



Decision

Matter of: K2 Solutions, Inc.

File: B-417689

Date: September 24, 2019

Meghan Whitt, Esq., K2 Solutions, Inc., for the protester.
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Gregory P. Weber, Esq., Koprince Law, LLC, for Actionable Solutions Group, LLC, the
intervenor.

Heather M. Mandelkehr, Esq., and Alexis J. Bernstein, Esq., Department of the Air
Force, for the agency.

Evan C. Williams, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

1. Protest challenging the agency's evaluation of awardee's proposal under the past performance evaluation factor is denied where the solicitation did not prohibit the agency from giving more weight to the past performance of awardee's joint venture partner than the past performance of a subcontractor, and the agency's evaluation was reasonable.
2. Protest alleging that the agency failed to comply with the pre-award notification requirements of Federal Acquisition Regulation § 15.503(a)(2) is denied where the failure to provide such notice constitutes a procedural deficiency that did not affect the validity of the award.

DECISION

K2 Solutions, Inc. (K2), a service-disabled veteran-owned small business (SDVOSB), of Southern Pines, North Carolina, protests the award of a contract to Actionable Solutions Group, LLC (ASG)¹ under request for proposals (RFP) No. H92222-18-R-0012, issued

¹ ASG is a SDVOSB joint venture between Preting and Cyberspace Solutions, LLC (Cyberspace), under the Small Business Administration's (SBA) All-Small Mentor/Protégé Program. Intervenor's Comments at 1.

by the Department of Defense, United States Special Operations Command (SOCOM), for intelligence support services. K2 argues that the agency unreasonably evaluated ASG's proposal under the past performance factor. The protester also contends the agency violated Federal Acquisition Regulation (FAR) § 15.503(a)(2) by failing to provide K2 a pre-award notice of the agency's intent to make award to ASG.

We deny the protest.

BACKGROUND

On June 15, 2018, the agency posted the RFP synopsis on the Federal Business Opportunities website. Agency Report (AR), Tab 3, RFP Synopsis (June 15, 2018). The agency notified potential offerors that the RFP would only be provided to verified SDVOSBs that possessed a top secret facilities clearance with the capability to provide Secret-level information safeguarding. *Id.* at 1-2; Contracting Officer's Statement (COS) at 7. On July 13, the agency made the RFP available to eligible offerors upon request. AR, Tab 4, RFP Synopsis (July 13, 2018); COS at 7.

The RFP was set aside for SDVOSBs, and issued under the procedures of FAR part 15. AR, Tab 5, RFP at 49; COS at 2. The RFP sought proposals to provide analytical intelligence, technical assistance, and special security services to support Joint Special Operations Task Force units in various worldwide locations. RFP, Statement of Work (SOW), at 1.

The RFP contemplated the award of a single contract with a combination of labor-hour, fixed-price and cost-reimbursement contract line items, for a base year and four 1-year options periods. RFP at 1-37, 106. The RFP provided that award would be made on a best-value tradeoff basis among the following factors, listed in descending order of importance: transition plan, management plan/key personnel/oral presentation, past performance, and price.² RFP § M at 3-4.

As relevant to this protest, under the past performance factor, offerors were instructed to submit information on contracts considered recent and relevant in demonstrating their ability to perform the RFP's requirements. RFP § L at 10. The RFP defined recent contracts as contracts performed, all or in part, during the past three years from the date of issuance of the solicitation. *Id.* at 11. For prime contractors, the RFP defined relevant contracts as contracts performed that are "most similar" to the overall effort of

² The RFP also included a general and administrative qualifying criteria evaluation factor that would be evaluated on a pass/fail basis. RFP § M at 1, 3.

the solicitation, as stated in the SOW.³ Id. As relevant to this protest, the RFP instructed potential joint venture (JV) offerors, as follows:

If the Prime Offeror is a Joint Venture, and the Joint Venture does not have a minimum of three active or completed Government contracts/task/delivery orders to submit, then the Joint Venture shall submit whatever relevant Past/Present Performance Information Sheets they have (two or less) and the Managing Partner shall submit a minimum of three and a maximum of five Past/Present Performance Information Sheets with each partner and any non-partner subcontractors performing +20% of the work submitting a minimum of one and maximum of two Past/Present Performance Information Sheets.

RFP § L at 10.

With respect to the agency's evaluation, the RFP stated, "[t]he [p]ast [p]erformance evaluation considers the Offeror's (including subcontractors and partners) demonstrated record of performance in providing services and products that meet the users' needs and in past performance regarding subcontracting." RFP § M at 7. The solicitation also warned that past performance efforts that did not meet the RFP's recency or relevancy requirements would not be evaluated further. Id. at 2. To assess past performance, the RFP provided that the agency would assign one of the following confidence ratings: substantial, satisfactory, limited, no confidence, or neutral. Id. at 3-4.

The agency received multiple proposals prior to the August 28 closing date, including those of K2 and ASG. COS at 8. The source selection evaluation board (SSEB) evaluated the proposals and provided initial evaluation results. Id. at 8. Based upon the SSEB's recommendation, the source selection authority (SSA) established a competitive range, which included K2 and ASG. Id. at 8-9. The agency entered into discussions with all of the offerors in the competitive range and requested final proposal revisions (FPRs). Id. at 9. The agency evaluated the FPRs submitted by K2 and ASG, under the non-price factors, as follows:

³ For proposed subcontractors, the RFP defined relevant contracts as contracts that reflect the area of expertise the subcontractor is projected to actually perform under this contract. Id. at 12.

	K2	ASG
Qualifying Criteria	Pass	Pass
Transition Plan	Outstanding	Outstanding
Management Plan/Key Personnel/ Oral Presentation	Outstanding	Outstanding
Past Performance Confidence	Satisfactory	Substantial

See Protest at 2; COS at 15. Based upon an integrated assessment of all proposals, the SSA made award to ASG, finding that ASG's proposal, with a total evaluated price of \$240,658,061.08, represented the best overall value to the government. COS at 15.

On May 17, 2019, the agency notified K2 that it was an unsuccessful offeror. Id. After requesting and receiving a debriefing, K2 filed this protest with our Office.⁴

DISCUSSION

K2 contends that the agency's evaluation of ASG's proposal under the past performance factor was unreasonable. Protest at 4-10. In addition, K2 asserts that the agency violated FAR § 15.503(a)(2) by failing to provide K2 with a required pre-award notice of the agency's intent to award to ASG. Id. at 10-16. For the reasons discussed below, we find no basis to sustain the protest.⁵

Past Performance

As set forth above, the RFP provided that the agency would assign a confidence rating based upon an evaluation of an offeror's recent and relevant past performance. K2 challenges the agency's evaluation of ASG's proposal under the past performance factor, arguing that the agency's assignment of a substantial confidence past performance rating was unreasonable.

First, K2 contends that the agency's evaluation was inconsistent with the RFP because the agency gave more weight to the past performance of ASG's non-managing JV partner (i.e., Cyberspace) than it gave to a subcontractor's past performance. Protest at 7-8. In this regard, K2 argues that the RFP used the terms non-managing partner and subcontractor interchangeably, which meant that the agency was required to give non-managing partner past performance the same weight as subcontractor past performance. Id. Second, K2 asserts that publically available information indicates that

⁴ The Department of the Air Force has represented SOCOM throughout this protest.

⁵ K2 has presented arguments that are in addition to, or variations of, those discussed below. While we do not discuss all of the protester's arguments, we have considered them all and find none provide a basis to sustain the protest.

ASG's managing JV partner (i.e., Preting) lacks recent and relevant past performance, and as a result, the agency's assignment of a substantial confidence rating was unreasonable.⁶ Id. at 8-10.

The agency maintains that its evaluation was reasonable and consistent with the RFP. In response to K2's first argument, the agency contends that the RFP did not prohibit the agency from giving more weight to a non-managing partner's past performance. COS at 17-18. The agency argues that the RFP distinguished between subcontractor and non-managing partner experience, and that the protester has therefore conflated distinct terms. As to K2's second contention, the agency claims that ASG's proposal warranted a substantial confidence rating because its past performance demonstrated an ability to handle contracts similar to the work contemplated by the RFP. Id. at 18-19.

Our Office will examine an agency's evaluation of an offeror's past performance only to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations. Richen Mgmt., LLC, B-409697, July 11, 2014, 2014 CPD ¶ 211 at 4. The relative merits of an offeror's past performance information is generally within the broad discretion of the contracting agency, and our Office will not substitute our judgment for that of the agency. AT&T Corp., B-299542.3, B-299542.4, Nov. 16, 2007, 2008 CPD ¶ 65 at 19.

Here, as noted above, ASG is a SDVOSB joint venture (JV) between Preting, the managing partner, and Cyberspace, the non-managing partner. Intervenor's Comments at 1. In its proposal, ASG identified multiple past performance projects for Preting and Cyberspace, respectively. Id. at 2.

The agency evaluated ASG's past performance references and found that ASG's experience warranted a substantial confidence rating.⁷ COS at 14. With respect to the weighting of past performance, the agency placed significantly more weight on prime

⁶ K2 also alleges that by not weighting the past performance of non-managing partners and subcontractors the same, the agency unfairly favored joint venture offerors. Protest at 7-8. Here, however, the protester's allegations of disparate treatment are general in nature, and fail to allege how the agency's evaluation was flawed with respect to any offeror other than ASG. Accordingly, we dismiss this ground for failure to state a valid basis of protest. 4 C.F.R. §§ 21.1 (c)(4) and (f) (a protest must include a detailed statement of the legal and factual grounds for the protest, and the grounds must be legally sufficient).

⁷ No protective order was issued in this matter because K2 proceeded with its protest without retaining outside counsel. A full version of the AR was provided to our Office, while a redacted version of the report was furnished to the protester. We have reviewed the entire record. As much of the information reviewed by our Office is source selection sensitive or proprietary in nature, our discussion of some aspects of the agency's evaluation of ASG's proposal is necessarily general in nature.

contractors' past performance as opposed to subcontractor past performance. AR, Tab 39, Final SSEB Report, at 16. In the context of a JV proposal, the agency placed slightly more weight on the past performance of the managing partner of the JV as opposed to the non-managing partner(s). Id. Of particular relevance to this protest, the agency assigned significantly more weight to the combined past performance of the managing partner and the non-managing partner(s) than to the past performance of subcontractors. Id.

In response to this protest, the agency states that this weighting was based on SOCOM's past experience, which has shown that, over the course of contract performance, subcontractors can and do change. COS at 12. In light of this possibility, according to the agency, the past performance of the prime contractor becomes more important, warranting greater emphasis in the evaluation. Id. Based upon our review of the record, we find no basis to question the agency's evaluation under the past performance factor.

First, we reject the protester's contention that the RFP required the agency to evaluate non-managing partner past performance in the same manner as it evaluated subcontractor past performance. As an initial matter, the protester does not dispute that the RFP does not indicate how joint venture proposals would be evaluated. Protest at 7 ("The Solicitation does not provide an indication as to the amount of weight given to past performance of the Prime offeror [versus] that given to past performance submitted on behalf of the Prime offeror's subcontractor(s).") Instead, according to K2, the solicitation's synonymous use of the terms "[p]rime" and "managing partner", as well as "subcontractor" and "non-managing partner" indicated the weight given to the past performance of non-managing partners would be identical to the weight given to subcontractor experience. Id.

K2 provides several examples of RFP language it argues support its contention. Id. at 7; Protester's Comments at 2-3, 5-7. For instance, the protester cites the following instructions to potential offerors:

The Offeror shall submit a minimum of three (3) and maximum of (5) Past Performance Information Sheets identifying active or completed Government contracts for each prime or managing partner, and a minimum of one (1) and maximum of two (2) Past Performance Information Sheets(s) for each major subcontractor, or non-managing partner.

Protest at 7; Protester's Comments quoting RFP § L at 4. While we agree that the RFP treated subcontractors and non-managing partners the same in the context of how many past performance references to provide, we do not believe that this language required the agency to evaluate past performance in any particular way. Thus, we find

that the language cited by the protester did not require the agency to evaluate non-managing partner and subcontractor past performance the same.⁸

As stated above, the RFP did not prohibit, but in fact required, the agency to evaluate the past performance of individual JV partners and subcontractors. RFP § M at 7 (“[t]he [p]ast [p]erformance evaluation considers the Offeror’s (including subcontractors and partners) demonstrated record of performance”). As the RFP acknowledges, a JV submits a proposal as a prime contractor, making the JV partners themselves prime contractors.⁹ RFP § L at 10 (“If the Prime Offeror is a Joint Venture [. . .]”). Our Office has recognized that the weight to be assigned to both prime contractor and subcontractor past performance is a matter of contracting agency discretion. See Alpha Data Corp., B-291423, Dec. 20, 2002, 2003 CPD ¶ 18 at 5; see also Dawson Enterprises, LLC, B-414591.2, July 24, 2017, 2017 CPD ¶ 301 at 5-6. Here, the protester cites no statute, regulation, or prior precedent that requires an agency to treat subcontractor and non-managing partner past performance in the same manner. Further, the protester also provides no basis to question the reasonableness of the agency’s proffered reasoning for giving less weight to subcontractor performance. See COS at 12. Thus, in the absence of any solicitation language prohibiting the agency from giving more weight to a JV partner’s past performance than to a subcontractor’s past performance, we find nothing objectionable about the agency’s weighting of past performance references.¹⁰

⁸ In support of its protest, K2’s comments cite--for the first time--a provision of the RFP’s evaluation criteria it contends uses the terms subcontractor and non-managing partner interchangeably. Protester’s Comments at 2 quoting RFP § M at 6. Our Bid Protest Regulations do not contemplate the piecemeal presentation or development of protest issues through later submissions citing examples or providing alternate or more specific legal arguments missing from earlier general allegations of impropriety. Sealift Inc., B-405705, Dec. 8, 2011, 2011 ¶ 271 at 2-3 n. 1. Because K2 waited until its comments to raise this new example of RFP language supporting its original protest allegations, this argument is untimely and will not be considered. 4 C.F.R. § 21.2(a)(2). In any event, even if we were to consider this new argument, we would not be persuaded because the cited section of the RFP relates to the agency’s evaluation of an offeror’s management plan, rather than past performance.

⁹ We note that the RFP’s evaluation scheme for JV offerors was consistent with SBA regulations that apply when evaluating the past performance of a JV submitting a proposal in response to a procurement set-aside for small businesses. 13 C.F.R. § 125.8(e) (“a procuring activity must consider work done individually by each partner to the joint venture as well as any work done by the joint venture itself previously”).

¹⁰ K2 also contends the agency applied unstated evaluation criteria by evaluating the past performance of non-managing partners and subcontractors differently. Protest at 7-8. Because we find that the agency’s weighting scheme was unobjectionable, this basis of protest is denied.

In addition, we find that the protester has not shown that the agency unreasonably assigned ASG's proposal a substantial confidence rating based upon the past performance of ASG's partners, Preting and Cyberspace. As stated above, ASG identified multiple past performance projects for Preting and Cyberspace. Intervenor's Comments at 2. While the protester asserts that, based upon publicly available information, Preting does not have recent experience that is relevant to the work identified in the RFP, it has not demonstrated that the agency's evaluation was unreasonable. Based upon our review of the entire record, the agency reasonably evaluated ASG's past performance, and assigned a substantial confidence rating. ASG provided the requisite number of past performance references for each of its JV partners, and the record demonstrates the agency evaluated the recency and relevancy of ASG's past performance references in accordance with the RFP. Consequently, this protest ground is denied.

Failure to Provide Pre-Award Notice

Next, K2 contends that the agency violated FAR § 15.503(a)(2) by failing to provide a pre-award notice of the agency's intent to make award to ASG. Protest at 10-16. In procurements set aside for small businesses, FAR § 15.503(a)(2) requires the contracting agency to inform each unsuccessful offeror, in writing, of the identity of the apparent successful offeror prior to making award.¹¹ The purpose for this pre-award notice is to allow unsuccessful offerors the opportunity to have the SBA review the prospective awardee's size status before award. See Spectrum Sec. Servs., Inc., B-297320.2, B-297320.3, Dec. 29, 2005, 2005 CPD ¶ 227 at 3-4.

A failure to provide a pre-award notice is only procedural in nature and our Office will not sustain a protest of an agency's failure to comply with this pre-award notification requirement absent competitive prejudice to the protester. See, e.g., Jensco Marine, Inc., B-278929.7, Feb. 11, 1999, 99-1 CPD ¶ 32 at 3. The protester contends that it was prejudiced by the agency's failure because the lack of notice prohibited K2 from filing a pre-award challenge to ASG's eligibility for award, thereby preventing the contract award to ASG. Protest at 10-16. In response, the agency acknowledges that it did not provide K2 with the pre-award notification required under FAR § 15.503(a)(2), but asserts that K2 was not prejudiced by this failure because K2 was able to file post-award challenges to both ASG's size, and status as a SDVOSB, with the SBA. COS at 19-20; Memorandum of Law at 22.

Under the circumstances here, we find no competitive prejudice resulting from the agency's failure to provide K2 with the required pre-award notice. During the pendency of the protest, the SBA issued a size determination affirming ASG's status as a small

¹¹ This FAR section also states that the pre-award notice is not required when the contracting officer determines in writing that the urgency of the requirement necessitates award without delay. FAR § 15.503(a)(2)(iii). Here, the agency does not argue that urgency prevented it from providing the required notice.

business under the applicable size standard, and dismissed K2's protest of ASG's status as a SDVOSB. SBA Size Determination, ASG (Aug. 1, 2019), at 6; SBA Decision, ASG SDVOSB Status Protest (Aug. 29, 2019), at 2. Thus, we deny this protest ground because the protester has not shown that even if the agency had provided the required pre-award notice, it would have had any bearing on the validity of the underlying award to ASG.¹²

The protest is denied.

Thomas H. Armstrong
General Counsel

¹² The protester also contends that the agency was obligated to seek an independent evaluation from the SBA regarding ASG's size and status under this procurement. Protest at 10-16. In this regard, the protester alleges that, under the circumstances, the agency had reason to know that ASG neither qualified as an eligible small business, nor as a SDVOSB. Id. As noted above, the SBA has determined that ASG is an eligible small business for purposes of this particular procurement, and has dismissed K2's protest to ASG's status as an SDVOSB. SBA Size Determination, ASG (Aug. 1, 2019), at 6; SBA Decision, ASG SDVOSB Status Protest (Aug. 29, 2019), at 2. As a result, we dismiss K2's protest ground related to whether the agency should have referred the matter of ASG's eligibility to the SBA as academic. See Technology and Management Service, Inc.--Recon., B-231025.6, Sept. 13, 1988, 88-2 CPD ¶ 229 at 2 (denying request to reinstate previous protest dismissed as academic where SBA determined that the certifying firm in question is small).