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Decision

Matter of: The Logistics Company, Inc.

File: B-419932.3

Date: May 26, 2022

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Michael D. Maloney, Esq., Williams Mullen, and Todd W. Miller, Esq., Miller & Miller, LLC, for, Vanquish Worldwide, LLC, the intervenor.
Brittany N. Salter, Esq., and Jonathan A. Hardage, Esq., Department of the Army, for the agency.
Michael Willems, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging awardee's proposal contained a material misrepresentation and false certification is denied where the record does not support a conclusion that the proposal contained misrepresentations or false certifications.
2. Protest challenging contracting officer's affirmative responsibility determination is denied where the protester's allegations do not establish that the contracting officer failed to reasonably consider available relevant information when making the responsibility determination.

DECISION

The Logistics Company (TLC), Inc., a small business of Fayetteville, North Carolina, protests the issuance of a task order to Vanquish Worldwide, LLC, a small business of Knoxville, Tennessee, under request for proposals (RFP) W52P1J-19-R-0118 by the Department of the Army, Army Materiel Command, for logistics support services, as part of the Enhanced Army Global Logistics Enterprise (EAGLE) program. The protester alleges that the awardee made material misrepresentations and false certifications and that the agency erred in making an affirmative responsibility determination concerning the awardee.

We deny the protest.

BACKGROUND

On January 8, 2020, the agency issued the RFP as a small business set-aside seeking proposals from EAGLE basic ordering agreement holders for logistics readiness center maintenance, supply, and transportation requirements. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 3. The solicitation contemplated a three-step evaluation process for the purpose of selecting a single firm to receive the task order. Agency Report (AR), Tab 6, RFP at 145-146. First, proposals would be evaluated for "strict compliance" with solicitation terms and evaluated for technical acceptability. *Id.* Second, the three lowest-priced, technically acceptable proposals would be evaluated for past performance and price. *Id.* Finally, the agency would make award to the lowest-priced, responsible, and technically acceptable offeror that also had a rating of substantial confidence for past performance. *Id.*

Relevant to this protest, the RFP included Federal Acquisition Regulation (FAR) provision 52.209-7, Information Regarding Responsibility Matters, (Oct. 2018). Among other things, the provision requires each offeror to certify whether it or any of its principals have been the subject of a civil proceeding in the last five years in connection with a federal contract or grant in which there was a finding of fault or liability that resulted in the payment of a monetary fine, penalty, reimbursement, restitution, or damages of \$5,000 or more. *Id.* at 48-49.

On July 30, 2020, the agency received 14 proposals, including proposals from the protester and intervenor. COS/MOL at 4. Both the protester and the intervenor advanced to step two of the evaluation, and both offerors also received a rating of substantial confidence for past performance. *Id.* at 5. Because the intervenor's price (\$65,083,198) was lower than the protester's price (\$66,971,975), the agency initially planned to make award to Vanquish on that basis. *Id.* at 6. As part of making the award decision, the agency requested a Defense Contract Management Agency (DCMA) pre-award survey and ultimately concluded that Vanquish was a responsible offeror. *Id.*

On November 23, 2020, the agency notified the other offerors of the pending award to Vanquish, and the agency received two agency protests, including one from the protester, alleging that Vanquish had made false certifications concerning its responsibility by allegedly failing to disclose multiple outstanding civil judgments. COS/MOL at 6. The agency elected to take corrective action and re-evaluate Vanquish's responsibility. *Id.* Specifically, the agency asked Vanquish for additional information and supporting evidence concerning any undisclosed judgments and requested a second DCMA pre-award survey. *Id.* The agency also asked Vanquish to reaffirm its representations and certifications regarding its responsibility, and Vanquish complied. *Id.* at 6-7.

Following this initial investigation, the agency also decided to establish a competitive range and conduct discussions. COS/MOL at 7. Both the protester and the intervenor were included in the competitive range, and submitted final proposal revisions in July of

2021. *Id.* While Vanquish's price increased to \$66,045,755, it remained the lowest-priced, technically acceptable offeror with a rating of substantial confidence for past performance. *Id.* Accordingly, on October 21, 2021, the agency notified the protester of Vanquish's selection as awardee. *Id.*

The protester subsequently filed a protest with our Office alleging, among other things, that Vanquish failed to disclose certain adverse past performance information, made false certifications about its responsibility by failing to disclose numerous judgments, and that the agency failed to adequately consider Vanquish's business integrity and ethics in making its responsibility determination. AR, Tab 2, TLC Protest in B-419932.2. On November 22, 2021, the agency indicated that it intended to take corrective action by investigating the protester's allegations and making a new responsibility determination and award decision. COS/MOL at 8. We dismissed the protest as academic on November 29. *The Logistics Company, Inc.*, B-419932.2, Nov. 29, 2021 (unpublished decision).

As part of this investigation, the agency posed additional questions to Vanquish and requested that Vanquish provide signed affidavits in response. COS/MOL at 8-9. Vanquish responded by providing signed affidavits from Vanquish's principals and supporting documentation. AR, Tab 20, Vanquish Affidavits. The agency also requested a third DCMA pre-award survey. COS/MOL at 8-9. Ultimately, the agency concluded, on the basis of the additional information provided, that Vanquish's certifications were accurate, and the agency found Vanquish to be responsible. *Id.* On February 8, 2022, the agency reaffirmed its prior award to Vanquish, and, after a debriefing, this protest followed. COS/MOL at 10.

DISCUSSION

The protester primarily challenges the agency's affirmative responsibility determination concerning Vanquish.¹ First, the protester alleges that Vanquish's proposal contained a material misrepresentation and false certification by impermissibly failing to disclose several judgments against it. Protest at 17-23. Second, the protester alleges that the agency erred in its responsibility determination by failing to consider available information concerning Vanquish's business ethics. Comments at 15-27. We address these arguments in turn.²

¹ The protester also raises other collateral arguments not addressed in this decision. We have considered these arguments and conclude they provide no basis to sustain the protest.

² In its initial protest, the protester also raises two additional arguments concerning the agency's cost realism analysis and the agency's conduct of discussions. Protest at 11-17, 25-28. We dismiss those arguments as untimely. Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, protests generally must be filed no later than 10 calendar days after the protester knew, or should have known, the basis of its protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2)

Material Misrepresentation and False Certification

The protester argues that Vanquish impermissibly failed to disclose three judgments. Protest at 17-23. First, the protester maintains Vanquish should have disclosed the *Barton* judgment, resulting from divorce litigation involving one of Vanquish's principals on July 6, 2018. See Protest at 19 and AR, Tab 5BB, Tennessee Court of Appeals Decision in *Eric Wayne Barton v. Mechelle Schlomer Barton*, No. E2019-01136-COA-R3-CV (Tenn. Ct. App. 2020). Second, the protester contends Vanquish should have disclosed the *Sadat* arbitration award, made on May 13, 2015, which resulted from an arbitration concerning a dispute between Vanquish and a subcontractor relating to a federal contract for logistics services. See AR, Tab 5DD, *United Sadat Transportation and Logistics Company, LTD. v. Vanquish Worldwide, LLC* Complaint and Arbitration Partial Award at 77. Finally, the protester argues Vanquish should have disclosed the

(2014). Moreover, where a protester initially files a timely protest, and later supplements it with independent grounds of protest, the later-raised allegations must independently satisfy the timeliness requirements, since our Regulations do not contemplate the unwarranted piecemeal presentation or development of protest issues. *International Code Council*, B-409146, Jan. 8, 2014, 2014 CPD ¶ 26 at 3 n.3; *Cedar Elec., Inc.*, B-402284.2, Mar. 19, 2010, 2010 CPD ¶ 79 at 4.

The protester's allegations concerning cost realism and discussions primarily relate to a prior agency evaluation and the agency's decision to permit the intervenor to amend its proposal via a solicitation amendment. The protester was aware of the underlying facts concerning the evaluation and amendment by November of 2021, at the latest, when the protester filed its previous protest of this procurement. The protester argues that these arguments are timely presented now because the protester acquired new relevant information in February of 2022. Resp. to Agency Req. to Dismiss at 4-7. However, the allegedly new information on which the protester relies is that the February Source Selection Decision Document (SSD) provided by the agency included a two-sentence summary of the contents of the relevant solicitation amendment, which was already available to the protester. *Id.*

Contrary to the protester's suggestion, the language was nothing more than a summary of the text of the amendment, and does not provide any new information. Accordingly, because the protester had all the information that it currently possesses when it filed its prior protest, but did not raise these protest grounds, these arguments represent an impermissible piecemeal presentation of protest issues and are dismissed. See *Loyal Source Gov't Servs., LLC*, B-407791.5, Apr. 9, 2014, 2014 CPD ¶ 127 at 5-7 (protest issue that could have been raised in prior protest is untimely notwithstanding that agency made a new source selection decision and provided a required debriefing where the basis of the otherwise untimely protest allegation concerns an aspect of the agency's evaluation that was not subsequently affected by the agency's corrective action).

Koshani judgment, entered on June 7, 2019, in the amount of \$33 million, which resulted from a lawsuit alleging breach of a profit-sharing agreement between one of Vanquish's principals and one of Vanquish's subcontractors on a federal contract for logistics services in Afghanistan. AR, Tab 5AA, Judgment resolving *Shafiqullah Koshani v. Eric Wayne Barton*, 3:17-cv-265 (E.D. Tenn. 2019). The protester alleges that Vanquish's failure to disclose these judgments was materially misleading and a false certification because FAR provision 52.209-7 requires offerors to certify whether they have been subject to litigation resulting in findings of fault or liability. Protest at 17-23. The protester further notes that the *Koshani* and *Barton* judgments, in particular, were both in effect at the time of Vanquish's first certification in July of 2020. *Id.*

As noted above, the RFP contained the FAR provision at section 52.209-7. RFP at 48-49. In relevant part, this FAR provision requires offerors to disclose when they (or their principals) have been the subject of a civil proceeding in the last five years in connection with a federal contract or grant in which there was a finding of fault or liability that resulted in the payment of a monetary fine, penalty, reimbursement, restitution, or damages of \$5,000 or more.³ FAR provision 52.209-7(c)(1). Additionally, the FAR requires offerors to disclose dispositions of civil or administrative proceedings by consent or compromise that include an acknowledgement of fault. *Id.* On the record before us, we conclude that there was no misrepresentation or false certification because none of the cases identified by the protester meet the elements of the FAR's disclosure requirements.

First, the *Barton* judgment stemmed from a divorce proceeding involving one of Vanquish's principals, but has no apparent relationship to a federal contract or grant. The FAR does not require offerors to disclose *any* finding of fault or liability, but rather only requires offerors to disclose certain findings of fault or liability "in connection with the award to or performance by the offeror of a Federal contract or grant." FAR provision 52.209-7(c)(1). The protester has provided no explanation concerning how this judgment was related to a federal contract or grant, other than noting that both Vanquish's principal and his spouse had ownership interest in Vanquish and were involved in its operations while it performed federal contracts. We see no basis to question the agency's conclusion that Vanquish was not required to disclose this judgment because it did not relate to a federal contract or grant.

Second, while the *Sadat* arbitration resulted in a finding of fault or liability in May of 2015 and a follow-on lawsuit seeking enforcement of the arbitrator's award in federal court in 2016, the parties reached a settlement agreement before final damages were assessed. See AR, Tab 9c, Order Setting Aside Judgment and AR, Tab 9d, Final

³ The FAR imposes a parallel disclosure requirement for administrative proceedings resulting in a finding of fault or liability. See FAR provision 52.209-7(c)(1)(iii). The provision is substantially similar to the requirement to disclose civil proceedings, with the exception of a higher dollar threshold for disclosure concerning payments of reimbursement, restitution, or damages. *Id.*

Arbitration Decision by Consent at 4. In May of 2016 the original arbitrator's judgment and orders confirming the arbitration award in the federal lawsuit were vacated. *Id.* Sadat subsequently sued Vanquish in 2018 for alleged default under the terms of a promissory note related to the settlement, but the parties also reached a settlement in that subsequent case. See Protester's Comments at 23, COS/MOL at 23. Relevant here, Vanquish made its first FAR 52.209-7 certification on July 30, 2020.

The *Sadat* award does not meet the FAR's requirements for disclosure primarily because the finding of fault or liability in question was entered more than five years prior to the date of Vanquish's first certification, and the FAR only requires the disclosure of findings of fault or liability "within the last five years." See FAR provision 52-209-7(c)(1). While there was subsequent litigation related to the original finding within the five-year window, it is not clear that the subsequent litigation involved any new findings of fault or liability or had a clear nexus to a federal contract or grant. However, even assuming, for the sake of argument, that the subsequent litigation should be considered, that litigation resulted in out-of-court settlement agreements without admissions of fault, and, as discussed in greater detail below, our decisions indicate that such settlements do not generally meet the FAR's disclosure requirements. See *Government Acquisitions, Inc.*, B-408426 *et al.*, Sep. 17, 2013, 2013 CPD ¶ 277 at 8-9. Accordingly, we see no basis to disturb the agency's conclusion that Vanquish was not required to disclose the *Sadat* award.

Finally, the *Koshani* judgment does not meet the disclosure requirements of the FAR because, while the judgment included a finding of fault and liability in 2019, Vanquish ultimately settled the case without an admission of fault, and the judgment was vacated in October of 2020. See AR, Tab 25, Order Vacating *Koshani* Judgment. In this regard, our decisions have concluded that a settlement in which no fault is admitted does not generally meet the disclosure requirements of the FAR. *Government Acquisitions, Inc.*, B-408426 *et al.*, *supra*. The protester contends our decision in *Government Acquisitions* is inapplicable here because, in that case, the parties settled prior to any judgment, while the parties in this case settled after the court had already reached a finding of fault or liability and awarded damages. Protester's Comments at 7-9.

While the protester is correct that the facts in *Government Acquisitions* differ from the facts in this case, the plain language of the FAR dictates the same outcome here. The FAR is explicit that offerors must disclose a civil finding of fault or liability that "results in the payment of a monetary fine, penalty, reimbursement, restitution, or damages of \$5,000 or more." FAR provision 52.209-7(c)(1)(ii). A payment made pursuant to an out-of-court settlement admitting no fault is not a payment of a fine, penalty, reimbursement, restitution, or damages, and also cannot be said to clearly result from a civil finding of fault or liability. This is the case regardless of when such a settlement occurs.⁴

⁴ The protester contends that this reading of the FAR creates an inappropriate incentive. Comments at 8-9. Specifically, if an offeror need not disclose a civil judgment unless

Moreover, this reading is strengthened by other portions of the relevant FAR provision. For example, the FAR provision also requires that offerors disclose dispositions of civil or administrative matters by consent or compromise that involve “an acknowledgement of fault.” FAR provision 52.209-7(c)(1)(iv). It would be irrational to conclude that the FAR also compels the disclosure of dispositions of civil or administrative matters by consent or compromise, such as the settlement agreements in this case, that include no acknowledgement of fault. In short, we see no basis in the FAR to find that the agency erred in concluding that Vanquish was not compelled to disclose the *Koshani* judgment.

In response, the protester raises an alternative argument noting that the *Koshani* judgment was still pending at the time of Vanquish’s original certification on July 30, 2020, and Vanquish’s counterparty was actively seeking garnishment of various assets in the interval between the judgment and the settlement. Comments at 10-13. For example, the protester notes that the United States Marshals Service seized Vanquish’s corporate headquarters building on June 10, 2020, and scheduled its sale at auction for July 1, 2020 to partially satisfy the judgment. *Id.* The protester also identifies other garnishments of various sums of money or revenue streams. *Id.* The protester contends that these garnishments constituted payments of monetary damages resulting from a civil finding of fault or liability, and, because no settlement had been reached on July 30, 2020 when Vanquish made its initial certification, the FAR required Vanquish to disclose the *Koshani* judgment. *Id.*

While such garnishments, had they gone into effect, would be payments of monetary damages resulting from a civil finding of fault or liability, the protester has not provided evidence that such garnishments actually occurred and were executed. The evidence of garnishments relied on by the protester are a news article concerning the seizure and planned auction of Vanquish’s headquarters, and various applications for garnishment filed by Vanquish’s counterparty. See, e.g., AR, Tabs 5CC, 5JJ-5NN. However, the protester has provided no evidence that the auction occurred, or that any of the applications for garnishment were granted or otherwise executed prior to the time the parties reached a settlement agreement.

Indeed, in this regard, the intervenor represents, and the record supports, that the garnishments identified by the protester ultimately did not go into effect due to settlement negotiations between the parties. See Joint Notice of Settlement and Motion to Stay at 1; see also AR, Tab 20, Vanquish Affidavits (representing that the only payments made in connection with the *Koshani* matter were made pursuant to a settlement agreement and involved no acknowledgement of fault or liability). For

payment is made, the protester argues, an offeror is incentivized to simply avoid paying any judgments against it. *Id.* We express no view on what incentives may or may not be created by this FAR provision, but the provision’s language is clear that offerors must only disclose a finding of fault or liability that “results in the payment” of a monetary fine, penalty, reimbursement, restitution, or damages over \$5,000. FAR provision 52.209-7(c)(1).

example, concerning the seizure of Vanquish's corporate headquarters, the record reflects that the parties reached an agreement in principle on a settlement and requested a stay of proceedings on June 30, 2020, prior to the scheduled auction. *Id.* Accordingly, because the protester has not demonstrated that any garnishments were, in fact, executed, and the available record suggests the opposite, this alternative argument lacks a factual basis and is dismissed. 4 C.F.R. §§ 21.1(c)(4), (f); 21.5(f).

In sum, none of the judgments identified by the protester meet the requirements for disclosure identified in FAR provision 52.209-7. Therefore, on the record before us, we see no basis to conclude that Vanquish's proposal included a material misrepresentation or false certification by failing to disclose these judgments.

Affirmative Responsibility

Next, the protester contends that the agency ignored the substance of the judgments in the *Koshani* and *Sadat* cases discussed above, which contain information highly relevant to a determination of Vanquish's responsibility and business ethics. Comments at 15-27. In this regard, the protester notes that these cases led to specific findings of fault and liability before they were vacated or set aside, and that the findings in those cases involved civil fraud, breach of fiduciary duty, and other serious misconduct. *Id.* In this regard, the protester notes that both the *Sadat* award and the *Koshani* judgment either authorized or actually awarded punitive damages. *Id.* Accordingly, the protester contends that this evidence raises serious concerns about Vanquish's responsibility that the contracting officer unreasonably failed to consider. *Id.*

The FAR provides that contract award may not be made unless the contracting officer makes an affirmative determination of the prospective awardee's responsibility. FAR 9.103(b). In making the responsibility determination, the contracting officer must determine, among other things, that the contractor has "a satisfactory record of integrity and business ethics." FAR 9.104-1(d). In most cases, responsibility determinations involve subjective business judgments that are within the broad discretion of the contracting activity. *Mountaineers Fire Crew, Inc., et al., B-413520.5 et al., Feb. 27, 2017, 2017 CPD ¶ 77 at 10.* GAO will review challenges to an agency's affirmative responsibility determination when the protester presents specific evidence that the contracting officer may have unreasonably ignored information that, by its nature, would be expected to have a strong bearing on whether the agency should find the awardee responsible. 4 C.F.R. § 21.5(c); see *Southwestern Bell Tel. Co., B-292476, Oct. 1, 2003, 2003 CPD ¶ 177 at 10-11.* The information in question must concern very serious matters, for example, potential criminal activity or massive public scandal. *IBM Corp., B-415798.2, Feb. 14, 2019, 2019 CPD ¶ 82 at 11.*

We see no basis to conclude that the contracting officer unreasonably ignored these cases. Indeed, the protester's prior protests called these specific issues to the contracting officer's attention, and the record in this case is clear that the contracting officer was aware of and considered both of the judgments raised by the protester.

Specifically, the record reflects that the contracting officer repeatedly asked Vanquish questions concerning the facts surrounding these judgments and received affidavits and supporting documents from Vanquish in response. See, e.g., AR, Tab 22, SSD at 8-11; AR, Tab 9, Vanquish Response Concerning Representations and Certifications; AR Tab 20, Vanquish Affidavits. Moreover, the agency ultimately discussed the *Koshani* and *Sadat* cases in the SSD and in its responsibility determination, noting that both judgments were vacated or set aside as a result of settlements. AR, Tab 22, SSD at 8-11; AR, Tab 15, Final Responsibility Determination. In short, it is abundantly clear from the record that the contracting officer was, at a minimum, aware of the judgments identified by the protester.

While the SSD does not delve into the substance of the judgments, the agency has explained that it did not consider the judgments to meaningfully affect Vanquish's responsibility. COS/MOL at 15, 23-24. In this regard, the agency notes the judgments did not involve criminal activity, and both cases were ultimately vacated or set aside, without an admission of fault, and no longer have any legal effect or impact on Vanquish's ability to perform this task order. *Id.* That is to say, the agency considered the information and ultimately concluded that it did not render Vanquish non-responsible. *Id.*

In response, the protester contends that our decision in *FCi Federal, Inc.*, B-408558.4 *et al.*, Oct. 20, 2014, 2014 CPD ¶ 308, suggests the agency's consideration was unreasonable. Comments at 17-18. In that case, we sustained a protest of an agency's affirmative responsibility determination because the agency did not reasonably consider allegations of criminal fraud. *FCi Federal, Inc.*, *supra* at 7-11. However, the facts in that case are distinguishable from the facts in this one. In *FCi Federal*, among other issues not relevant here, we concluded that the contracting officer failed to seek out or consider evidence concerning criminal fraud proceedings against the awardee. *Id.* Of note, the contracting officer in *FCi* relied solely on news reports concerning the ongoing litigation, did not request any additional information from the awardee, and neither sought out nor read relevant court documents. *Id.* Accordingly, we concluded that the contracting officer failed to obtain or consider relevant information necessary to make an appropriate responsibility determination. *Id.*

In this case, by contrast, the record reflects that the agency obtained and was aware of the contents of relevant court documents, repeatedly requested and received additional information from the awardee, and conducted an independent investigation of the awardee's responsibility. In short, we cannot conclude on the record before us that the contracting officer unreasonably failed to consider the information raised by the protester, and therefore we have no other basis to question the agency's affirmative responsibility determination. 4 C.F.R. § 21.5(c).

The protest is denied.

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