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Decision

Matter of: U.S. Marine Management, Inc.

File: B-420468

Date: April 14, 2022

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Ann C. Calabrese, Esq., Department of the Navy, for the agency.
Christopher Alwood, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the agency's evaluation of the awardee's proposal under the technical and price evaluation factors is dismissed where the protester cannot demonstrate that it is an interested party to raise these grounds of protest.
 2. Protest contending that the agency waived or relaxed certain solicitation requirements for the awardee is dismissed as untimely where the protester filed it more than 10 days after it knew the bases for its grounds of protest and the debriefing exception to our timeliness rules does not apply because the protester's post-award debriefing was not a required debriefing.
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DECISION

U.S. Marine Management, Inc., of Norfolk, Virginia, protests the award of a contract to Crowley Government Services, Inc., of Jacksonville, Florida, under request for proposals (RFP) No. N3220520R4143, issued by the Department of the Navy, Military Sealift Command, for the time charter of an ice-class tanker vessel with identified specifications and capabilities. The protester contends that the agency improperly waived or relaxed multiple solicitation requirements and unreasonably evaluated the awardee's proposal under the technical and price factors.

We dismiss the protest.

BACKGROUND

On March 23, 2021, the Navy issued the RFP under the commercial item procedures of Federal Acquisition Regulation (FAR) part 12, using the negotiated procurement policies and procedures established under FAR part 15, seeking proposals for a time charter of an ice-class tanker vessel for the transportation of petroleum and other cargo. Request for Dismissal, encl. 1, RFP¹ at 1, 87. The solicitation contemplated the award of a contract for a 12-month base period, three 1-year option periods, and one 11-month option period, for a potential total period of performance of 59 months. RFP at 41. The RFP established that award would be made on a lowest-price, technically acceptable basis, considering the following evaluation factors: critical submission data, technical, past performance, and price. *Id.* at 71.

The RFP set forth many requirements for the successful charter vessel, including, as relevant here, that it must be a U.S. flagged vessel upon delivery; that if it would be more than 15 years old during performance, the vessel must be enrolled in a relevant condition assessment program; and that the vessel could not exceed specified maximum deadweight tonnage and displacement measurements at the loading terminal. See RFP at 21; see *also* Protest at 11. Also, the RFP included FAR provision 52.212-1, which states that offers “may be withdrawn by written notice received at any time before the exact time set for receipt of offers.” FAR provision 52.212-1(f)(5).

On May 1, 2021, Marine Management submitted three proposals in response to the RFP: one proposing the vessel *Maersk Peary* for a term of 36 months; one proposing the vessel *Maersk Peary* and an unnamed replacement vessel for a term of 59 months; and one proposing the vessel *CB Adriatic* for a term of 59 months. Protest at 5. Between August 12 and August 26, the agency conducted initial discussions with Marine Management regarding its three proposals. *Id.*; see Response to Req. for Dismissal, exh. 2, Competitive Range Notice. On September 7, in response to discussions, Marine Management submitted a revised proposal for its 59-month *Maersk Peary* and replacement vessel offer and reaffirmed its 36-month *Maersk Peary* proposal without revisions. *Id.* at 5-6. Also on September 7, Marine Management withdrew the *CB Adriatic* proposal via email to the agency. *Id.* at 6.

Despite this withdrawal, on November 3, the agency informed Marine Management that the initial *CB Adriatic* proposal had been included in the final competitive range even

¹ The agency amended the solicitation ten times. See RFP at 3. All citations to the RFP in this decision are to the conformed copy provided by the agency in its report. The sections of the conformed solicitation were separately paginated, ultimately leading to multiple pages with repeated page numbers. For clarity, citations to the RFP in this decision refer to the electronic page number of the Adobe PDF document provided by the agency.

though Marine Management had not submitted a revised proposal. Response to Req. for Dismissal, exh. 2, Competitive Range Notice. On November 4, the agency informed Marine Management that its other two proposals had been excluded from the competitive range.² Protest at 6-7. Marine Management requested a pre-award debriefing for the 59-month *Maersk Peary* and replacement vessel proposal, but not for the 36-month *Maersk Perry* proposal. Req. for Dismissal at 1-2. On November 12, the agency provided Marine Management with a pre-award debriefing for its 59-month *Maersk Peary* and replacement vessel proposal. *Id.* at 2; Protest at 7-9.

After the conclusion of discussions, the Navy established November 29 as the deadline for the submission of final proposal revisions. Protest at 9. Marine Management did not submit any final revised proposals. *Id.* On December 23, the agency notified Marine Management that it had awarded the tanker charter contract to Crowley. Response to Req. for Dismissal, exh. 1, Notice of Award. In the notice, the agency did not mention a specific Marine Management proposal but it did state “[u]nsuccessful [o]fferors have three days after date of receipt of notification of contract award to request, in writing, a debrief.” *Id.*

On January 3, 2022, the Navy provided Marine Management with a debriefing for its *CB Adriatic* proposal. Protest at 10; Req. for Dismissal at 2. On January 5, Marine Management submitted questions to the Navy as part of the debriefing. On January 11, the Navy responded to Marine Management’s questions. Req. for Dismissal, exh. A, Marine Management Debriefing and Responses at 5. On January 18, Marine Management filed the instant protest.

DISCUSSION

Marine Management contends that the Navy unreasonably waived or relaxed solicitation requirements for the awardee.³ Protest at 10-14. Marine Management also alleges that the agency’s technical evaluation of Crowley’s proposed vessel’s

² Both of Marine Management’s *Maersk Peary* proposals were excluded from the competitive range because the agency found that the proposals were technically unacceptable and “not reasonably susceptible to becoming acceptable in discussions.” Protest at 6-7 (*quoting* Navy Letter Dated Nov. 4, 2021). The agency informed Marine Management that the 36-month *Maersk Peary* proposal did not meet the requirement to provide a vessel with an age of less than 20 years during the entire period of the charter, including options. *Id.*; see RFP at 19. The agency also informed Marine Management that the 59-month *Maersk Peary* and replacement proposal was unacceptable because it did not include required documentation for the proposed replacement ship. Protest at 6-7 (*quoting* Navy Letter Dated Nov. 4, 2021).

³ Marine Management specifically alleges that the Navy improperly waived the requirements that the vessel be a U.S. flagged upon delivery and that vessels that will exceed 15 years of age during the charter period be enrolled in a relevant condition assessment program. Protest at 10-14.

deadweight tonnage and displacement was unreasonable. *Id.* at 14-15. Marine Management argues that the agency's evaluation of Crowley's price was also unreasonable. *Id.* at 15. The agency requests that we dismiss the protest, setting forth several theories on why the protest grounds are not appropriate for consideration on the merits. Req. for Dismissal at 1-6. For the reasons set forth below, we dismiss the protest.

Interested Party

The agency argues that Marine Management is not an interested party to challenge the award here because its proposals were either withdrawn or properly excluded from the competitive range. Req. for Dismissal at 3-4. The protester responds that it is an interested party because the procurement errors alleged here warrant the cancelation of the award and a resolicitation of the requirement. Response to Req. for Dismissal at 1-2. Marine Management maintains that it would have the opportunity to compete under such a resolicitation and is therefore a prospective offeror. *Id.*

The jurisdiction of our Office is established by the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557. That authority states that only an interested party may protest a federal procurement, including the award or proposed award of a contract. *Id.* §§ 3551, 3553(a). That is, a protester must be an actual or prospective bidder or vendor whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a)(1). Determining whether a party is interested involves the consideration of a variety of factors, including the nature of the issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. *REEL COH Inc.*, B-418095, B-418095.2, Jan. 10, 2020, 2020 CPD ¶ 55 at 7. Generally, a party will not be deemed to have the necessary economic interest to maintain a protest if it would not be in line for award if its protest were sustained. *Id.*; 4 C.F.R. § 21.0(a).

Two of Marine Management's protest grounds generally concern the reasonableness of the agency's technical and price evaluation of the awardee's proposal. Protest at 14-15. Here, the protester claims it is an interested party to raise these protest grounds because it seeks to have the agency modify the solicitation and allow the submission of new proposals. Protest at 10-12. However, if our Office were to sustain Marine Management's challenges to the agency's technical and price evaluation of the awardee's proposal, the appropriate recommendation would be that the agency reevaluate proposals and make a new award decision.

As noted above, two of Marine Management's proposals were found to be technically unacceptable and excluded from the competitive range--conclusions that the protester has not challenged--and Marine Management withdrew its other proposal. In this regard, Marine Management does not allege that it submitted any technically acceptable proposal under the terms of the RFP. See Response to Req. for Dismissal at 1-2. Further, the record demonstrates that there was another technically acceptable proposal eligible for award. Req. for Dismissal, Encl. 2, Business Clearance

Memorandum at 4. The protester does not challenge the agency's evaluation of this other technically acceptable proposal. See Response to Req. for Dismissal at 1-2.

Based on the above, were our Office to sustain Marine Management's challenges to the reasonableness of the agency's technical and price evaluation of the awardee's proposal, Marine Management would neither be in line for award nor be in a position to submit a revised proposal. Therefore, we find that, without more, Marine Management does not qualify as an interested party to generally challenge the reasonableness of the agency's technical and price evaluation.

However, we find that Marine Management is an interested party to raise its remaining protest grounds. Specifically, the protester also contends that the Navy unreasonably waived or relaxed several solicitation requirements. Protest at 10-14. If our Office were to sustain a protest on these bases, we would likely recommend that the agency revise the solicitation to reflect its actual needs, accept and evaluate revised proposals, and make a new award decision. Since Marine Management would be in a position to submit a revised proposal, we find that the protester has sufficient economic interest to qualify as an interested party to challenge the contract award on these bases.

Timeliness

The agency also requests that we dismiss the protest as untimely. Req. for Dismissal at 1-3. In this regard, the agency argues that the protest was filed more than 10 days after Marine Management knew the basis for its remaining protest grounds and that the post-award debriefing--which the agency describes as a "courtesy" debriefing--did not toll the 10-day period for filing its protest because it was not a required debriefing. *Id.* Marine Management responds that its debriefing was required under FAR section 15.506 because the agency kept its withdrawn proposal in the competitive range. Response to Req. for Dismissal at 3. Accordingly, the protester argues that it timely filed its protest within 10 days of the conclusion of its post-award debriefing. *Id.* For the reasons set forth below, we agree with the agency and dismiss the remaining protest grounds as untimely filed.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. The timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without disrupting or delaying the procurement process. *The MIL Corp.*, B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 5. Under these rules, a protest such as Marine Management's, based on other than alleged improprieties in a solicitation, must be filed not later than 10 days after the protester knew or should have known of the basis for its protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). An exception to this general rule is a protest that challenges "a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required." *Id.* This exception to our timeliness rules does not apply where an agency provides a debriefing that is not required. *Exceptional Software Strategies, Inc.*, B-416232, Jul. 12, 2018, 2018 CPD ¶ 237 at 5.

Here, we find that the post-award debriefing provided by the agency was not required for any of Marine Management's proposals. Marine Management does not argue that either of its *Maersk Peary* proposals, which were excluded from the competitive range, entitled it to a required post-award debriefing.⁴ See, generally, Response to Req. for Dismissal at 3-4. Rather, the protester maintains--despite having withdrawn its *CB Adriatic* proposal--that the agency's inclusion of its *CB Adriatic* proposal in the competitive range demonstrates that it is an unsuccessful offeror whose post-award debriefing was required. We disagree.

The requirement for a post-award debriefing in this procurement is established by 10 U.S.C. § 3304, which provides as follows:

When a contract is awarded by the head of an agency on the basis of competitive proposals, an unsuccessful offeror, upon written request received by the agency within 3 days after the date on which the unsuccessful offeror receives the notification of the contract award, shall be debriefed and furnished the basis for the selection decision and contract award.

10 U.S.C. § 3304(a).

Further, the FAR defines an offer as:

a response to a solicitation that, if accepted, would bind the offeror to perform the resultant contract. Responses to invitations for bids (sealed bidding) are offers called "bids" or "sealed bids"; responses to requests for proposals (negotiation) are offers called "proposals"; however, responses to requests for quotations . . . are "quotations," not offers.

FAR 2.101.

⁴ The record demonstrates that the protester requested and received a pre-award debriefing for its 59-month *Maersk Peary* and replacement vessel proposal. Req. for Dismissal at 2. Offerors are entitled to no more than one debriefing for each proposal. FAR 15.505(a)(3). Accordingly, the protester cannot demonstrate that its post-award debriefing was required for its 59-month *Maersk Peary* and replacement vessel proposal. Further, nothing in the record shows that Marine Management requested any debriefing for its 30-month *Maersk Peary* proposal. An offeror excluded from the competitive range may request a debriefing. 10 U.S.C. § 2305(b)(6)(A); FAR 15.505. An offeror that fails to submit a written 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)(1), (3). In these instances, the debriefing is not "required." See *Exceptional Software Strategies Inc.*, *supra* at 4. Accordingly, the protester has not demonstrated that its post-award debriefing was required for its 36-month *Maersk Peary* proposal.

As noted above, the RFP contained FAR provision 52.212-1, which states that offers “may be withdrawn by written notice received at any time before the exact time set for receipt of offers.” FAR provision 52.212-1(f)(5). Therefore, an offeror who timely withdraws a proposal from a procurement in accordance with the FAR and the terms of the solicitation is no longer an actual offeror for the purposes of that proposal because the agency cannot unilaterally accept the offer and bind the former offeror to accept the resultant contract. Similarly, a firm that timely withdrew an offer and was no longer therefore an actual offeror, upon the ultimate award of a contract, is not an unsuccessful offeror, based on the withdrawn offer.

Here, the protester concedes that it withdrew the *CB Adriatic* proposal on September 7, 2021, more than two months prior to the deadline for receipt of final proposals. Protest at 5-6, 9. Accordingly, we find that Marine Management’s timely withdrawal of the *CB Adriatic* proposal means it was not an unsuccessful offeror entitled to a post-award debriefing for the *CB Adriatic* proposal under 10 U.S.C. § 3304(a) because, had the agency accepted the withdrawn proposal, Marine Management would not have been bound to perform the resultant contract.⁵ In short, we see no basis to conclude that the post-award debriefing provided to Marine Management was required, and therefore analyze the timeliness of the protest without applying the debriefing exception to our timeliness rules.

As noted above, a protest based on other than alleged improprieties in a solicitation must be filed not later than 10 days after the protester knew or should have known of the basis for its protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Marine Management’s remaining protest grounds allege that the Navy improperly waived the requirements that the vessel be a U.S. flagged upon delivery and that vessels that will exceed 15 years of age during the charter period be enrolled in a relevant condition assessment program. Protest at 10-14.

Here, the record shows that on January 5, 2022, in response to its post-award debriefing, the protester submitted questions regarding waiving vessel reflagging requirements and the requirement to enroll 15 year-old or older vessels in a condition

⁵ Marine Management also argues that it is an unsuccessful offeror entitled to a required post-award debriefing because the agency’s notice of award identified it as an unsuccessful offeror. Response to Req. for Dismissal at 3. However, the notice at issue did not specifically reference the *CB Adriatic* proposal or otherwise state that the protester itself was an unsuccessful offeror entitled to a post-award debriefing, only that “[u]nsuccessful [o]fferors have three days . . . to request” a debriefing. Response to Req. for Dismissal, exh. 1, Notice of Award. The record here is clear that Marine Management was an unsuccessful offeror with regard to its two *Maersk Peary* proposals. As discussed above, the fact that Marine Management was an unsuccessful offeror with regard to the two proposals not included in the competitive range does not automatically entitle it to a required post-award debriefing.

assessment program. Req. for Dismissal, exh. A, Debriefing Questions at 1-2. The protester's debriefing questions letter cites to a chartering questionnaire referred to in the pleadings as a Q88. *Id.* at 2. This Q88 contains significant information regarding the awardee's vessel, including its age, flag status, and lack of enrollment in a condition assessment program.⁶ Protest, exh. 1, Awardee's Q88 at 1-2. Based on the above, we find that Marine Management had the information underlying its remaining protest grounds no later than January 5, 2022. The protester filed its protest more than 10 days later, on January 18. We therefore dismiss these remaining grounds of Marine Management's protest as untimely filed.

The protest is dismissed.

Edda Emmanuelli Perez
General Counsel

⁶ Marine Management filed this Q88 as an exhibit to its protest. Protest, exh. 1, Awardee's Q88 at 1-2. The exhibit contains a date stamp on this exhibit clearly marking that it was printed on January 3, 2022, however, the record is not clear regarding exactly when the protester first possessed this document. *See Id.*