



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: VMD Systems Integrators, Inc.

File: B-412729

Date: March 14, 2016

Kristen E. Ittig, Esq., Kara L. Daniels, Esq., and Nathaniel E. Castellano, Esq., Arnold & Porter LLP, for the protester.
Richard J. McCarthy, Esq., Randall T. Suratt, Esq., and Cody L. Corley, Esq., National Aeronautics and Space Administration, for the agency.
Joseph G. Billings, Esq., and Katherine B. Burrows, Esq., Miles & Stockbridge P.C., for MORI Associates, Inc., an intervenor.
Young H. Cho, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Post-award protest challenging exclusion from competitive range, based on information obtained during post-award debriefing, is untimely where protester requested that the debriefing be delayed until after award.

DECISION

VMD Systems Integrators, Inc. (VMD), of Reston, Virginia, protests its exclusion from the competitive range by the National Aeronautics and Space Administration (NASA) under request for proposals (RFP) No. NNJ14498840R for information technology, information management, communications, and multimedia services. VMD argues that its proposal was excluded based on the agency's disparate treatment of competing proposals.

We dismiss the protest as untimely.

The RFP, issued on March 30, 2015 under Federal Acquisition Regulation (FAR) part 15, was set aside for small businesses. The RFP contemplated the award of a single indefinite-delivery, indefinite-quantity contract, to be made on a best-value basis considering the following evaluation factors: mission suitability, past performance, and cost/price. Protest, exh.1, Solicitation at 1. The solicitation stated that the non-cost/price factors, when combined, were more important than

price; however, mission suitability was more important than past performance or price, and price was more important than past performance. Id.

VMD submitted its proposal by the proposal due date and was evaluated by a source evaluation board (SEB). The agency's evaluation identified a number of significant weaknesses in VMD's proposal under the mission suitability factor. Protest, exh. 5, SEB Findings at E-7, E-11 to 13. On December 1, 2015, NASA notified VMD that its proposal had not been included in the competitive range "[b]ecause of its low mission suitability score." Protest, exh. 3, Notification of Exclusion. The notification letter informed VMD that "[r]equests for debriefings shall be in accordance with the [Federal Acquisition Regulation (FAR)], Parts 15.505 [Preaward debriefing of offerors] and 15.506 [Postaward debriefing of offerors]." Id. VMD elected to receive a post-award debriefing "in order to learn as much as possible from the debriefing process so that it might better improve its performance in future procurements." Protest at 2, 4.

On February 1, 2016, VMD was notified of the award to MORI Associates, Inc. (MORI), and on February 4, 2016, the agency provided VMD with a post-award debriefing. Protest at 3. As part of the debriefing, NASA provided VMD with debriefing slides, the source selection decision document, and the SEB's findings with regard to the evaluation of VMD's proposal. See Protest, exh. 3, Debriefing Slides; exh. 4, Source Selection Decision Document (SSDD); exh. 5, SEB Findings. As relevant here, the SSDD discussed the strengths that were identified under the mission suitability factor in the proposals that were included in the competitive range.¹ See Protest, exh. 4, SSDD at 16-21.

On February 11, 2016, VMD filed this protest challenging its exclusion from the competitive range and alleging that the agency treated its proposal disparately from the proposals submitted by competitive-range offerors. The protester argues that the agency held VMD's proposal to a higher standard under the mission suitability factor and past performance factor. Specifically, VMD argues that under this factor, the agency assigned strengths to the two other offerors' proposals but failed to do the same for VMD's proposal, even though (according to the protester) VMD proposed the same or substantially similar performance. Protest at 8-15. Similarly, VMD also challenges the rating assigned by the agency under the past performance factor, arguing that the agency assigned identical ratings to VMD and one of the offerors in the competitive range, even though, according to the protester, VMD provided the "unique advantage" of proposing [REDACTED]. Id. at 15-16.

¹ The source selection decision document indicated that the strengths identified in initial proposals did not change in the evaluation of final proposal revisions. See Protest, exh. 4, Source Selection Decision Document at 13, 15.

Prior to the due date for the agency report, in response to our Office's request to address the timeliness of the protest, the agency filed a request for dismissal on grounds that the protest should be dismissed as untimely.

Our bid protest rules provide that protests, other than those based on alleged solicitation improprieties, shall be filed no later than 10 days after the basis of the protest is known or should have been known, with the exception of protests challenging a procurement "under which a debriefing is requested and when requested, is required." 4 C.F.R. § 21.2(a)(2).

The agency argues that here, because VMD chose to delay its debriefing until after award, the exception in our timeliness rules based on receipt of a required debriefing is inapplicable. In response, the protester argues that it first learned the information on which its protest is based from the source selection decision, which could not have been obtained in a pre-award debriefing. Protester's Response to Agency's Request for Dismissal at 1. The protester further contends, without authority, that "the only relevant issue for GAO is whether, prior to award, VMD 'knew or could have known' the information on which VMD bases its unequal treatment and unreasonable award challenge." *Id.* at 2. We disagree.

As stated in our timeliness rules, a post-award debriefing protest will be considered timely if filed as late as 10 days after the debriefing, even as to issues that should have been known before the debriefing, if that debriefing is "required." Here, VMD concedes that its post-award debriefing was not a "required" debriefing.² Protester's Response to Agency's Request for Dismissal at 2. Instead, the protester argues that its basis of protest--the alleged unequal treatment of proposals in the evaluation--is based on information VMD did not and could not have known until after it received the source selection decision document. *See* Protest at 3. In this regard, the protester contends that because the FAR prohibits disclosure of information about the evaluation of other offerors' proposals in a pre-award debriefing, it could not, as a matter of law, have learned of any disparate treatment earlier, had it chosen to receive a pre-award debriefing. Protest at 4; Protester's Response to Agency's Request for Dismissal at 2 (*citing* FAR § 15.506(f)(3)-(5)).

The protester's argument reflects a misunderstanding of our timeliness rules in this particular context. At the time of its exclusion from the competition, the protester could have requested a pre-award debriefing, from which it would have learned the

² The Competition in Contracting Act of 1984 provides that a contracting officer is required to provide a post-award debriefing to an offeror excluded from the competitive range only if that offeror requested and was refused a pre-award debriefing. *See* 41 U.S.C. § 253b(f)(2); *see also* FAR § 15.505(a)(2). Here, it is undisputed that VMD elected to forego a pre-award debriefing in favor of the post-award debriefing.

results of the evaluation of its proposal and the basis for its exclusion from the competitive range.³ See Protest, exh. 4, SSDD at 7. To the extent the protester believed that its exclusion was unreasonable, it could have protested that at that time. Instead, by electing to receive a post-award debriefing in order to “improve its performance in future procurement,” it effectively chose not to protest its exclusion from the competitive range. After the post-award debriefing, since its proposal was excluded, VMD is not an interested party for purposes of challenging the evaluation of other offers, or the award decision. See 4 C.F.R. § 21.0(a)(1).

VMD argues, nonetheless, that “[i]f the post-award debriefing reveals improprieties that could not have been discovered during a pre-award debriefing, a protest on those grounds is timely if it is filed within ten days of the date the protester knew or should have known of the basis of protest,” Protest at 3, citing our decision in University of Mass. Donahue Inst., B-400870.3, July 15, 2009, 2009 CPD ¶ 173.

The protester’s reliance on University of Mass. Donahue Inst. is misplaced. There, the protester had submitted eight proposals under a single solicitation that provided for multiple awards. Id. at 4. When one of the protester’s proposals was eliminated from the competition, the protester elected not to receive a pre-award debriefing. Id. at 9. After the awards were made, the University of Massachusetts filed a protest challenging the elimination of one of its proposals from the competition, and, at the same time, protesting the evaluation of four of its and the awardee’s proposals. Our decision dismissed the protester’s arguments pertaining to the elimination of one of its proposals as untimely--as we do VMD’s protest, here--and considered the merits of the arguments challenging the evaluation of proposals that were not eliminated from the competition. See id. at 9, 11. It did not, as the protester claims, “[dismiss] as untimely those grounds that the protester could have learned at the pre-award debriefing [but permit] the ground related to the evaluation of other offerors to proceed on the merits.” Response to Agency’s Request for Dismissal at 2. In sum, our conclusion here is consistent with the cited decision.

The protest is dismissed.

Susan A. Poling
General Counsel

³ During a pre-award debriefing, an offeror is entitled to information concerning the agency’s evaluation of significant elements of the firm’s proposal and a summary of the rationale for eliminating the offeror from the competition. See FAR § 15.505(e).