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Decision

Matter of: M&C Venture Group, LLC

File: B-417965.3

Date: September 15, 2020

Joseph A. Camardo Jr., Esq., Camardo Law Firm, PC, for the protester.
Deborah K. Morrell, Esq., Department of Veterans Affairs, for the agency.
Sarah T. Zaffina, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging the agency failed to issue the solicitation as a service-disabled veteran-owned small business set-aside is dismissed as untimely where the protest was not filed before the time set for receipt of initial proposals.
 2. Protest challenging agency's implementation of corrective action taken in response to a prior protest is dismissed where protester fails to state a valid basis of protest.
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DECISION

M&C Venture Group, LLC (M&C), a service-disabled veteran-owned small business (SDVOSB) of Bellport, New York, protests the terms of request for proposals (RFP) No. 36C24219R0109, issued by the Department of Veterans Affairs (VA), for residential housing services at the Northport VA Medical Center as part of the healthcare for homeless veterans program. M&C contends that the VA unreasonably failed to issue the RFP as an SDVOSB set-aside. M&C also argues that the VA failed to implement corrective action proposed in response to an earlier protest.

We dismiss the protest.

BACKGROUND

On August 5, 2019, the VA issued the solicitation, on an unrestricted basis, under the procedures of Federal Acquisition Regulation (FAR) parts 12 and 15. Protest ex. 1, RFP at 1, 5. The solicitation sought residential housing services for homeless veterans on-site at the Northport VA Medical Center in Northport, New York, and required that the contractor provide room and board, food service, laundry service, therapeutic and

rehabilitative services, and case management for identified veterans. *Id.* at 10-13. The solicitation anticipated award of a fixed-price, indefinite-delivery, indefinite-quantity contract. *Id.* at 91. The due date for proposals was September 6, 2019. *Id.* at 1.

Before the deadline for proposals, on August 16 and August 26, M&C requested that the VA set aside the procurement for SDVOSBs. Protest exh. 2 at 2-4.¹ In responding to M&C on August 20 and August 27, the VA stated that it had conducted market research and determined that there was no reasonable expectation that VA would receive two or more qualified offers from SDVOSBs at a fair and reasonable price. *Id.* at 2-3.

Following the VA's initial award decision, M&C filed a protest with our Office contending that the agency failed to evaluate proposals in accordance with the stated evaluation criteria and failed to conduct a proper best-value tradeoff analysis.² In response, the VA proposed to take corrective action by terminating the contract award, reevaluating proposals consistent with the solicitation terms, and making a new award decision. On March 10, 2020, we dismissed the protest as academic. *M&C Venture Group, LLC*, B-417965.2, Mar. 10, 2020 (unpublished decision).

The VA concluded its reevaluation and determined discussions were necessary. Protest at 1-2. On June 10, M&C received a letter informing it that M&C was in the competitive range and identifying areas of its proposal that the VA determined were deficient, weak, or uncertain. *Id.* at 2. Final proposal revisions were due June 17. On June 12, M&C filed the instant protest with our Office. *Id.*

DISCUSSION

The protestor alleges the agency's market research and its decision not to issue the RFP as an SDVOSB set-aside were unreasonable. Protest at 2-5. The protestor also argues that by establishing a competitive range, conducting discussions, and requesting revised proposals, the agency failed to implement the corrective action it proposed. Protest at 5. We have considered all the protestor's allegations, and for the reasons set forth below, we dismiss the protest.

¹ Page numbers for Protest exhibit 2, a series of emails between the manager partner/principal of M&C, and the contracting officer, between August 16, 2019 and September 3, 2019, refer to the page number of the .pdf file because the exhibit was not numbered when submitted.

² A different unsuccessful offeror, also an SDVOSB, filed an unrelated protest with our Office on September 11, 2019, challenging the agency's refusal to extend the proposal deadline. On November 21, we denied the protest because the agency's refusal was reasonable. *Patriot First Prof'l Servs., Inc.*, B-417965, Nov. 21, 2019, 2019 CPD ¶ 393.

Timeliness

M&C submitted its protest challenging the agency's market research and determination not to set aside the procurement for SDVOSBs on June 12, 2020, after the deadline for initial proposals. M&C asserts its protest is timely because it was filed before the deadline for final proposal revisions. Protest at 6. In response, the agency argues that the protest, which asserts solicitation improprieties, is clearly untimely because it was not filed before initial proposals were due. Req. for Dismissal at 3. We agree with the agency.

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 receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1); see *AmaTerra Envtl. Inc.*, B-408290.2, Oct. 23, 2013, 2013 CPD ¶ 242 at 3.

Here, the VA issued the solicitation on August 5, 2019, as an unrestricted procurement with proposals due September 6. M&C emailed the contracting officer on August 16 requesting that the procurement be set aside for SDVOSBs and inquiring whether market research had been performed to determine whether two or more SDVOSBs were likely to submit proposals. Protest exh. 2 at 3-4. On August 20, the contracting officer responded that the VA had performed market research and determined that there was no reasonable expectation that the VA would receive two or more qualified offers from SDVOSBs at a fair and reasonable price. *Id.* at 2-3. After participating in the facility site visit, on August 26 the protester again requested the VA to set aside the procurement for SDVOSBs, stating that two companies present at the site visit were verified in the VA's Vendor Information Pages database as SDVOSB firms. *Id.* at 2. In her August 27 response to M&C, the contracting officer repeated that the VA had determined there was no reasonable expectation that it would receive two or more qualified offers from SDVOSBs at a fair and reasonable price. *Id.*

The protester contends that its protest is timely despite being filed after the due date for initial proposals because it relied on the VA's representations there was no reasonable expectation of offers from two or more SDVOSBs, and did not learn until after the initial due date that another SDVOSB had also submitted a proposal. Protest at 4. In support of its argument, M&C cites *AeroSage LLC*, B-414314, B-414314.2, May 5, 2017, 2017 CPD ¶ 137. In *AeroSage*, we determined a protest of solicitation terms was timely even though it had been filed after the solicitation closed where the solicitation did not specify if it was set aside for SDVOSBs, and the protester relied on an email from the agency stating that the agency generally would conduct the type of procurement under protest as an SDVOSB set-aside. *AeroSage LLC*, *supra*, at 4. We concluded that it was reasonable for the protester to assume, based on the email, that the procurement would be set aside for SDVOSBs; we therefore found that the protest, filed within 10 days after

the protester learned that the procurement had not, in fact, been conducted as an SDVOSB set-aside, was timely. *Id.* M&C asserts the circumstances here are analogous, and its protest--filed before final proposal revisions are due--is timely. Resp. to Req. for Dismissal at 2.

We are unpersuaded and conclude that our finding in *AeroSage* is distinguishable from the protest here. Unlike the solicitation in *AeroSage*, the solicitation in this case expressly indicated it was unrestricted, and the VA unequivocally informed M&C that after market research, the agency did not have a reasonable expectation of receiving offers from two or more SDVOSBs with fair and reasonable pricing. None of the circumstances on which we based our finding of timeliness in *AeroSage* are present in this instance.

Here, the VA informed the protester 10 days before the initial RFP closed that it would not set aside the procurement for SDVOSBs, which was ample time for M&C to file a protest challenging the solicitation terms before the time set for the receipt of proposals. In the protester's second request to set aside the RFP, the protester stated that two SDVOSB firms attended the site visit and were interested in the procurement, establishing that M&C was aware of its basis for challenging the VA's market research and decision not to set aside the procurement as of August 26, which was also prior to the due date for initial proposals. Moreover, the solicitation was issued as an unrestricted procurement initially and no subsequent amendment changed that status. Accordingly, to be timely, M&C was required to file its protest, challenging the solicitation's terms and the agency's market research, before the initial closing date. 4 C.F.R. § 21.2(a)(1). In other words, because the basis for M&C's protest existed in the initial solicitation and did not arise subsequently (*e.g.*, via an amendment to the solicitation), M&C's protest, filed after the deadline for initial proposals is untimely. Accordingly, we dismiss the protest.

Implementation of Corrective Action

M&C also alleges the VA failed to take the corrective action it proposed in response to M&C's earlier protest. Protest at 5. M&C argues that the VA did not inform GAO that it would seek revised pricing as part of the corrective action. *Id.* M&C asserts that because its price was disclosed in its earlier redacted protest, the VA's request for revised pricing allows other offerors to reduce their prices below M&C's price and contends the competitive process could be compromised. *Id.*; Resp. to Req. to Dismissal at 3.

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557. Our role in resolving bid protests is to ensure that the statutory requirements for full and open competition are met. *Honeywell Tech. Sols., Inc.*, B-407159.4, May 2, 2013, 2013 CPD ¶ 110 at 3. To achieve this end, our Bid Protest Regulations require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. 4 C.F.R. §§ 21.1(c)(4), (f). These requirements contemplate that

protesters 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. *Midwest Tube Fabricators, Inc.*, B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

Here, the protester has failed to allege facts that, if uncontradicted, establish the likelihood that the VA violated applicable procurement laws or regulations. In the prior decision, we dismissed M&C's protest as academic because the agency asserted it would terminate the contract award, reevaluate proposals consistent with the solicitation terms, and make a new award decision. *M&C Venture Group, LLC, supra*. After reevaluating proposals, the VA elected to establish a competitive range, conduct discussions, and allow proposal revisions. M&C's current protest does not argue that the agency has taken action prohibited by law or regulation, nor does it argue that the agency has taken action inconsistent with the solicitation terms, which notified offerors that if award was not made based on initial proposals, the government reserved the right to conduct discussions. RFP at 87. The agency's determination to conduct discussions and seek final proposal revisions, which may include revised price proposals, is an inherent part of the procurement process under FAR part 15 and consistent with the terms of the solicitation.

Finally, to the extent that M&C argues its prices were exposed, agencies are not precluded from seeking revised prices even after prices have been exposed. *See, e.g., Jackson Contractor Group, Inc.*, B-402348.2, May 10, 2010, 2010 CPD ¶ 154 at 3 (concluding that where the corrective action taken by an agency is otherwise unobjectionable, a request for revised price proposals is not improper merely because the awardee's price has been exposed). We therefore find that this complaint also fails to state a valid basis of protest. *See* 4 C.F.R. § 21.5(f).

The protest is dismissed.

Thomas H. Armstrong
General Counsel