissal at 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).

Alliant alleges that "because the communication from the Navy [to incumbent contractor personnel] said that it was for immediate action and had four exclamation points, virtually all incumbent personnel immediately signed up and divulged their salary information to DKW." Protest at 5. The protester asserts that, "[a]s a result of the Navy's actions, direct labor rates and cost or pricing data that form the basis for Alliant's proposal (indeed, they are included in the [Alliant] proposal) have improperly been furnished to DKW at the direction of the Navy." Id.

We dismiss the protest grounds relating to a violation of the Procurement Integrity Act because Alliant's allegations do not describe a violation of the Procurement Integrity Act. As relevant to this protest, the Procurement Integrity Act prohibits disclosure of "contractor bid or proposal information" by a government official before the award of a contract to which the information relates. 41 U.S.C. § 2102(a)(1). This prohibition applies to anyone who "(i) is a present or former official of the Federal Government; or (ii) is acting or has acted for or on behalf of, or who is advising or has advised the Federal Government with respect to, a Federal agency procurement."⁴ 41 U.S.C. § 2102(a)(3)(A). According to Alliant, the incumbent's employees provided their own salary information to DKW. The incumbent contractor employees are neither federal government officials nor acting on behalf of federal government officials with regard to this procurement; thus, the prohibition on disclosing bid or proposal information in 41 U.S.C. § 2102(a)(1) does not apply to them.

Our Bid Protest Regulations require that a protest must include a sufficiently detailed statement of the grounds supporting the protest allegations. 4 C.F.R. §§ 21.1(c)(4), 21.1(f), 21.5(f). That is, a protest must include sufficient factual bases to establish a

⁴ In addition, that person must have "or had access to contractor bid or proposal information or source selection information" "by virtue of that office, employment, or relationship." 41 U.S.C. § 2102(a)(3)(B).

reasonable potential that the protester's allegations may have merit; bare allegations or speculation are insufficient to meet this requirement. Ahtna Facility Servs., Inc., B-404913, B-404913.2, June 30, 2011, 2011 CPD ¶ 134 at 11. Alliant's allegations here fail to state a valid basis of protest because the acts alleged would not describe a violation of the Procurement Integrity Act. In this regard, because the incumbent contractor employees are not prohibited from disclosing their own salary information, the protest lacks a sufficient factual basis to support a claim of a violation of the Procurement Integrity Act. This protest ground is dismissed. 4 C.F.R. §§ 21.1(f), (i).⁵

Discussions and Past Performance

Alliant also argues that, because the Navy entered into discussions as part of its corrective action, the protester should be permitted to provide a substitute contract reference for one deemed not relevant, despite the clear terms of the solicitation prohibiting such substitution. Protest at 6-7. The agency argues that these arguments are untimely solicitation challenges that the protester was required to raise prior to the time set for receipt of initial proposals.⁶ Req. for Dismissal at 5; 4 C.F.R. § 21.2(a)(1).

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. Verizon Wireless, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4. Our timeliness rules specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for

⁵ Alliant similarly claims that "DKW has knowingly obtained bid and proposal information in violation of the Procurement Integrity Act." Protest at 5. The emails with the employment application website link were sent on November 21 and 28, i.e., after the November 14 award and prior to the November 29 protest filing. The statute prohibits persons from knowingly obtaining bid or proposal information in the period "before the award of a Federal agency procurement contract to which the information relates." 41 U.S.C. § 2102(b). However, Alliant has not alleged facts that would establish that DKW "knowingly" obtained bid or proposal information. Furthermore, the protester does not explain how post-award acceptance of employment applications could nevertheless run afoul of the Procurement Integrity Act. This protest ground is dismissed for failing to state a valid basis. 4 C.F.R. §§ 21.1(f), (i).

⁶ Alliant also contends that a commitment to appropriate corrective action required the Navy to amend the solicitation to permit consideration of "[too] close at hand information." Protest at 9. The protester alleges that it had a reliance interest in such amendment as a corrective action remedy. Id.; Opp'n to Req. for Dismissal, Feb. 6, 2018, at 6. The protester cites no support for these legal theories. Indeed, Alliant does not explain how our prior decisions on this topic apply to the situation here, where the solicitation expressly prohibits substitution of contract references or consideration of subcontractor references. In sum, the arguments in this vein fail to state a legally sufficient basis of protest and are dismissed. 4 C.F.R. §§ 21.1(f), (i).

receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1); Precise Mgmt., LLC--Recon., B-410912.2, June 30, 2015, 2015 CPD ¶ 193 at 2-3.

Under the past performance factor Alliant submitted three contract references. The Navy determined that Alliant's third reference was "Not Relevant." Protest at 6. The RFTOP prohibits substitution of contract references:

As a reminder, in accordance with solicitation Section M, Part B, 1.0 Relevancy, "Any past performance contract deemed to be Not Relevant will receive no further consideration, with no opportunity to submit a replacement, even if the Government requests revised proposals." As such, Past Performance evaluations will only be refreshed for quality of the original proposal past performance contract submissions. All other terms and conditions remain unchanged.

Amend. 0004 at 3. This prohibition on substitution has been part of the solicitation since its initial issuance on June 22, 2017. Id. ("Please also note that no changes to the Past Performance Section L Instructions or Section M evaluation criteria have been made in this amendment."); see also RFTOP at 251.

According to Alliant, at this time, "[t]he only possible remaining discriminator between DKW and Alliant is a Not Relevant rating on Alliant's third past performance reference." Protest at 7. Thus, key to Alliant's success in this competition is substitution of its "not relevant" contract reference. In pursuit of this aim, Alliant argues that a not relevant rating "is the equivalent of a Significant Weakness/Deficiency requiring 'discussions,' which necessarily encompasses the ability to change the proposal." Id. In essence, Alliant asserts that because the agency entered into discussions as part of the corrective action, offerors must be permitted to submit substitute contract references, even though the relevant RFTOP language prohibiting such substitution has not changed since the due date for receipt of initial proposals. Alliant's argument is an untimely challenge to the terms of the solicitation. To the extent that Alliant believed that the RFTOP should have permitted offerors to offer substitute contract references after discussions, it should have filed a protest challenging the terms of the solicitation prior to the time for receipt of initial proposals, i.e., July 31, 2017. 4 C.F.R. § 21.2(a)(1). This basis of protest is untimely. Id.; Precise Mgmt., supra.

The protest is dismissed.

Thomas H. Armstrong
General Counsel