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Decision

Matter of: Team J's, LLC

File: B-415090

Date: November 14, 2017

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DIGEST

Protest is untimely where the protester was excluded from the competition prior to award and the protester neither requested a debriefing within three days of the exclusion nor filed a protest within ten days of the exclusion.

DECISION

Team J's, LLC (TJL), an 8(a) small business of Dunkirk, Maryland, protests the award of a contract to Melgar Janitorial Solutions, an 8(a) small business of San Jose, California, under request for proposals (RFP) No. GS-11P-17-YE-D-0001 issued by the General Services Administration (GSA) for janitorial and cleaning services. The protester contends that the agency erred in finding it nonresponsible because the agency misinterpreted a provision of the solicitation, and further that the Small Business Administration (SBA) denied it a certificate of competency (COC) because of the manner in which the agency presented the issue to SBA.

We dismiss the protest because it is untimely.

BACKGROUND

The agency issued the RFP on December 2, 2016, as an 8(a) set-aside, and contemplated the award of single fixed-price indefinite-delivery, indefinite-quantity contract. RFP at 1, 3. The contract was to be awarded on a lowest-priced technically-acceptable basis, with three technical evaluation factors: (1) corporate experience; (2) past performance; and (3) key personnel. *Id.* at 122. Of note, the solicitation

provided that the contractor's submission in response to the corporate experience factor should provide corporate experience information on a minimum of three and a maximum of seven projects. In addition, the solicitation provided that each project required substantive performance of a list of requirements, to include demonstrating that the offeror has "experience on at least three (3) Custodial/Janitorial Service Contracts in facilities over 800,000 gross square feet." Id. at 123.

In its proposal, TJJ included three reference contracts that it identified as responsive to the janitorial services requirement, but did not include square footage figures for those three contracts. TJJ Technical Proposal at 5-9, 14. As a result of this omission, among other issues not contested in this protest, the agency issued a determination of nonresponsibility and referred the protester to the SBA for a COC determination on May 3, 2017. Agency Request for Dismissal at 2. On May 18, the SBA sent a letter to the protester informing it that the agency had found it nonresponsible, and noted that this finding was due to, among other things, omission of details such as the gross square footage of past projects. Letter from SBA to TJJ, May 18, 2017. On May 25, the protester provided information to SBA concerning the square footage of some, but not all of the submitted references. Letter from TJJ to SBA, May 25, 2017. Of note, the prior contracts discussed in the May 25 letter collectively exceeded 900,000 square feet. Id. However, no single contract discussed exceeded 800,000 square feet, and not all the contracts discussed involved the performance of janitorial or custodial services. Id. On June 6, the SBA requested that the agency confirm that TJJ was the apparent awardee. E-mail from SBA to TJJ, June 6, 2017.

On July 7, based on the information provided by the protester, the SBA declined to issue a COC, stating that the solicitation required, among other things, experience managing a minimum of three separate contracts for janitorial services at facilities with a size in excess of 800,000 square feet, but that TJJ had provided contracts that only exceeded 800,000 square feet when combined, some of which were not janitorial or custodial in nature. SBA COC Determination at 1. On July 14, the protester clarified in correspondence to the agency that the three responsive references submitted in its proposal were contracts for janitorial or custodial services representing 1,200,000 square feet collectively, and that, in its view, this met the requirements of the solicitation. E-mail from TJJ to GSA, July 14, 2017. Following some additional correspondence, TJJ sent an additional e-mail on July 20, noting that an SBA representative clarified that the SBA and GSA both interpreted the solicitation as requiring 3 contracts totaling 2.4 million square feet, but that TJJ did not agree with this reading of the solicitation. E-mail from TJJ to GSA, July 20, 2017. The agency notified TJJ on July 21 that the agency had revisited TJJ's proposal, but found no basis to reverse the nonresponsibility determination with respect to corporate experience. E-mail from GSA to TJJ, July 21, 2017. Specifically, the agency indicated that TJJ's proposal did not meet the requirements of the solicitation and that the agency could not "move forward with an award with Team J." Id. On July 31, the agency awarded a contract to Melgar Janitorial Services (MJS), and notified TJJ of the award on August 9. Agency Report at 5. This protest followed on August 15, 2017.

DISCUSSION

TJL contends that the agency's evaluation of its proposal and determination of nonresponsibility were unreasonable because they were premised on an unreasonable reading of the janitorial services requirement. Protester's Comments on the Agency Report at 1-2. Additionally, TJL contends that the SBA's refusal to issue a COC was predicated on the misleading manner in which the agency presented information to the SBA in connection with its proposal.¹ Protest at 3. TJL further contends that its protest is timely because it did not have notice that it would not receive the contract until it received the notice of award on August 9. Protester's Response to Agency Request for Dismissal at 3. In this connection, TJL argues that GSA and SBA sent inconsistent signals about its eligibility for award, by for example, issuing a determination of nonresponsibility on May 18, but then allegedly notifying TJL that it was the apparent awardee on June 6.² Id. TJL also notes that it requested a debriefing on August 10, and that its request was acknowledged by the agency. Id.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Verizon Wireless, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4. Under these rules, a protest based on other than alleged improprieties in a solicitation must generally be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). However, in situations where a debriefing is requested, and when requested, required, our Bid Protest Regulations provide that protest grounds known either before or as a result of a debriefing may be filed not later than 10 days after the date on which the debriefing is held. 4 C.F.R. § 21.2(a)(2).

Here, the required debriefing exception to the 10-day rule does not apply because the protester's requested debriefing was not a required debriefing. In a negotiated procurement, such as the procurement at issue, where an offeror is excluded from the competition prior to award, a debriefing is only required if submitted, in writing, to the

¹ In its comments on the agency report, the protester advanced a separate argument that the awardee was also found nonresponsible at one point in the evaluation and that no later evidence has been adduced demonstrating them to be responsible. Protester's Comments on the Agency Report at 3. Because, as discussed herein, the protester failed to timely challenge its exclusion from the competition, it would not be an interested party to raise this argument where, as here, the record reflects that there were multiple other offerors who would be in line for award. See 4 C.F.R. § 21.0(a)(1).

² We note that the e-mail provided by TJL in support of this argument only suggests that the SBA requested confirmation from the agency that TJL was the apparent awardee, but does not indicate that such confirmation was actually received. E-mail from SBA to TJL, June 6, 2017.

contracting officer within three days after receipt of notice of exclusion from the competition. See Empire Veteran Group, B-408866.2, B-408866.3, Dec. 17, 2013, 2013 CPD ¶ 294 at 4, citing Federal Acquisition Regulation (FAR) § 15.505(a)(1); VMD Systems Integrators, Inc., B-412729, Mar. 14, 2016, 2016 CPD ¶ 88 at 3 n.2; see also 41 U.S.C. § 3705 and FAR § 15.505(a)(3). The record reflects that the protester was excluded from the competition, at the latest, on July 21, when GSA notified TJJ that its proposal did not meet the requirements of the solicitation and that the agency could not move forward with an award to TJJ.³ E-mail from GSA to TJJ, July 21, 2017. The protester did not request a debriefing until August 10, one day after it received notice of award to another offeror, but nearly 20 days after learning of its exclusion from the competition. Since the protester did not submit a timely request for a pre-award debriefing, no debriefing was required, and the timeliness of the protest is measured from the date TJJ first knew or should have known its protest grounds.

The record demonstrates that the protester knew its basis for protest more than ten days prior to when the protest was filed. On July 7, the SBA declined to issue a COC noting that the protester had not met the requirement to demonstrate experience managing a minimum of three separate contracts for janitorial services at facilities whose size exceed 800,000 square feet. SBA COC Determination at 1. Additionally, on July 20, TJJ sent an e-mail explaining that TJJ was aware that the SBA disagreed with TJJ's interpretation of the terms of the solicitation, and that the SBA representative told TJJ that "this decision was GSA's due to the way the requirement was interpreted." E-mail from TJJ to GSA, July 20, 2017. Thus, the protester's own e-mail confirms that it knew of GSA's interpretation of the disputed provision and the SBA's adoption of that position by July 20 at the latest, and GSA unequivocally indicated that TJJ was not eligible for award on July 21. Because TJJ's protest was filed on August 15, 26 days after that e-mail and 25 days after GSA's confirmation that TJJ would not receive award, the protest is untimely.

The protest is dismissed.

Susan A. Poling
General Counsel

³ While the record shows that TJJ continued to pursue the issue via e-mail with GSA and SBA following July 21, the record does not contain anything that would suggest that either GSA or SBA modified their positions. See, e.g., e-mail from TJJ to GSA, July 23, 2017; e-mail from TJJ to SBA, July 24, 2017. In any case, attempting to resolve adverse agency action through informal channels does not toll our timeliness rules. See, e.g., Scheduled Airlines Traffic Offices, Inc., B-244852, Oct. 24, 1991, 91-2 CPD ¶ 369 at 4-5.