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Decision

Matter of: Exceptional Software Strategies, Inc.

File: B-416232

Date: July 12, 2018

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DIGEST

Protest of exclusion from competitive range is untimely where: (1) protester learned its basis of protest more than 10 days prior to filing its protest; and (2) because its request for a debriefing was filed late, the non-required debriefing did not toll the time for filing a protest.

DECISION

Exceptional Software Strategies, Inc., (ESS) a small business of Linthicum, Maryland, protests its exclusion from the competitive range pursuant to request for proposals (RFP) No. H98230-16-R-0246, which was issued by the National Security Agency (NSA) for presentation and visualization capabilities. ESS challenges the agency's determinations regarding the capacity of the firm's proposed sensitive compartmented information facilities (SCIFs).

We dismiss the protest as untimely filed.

BACKGROUND

The solicitation, issued on June 30, 2017, under the procedures of Federal Acquisition Regulation (FAR) part 15, contemplated the award of up to six indefinite-delivery, indefinite-quantity (IDIQ) contracts under which the agency would issue cost-plus-

award-fee task orders over a 7-year period of performance, including option periods.¹ Agency Report (AR), Tab 5, RFP, at 2, 14, and 19; Tab 16, RFP amend. 3, Final Proposal Evaluation Criteria (PEC), at 4. The RFP also provided for the issuance of six initial task orders, with three set aside for small businesses and three to be issued on an unrestricted basis. PEC at 5-6.

Pursuant to the RFP's statement of work (SOW), the awardee was to provide capabilities for the definition, prototyping, development, and production of visualization and presentation tools. AR, Tab 14, RFP amend. 3, Final SOW, § 2.0. Unless otherwise specified, the contractor was to perform the SOW (and task order) tasks in a SCIF or SCIFs. Id. § 4.13. Among other requirements, the SOW required that each facility have a conference room with classified connectivity that was able to accommodate a minimum of 20 people. Id. In addition, the solicitation documents identified the number of contract full time equivalents (FTEs) who would be supporting the initial task orders at the contractor's facilities. As relevant here, the three small business task orders necessitated SCIF seating for a total of 48.5 FTEs, plus one "Hot Desk" workstation for government contract surveillance. AR, Tab 19, RFP amend. 4, Task Order 1, at 1 (identifying 13 FTEs); Tab 20, RFP amend. 4, Task Order 2, at 1 (15.5 FTEs); Tab 21, RFP amend. 4, Task Order 2, at 1 (20 FTEs); SOW § 4.13.

The RFP described a best-value tradeoff source selection process that involved the consideration of six factors and two evaluation phases. First, in phase I, NSA would assess offerors' IDIQ proposals under management, technical, and past performance factors. PEC at 5. The management and technical factors included multiple subfactors, each of which was to be evaluated on an acceptable/unacceptable basis. Id. at 6-7. If the proposal was rated acceptable under the management and technical subfactors and rated higher than "No Confidence" under the past performance factor, NSA would conduct phase II of the evaluation, which focused on offerors' task order proposals. Id. at 5. Under phase II, the agency would assess the offerors' responses to the three task orders, the offeror's ability to staff the effort, and cost/price. Id. at 7. During this phase, NSA would assign adjectival ratings and calculate a probable cost. Id. at 5. The highest ranked offerors for each task order would be awarded an IDIQ contract and the respective task order. Id. at 5-6.

Of relevance here, one of the management subfactors assessed offerors' responses to the SOW contractor facilities requirements (SOW § 4.13). Id. at 6, 13. Specifically, under the subfactor, NSA would evaluate the offeror's "ability to provide an NSA-accredited SCIF(s), which satisfies the SOW requirements." Id. at 13. NSA would evaluate the extent to which the offeror's proposed solution addressed "sizing, functionality, capabilities, accreditation status, and/or required timeline for NSA accreditation; and the relevance and suitability to the . . . SOW." Id.

¹ The RFP provided that three awards would be made to large business offerors and three to small business offerors. AR, Tab 16, Final PEC, at 4.

In August 2017, NSA received 13 proposals in response to the RFP, including an offer from ESS. Contracting Officer's Statement (COS) at 6. A source selection evaluation board (SSEB) evaluated proposals and concluded that ESS's proposal was unacceptable under the management factor.² AR, Tab 27, ESS Management Consensus Report, at 1. Specifically, under the subfactor concerning contractor facilities, the SSEB concluded that ESS did "not demonstrate the ability to provide an NSA-accredited SCIF(s), which satisfies the SOW requirements" Id. at 6. First, the SSEB highlighted that the SCIF ESS identified for use during performance did not meet the SOW conference room requirements. Id. at 6-7. In addition, the SSEB determined that ESS's SCIF space was "insufficient for the requirements" because, according to ESS's proposal, the firm's SCIF had capacity for 26 people, whereas the task orders necessitated space for 48.5 FTEs and an additional seat for a government hot desk. Id. at 7. Because of the unacceptable rating, the proposal was no longer eligible for award, see PEC at 5, and, consequently, was not included in the agency's competitive range. AR, Tab 30, Competitive Range Determination, at 2.

By letter of March 15, 2018, NSA advised ESS that its proposal was excluded from the competitive range. AR, Tab 33, Notice of Exclusion from Competitive Range, at 1-2. The letter detailed the basis for the unacceptable rating, including most of the same information contained in the consensus evaluation report. See id. The letter expressly explained that ESS's SCIF did not comply with the SOW requirement for a conference room and that ESS's SCIF did not have sufficient space for all the personnel necessary to perform the task orders. Id.

By email of March 19, ESS requested a debriefing. Response to Dismissal Request, exh. A, Debriefing Request, Mar. 19, 2018 (4:59 p.m.). NSA contracting personnel provided ESS officials a debriefing on April 2. COS at 7. In addition to background information about the procurement, the written debriefing presentation included nearly verbatim information from the competitive range notice explaining the basis for the unacceptable rating. AR, Tab 32, Debriefing Slides, at 14-16. On April 6, ESS protested its exclusion from the competitive range.

DISCUSSION

ESS objects to the unacceptable rating. The protester maintains that its proposed SCIF space met the solicitation requirements and that it was unreasonable for the agency not to seek clarification from the firm.³ Protest at 7-12.

² The firm's proposal was deemed acceptable under the technical factor and rated as limited confidence under the past performance factor. AR, Tab 28, ESS Technical Consensus Report, at 1; Tab 29, ESS Past Performance Report, at 1.

³ The protester also challenges its past performance rating, but ESS acknowledges that the limited confidence rating "did not form a basis to exclude ESS from the competitive range." Protest at 13. Indeed, the record confirms that the past performance rating did not impact the agency's competitive range determination. As such, ESS cannot

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In addition to persuasively addressing the merits of ESS's arguments, the agency also requests that our Office dismiss the protest because ESS failed to request its debrief within the timeframe required by the FAR. Request for Dismissal at 1. NSA maintains that the April 2 debriefing was not a "required" debriefing that tolled our Office's timelines rules--it was merely a courtesy debriefing during which ESS did not learn any new information. Id. at 4-6. As a result, NSA argues that ESS's April 6 protest is untimely.

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. Under these rules, a protest based on other than alleged improprieties in a solicitation must generally 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). However, in situations "under which a debriefing is requested and, when requested, is required," our Bid Protest Regulations provide that protest grounds known either before or as a result of a debriefing may be filed not later than 10 days after the date on which the debriefing is held. Id.; see Empire Veteran Group, Inc., B-408866.2, B-408866.3, Dec. 17, 2013, 2013 CPD ¶ 294 at 4. Thus, a required debriefing has the effect of tolling the filing period in limited circumstances. See Raith Eng'g & Mfg. Co., W.L.L., B-298333.3, Jan. 9, 2007, 2007 CPD ¶ 9 at 3.

An offeror excluded from the competitive range or otherwise excluded from further consideration prior to contract award may request a pre-award debriefing. 10 U.S.C. § 2305(b)(6)(A); FAR § 15.505. Such request must be a written request to the contracting officer within 3 days after receipt of the agency's notice of exclusion from the competition. FAR § 15.505(a)(1). An offeror that fails to submit its request to the contracting officer within 3 days after receiving notice of exclusion is not entitled to either a pre-award, or post-award, debriefing. FAR § 15.505(a)(3). In these instances, the debriefing is not "required." See Team J's, LLC, B-415090, Nov. 14, 2017, 2017 CPD ¶ 361 at 3-4.

First, we agree with the agency that the debriefing exception to our Office's 10-day rule does not apply because the protester requested its debriefing outside of the period prescribed in the FAR. As noted above, NSA informed ESS on Thursday, March 15, that its proposal was eliminated from consideration and would not be included in the competitive range. AR, Tab 33, Notice of Exclusion from Competitive Range, at 1-2; see also Protest at 2 (acknowledging that ESS learned of its exclusion on March 15).

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establish that it suffered competitive prejudice due to the past performance evaluation, and, therefore, this protest ground is dismissed. See Optimal Solutions & Techs., B-407467, B-407467.2, Jan. 4, 2013, 2013 CPD ¶ 20 at 7 (explaining that competitive prejudice is an essential element of a viable protest).

Although ESS requested a debrief via email on Monday, March 19, the email was delivered after close of business at the agency.⁴ More specifically, the record reflects that ESS sent its Monday email at 4:59 p.m., and that NSA received the message at 5:24 p.m.⁵ Response to Dismissal Request, exh. A, Debriefing Request, Mar. 19, 2018 (4:59 p.m.); Dismissal Request, exh. 1, Debriefing Request, Mar. 19, 2018 (5:24 p.m.). Pursuant to the FAR, “[u]nless otherwise stated, the agency close of business is presumed to be 4:30 p.m., local time,” and documents received after close of business are considered filed as of the next day. FAR § 33.101.

Here, nothing in the solicitation, or elsewhere in the record, designates the business hours for NSA; as such, in our view, the 4:30 p.m. deadline applies. Accordingly, ESS’s 4:59 p.m. debriefing request is considered filed on the next business day, Tuesday, March 20. Because March 20 is more than 3 days after ESS was notified of its exclusion from the competitive range, the debriefing request was not timely made. See Empire Veteran Group, supra; see also 10 U.S.C. § 2305(b)(6)(A) and FAR § 15.505(a)(3). Therefore, the agency’s April 2 debriefing cannot be considered a required debriefing, and, as a result, the debriefing exception to our timeliness rules does not apply. See Team J’s, LLC, supra, at 4; Hawker Beechcraft Def. Co., LLC, B-406170, Dec. 22, 2011, 2011 CPD ¶ 285 at 4 (dismissing protest as untimely where protester failed to request a debriefing within 3 days of notice of its exclusion from the competitive range); Minotaur Eng’g, B-276843, May 22, 1997, 97-1 CPD ¶ 194 at 4 (same).

The protester counters that the 4:30 p.m. close of business time stipulated in the FAR should not apply here because NSA “operates 24-7” and, according to ESS, the FAR provision that dictates a 4:30 closing time “has no relevance to debrief requests.” Response to Dismissal Request at 2-3. In this respect, ESS apparently interprets the 3-day period (to request a debriefing) as ending at midnight on the third day. See id. at 3 (arguing that “there is no ‘hour’ requirement for the submission of a debriefing request”). After careful consideration, in our view, such a result does not withstand scrutiny.

In this regard, the FAR defines “[f]iled” as the “complete receipt of any document by an agency before its close of business.” FAR § 33.101 (emphasis added). The definition further provides that unless otherwise stated, “close of business is presumed to be 4:30 p.m., local time.” Id. First, as stated above, the submission of a written request to

⁴ Because the third day fell on a Sunday, ESS had until close of business on Monday to file its written request for a debriefing. In this respect, FAR subpart 15.5 expressly incorporates the FAR section 33.101 definition of “[d]ay,” which provides that the last day of a designated period of time cannot be a Saturday, Sunday, or Federal holiday. FAR §§ 15.501, 33.101.

⁵ The record does not reconcile, or even acknowledge, the delay between delivery and receipt of the message.

an agency is required by the FAR in order to generate a required debriefing. We see no basis to conclude that this required written request is not a filing, as contemplated by the FAR. A government agency is not required to receive and review filings after its close of business, including filings such as debriefing requests from outside parties. Indeed, the FAR consistently applies a 4:30 p.m. default close of business time for government agencies.⁶ See FAR §§ 15.208(a) (stipulating 4:30 p.m., local time, as the default time for receipt of proposals), 14.304 (stipulating 4:30 p.m., local time, as the default time for the submission of bids). Notably, the protester has cited to no provision or regulation that requires a government agency to accept, as timely, any submission filed after the close of business.

Moreover, in a similar but reversed instance, our Office has recognized that a disappointed offeror's notice of exclusion from the competitive range--notice that begins the 3-day period to request a debriefing--was received by the firm on the next business day where the email message from the agency had entered the firm's computer system after business hours. International Resources Group, B-286663, Jan. 31, 2001, 2001 CPD ¶ 35 at 5. Our conclusion here is consistent with this approach.

Thus, absent any alternate official business hours for NSA in the record, we adopt the FAR's default 4:30 p.m., local time, close of business for the agency. We further conclude that ESS had to file its request for a debriefing by 4:30 p.m. on Monday, March 19. Because it did not--ESS's request is deemed filed on the next business day--the debriefing was not a required debriefing and did not toll our Office's timeliness rules.⁷

Notwithstanding that the debriefing exception to our timeliness rules does not apply, ESS still retained its right to file a protest within 10 calendar days from when it learned the basis for protest. See Optimum Mgmt. Sys., LLC, B-299322.3, May 23, 2007, 2007 CPD ¶ 106 at 3 n.3. Indeed, even an offeror that learns a basis for protest as a result of a non-required debriefing is not precluded from subsequently filing a timely protest based on information learned at that debriefing. Trifax Corp., B-279561, June 29, 1998, 98-2 CPD ¶ 24 at 4-5. Here, however, the record reflects that ESS learned its basis of protest in the agency's March 15 notice of exclusion from the competitive range.

⁶ The position our Office takes herein is consistent with another executive agency's stated business hours. Specifically, the General Services Administration (GSA) expressly denotes 4:30 p.m. as its close of business. Indeed, GSA's acquisition regulations provide that "[r]equests for pre-award debriefings postmarked or otherwise submitted after 4:30 p.m. . . . will be considered submitted the following business day." General Services Acquisition Regulation, 48 C.F.R. § 552.215-73(b); see also 48 C.F.R. § 512.301(d)(2) (requiring same, for solicitations for commercial items).

⁷ That the agency did not advise ESS that its briefing was not a required debriefing prior to or during the debriefing is of no consequence here. See Response to Dismissal Request at 3-4.

Specifically, as noted above, the agency's letter detailed that ESS had been excluded from the competition, as well as NSA's evaluation conclusions regarding ESS's SCIF capacity that the firm challenged in its April 6 protest. The record confirms that the April 2 non-required debriefing documents contained the same evaluation conclusions, nearly verbatim. Significantly, the debriefing did not include any additional explanation or rationale for ESS's unacceptable rating. Compare AR, Tab 33, Notice of Exclusion from Competitive Range, at 1-2, with Tab 32, Debriefing Slides, at 14-16. Thus, the record is clear: ESS learned its basis of protest from the March 15 letter.

Accordingly, any protest of ESS's exclusion from the competitive range had to have been filed within 10 days of when the basis of protest was first known, i.e., the March 15 letter.⁸ See 4 C.F.R. § 21.2(a)(2). Because ESS filed its protest on April 6, more than 10 days after it learned its basis of protest, and in light of the fact that the filing period was not extended by the agency's courtesy debriefing, ESS's protest was untimely filed.⁹ See Team J's, LLC, supra, at 4 (dismissing protest as untimely where debriefing exception did not apply and protester learned its basis of protest more than 10 days from when its protest was filed).

The protest is dismissed.

Thomas H. Armstrong
General Counsel

⁸ When the last day of a filing period falls on a Saturday, Sunday, or Federal holiday--as was the case here--the filing period extends to the next business day. 4 C.F.R. § 21.0(d). To be timely, ESS's protest had to have been filed by Monday, March 26.

⁹ In any event, even if the allegations were timely raised, the record shows that they are without merit. In this regard, an offeror has the burden of submitting an adequately written proposal; where a proposal omits, inadequately addresses, or fails to clearly convey required information, the offeror runs the risk of an adverse agency evaluation. Addvetco, Inc., B-412702, B-412702.2, May 3, 2016, 2016 CPD ¶ 112 at 7-8. Based on our review of the record, we agree with the agency that ESS's proposal was unclear and inconsistent with respect to which SCIF spaces it contemplated using during performance. See AR, Tab 24, ESS Management Proposal, at 40 (identifying "SCIF E," with a capacity of [DELETED] people, for performance of the SOW) and 41 (identifying a conference room in "SCIF A," which ESS stated could be used "for additional growth"). Consequently, the unacceptable rating was reasonably assigned.