



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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Washington, DC 20548

Comptroller General
of the United States

Decision

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Matter of: University of Maryland

File: B-416682

Date: October 24, 2018

Jen Gartner, Esq., University of Maryland, for the protester.
Joseph J. Petrillo, Esq., and Karen D. Powell, Esq., Petrillo & Powell, PLLC, for Development Services Group, Inc., the intervenor.
Kathleen D. Martin, Esq., Department of State, for the agency.
Todd C. Culliton, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest allegations are dismissed where they do not state a valid basis of protest because they do not allege unreasonable agency action or provide sufficient information to state cognizable claims; other allegations are dismissed as untimely where they are filed more than 10 days after the protester knew or should have known its basis of protest or where they do not allege a sufficient basis to establish that they were timely.

DECISION

The University of Maryland (UMD), of College Park, Maryland, the incumbent contractor, protests the award of a contract to Development Services Group, Inc. (DSG), of Bethesda, Maryland, under request for proposals (RFP) No. 19AQMM18R0225, issued by the Department of State for data collection and management services. The protester primarily alleges that the agency unreasonably evaluated the awardee's proposal, improperly determined that DSG was a responsible contractor, and was biased against UMD in conducting its evaluation and source selection decision.

We dismiss the protest.

BACKGROUND

The agency issued the RFP on June 20, 2018, for data collection and management services to assist in producing a report on worldwide incidents of terrorism (i.e., the global terrorism database). RFP at 1, 16. The RFP contemplated the award of a fixed-price contract to be performed over a 1-year base period, four 1-year option periods, and a 6-month extension period. Id. at 2-14, 28.

Award was to be made to the firm submitting the lowest-priced, technically acceptable offer. RFP at 33. To be technically acceptable, each offeror had to demonstrate that it met the solicitation's technical requirements. Id. As relevant here, the solicitation stated that "resumes will be evaluated against the minimum qualifications for each proposed labor category." RFP, amend. 2 at 9. The database manager/administration labor category required the proposed employee to possess a bachelor's degree in computer science, management information systems, or related field, and to have seven to nine years of database design and implementation experience. RFP at 19.

UMD and DSG were the only firms to submit proposals prior to the July 2 closing date. The agency determined that both proposals were technically acceptable and made award to DSG as it had the lowest price, \$10,376,378. Contracting Officer's Statement at 5. On August 3, the agency notified UMD that DSG was the awardee. Protest at 2. On August 6, UMD learned that DSG had made contingent offers of employment to several UMD employees, and that UMD's information technology manager for this project, Employee A, had accepted employment with DSG. Id.

On August 13, UMD filed its protest alleging three grounds. First, UMD alleged that DSG included Employee A in its proposal without his permission. Protest at 2. Second, UMD alleged that DSG "may have inflated [Employee A's] experience with the Global Terrorism Database data collection process." Id. Finally, UMD alleged that because there was "only a 0.2% difference in the budgets submitted by UMD and DSG, UMD suspects that DSG may have had access to UMD's confidential information related to the UMD proposal." Id.

On August 17, the agency requested partial dismissal of the protest, arguing that UMD's allegation regarding its confidential information was legally insufficient. Agency Request for Partial Dismissal at 2-3. On August 20, DSG requested dismissal of the remaining allegations, arguing that those allegations were factually incorrect or speculative. Intervenor's First Request for Dismissal at 1-3. Specifically, DSG asserted that it did not improperly include Employee A in its proposal because Employee A had consented to work for DSG in the event that DSG was awarded the contract. Id. at 1. To support that statement, DSG included a signed employment contract contingent upon DSG receiving award, as well as an e-mail from Employee A to DSG providing his biography for inclusion in DSG's proposal. Id., Ex. 1, Contingent Employment Contract between Employee A and DSG, June 27, 2018; Ex. 2, E-mail from Employee A to DSG, June 28, 2018.

On August 22, UMD provided a response to both dismissal requests, as well as a number of additional allegations.¹ The protester represented that it “discovered additional information supporting its protest [allegations] since its August 13, 2018 initial filing.” UMD First Response at 1. UMD alleged that the agency improperly failed to award the contract based on the lowest price because it evaluated pricing for option years instead of just the base year. Id. at 3. UMD also alleged that the agency failed to evaluate DSG’s price for fairness and reasonableness because the firm’s price for the base period was higher than for each of the option periods. Id. at 4. UMD further alleged that the agency unreasonably failed to conduct discussions, and unreasonably evaluated DSG’s proposal as technically acceptable. Id. at 5-9. With regard to technical acceptability, UMD specifically alleged that Employee A’s experience does not satisfy the solicitation’s minimum qualifications for the database manager position. Id. at 6-8. In addition, UMD alleged that the agency unreasonably failed to evaluate past performance or perform its responsibility determination. Id. at 9. Finally, UMD responded to the intervenor’s request for dismissal, asserting that DSG made factually inaccurate statements. Id. at 10.

On August 27, DSG filed its second request for dismissal. DSG asserted that UMD’s supplemental protest allegations were speculative, inconsistent with the solicitation’s terms, or untimely. Intervenor’s Second Request for Dismissal at 1-4. In its August 29 response, UMD argued that its allegations were based on a correct interpretation of the solicitation and that its supplemental protest grounds were timely because it discovered new information. UMD Second Response at 1-3. UMD argued that, while its employees may have known about relevant protest information, its decision-makers were unaware of the information until after the filing of the initial protest. Id. UMD also asserted that the agency was biased against it when evaluating proposals and making its source selection decision. Id. at 4.

Our Office notified the parties that we would not require the agency to respond to the majority of the protester’s allegations because they were procedurally deficient. We also explained that we would not dismiss the protester’s allegations related to whether DSG’s proposal was technically acceptable in light of Employee A’s experience. That is, we would examine whether Employee A’s experience satisfied the solicitation’s minimum qualifications. We noted that the allegation appeared to be timely raised because it was predicated on the contingent employment contract included in the intervenor’s August 20 filing.

On September 7, the agency filed its report, and both the protester and intervenor filed their comments. On September 24, DSG filed a third request for dismissal alleging that the sole remaining protest allegation was untimely. To support its request, DSG produced an e-mail showing that UMD had been aware that DSG had proposed Employee A as its database manager prior to filing its initial protest. Intervenor’s Third Request for Dismissal at 2. The intervenor also asserted that UMD had failed to provide

¹ Our Office did not assign a separate file number to these allegations.

all information establishing that the grounds were timely as required by our Bid Protest Regulations. Id.

UMD acknowledged that it was aware that DSG had proposed Employee A as its database manager prior to filing its initial protest. UMD Third Response at 2. UMD explained that its allegation was raised in its initial protest when it had expressed concern that DSG had inflated Employee A's experience. Id. UMD then argued that our Office should consider its protest allegations under our exceptions to the timeliness rules. Id. at 3-4.

DISCUSSION

We have reviewed all of the protest allegations and dismiss them as failing to state a valid basis of protest or untimely. We discuss the chief allegations below as illustrative examples.

Fails to State a Valid Basis of Protest

Our Bid Protest Regulations require that protests “[s]et forth a detailed statement of the legal and factual grounds of protest” and require a protester to “clearly state sufficient grounds of protest.” 4 C.F.R. §§ 21.1(c)(4), (f); see also AeroSage, LLC; SageCare, Inc., B-415267.13, B-415267.14, Mar. 19, 2018, 2018 CPD ¶ 114 at 5. These requirements contemplate that a protester 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. Kodiak Base Operations Servs., LLC, B-414966 et al., Oct. 20, 2017, 2017 CPD ¶ 323 at 3.

UMD alleges in its initial protest filing that DSG materially misrepresented its ability to offer Employee A as a key person, and misrepresented Employee A's experience. Protest at 2. We dismiss these protest allegations because they are not supported by specific evidence, and because the latter allegation is not supported by any specific claim of misrepresentation.

If a protester alleges that an awardee materially misrepresented information in its proposal, then it must demonstrate that the information at issue is false. ANHAM FZCO, B-415969 et al., May 8, 2018, 2018 CPD ¶ 184 at 14. To prove that the information at issue is false, the protester must provide sufficient evidence of the specific misrepresentation. See Commercial Design Grp., Inc., B-400923.4, Aug. 6, 2009, 2009 CPD ¶ 157 at 4. Here, neither allegation was supported by specific evidence, but rather both were wholly unsupported assertions. Further, UMD failed to explain specifically how DSG misrepresented Employee A's experience. Without sufficient evidence, or even an attempt to highlight a specific misrepresentation, the protester's allegations in this regard amount to speculation and do not constitute valid bases of protest.

UMD also alleges that DSG improperly accessed its confidential information. Protest at 2. We dismiss that protest allegation because it does not allege unreasonable

agency action. UMD does not allege that the agency played any role in DSG allegedly obtaining access to its confidential information and therefore facially does not demonstrate unreasonable agency action. Instead, UMD's allegation essentially constitutes a dispute between private parties which our Office does not consider. Ellwood National Forge Co., B-402089.3, Oct. 22, 2010, 2010 CPD ¶ 250 at 3-4.

UMD next alleges that the agency should have evaluated offerors' pricing information based solely on prices offered for the base periods and that the agency failed to evaluate offerors' past performance. UMD First Response at 3, 9. We dismiss these allegations because they are contradictory to the evaluation criteria. The solicitation incorporated Federal Acquisition Regulation clause 52.217-5, which requires the agency to evaluate price by adding the pricing information for all option years to the pricing information for the base year. RFP at 33. The solicitation also advised that offerors' technical ratings would be solely based on whether they satisfied the technical requirements, and included no provisions to evaluate past performance. Id. Thus, these allegations do not demonstrate that the agency evaluated proposals inconsistent with the terms of the solicitation, and as a result, are dismissed for failure to state a valid basis of protest. Cf. Mayfield Gov't Inspections, B-414528, June 13, 2017, 2017 CPD ¶ 189 at 3 (agency's evaluation was reasonable when it was consistent with the terms of the solicitation).

UMD also alleges that DSG's price was neither fair nor reasonable solely because it was more expensive than UMD's price during the base period and less expensive than UMD's price during the option periods. UMD First Response at 4. An agency's concern in making a price reasonableness determination is whether the offered prices are too high, rather than too low. i4 Now Solutions, Inc., B-412369, Jan. 27, 2016, 2016 CPD ¶ 47 at 9. Thus, the protest allegation is legally insufficient because UMD did not allege that DSG's price was unreasonably high, and indeed we highlight that the prices were nearly identical with UMD's price being only 0.2 percent higher. Accordingly, we dismiss this allegation as failing to state a valid basis of protest.

Finally, UMD alleges that the agency's source selection evaluation team was biased against UMD. The protester asserts that the agency sought to make award to another firm because UMD had disseminated the global terrorism database to other organizations during the previous contract. UMD Second Response at 4. Our decisions explain that government officials are presumed to act in good faith, and a protester's contention that procurement officials are motivated by bias or bad faith must be supported by convincing proof; our Office will not consider allegations based on mere inference, supposition, or unsupported speculation. Athena Sciences Corp., B-409486, B-409486.2, May 14, 2014, 2014 CPD ¶ 154 at 9. The protester's allegation does not meet the standard because it reflects no more than mere supposition that the agency was biased against UMD and does not present any evidence whatsoever to rebut the presumption that government officials act in good faith.

Untimely

UMD raises several supplemental protest allegations in its filing dated August 22. Specifically, UMD alleges that the agency unreasonably failed to conduct discussions, unreasonably evaluated DSG as technically acceptable, and improperly conducted its responsibility determination. Under our Bid Protest Regulations, any protest not based on an alleged solicitation impropriety must be filed not later than 10 days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2). We dismiss each of these allegations as untimely because they were filed more than 10 days after the protester knew or should have known their bases. Indeed, the filings reflect that the agency notified UMD that its proposal was unsuccessful on August 3. Based on that information, UMD should have filed any protest alleging that the agency improperly conducted its procurement or unreasonably evaluated proposals within 10 days of that date because, at that point, UMD was aware that the agency had made award without conducting discussions, had evaluated DSG as technically acceptable, and determined that DSG was a responsible contractor.

Likewise, we dismiss UMD's allegation that the agency unreasonably evaluated Employee A's experience as meeting the minimum qualifications for the position of database manager as untimely. UMD raised this allegation in its August 22 filing in response to the intervenor's August 20 dismissal request and specifically represented the following:

As the University learned after it obtained DSG's contingent offer letter to [Employee A] (which occurred after the University filed its initial protest), [Employee A's] resume does not support the minimum qualifications for the Database Manager/Administrator labor category and a review of [Employee A's] resume shows that his work at [the University] does not align with the development of the [global terrorism database].

UMD First Response at 8 (emphasis added). Thus, UMD represented that its challenge to the agency's evaluation of Employee A's experience to be proposed as the database manager was predicated on the contingent employment contract contained within intervenor's August 20 filing. Based on that representation, we concluded that at that time the protester had set forth evidence that established the timeliness of the allegation as required under our Bid Protest Regulations, 4 C.F.R. § 21.1(c)(6).

Despite that earlier representation, UMD later represented that it was aware prior to filing its initial August 13 protest that DSG had proposed Employee A as its database manager. UMD represented the following in an e-mail to intervenor's counsel:

You're correct that my clients are aware that DSG proposed [Employee A] for the Database Manager/Administrator position, but that's because of their personal interactions with [Employee A], all of which took place before DSG intervened in UMD's protest (and in fact before UMD filed its

protest, although [protester's management] was not aware of all of these conversations until after the initial filing).

E-mail from UMD to DSG, Sept. 20, 2018. UMD then confirmed to our Office that it was aware prior to its initial protest filing that Employee A had been proposed as DSG's database manager. UMD Third Response at 2-3. When addressing whether its allegation was timely, UMD asserted that it initially raised the allegation in its original protest filing when it asserted generally that DSG had misrepresented Employee's experience and explained that Employee A had told his UMD supervisor that he "lacks the subject matter expertise required to participate as a prominent member of DSG's technical team." Id. at 2 (citing Protest at 2).

In view of this development, we now conclude that the allegation is untimely because the protester has developed this issue in piecemeal fashion, and has not provided any evidence to establish the allegation as timely under our Bid Protest Regulations. Where a protester initially files a timely protest, and later supplements it with new grounds of protest, the later-raised allegations must independently satisfy our timeliness requirements, since our Regulations do not contemplate the piecemeal presentation or development of protest issues. Vigor Shipyards, Inc., B-409635, June 5, 2014, 2014 CPD ¶ 170 at 5. Supplemental protest grounds that amount to "examples" of an initial--general--challenge to the agency's evaluation must independently satisfy our timeliness requirements where such "examples" involve different factual circumstances and require a separate explanation from the agency. Id.

Here, the protester's initial August 13 filing did not allege that Employee A lacked the requisite experience to satisfy the minimum qualifications for the database manager position but only generally alleged that Employee A lacked subject matter expertise to participate as a prominent member of DSG's technical team. Consequently, we find that UMD raised this allegation in piecemeal fashion because it raised a specific example of its general challenge in a later protest filing. See Vigor Shipyards, Inc., supra at 5.

On this record, we also have no basis to conclude that UMD's allegation concerning whether Employee A met the database manager qualifications is timely. Under 4 C.F.R. § 21.1(c)(6), a protester must set forth all information establishing the timeliness of the protest. When a protester fails to set forth sufficient information to establish the timeliness of a particular allegation, our Office may dismiss the allegation at its discretion. Ervin and Assoc., Inc., B-278850, Mar. 23, 1998, 98-1 CPD ¶ 89 at 6. Here, UMD has set forth no independent facts showing that it raised this allegation within ten days of when it knew or should have known that Employee A was proposed as DSG's database manager. Without such information, we have no basis on which to conclude that the protest allegation is timely as presented to our Office. Accordingly, we dismiss the protest allegation.

Finally, UMD also argues that we should consider its protest under our significant issue exception to the timeliness rules. Under 4 C.F.R. § 21.2(c), our Office may consider a

protest that raises issues significant to the procurement system. In this regard, what constitutes a significant issue is to be decided on a case-by-case basis. Cyberdata Tech., Inc., B-406692, Aug. 8, 2012, 2012 CPD ¶ 230 at 3. We generally regard a significant issue as one of widespread interest to the procurement community and that has not been previously decided. Id. at 3-4. While we recognize the importance of the matter to UMD, its allegations do not present issues of such widespread interest or importance to the procurement community as to justify invoking the exception. See Cleveland Telecomm. Corp.--Recon., B-247964.4, Nov. 12, 1992, 92-2 CPD ¶ 340 at 3.

The protest is dismissed.

Thomas H. Armstrong
General Counsel