



Decision

Matter of: Loc Performance Products, Inc.

File: B-417431

Date: April 22, 2019

Christian B. Nagel, Esq., Edwin O. Childs, Jr., Esq., Blake R. Christopher, Esq., Nathan R. Pittman, Esq., McGuire Woods LLP, for the protester.
Debra J. Talley, Esq., Department of the Army, for the agency.
Michael Willems, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest filed based on information obtained during post-award debriefing is not timely filed where protester who was excluded from competitive range declined a required pre-award debriefing in favor of a post-award debriefing that was not required.

DECISION

Loc Performance Products, Inc., a small business of Plymouth, Michigan, protests its exclusion from the competitive range, and the agency's determination of affirmative responsibility for Ibis Tek, Inc., under solicitation No. W15QKN-18-R-0004 issued by the Department of Army for armor hardware, turret systems, and platform integration kits. The protester alleges that the agency erred in several respects in evaluating its proposal, and additionally erred in conducting a responsibility determination for Ibis Tek.

We dismiss the protest.

BACKGROUND

The agency issued the solicitation on October 25, 2017, and the protester submitted its proposal on January 19, 2018. Agency Request to Dismiss at 1. On September 11, the agency notified the protester that it was excluded from the competitive range. Id. On that date, the protester requested a pre-award debriefing. Agency Request to Dismiss, Tab 1, Email Exchanges at 7. In response, the agency explained to the protester that different information would be available in a pre-award debriefing than in a post-award debriefing, and clarified that the protester could elect either one, but must choose one or the other. Id. at 5-7. The protester then declined a pre-award debriefing and elected to

receive a post-award debriefing. Id. at 4. The protester learned of the contract award on February 7, 2019, and requested a debriefing, which the agency provided on March 22. Agency Request to Dismiss, Tab 1, Email Exchanges at 2-3. The protester filed a protest with our Office on March 27, followed by a more detailed supplemental protest on April 1.

DISCUSSION

The protester contends that its protest should be considered timely because it learned of the information forming the basis of its protest for the first time in its post-award debriefing on March 22, 2019. Protester's Opposition to Agency Request to Dismiss at 1-4. The protester argues, therefore, that both its protest filed on March 27 and its supplemental protest filed on April 1 were filed within 10 days of when it knew, or should have known, of its basis for protest. Id.

The Competition in Contracting Act, as amended, requires that offerors which are excluded from the competitive range must be debriefed by the procuring agency if, within 3 days after receiving notice of such exclusion, the offeror requests a pre-award debriefing. 41 U.S.C. § 3705(a). As set forth in our timeliness rules, a post-award debriefing protest will be considered timely if filed not later than 10 days after the debriefing, even as to issues that should have been known before the debriefing, if that debriefing is "required." 4 C.F.R. § 21.2(a)(2). The statute specifically addresses the issue of when agencies are required to give post-award debriefings to offerors excluded from the competitive range, providing that such debriefings are required "only if that [excluded] offeror requested and was refused a pre-award debriefing." 41 U.S.C. § 3705(c).

In this case, the protester was offered and declined a required pre-award debriefing.¹ Accordingly, the post-award debriefing received by the protester was not a required debriefing. Absent a required debriefing, protests, other than those of the terms of a solicitation, must be filed within 10 days of when a protester knew, or should have known the basis for the protest grounds. 4 C.F.R. § 21.2(a)(2).

However, our Office has consistently concluded that a protester may not passively await information providing a basis for protest; rather, a protester has an affirmative obligation

¹ The protester contends that the agency engaged in "gamesmanship" by suggesting that the protester select a post-award debriefing, despite the protester's initial intent to request a pre-award debriefing. Protester's Opposition to Agency Request to Dismiss at 3-4. The record reflects that the agency merely responded to the protester's initial request for a pre-award debriefing by requesting confirmation from the protester and providing additional information about the protester's options. Agency Request to Dismiss, Tab 1, Email Exchanges at 4-7. The record reflects no misleading or inappropriate behavior on the agency's part, nor does the record support the protester's characterization that the agency suggested that the protester defer the debriefing. Id.

to diligently pursue such information, and a protester's failure to utilize the most expeditious information-gathering approach may constitute a failure to meet this obligation. See, e.g., Thomas May Constr. Co., B-255683, Mar. 23, 1994, 94-1 CPD ¶ 210; Automated Med. Prods. Corp., B-275835, Feb. 3, 1997, 97-1 CPD ¶ 52 at 2-3; Bannum, Inc., B-408838, Dec. 11, 2013, 2013 CPD ¶ 288 at 5; MILVETS Systems Tech., Inc., B-411721.2, B-411721.3, Jan. 14, 2016, 2016 CPD ¶ 42 at 8. In this respect, we have specifically concluded that where, as here, a protester elects to delay a required pre-award debriefing, the protester has failed to diligently pursue any protest grounds which the protester would have discovered in that pre-award debriefing. See United International Investigative Services, Inc., B-286327, Oct. 25, 2000, 2000 CPD ¶ 173 at 3.

The protester contends that our decisions have come to different conclusions on this point both before and after our decision in United States International Investigative Services. Protester's Opposition to Agency Request to Dismiss at 3-4 (citing Sumaria Sys., Inc., B-299517, B-299517.2, June 8, 2007, 2007 CPD ¶ 122; Raith Eng'g & Mfg. Co., W.L.L., B-298333.3, Jan. 9, 2007, 2007 CPD ¶ 9; and Trifax Corp., B-279561, June 29, 1998, 98-2 CPD ¶ 24). However, the protester misconceives our conclusions in those decisions. Those decisions collectively affirm that even where a disappointed offeror does not secure a required debriefing, it continues to retain its right to file a protest within 10 calendar days after it learns, or should have learned, the basis for protest, provided it has diligently pursued the matter. See Raith Eng'g & Mfg. Co., W.L.L., supra at 3. However, none of those decisions involve a protester that deliberately deferred a required pre-award debriefing until after contract award.²

United International Investigative Services, Inc., supra, is not inconsistent with those decisions. Our reasoning in that decision does not suggest that protesters may not file protests on the basis of information learned in non-required debriefings, but rather concludes narrowly that a protester fails to diligently pursue its protest when it declines to receive a required pre-award debriefing, and instead waits until after award to receive a debriefing. In effect, a protester should have known, prior to award, about any grounds of protest that it would have discovered had it requested a required pre-award debriefing.

In this case, the protester would have learned of the agency's alleged errors in evaluating its proposal had it requested the pre-award debriefing. By declining to receive the required pre-award debriefing the protester did not diligently pursue those

² Sumaria Sys., Inc., supra, involved a procurement in which no required debriefing of any kind was at issue. Raith Eng'g & Mfg. Co., W.L.L., supra, involved a procurement in which a post-award debriefing was required, but in which the agency argued that the protester made an untimely request for that debriefing. Trifax Corp., supra, involved a procurement in which a pre-award debriefing was required, and in which the protester made an untimely request for that debriefing, but nonetheless received the debriefing prior to award.

protest grounds. See United International Investigative Services, Inc., supra. Accordingly, the protester's challenges to its own evaluation are dismissed as untimely.

This leaves only the protester's challenges to the agency's determination of Ibis Tek's affirmative responsibility. Setting aside that we generally only consider agency determinations of affirmative responsibility in certain narrow circumstances, these protest grounds are also untimely for different reasons. See 4 C.F.R. § 21.5(c). In support of this protest ground, the only factual evidence alleged by the protester involves publicly available information about Ibis Tek from October of 2017. Supp. Protest at 7-9. Accordingly, the protester knew, or should have known, all relevant information regarding this protest ground when it learned of the contract award on February 7, 2019. Agency Request to Dismiss, Tab 1, Email Exchanges at 2-3. This protest ground was introduced, for the first time, in the protester's supplemental protest filed on April 1, more than ten days after February 7.³ Supp. Protest at 7-9. Accordingly, this protest ground is also untimely.

The protest is dismissed.

Thomas H. Armstrong
General Counsel

³ While the protest ground was filed within 10 days of the protester's post-award debriefing on March 22, that debriefing, as discussed above, was not a required debriefing, and therefore the debriefing exception to our normal timeliness rules does not apply. See 4 C.F.R. § 21.2(a)(2).