



Decision

Matter of: Medical Staffing Solutions USA

File: B-415571; B-415571.2

Date: December 13, 2017

Edward J. Tolchin, Esq., Offit Kurman Attorneys at Law, for the protester.
Major Bruce H. Robinson, and Scott N. Flesch, Esq., Department of the Army, for the agency.
Todd C. Culliton, Esq., and Scott H. Riback, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is dismissed as abandoned when the agency provided a detailed response to the initial protest allegations and the protester did not offer any rebuttal in its comments.
2. Protest is dismissed as untimely when the protester did not raise new protest allegations within 10 days of when it knew or should have known of them.

DECISION

Medical Staffing Solutions USA (MSS), of Norfolk, Virginia, protests the award of a contract to WJM Professional Services, LLC, of Rockville, Maryland, under request for proposals (RFP) No. W91YTZ-17-R-0002, issued by the Department of the Army for emergency physician services at Fort Benning, Georgia. MSS alleges that the agency misevaluated WJM's proposal and made an unreasonable best-value tradeoff determination.

We dismiss the protest.

On February 2, 2017, the agency issued the solicitation as a small business set-aside under the U.S. Small Business Administration's 8(a) program, which contemplates the award of a fixed-price contract for emergency physician services to be performed over a one-year base period and four 1-year option periods. RFP at 1; Tab 5, RFP amend. 1 at 2. The RFP specified that award would be made on the basis of a best-value tradeoff evaluation, and that proposals would be evaluated based on three factors: technical, past performance, and price. RFP at 81-82.

The agency received 14 offers prior to the closing date set for receipt of proposals. It awarded the contract to WJM at a price of \$9,573,326. In the agency's letter notifying MSS of the award decision, the agency provided MSS with a side-by-side comparison of MSS's and WJM's evaluations. Tab 9, Unsuccessful Offeror Letter, at 1. The comparison detailed both offerors technical ratings, but for the past performance factor, the comparison did not provide a rating for WJM's past performance evaluation. Id.

On October 16, MSS filed the instant protest, and alleged four protest grounds predicated on WJM lacking any past performance. MSS alleged that the agency failed to evaluate WJM's proposal under the past performance factor, and that if the agency had evaluated WJM's past performance, then WJM would not have received the award. Protest at 6. Further, MSS asserted that, had the agency rated WJM's past performance as "neutral" because WJM lacked past performance, then WJM would have been ineligible for award under the terms of the solicitation. Id. at 7. MSS also alleged that the agency improperly evaluated WJM's technical proposal because WJM lacked past performance, and that the agency conducted an unreasonable best-value tradeoff evaluation because MSS's better past performance rating and lower price should have outweighed WJM's superior technical rating and lack of past performance. Id. at 6-7.

On November 3, prior to the agency report deadline of November 15, the agency submitted a partial agency report containing all relevant documents except for the agency's legal memorandum and the contracting officer's statement of facts. E-mail from Agency to GAO, Nov. 3, 2017. The partial agency report contained the Price Negotiation Memorandum, which showed that the agency evaluated WJM as having very relevant past performance and assigned a past performance confidence rating of "substantial confidence." Tab 8, Price Negotiation Memorandum at 22. Further, the Price Negotiation Memorandum provided that the agency compared the two proposals when conducting its tradeoff evaluation and determined WJM's higher-rated proposal warranted the additional price. Id. at 23. The partial agency report also contained the past performance information from WJM's proposal. Tab 6, WJM's Revised Proposal at 27. On November 15, the agency submitted the balance of its agency report. E-mail from Agency to GAO, Nov. 15, 2017.

On November 27, MSS submitted its comments on the agency report. The protester's comments alleged that WJM should not have received a "substantial confidence" past performance assessment rating based on the submitted past performance information but instead should have received a neutral rating, at most. Comments at 1-2. MSS also argued that the agency unreasonably evaluated WJM's technical proposal because the agency failed to document its evaluation. Id. at 2. MSS further argued that the agency's tradeoff determination was flawed because the agency's analysis improperly applied price realism. Id. at 3-4. On November 28, the agency submitted a request for dismissal, alleging that the arguments raised in MSS's comments constitute supplemental grounds of protest and should be dismissed as untimely.

As an initial matter, the agency report shows that it assigned WJM's past performance a rating of "substantial confidence" based on its submitted past performance history, and in its comments, MSS no longer asserts that WJM lacked any past performance or that the agency did not conduct a past performance evaluation. Where, as here, an agency provides a detailed response to a protester's assertion and the protester fails to rebut the agency's argument in its comments, the protester fails to provide us with a basis to conclude that the agency's position with respect to the issue in question is unreasonable, and as a result, the protester abandons that assertion. IntegriGuard, LLC d/b/a HMS Federal--Protest and Recon., B-407691.3, B-407691.4, Sept. 30, 2013, 2013 CPD ¶ 241 at 5; Atmospheric Research Sys., Inc., B-240187, Oct. 26, 1990, 90-2 CPD ¶ 338 at 3. Thus, we find that MSS abandoned its original protest grounds because, as noted above, all of MSS's original protest grounds were predicated on WJM lacking past performance or the agency failing to evaluate WJM's lack of past performance.

To the extent MSS raises new protest allegations in its comments, we dismiss them as untimely. Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2), require that protests other than those challenging the terms of a solicitation be filed within 10 days of when a protester knew or should have known of its basis for protest. Further, where a protester initially files a timely protest, and later supplements it with new grounds of protest, the later-raised allegations must independently satisfy our timeliness requirements, since our Regulations do not contemplate piecemeal presentation or development of protest issues. Epsilon Sys. Sols., Inc., B-409720, B-409720.2, July 21, 2014, 2014 CPD ¶ 230 at 11.

Here, the agency produced the price negotiation memorandum, the technical evaluation document, and the relevant portions of WJM's proposal on November 3. Under our Bid Protest Regulations, any arguments based on these documents must then have been filed with our Office by November 13. Because MSS did not raise these new arguments until it submitted its comments on November 27, they are untimely and not for consideration.

In reaching that conclusion, we are unpersuaded by MSS's argument that the allegations raised in its comments are not new grounds of protest. Allegations raised during the course of a protest constitute new protest grounds when the later-raised allegations are independent from, and provide no support for, the initial protest grounds. Ti Hu, Inc., B-284360, Mar. 31, 2000, 2000 CPD ¶ 62 at 4; Vinnel Corp., B-270793, B-270793.2, Apr. 24, 1996, 96-1 CPD ¶ 271 at 7-8.

The arguments raised in MSS's comments constitute new protest grounds because the later-raised allegations are independent of the original protest grounds. Whereas the original protest allegations were predicated on the assertion that WJM lacked any relevant past performance, the allegations raised in the comments are predicated on the agency allegedly incorrectly evaluating WJM's past performance and improperly applying price realism principles. Furthermore, the later-raised allegations provide no support for the original protest grounds because arguing that the agency should have

rated WJM's past performance less favorably does not support the allegation that WJM lacked any past performance. Similarly, arguing that the agency improperly conducted its tradeoff evaluation because the agency improperly conducted a price realism analysis does not support the allegation that the agency improperly failed to consider that WJM had no past performance.

While MSS is correct in observing that its new protest grounds are related to its original protest grounds, a strong factual nexus between protest grounds does not change the independent legal nature of the allegations. See Ti Hu, Inc., supra at 4 (protester's subsequent allegation constituted a supplemental protest ground, even though both allegations were predicated on the agency's past performance evaluation). Accordingly, MSS's allegations raised in its comments constitute new protest grounds, and are dismissed as untimely since the protester raised those protest grounds more than 10 days after it knew or should have known of them.

The protest is dismissed.

Thomas H. Armstrong
General Counsel