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Decision

Matter of: DSoft Technology, Engineering & Analysis, Inc.

File: B-422254

Date: February 26, 2024

Jerome S. Gabig, Esq., Government Procurement Lawyer, LLC, for the protester.
Devon E. Hewitt, Esq., and Matthew L. Nicholson, Esq., Potomac Law Group, PLLC, for AdaptiveVets, Inc., the intervenor.
Ronald J. Bakay, Esq., and Tobias Hunziker, Esq., Department of Veterans Affairs, for the agency.
Kenneth Kilgour, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Allegations based on information contained in the award notice are dismissed as untimely because they were untimely asserted in the agency-level protest; the debriefing exception to GAO's timeliness regulations is not applicable to agency-level protests.
 2. Protest that the contracting officer unreasonably failed to challenge the status of the awardee as a service-disabled veteran-owned small business (SDVOSB) at the Small Business Administration is dismissed where the information giving rise to the allegation that the awardee was ineligible to be considered an SDVOSB was not apparent on the face of the awardee's quotation.
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DECISION

DSoft Technology, Engineering & Analysis, Inc., of Colorado Springs, Colorado, protests the issuance of a task order to AdaptiveVets, Inc., of West Melbourne, Florida, under request for quotations (RFQ) No. 36C10B23Q0434, issued by the Department of Veterans Affairs (VA), National Surgery Office (NSO), for technical application support for NSO systems. The protester challenges the reasonableness of the agency's evaluation of the awardee's quotation and asserts that the contracting officer's failure to pursue a challenge to the awardee's status at the Small Business Administration (SBA) was an abuse of discretion.

We dismiss the protest.

BACKGROUND

This RFQ, set aside for service-disabled veteran-owned small business (SDVOSB) concerns, sought a contractor to provide “technical application support for NSO Systems and Transplant and Web Tools in developing, supporting and updating applications for the NSO.” Agency Report (AR), Tab 5, RFQ at 47. The agency conducted the acquisition under the General Services Administration’s Federal Supply Schedule (FSS) program pursuant to Federal Acquisition Regulation (FAR) subpart 8.4, and limited the competition to vendors holding contracts under FSS multiple award schedule 54151S-Information Technology Professional Services. Contracting Officer’s Statement (COS) at 1. The RFQ anticipated the issuance of a single fixed-price task order with a 1-year base period and four 1-year options. RFQ at 105. The task order would be issued to the vendor whose quotation offered the best value to the agency, considering three factors: technical, past performance, and price. *Id.* The technical factor was significantly more important than the past performance factor; combined, those two factors were significantly more important than price. *Id.*

NSO received timely quotations from five vendors, including the protester and the awardee. AR, Tab 10, Notice of Award at 1. The evaluation team evaluated the quotations against the criteria set forth in the RFQ and the source selection plan. COS at 2. The contracting officer, who was also the source selection authority (SSA) for this procurement, reviewed “the detailed written evaluation reports that included a thorough write up of each [vendor’s] evaluation results.” *Id.* The SSA noted that NSO assessed DSoft’s and AdaptiveVets’s quotations the same adjectival ratings under the technical and past performance factors--good and low risk, respectively. *Id.* AdaptiveVets’s total evaluated price of \$2,492,318 was lower than DSoft’s total evaluated price of \$4,514,073. *Id.* at 2-3. After a comparative assessment of the quotations, the SSA determined that AdaptiveVets’s quotation provided the best overall value to the agency, and the SSA issued the task order to AdaptiveVets. *Id.* at 3.

The agency provided DSoft an award notice on October 3, 2023. The award notice included the evaluation ratings for the technical and past performance factors, as well as the total evaluated price, for DSoft’s and AdaptiveVets’s quotations. AR, Tab 10, Notice of Award at 2. On October 5, NSO provided DSoft with a brief explanation of the basis for award; in addition to the information provided in the award notice, the explanation identified two strengths the agency assessed DSoft’s quotation under the technical factor, described the agency’s evaluation of the protester’s quotation under the past performance factor, and described the agency’s rationale for issuing the task order to AdaptiveVets. AR, Tab 11, Brief Explanation at 2-4. On October 10, DSoft requested clarification of the brief explanation, which the agency provided on October 13. See AR, Tab 12, DSoft Request for Clarification; AR, Tab 13, Agency Response to Clarification. On October 11, DSoft requested that the contracting officer initiate a

protest of the awardee's SDVOSB status.¹ See Resp. to Agency Req. for Dismissal, attach. 1, Letter from DSoft to VA at 1.

On October 16, DSoft filed an agency-level protest that asserted the following: AdaptiveVets's quotation should have been assigned a significant weakness under the technical factor because it was highly probable that the awardee could not recruit and retain qualified software engineers at the awardee's quoted price; the agency unreasonably assessed both quotations as good under the technical factor because, according to USAspending.gov, AdaptiveVets has not been awarded a contract comparable in value to the competed requirement; the agency unreasonably assessed both quotations as low risk under the past performance factor, because DSoft's past performance was entitled to be evaluated higher than AdaptiveVets's past performance; the evaluators ignored two reports assessing DSoft's past performance on the predecessor NSO contract, rendering the evaluation of DSoft's past performance unreasonable; and the contracting officer's refusal to initiate an SBA protest challenging AdaptiveVets's status as a SDVOSB concern was an abuse of discretion. Protest, attach. 1, Agency-Level Protest at 2-13.

The protester asserted that the agency-level protest was timely filed on October 16, within 10 days of receipt the agency's response to DSoft's request for clarification on October 13. *Id.* at 1. On October 19, DSoft filed a supplemental agency-level protest asserting that, because the awardee quoted 38 percent fewer labor hours than the protester, it was unreasonable for the agency to assess both quotations as good under the technical factor. Protest, attach. 4, Supp. Agency-Level Protest at 2.

On December 5, the agency informed DSoft that NSO was dismissing or denying its allegations. See AR, Tab 15, Ruling on Agency-Level Protest; see also COS at 4 (noting that letter dated December 4 was delivered the following day). DSoft filed this protest on December 14.

DISCUSSION

DSoft, which is the incumbent contractor, alleges the following: the awardee's quotation should have been assessed a significant weakness under the technical factor because it is highly probable that AdaptiveVets cannot recruit and retain qualified software engineers at the quoted price; the agency disparately evaluated quotations when NSO evaluated both quotations as good under the technical factor; the agency unreasonably evaluated the awardee's quotation as low risk under the past performance factor; and the contracting officer's refusal to initiate an SBA status protest to determine whether

¹ On October 20, 2023, in accordance with 13 C.F.R § 134.1004(c), the contracting officer forwarded DSoft's request to SBA's Office of Hearings and Appeals (OHA) "to address the SDVOSB Status aspect" of DSoft's agency-level protest. COS at 3-4. OHA dismissed that protest as untimely. See *id.*

AdaptiveVets was entitled to be considered an SDVOSB was an abuse of discretion. As discussed below, we dismiss these allegations on two bases.²

Untimely Allegations

AdaptiveVets argues that DSoft failed to file a timely agency-level protest, and that DSoft's protest at GAO was thus untimely. Intervenor's Req. for Dismissal at 3, *citing* 4 C.F.R. § 21.2(a)(3) (noting that, if a timely agency-level protest was previously filed, any subsequent protest to GAO must be filed within 10 days of actual or constructive knowledge of initial adverse agency action). AdaptiveVets further argues that the debriefing exception to the 10-day deadline for filing protests is inapplicable for agency-level protests.³ Intervenor's Req. for Dismissal at 3, *citing* FAR 33.103(e) (noting that, at the agency level, except for protests based on alleged apparent improprieties in a solicitation, all protests shall be filed no later than 10 days after the basis of protest is known or should have been known).

Our Office has explained that the rules for filing an agency-level protest are generally established by the FAR, under which protests of other than alleged solicitation improprieties are required to be filed within 10 days after the basis of protest is known or should have been known, and the FAR does not contain a "required debriefing" exception to this 10-day rule. See *M2 Glob. Tech., Ltd.*, B-400946, Jan. 8, 2009, 2009 CPD ¶ 13 at 3, *citing* FAR 33.103(e).

² In addition, DSoft raised two allegations that it subsequently withdrew. First, DSoft alleged that the evaluators ignored two performance assessment reports for DSoft, rendering the past performance evaluation unreasonable. Protest at 14. DSoft withdrew that allegation when, as part of its request for dismissal, the agency produced the past performance evaluation for DSoft. See Resp. to Agency Req. for Dismissal at 15-16. Second, DSoft asserted that the agency disparately evaluated both quotations as good under the technical factor, notwithstanding that the awardee quoted 38 percent fewer labor hours than DSoft. Protest at 18-19. DSoft withdrew that ground of protest after the receipt of the agency report, which indicated that the information on which that allegation was based was incorrect. See Comments at 2.

³ 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). An exception to this general rule--referred to as the debriefing exception--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.*; *Centerra Integrated Facilities Servs., LLC*, B-418628, Apr. 23, 2020, 2020 CPD ¶ 155 at 4. In such cases--when a debriefing is required--with respect to any protest basis which is known or should have been known either before or as a result of the debriefing, the protest must be filed no later than 10 days after the date on which the debriefing is held. 4 C.F.R. § 21.2(a)(2).

The award notice provided to DSoft on October 3, combined with publicly available information, provided the protester with bases of protests for the following allegations: AdaptiveVets's quotation should have been assigned a significant weakness under the technical factor because it was highly probable that the awardee could not recruit and retain qualified software engineers at the awardee's quoted price; the agency unreasonably assessed both quotations as good under the technical factor because, according to USAspending.gov, AdaptiveVets has not been awarded a contract comparable in value to the competed requirement; and the agency unreasonably assessed both quotations as low risk under the past performance factor, because DSoft's past performance was entitled to be evaluated higher than AdaptiveVets's past performance. DSoft filed its agency-level protest on October 16, more than 10 days after receipt of the award notice. Accordingly, the above allegations, based on information in the award notice or publicly available, are dismissed as untimely, because they were untimely asserted at the agency level.

SDVOSB Status of Awardee

On October 11, DSoft asked the contracting officer to "police" the SDVOSB program by "institut[ing] an inquiry into a potentially fraudulent award." Resp. to Agency Req. for Dismissal, attach. 1, Letter from DSoft to VA at 1. Based on a review of the profile of AdaptiveVets's Chief Executive Officer on LinkedIn.com, DSoft asserted that there were credible grounds for an investigation into whether AdaptiveVets qualified as an SDVOSB. *Id.* The protester noted, *citing* 13 C.F.R. § 134.1004(a)(2), that the contracting officer may file such a status challenge at any time, while, according to the protester, it had "lost the opportunity to bring such a protest" because it was unaware of the information providing the basis for its challenge until more than 5 days after the October 3rd notice of award. *Id.* The contracting officer did not initiate a challenge to the awardee's status as an SDVOSB. DSoft asserts that the failure to do so was an abuse of the contracting officer's discretion. Protest at 16.

The contracting officer, the SBA, or the VA may file an SDVOSB (or VOSB) status protest at any time after the apparent awardee has been identified. 13 C.F.R. § 134.1004(a)(2). An interested party must submit its status protest by close of business on the fifth business day after notification by the contracting officer of the apparent successful offeror. 13 C.F.R. § 134.1004(a)(3). The contracting officer must forward to the SBA's OHA any VOSB or SDVOSB status protest received, notwithstanding whether the contracting officer believes it is premature, sufficiently specific, or timely. 13 C.F.R. § 134.1004(c).

The agency asserts that there are established procedures for interested parties to challenge a firm's SDVOSB status, and that GAO will examine the reasonableness of a contracting officer's decision not to challenge an apparent awardee's size status at the SBA in only one limited circumstance, namely, "when [the] protester argues the awardee's offer *on its face* demonstrates the awardee should not be eligible." Req. for Dismissal at 4, *citing Fiskars Brands, Inc., dba Gerber Legendary Blades*, B-412730, B-412730.2, May 20, 2016, 2016 CPD ¶ 139 at 8 (noting that a limited exception to the

rule that GAO will dismiss a challenge to firm's small business or socio-economic status applies where a protester argues that the awardee's offer or quotation shows, on its face, that it is not eligible for award as an SDVOSB; in those instances, GAO will review the reasonableness of the contracting officer's decision not to refer the matter to the SBA) (additional citations omitted). The agency contends that, absent such a claim, GAO will not consider the allegation. *Id.*

DSoft did not respond to the agency's contention that the facts of this case do not give rise to this limited exception. See Resp. to Agency Req. for Dismissal at 1-7. Instead, the protester reiterated its assertion that information on LinkedIn provided "credible grounds" for the agency to inquire into the awardee's status and a "reasonable possibility" that the awardee would not qualify as a SDVOSB. *Id.* at 2-3. For the allegation to be considered by GAO, the protester's claim must rely on the face of the awardee's quotation and not on publicly available information, such as LinkedIn. Because the protester has not alleged that the face of the awardee's quotation gave rise to DSoft's contention that AdaptiveVets is ineligible for award as an SDVOSB, we dismiss the allegation. *Fiskars Brands, Inc., dba Gerber Legendary Blades, supra* n.10.

The protest is dismissed.

Edda Emmanuelli Perez
General Counsel