



Decision

Matter of: State Women Corporation

File: B-416510

Date: July 12, 2018

Sultan Siddiqi and Ahmad Yar Gharany, for the protester.
Maria Kolokithias, Esq., and Thomas J. Warren, Esq., Department of the Army, for the agency.

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DIGEST

1. Where an agency clearly indicated that a debriefing provided under the Department of Defense's enhanced postaward debriefing procedures was considered closed following the agency's responses to an initial set of questions submitted by the protester, the protester's posing of additional questions to the agency after the debriefing concluded does not extend the time for filing a bid protest, and a protest filed more than 10 days after the agency's initial responses is dismissed as untimely.
 2. Following use of enhanced debriefing procedures, the time period for filing a protest is 10 days, as provided under our Regulations, not 5 days, as argued by the agency.
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DECISION

State Women Corporation (SWC), of Kabul, Afghanistan, protests the award of a contract to Macro Vantage Levant DMCC (MVL), of Dubai, United Arab Emirates, under request for proposals (RFP) No. W5J9JE-18-R-0008, which was issued by the Department of the Army, Corps of Engineers, for the design and construction of a new consolidated morgue and visitation center at the Kabul National Military Hospital in Kabul, Afghanistan. SWC challenges the agency's evaluation of its proposal, and the best-value tradeoff resulting in the award of the contract to a higher-rated, higher-priced proposal.

We dismiss the protest as untimely.

BACKGROUND

The RFP, which was issued on January 7, 2018, and subsequently amended three times, contemplated a two-phase design-build procurement pursuant to Federal Acquisition Regulation (FAR) parts 15 and 36, for a fixed-price contract for a morgue and visitation center at the Kabul National Military Hospital in Kabul, Afghanistan. RFP, amend. no. 3, at Instructions ¶¶ A. Phase I proposals were to be evaluated on an acceptable/unacceptable basis considering two factors, (1) key personnel, and (2) specialized experience. Id., amend. no. 1, at ¶ B(5)(G). In Phase II, award was to be made on a best-value tradeoff basis, with the combination of the non-cost factors of (1) design and technical narrative, and (2) project management plan and schedule, being significantly more important than price. Id., amend. no. 3, at ¶ B(5)(F).

The Corps received 16 phase I proposals, and ultimately received 5 phase II proposals. Request for Dismissal, exh. no. 1, Award Notice Letter (May 16, 2018), at 1. Relevant here, the agency evaluated the proposals submitted by the protester and awardee as follows:

	SWC	MVL
Key Personnel	Acceptable	Acceptable
Specialized Experience	Acceptable	Acceptable
Design & Technical Narrative	Acceptable	Good
Project Management Plan & Schedule	Good	Good
Price	\$2,941,755	\$6,160,188

Id. at 2.

The source selection official selected MVL's proposal for award as representing the best value to the agency based on the RFP's evaluation scheme of the design and technical narrative and project management plan and schedule factors, when combined, being significantly more important than price. Id. On May 16, the agency notified SWC of the award decision and its right to a debriefing pursuant to FAR § 15.506. Id. On the same day, SWC requested a debriefing. Request for Dismissal, exh. no. 2, SWC Debriefing Request, at 1.

On May 28, the Corps provided a written debriefing to SWC. Request for Dismissal, exh. no. 3, SWC Debriefing Letter. The debriefing letter addressed the bases for the agency's evaluation of SWC's proposal under each of the four non-price factors, the awardee's technical ratings and total evaluated price, and the basis for the agency's best-value tradeoff. Id. at 2-4. The letter concluded by inviting the protester to submit any additional questions relating to the debriefing pursuant to Department of Defense (DOD) Class Deviation 2018-00011 – Enhanced Post Award Debrief Rights (hereinafter, Enhanced Debriefing Rights). Id. at 4.

Under the Enhanced Debriefing Rights, which was issued by DOD on March 22, contracting officers shall, consistent with the requirements of FAR § 15.506(d), include in the debriefing information provided to unsuccessful offerors language indicating that offerors may submit additional questions related to the debriefing within two business days after receiving the debriefing. Enhanced Debriefing Rights at 1. The agency must then respond to the questions in writing within five business days after receipt of the questions. Id. The Enhanced Debriefing Rights specify that the agency “shall not consider the postaward debriefing to be concluded until the agency delivers its written responses to the unsuccessful offeror.” Id.

Consistent with the agency’s invitation, SWC submitted questions regarding the evaluation of its proposal and of offerors’ proposed prices on May 28. Request for Dismissal, exh. no. 4, SWC Debriefing Questions. On June 1, the agency responded in writing to the protester’s additional debriefing questions. Request for Dismissal, exh. no. 5, Agency Response to SWC’s Debriefing Questions. The agency’s response stated that “[t]he debrief is hereby concluded.” Id. at 3. On June 8, the protester submitted further questions to the agency regarding the evaluation of its proposal and the agency’s evaluation of offerors’ proposed prices. Request for Dismissal, exh. no. 6, SWC Second Debriefing Questions. On June 20, the agency responded to the protester’s second set of debriefing questions. Request for Dismissal, exh. no. 7, Agency Response to SWC’s Second Debriefing Questions. On June 24, SWC filed this protest with our Office.

DISCUSSION

The Corps filed a request for dismissal of the protest on the basis that the protest is untimely. Specifically, the agency argues that the debriefing concluded following the agency’s June 1 response to the protester’s initial debriefing questions, and therefore, to be timely pursuant to the Enhanced Debriefing Rights, any protest to our Office had to have been filed by the close of business on June 6. In this regard, the agency asserts that the Enhanced Debriefing Rights establishes that “timely protests must be submitted to the Government Accountability Office not later than ‘Five days after the Government delivers its written response to additional questions submitted by the unsuccessful offeror. . . .’” Request for Dismissal at 5. In opposition, SWC argues that its protest was timely filed within 5 days of the agency’s June 20 response to its second set of debriefing questions. We agree with the agency that the time period for SWC to file its protest began to run on June 1 when the agency responded to the protester’s initial debriefing questions and advised the protester that the debriefing had closed. Therefore, SWC’s June 24 protest is untimely.¹ However, for the reasons discussed

¹ For purposes of this decision, we analyze the party’s arguments with respect to the debriefing rules applicable to a FAR part 15 negotiated procurement. While we interpret the RFP’s reference to FAR part 36 to refer to subpart 36.3, Two-Phase Design-Build Selection Procedures, we note that procurements for architect-engineer services pursuant to FAR subpart 36.6 are not conducted on the basis of competitive proposals,
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herein, we disagree with the agency's contention that the protester had only a 5-day window within which to file its protest.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, a protest based on other than alleged improprieties in a solicitation must be filed not later than 10 calendar days after the protester knew, or should have known, of the basis for protest, with an exception for protests that challenge 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). In such cases, protests must be filed not later than 10 days after the date on which the debriefing is held. Id.

As an initial matter, SWC does not contend that its protest is based on new information learned from the agency's June 20 response to its second set of debriefing questions. Thus, the only question for consideration is whether the debriefing reasonably remained open following the agency's June 1 response to the protester's first set of debriefing questions. Under the circumstances here, we conclude that the debriefing concluded on June 1.

Notwithstanding the Corps' voluntary responses to the protester's second round of additional debriefing questions, the agency's unequivocal direction that "[t]he debrief is hereby concluded" at the conclusion of its June 1 response to the protester's initial set of debriefing questions was unambiguous as to the status of the debriefing. We have recognized that the fact that a protester may not have been satisfied with all aspects of a debriefing, and that it continues to pursue certain questions with the agency, does not extend the time for filing a bid protest based on the information provided during the debriefing. Zafer Constr. Co.; Kolin Constr., Tourism, Industry and Trading Co. Inc., B-295903, B-295903.2, May 9, 2005, 2005 CPD ¶ 87 at 5-6; New SI, LLC, B-295209 et al., Nov. 22, 2004, 2005 CPD ¶ 71 at 3; Handheld Sys., Inc., B-288036, Aug. 10, 2001, 2001 CPD ¶ 142 at 2.² Furthermore, we find no support in FAR § 15.506(d) or in the Enhanced Debriefing Rights for the proposition that an offeror is entitled to multiple rounds of postaward debriefing questions.

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and therefore the debriefing exception in our Bid Protest Regulations is inapplicable to procurements conducted on that basis. See McKissack-URS Partners, JV, B-406489.2 et al., May 22, 2012, 2012 CPD ¶ 162.

² This case is readily distinguishable from Harris IT Servs. Corp., B-406067, Jan. 27, 2012, 2012 CPD ¶ 57, where we found that the agency's provision of additional responses to a protester's questions following a written debriefing and silence as to the status of the conclusion of the debriefing created an ambiguity as to whether or not the initially provided debriefing had concluded.

While we agree with the agency that the debriefing at issue closed on June 1, and that SWC's protest to our Office filed on June 24 was untimely, as noted above, we disagree with the agency's contention that the protester was required to file its protest by June 6, within 5 days of the conclusion of the enhanced debriefing. As set forth above, our timeliness rules contemplate that a protest following a requested, and when requested, required debriefing must be filed within 10 days of when the debriefing was held. 4 C.F.R. § 21.2(a)(2). The agency appears to view the Enhanced Debriefing Rules as having modified our timeliness rules with respect to debriefings such that following an enhanced debriefing, the timeliness period is reduced from 10 days to 5. The agency is mistaken in this regard.

The Enhanced Debriefing Rules, and the underlying statutory basis for them, do not in any way alter or impact the timeliness rules established by our Bid Protest Regulations. Rather, the Enhanced Debriefing Rules, and the underlying statutory changes to the Competition in Contracting Act, relate solely to the agency's obligations with respect to complying with the mandatory stay of contract performance or termination of the awarded contract upon the filing of a protest with our Office. See 31 U.S.C. § 3553(d)(4); Enhanced Debriefing Rules at 1. In this regard, the Enhanced Debriefing Rights specify that if an unsuccessful offeror submits additional debriefing questions, the agency shall comply with the requirements of FAR § 33.104(c) regarding the suspension of contract performance or termination of the awarded contract upon the receipt of a protest filed by the unsuccessful offeror with GAO within five days after the government delivers its written response to the unsuccessful offeror's additional questions. Enhanced Debriefing Rules at 1. Accordingly, the agency's reliance on the Enhanced Debriefing Rules for the purpose of establishing the timeliness of SWC's protest was in error.

The protest is dismissed.

Thomas H. Armstrong
General Counsel