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Decision

Matter of: Akima Data Management, LLC; Absolute Strategic Technologies, LLC

File: B-420644.7; B-420644.8

Date: February 5, 2024

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DIGEST

Protest is denied where record shows that agency's action in amending the solicitation to address errors found in a prior protest was reasonable and not unfair to offerors.

DECISION

Akima Data Management, LLC, a small business of Herndon, Virginia, and Absolute Strategic Technologies, LLC, a mentor-protégé joint venture¹ (MPJV) small business of Wichita Falls, Texas, protest the terms and conditions of General Services Administration (GSA) request for proposals (RFP) No. 47QTCB22R0001 for the small business pool of the governmentwide acquisition contract (GWAC) called Polaris, to provide customized information technology (IT) services and services-based solutions.

¹ The Small Business Administration's (SBA) small business mentor-protégé program allows small or large business firms to serve as mentors to small business protégé firms in order to provide "business development assistance" to the protégé firms and to "improve the protégé firms' ability to successfully compete for federal contracts."

13 C.F.R. § 125.9(a), (b); see 15 U.S.C. § 644(q)(1)(C). One benefit of the mentor-protégé program is that a protégé and mentor may form a joint venture. 13 C.F.R. § 125.9(d). If SBA approves a MPJV, the MPJV is permitted to compete as a small business for "any government prime contract or subcontract or sale, provided the protégé qualifies as small for the procurement[.]" *Id.* § 125.9(d)(1).

The protesters argue that a solicitation amendment, issued by GSA in response to a prior protest before the U.S. Court of Federal Claims (COFC), is unreasonable and unfair.

We deny the protests.

BACKGROUND

On September 15, 2022, GSA issued the RFP for the Polaris small business pool as a total small business set-aside pursuant to the procedures of Federal Acquisition Regulation (FAR) part 15 and subpart 19.5. Contracting Officer's Statement (COS) at 2.² The Polaris GWAC seeks to provide participating government agencies with access to highly qualified IT contractors, while also helping to fulfill the agencies' small business contracting goals.³ MOL at 1-2, 10.

The RFP contemplates a multiple-award, indefinite-delivery, indefinite-quantity (IDIQ) contract set aside for small businesses to provide customized IT services and services-based solutions. Agency Report (AR), Tab 12, RFP at 3.⁴ Under individual task orders, contractors will be required to provide all management, supervision, labor, facilities, and materials necessary to furnish the requested IT services. *Id.* at 3. The RFP anticipates a 10-year IDIQ contract ordering period, consisting of a 5-year base period and a single 5-year option period. *Id.* at 19.

The solicitation advises that GSA intends to make award to the 100 offerors that are highest technically rated with fair and reasonable pricing, with any offerors tied at the 100th position receiving an award. *Id.* at 97. The agency's source selection will be based on the offerors' self-scoring, using an agency-provided scoring table. *Id.* at 101-03. This scoring table allows offerors to claim points based on specified categories related to (1) relevant experience; (2) past performance; (3) systems, certifications, and clearances; and (4) organizational risk. The table provides for a total maximum of 95,000 possible points for all categories. *Id.* at 103.

After receiving proposals, GSA will begin its evaluation by initially ranking the proposals by highest total claimed self-score. *Id.* at 97. Then, the agency will: screen proposals to confirm that the offeror has submitted supporting documentation for all applicable

² The protests were developed separately. Citations are to the record filed in B-420644.7, *Akima Data Management, LLC*, except where otherwise noted, and refer to the documents' Adobe PDF pagination.

³ The Polaris GWAC is divided amongst the following four solicitation set-aside types, or pools: small businesses; woman-owned small businesses; service-disabled veteran-owned small businesses; and historically underutilized business zone businesses. Memorandum of Law (MOL) at 1.

⁴ Unless otherwise noted, references to the solicitation are to the conformed copy (amendment 10) of the RFP provided at Tab 12 of the agency report.

evaluation elements; validate the offeror's supporting documentation and claimed points under each evaluation element; and check for fair and reasonable pricing. *Id.* The agency will continue this process until it identifies the 100 awardees. *Id.*

The RFP initially established May 13, 2022, as the proposal due date. COS at 2. Another offeror filed a protest with our Office challenging the terms and conditions of the RFP, asserting that the solicitation violated small business regulations by improperly allowing MPJVs to meet requirements "without submitting any work done or qualifications held individually by the small business protégé firm." AR, Tab 16, Protest of BD2 Squared d/b/a DB Squared at 3. We dismissed the protest as academic when the agency took corrective action to amend the solicitation, including the requirements for MPJVs. *BD2 Squared d/b/a BD Squared*, B-420644, Apr. 25, 2022 (unpublished decision) at 2.

The amended RFP established October 7, 2022, as the new proposal due date. COS at 2. Approximately [DELETED] offerors submitted proposals in response to the RFP. *Id.* at 3. On October 7, prior to the deadline for proposal submission, two MPJVs protested the terms and conditions of the amended RFP at the COFC. *Id.* at 2; *SH Synergy v. United States*, 165 Fed. Cl. 745, 750 (2023). The COFC sustained the protests, enjoining GSA from evaluating proposals and awarding IDIQ contracts under that version of the RFP. *SH Synergy*, 165 Fed. Cl. at 786. The Court also ordered GSA to amend the RFP before proceeding with the competition. *Id.*

Relevant here is amendment 9 to the RFP, issued in response to the sustained protests at the COFC. AR, Tab 8, amend. 9 Cover Letter; AR, Tab 9, amend. 9 RFP.⁵ Prior to the November 7, 2023, deadline for submission of revised proposals, Akima and Absolute filed these protests with our Office.

DISCUSSION

Akima and Absolute challenge the terms and conditions of the agency's amendment of the solicitation's relevant experience submission requirements following the COFC decision and injunction. Akima and Absolute argue that the amendment unfairly and unreasonably restricts which offerors may revise their relevant experience submissions, and in what way. In addition, Absolute argues that the amended relevant experience submission requirements violate small business regulations. Although we do not specifically address all of the protesters' arguments, we have fully considered all of them and find that none provides a basis on which to sustain the protest.

Limited Proposal Revisions

Akima, a small business, and Absolute, a MPJV, argue that the limited revisions to relevant experience submissions permitted under amendment 9 are unfair and

⁵ GSA subsequently issued amendment 10. AR, Tab 10, amend. 10. Amendment 10 does not change the terms and conditions of the RFP relevant to this protest.

unreasonable. Protest at 16-22; Absolute Protest at 8-12. The agency defends amendment 9 as a reasonable and appropriate corrective action in response to the COFC decision and injunction regarding this solicitation. MOL at 5-10; Absolute MOL at 4-7.

Under the solicitation, offerors must submit a minimum of three, and a maximum of five “Primary Relevant Experience Projects” of the offeror, individual member of a joint venture offeror, or a proposed subcontractor. RFP at 68-76. Each project is worth 4,000 points, and offerors can then claim additional points based on the characteristics of the projects, including, for example, projects that were cost-reimbursement type. *Id.* at 101-02. Offerors are also permitted to submit a maximum of three “Emerging Technology Relevant Experience Projects” of the offeror, individual member of a joint venture offeror, or a proposed subcontractor. *Id.* at 82. Offerors can claim 1,000 points for each project, and up to 1,000 additional points based on the breadth of experience demonstrated across those projects. *Id.* at 102.

In the version of the RFP protested at the COFC, for MPJVs, “a minimum of one Primary Relevant Experience Project or Emerging Technology Relevant Experience Project must be from the Protégé or the offering Mentor-Protégé Joint Venture,” and “[n]o more than three Primary Relevant Experience Projects may be provided by the Mentor.” AR, Tab 15c, amend. 7 RFP at 67. The protesters argued the solicitation violated an SBA regulation that states agencies must consider the work and qualifications of the individual members of the MPJV as well as the MPJV itself, and “may not require the protégé firm to individually meet the same evaluation or responsibility criteria as that required of other offerors generally.” *SH Synergy LLC*, 165 Fed. Cl. at 755 (quoting 13 C.F.R. § 125.8(e).) In its decision, the COFC recognized that the RFP, as drafted, required protégé firms to submit one project to comply with section 125.8(e)--the SBA regulation which “requires the agency to evaluate the individual performance of a mentor-protégé JV’s protégé member[.]” *Id.* at 768-69. The Court held, however, “that the Polaris Solicitations violate section 125.8(e) by applying the same evaluation criteria to all Relevant Experience projects, regardless of whether the project is submitted by a protégé firm or by offerors generally.” *Id.* at 770. The COFC then enjoined the agency from proceeding without revising the RFP consistent with the decision. *Id.* at 786.

In response to the COFC’s decision, the agency issued amendment 9. AR, Tab 8, amend. 9 Cover Letter at 1. For MPJVs, amendment 9 still requires that a “minimum of one Relevant Experience Project must be from the Protégé or the offering Mentor-Protégé Joint Venture.” AR, Tab 9a, amend. 9 RFP at 68. The amended RFP, however, now provides that this requirement can be met by submitting “a Primary Relevant Experience Project”; “an Emergency Technology Relevant Experience Project”; or--new and specific to MJPVs--“a Protégé Capabilities Relevant Experience Project” to be evaluated on a pass/fail basis only, rather than according to the scoring table. *Id.* at 68-69.

In connection with this change, the amendment allows limited revisions to proposals. MPJVs are now permitted to “remove and/or replace any Primary Relevant Experience Projects and/or Emerging Technology Relevant Experience Projects that were submitted from the protégé or offering mentor protégé joint venture.” AR, Tab 8, amend. 9 Cover Letter at 2. Offerors are not allowed to replace any other previously submitted experience projects that did not meet this condition. If, as a result, a proposal now does not include a project from the protégé or MPJV, “the offeror must submit a Protégé Capabilities Relevant Experience Project from the Protégé or the offering Mentor Protégé joint venture.” *Id.* The amendment adds that “[a]ll projects must meet the requirements as of the original proposal due date (October 7, 2022) and will be evaluated based on the criteria met as of the original proposal due date.” *Id.*

Akima contends that amendment 9 is improper because it “gives MPJVs an unfair competitive advantage” by allowing only those offerors to amend their proposals, including by “adding a new small business subcontractor for the purpose of providing an additional Relevant Experience Project.” Comments at 2-10. Akima asserts that the agency should instead amend the RFP to allow all offerors to add or substitute relevant experience projects without limitation. Protest at 23. Absolute, for its part, asserts “that MPJVs should be allowed to revise *all* of the Relevant Experience Projects” because they are all impacted by the changes in amendment 9. Absolute Comments at 5 (emphasis added). Absolute also argues that the agency should allow submission of projects from after the initial October 7, 2022, deadline, and generally allow offerors the opportunity to revise any aspect of their proposals to the most current information. Absolute Protest at 12.

Contracting officers in negotiated procurements have broad discretion to take corrective action where the agency determines that such action is necessary to ensure a fair and impartial competition. *SMS Data Prods. Grp., Inc.*, B-280970.4, Jan. 29, 1999, 99-1 CPD ¶ 26 at 2. As a general matter, the details of a corrective action are within the sound discretion and judgment of the contracting agency. *Rockwell Elec. Commerce Corp.*, B-286201.6, Aug. 30, 2001, 2001 CPD ¶ 162 at 4. In this regard, an agency’s discretion when taking corrective action extends to a decision on the scope of proposal revisions, and there are circumstances where an agency may reasonably decide to limit the revisions offerors may make to their proposals. See, e.g., *Honeywell Tech. Solutions, Inc.*, B-400771.6, Nov. 23, 2009, 2009 CPD ¶ 240 at 4.

Our Office generally will not object to the specific corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. *Networks Elec. Corp.*, B-290666.3, Sept. 30, 2002, 2002 CPD ¶ 173 at 3. However, even where an agency is justified in restricting revisions in corrective action, the agency may not prohibit offerors from revising related areas of their proposal which are materially impacted. See *Deloitte Consulting, LLP*, B-412125.6, Nov. 28, 2016, 2016 CPD ¶ 355 at 6 (finding restrictive limitation on proposal revisions unreasonable where it prohibited submission of information materially impacted by corrective action). When assessing the reasonableness of an agency’s restrictions on proposal revisions, we consider the extent to which the amendment, and the permitted changes in

response to amendment, materially impact or are inextricably linked with other aspects of an offeror's proposal. *See id.*

The agency explains that it considered a variety of approaches to corrective action in response to the COFC's decision, taking into account the resources already expended by small business offerors and GSA, and ultimately decided to limit "the experience revisions to only the entities the COFC determined had been prejudiced by the prior RFP approach - Proteges." MOL at 5-6. Akima asserts that this is unfair because "all offerors were affected by this amendment," which the protester contends has changed the "competitive landscape" by making "it easier for MPJVs to obtain maximum scores under this highly competitive rubric." Protest at 1-2.

Competitive prejudice is an essential element of every viable protest; our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions. *Trident Vantage Sys., LLC; SKER-SGT Eng'g & Sci., LLC*, B-415944 *et al.*, May 1, 2018, 2018 CPD ¶ 166 at 22. Here, amendment 9 does not change the requirements for small businesses like Akima. Only MPJVs were ever required to submit projects from the protégé or MPJV, and the amendment simply limits revisions to those projects from the protégé or MPJV. Akima does not--and cannot--explain how MPJV offerors revising their protégé or MPJV relevant experience would materially impact any information in Akima's proposal. That is, we cannot discern how Akima is competitively prejudiced by the amendment, where, as a non-MPJV small business, the solicitation did not require Akima to submit such types of relevant experience projects, in the first place. Instead, Akima's argument hinges on its assertion that it had "reasonably believed that achieving a near-perfect score would not be necessary for award," and therefore Akima "decided not to seek a fully maximized score due to perceived concerns about the interpretation of the RFP's Organizational Risk Assessment, and because adding another major subcontractor would have come with the cost of promising away additional workshare to yet another partner." *Id.* at 2.

It is clear from the initial RFP, however, that the agency anticipates making award only to the 100 highest scoring offerors among the small businesses, including MPJVs, that submitted proposals. AR, Tab 12, amend. 10 RFP at 97. In other words, there was always an incentive for offerors, competing under this solicitation, to maximize their point scores. Akima's objection, therefore, is not predicated on the flexibility granted to MPJVs by amendment 9, but rather by Akima's business judgment with regards to the firm's initial proposal strategy. *See Computervision Corp.*, B-252632, July 19, 1993, 93-2 CPD ¶ 34 at 7 (finding no prejudice where solicitation error did not affect protester's "exercise of its business judgment" to not offer proposal that could earn highest possible score). Akima's desire for a second chance to craft its proposal does not render the restrictions in amendment 9 unfair or unreasonable under the circumstances. *See Cellebrite Inc.*, B-420371.2, Apr. 28, 2022, 2022 CPD ¶ 159 at 5 (denying challenge where protester's demand to update proposal was based on regret over its business judgment rather than any "proposal changes resulting from the agency's corrective action"). We find no merit to Akima's arguments in this regard.

Absolute, as an MPJV, offers a variation of Akima's argument. According to Absolute, the "changes to the RFP by Amendment [9] materially impacted how MPJVs could identify and select their Primary Relevant Experience Projects." Absolute Protest at 9. Absolute contends that the agency, thus, is not permitted to confine proposal revisions to only the protégé or MPJV projects but must allow MPJVs to revise *any* relevant experience project. *Id.* at 10. Absolute argues that it will otherwise be prejudiced, because it "seeks to replace one of its current mentor projects with a Relevant Experience Project" from the MPJV itself. Absolute Comments at 1. Specifically, Absolute would replace a project performed by its mentor with the [DELETED] awarded to Absolute on April 22, 2022. *Id.* at 12.

While Absolute argues why it did not submit the [DELETED] project in its initial proposal, it is also apparent from the record that the project did not meet the solicitation's requirements for submission at that time. As Absolute itself acknowledges, to be eligible for proposal submission, the solicitation required primary relevant experience projects to "be completed or have at least six months of performance by October 7, 2022." Absolute Protest at 3. By its own admission, the [DELETED] project was awarded on April 22, 2022--only 5 and a half months before the deadline for proposal submission. *Id.* at 16. In this regard, Absolute's desire now--to make its proposal more competitive based on the inclusion of a relevant experience project not eligible at the time of submission--does not render unreasonable the agency's decision to limit the extent of revisions to proposals in issuing amendment 9 to the solicitation.⁶

Indeed, more broadly, Absolute argues that "offerors should be permitted to revise any aspect of their proposals in order to address the impact of a material amendment to the solicitation on multiple areas of their proposals and to submit the most accurate, up-to-date, and competitive proposals." Absolute Protest at 9. The issue here is not whether proposals have been affected by the passage of time, but whether amendment 9 results in a material impact on other aspects of MPJV's proposals. While, as the protester suggests, GSA could have chosen to permit offerors to revise any aspect of their proposals, the contracting agency's decision not to undertake such action here represents a reasonable exercise of its discretion. *Honeywell Tech. Sols., Inc., supra* at 5-6 (rejecting protester's challenge to corrective action based mainly on allegation that proposals were "outdated"). Therefore, Absolute's allegations in this regard are denied.

Mentor-Protégé Joint Venture Experience

⁶ To the extent Absolute argues that it simply chose not to submit the [DELETED] project in its initial proposal, the argument only serves to undercut its challenge here. As we have explained, any competitive prejudice suffered as a result of the offeror's own business judgment or decisions is insufficient to sustain a protest of an agency's actions. *Connaught Labs, Inc.*, B-235793, Oct. 11, 1989, 89-2 CPD ¶ 337 at 7 (denying protest where "any prejudice to [the protester] occurred as a result of its own business choice based on the firm's" assessment of the competition and did not "warrant disturbing the procurement").

Finally, Absolute also argues that amendment 9 “is contrary to 13 C.F.R. § 125.8(e) because it unreasonably limits protégés from taking advantage of the experience of their MPJVs and precludes members of MPJVs from demonstrating past performance and experience to perform the contract ‘in the aggregate.’” Absolute Comments at 10. GSA responds that the RFP has always “require[d] information about every member of a joint venture,” and that amendment 9’s changes only enhance compliance with section 125.8. Absolute MOL at 11-12.

As discussed above, section 125.8(e) of the SBA’s regulation requires agencies to consider the work and qualifications of the individual members of the MPJV as well as the MPJV, itself, and provides that “partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems and certifications necessary to perform the contract.” 13 C.F.R. § 125.8(e). Our review finds that the language of amendment 9 simply provides MPJVs with additional flexibility--by allowing them the opportunity to replace any experience project from the protégé or the MPJV with one from the mentor or a subcontractor--while still providing details about the protégé’s capabilities. AR, Tab 8, amend. 9 Cover Letter at 2. We fail to see how this increased flexibility falls afoul of the requirement to evaluate MPJVs based on the abilities of the joint venture and its members in the aggregate. *Cf. Excalibur Consulting Servs., LLC*, B-421190.2 *et al.*, May 5, 2023, 2023 CPD ¶ 110 at 7 (denying protest that agency was not permitted to allow an MPJV to satisfy experience requirements with the experience of its members); *Meltech Corp.*, B-421064, B-421064.2, Dec. 22, 2022, 2023 CPD ¶ 9 at 7 (explaining that SBA regulations “do not mandate a specific degree of consideration for the mentor or protégé firm”). Consequently, we find no basis to sustain this allegation.

We deny the protests.

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