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Decision

Matter of: KSJ & Associates, Inc.

File: B-417850

Date: November 18, 2019

Mary Witzel, Esq., David Ludwig, Esq., and Thomas Dunlap, Esq., Dunlap Bennett & Ludwig PLLC, for the protester.
Keith Szeliga, Esq., Katie A. Calogero, Esq., Adam Bartolanzo, Esq., Bryce Chadwick, Esq., Keeley McCarty, Esq., and Ariel Debin, Esq., Sheppard Mullin Richter & Hampton LLP, for Deloitte Consulting, LLP, the intervenor.
Melvin A. Lee, Esq., Defense Health Agency, for the agency.
Kasia Dourney, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the evaluation of a protester's technical proposal as unreasonable, without providing sufficient facts or description to support the allegation, is dismissed for failure to establish a sufficient factual or legal basis for protest.
 2. Protest challenging the terms of a solicitation, filed after the closing date for receipt of initial proposals, is untimely.
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DECISION

KSJ & Associates, Inc. (KSJ) of Falls Church, Virginia, protests the award of a task order to Deloitte Consulting, LLP (Deloitte) under request for proposals (RFP) No. HT0011-17-R-0020-0003, issued by the Defense Health Agency (DHA) for project management and program management support services to be provided to the DHA's Deputy Assistant Director--Information Operations and the Solution Delivery Division. KSJ challenges the agency's evaluation of its technical proposal and the terms of the solicitation.

We dismiss the protest.

BACKGROUND

The RFP, issued on August 17, 2018, anticipated the award of a labor-hour task order under the General Services Administration (GSA) Professional Services Schedule, special item number 874-7 Integrated Business Program Support Services, utilizing Federal Acquisition Regulation § 8.405-2 ordering procedures.¹ COS at 1. The solicitation sought proposals for project management and program management support services to be provided to the DHA's Deputy Assistant Director--Information Operations and the Solution Delivery Division. Memorandum of Law (MOL) at 1. The RFP contemplated award on a best-value tradeoff basis. AR, Tab 4, Instructions to Offerors, at 7.

Offerors were advised that the agency would make award based on consideration of the following factors and subfactors, in descending order of importance:

1. Technical
 - a. Technical Approach
 - b. Experience
 - c. Management Approach
 - d. Quality Control Approach
2. Price
3. Small Business Participation Commitment
4. Past Performance.

Id. The solicitation provided detailed instructions regarding the expected specificity of offerors' proposals, stating with respect to the most important subfactor, technical approach, that an offeror "shall describe . . . in detail, its technical approach to perform business operations and product support services as described by the tasks" listed in the Performance Work Statement (PWS). Id. at 3. Moreover, the RFP advised that an offeror's proposal "must include all data and information requested in this solicitation"; "shall include sufficient detail for effective evaluation and for substantiating the validity of stated claims"; and "shall not simply rephrase or restate the [g]overnment's requirements, but rather shall provide convincing rationale to address how the offeror intends to meet these requirements." Id. at 1.

The solicitation instructed that the "[g]overnment will evaluate the extent to which the proposal exhibits a clear understanding of the work requirements and the means required to fulfill the requirements." Id. at 7. With respect to the most important

¹ The solicitation was amended multiple times. The final solicitation, RFP No. HT0011-17-R-0020-0003, was issued under GSA request for quotation No. 1318252 and several amendments were issued to the final solicitation. Agency Report (AR), Tab 6, Source Selection Decision Document (SSDD), at 3-4; Contracting Officer's Statement (COS) at 2-3. All references to the RFP are to the conformed RFP provided by the agency at Tab 2 to the AR.

subfactor, technical approach, the solicitation advised that the agency would evaluate “the degree to which the proposed approach meets or does not meet the minimum performance or capability requirements, which are the entirety of the tasks as listed in Part 5 of the PWS, through an assessment of the strengths, weaknesses, deficiencies, and risks of a proposal.”² Id. at 8.

The RFP provided that the agency would utilize the combined technical/risk rating methodology for the evaluation of the technical approach subfactor, using ratings of outstanding, good, acceptable, marginal, and unacceptable to evaluate proposals. Id. As relevant here, a “marginal” rating was defined as follows:

Proposal does not clearly meet requirements and has not demonstrated an adequate approach and understanding of the requirements. The proposal has one or more weaknesses which are not offset by strengths. Risk of unsuccessful performance is high.

Id.

Offerors were advised to submit proposals in four volumes: (1) technical proposal; (2) price proposal; (3) small business participation commitment, and (4) past performance. Id. at 2. Of particular importance here, the technical proposal volume was limited to 60 single-sided pages. Id.

The agency received proposals from three offerors, including KSJ and Deloitte, by its closing date of September 28, 2018. COS at 3. The agency’s evaluation of KSJ’s and Deloitte’s proposals was as follows:

	KSJ	Deloitte
Technical	Marginal	Outstanding
Price	Fair and Reasonable	Fair and Reasonable
Small Business Participation	Acceptable	Acceptable
Past Performance	Satisfactory Confidence	Satisfactory Confidence
Total Price	\$212,054,687.21	\$235,048,443.26

COS, exh. A at 4; AR, Tab 6, SSDD, at 46.

Moreover, KSJ’s proposal was evaluated under the technical factor’s specific subfactors as follows:

² “Weakness” was defined as “[a] flaw in the proposal that increases the risk of unsuccessful contract performance.” AR, Tab 4, Instructions to Offerors, at 6. “Significant weakness” was defined as “[a] flaw that appreciably increases the risk of unsuccessful contract performance.” Id.

	KSJ
Technical Approach	Marginal
Experience	Acceptable
Management Approach	Good
Quality Control Approach	Acceptable

COS, exh. A at 4. The agency identified three strengths, three weaknesses and two significant weaknesses in KSJ’s technical proposal under the technical approach subfactor. AR, Tab 6, SSDD, at 47-48. As described by the source selection official, KSJ’s technical proposal merited a “marginal” rating because the protester did not indicate how it would accomplish the PWS requirements, other than restating those requirements, and failed to describe its proposed technical approach. Id. at 49. In addition, in some instances, the agency found that KSJ failed to address the PWS requirements at all, including five (out of 74) of the PWS’s deliverables sections. Id. Hence, while there were strengths assessed under its technical approach subfactor, these were not sufficient to offset the weaknesses identified by the technical evaluators. Id. at 32.

Subsequently, the source selection official determined that Deloitte offered the best value to the government, and awarded the task order to that company. AR, Tab 6, SSDD, at 47-49. The agency notified KSJ of the award decision on August 1, 2019. COS, exh. A at 1-2.

Upon KSJ’s request, the agency provided an in-person brief explanation of its decision to KSJ on August 6, and delivered a redacted copy of the SSDD, with a four-page description of its evaluation of KSJ’s proposal, detailing the weaknesses and significant weaknesses the agency assessed the proposal. COS at 4. The agency also provided KSJ an unredacted version of the evaluation of its technical and past performance proposals. Id.

On August 8, as a follow-up to the brief explanation session, KSJ submitted a number of written questions to the agency, to which the agency responded on August 13. The next day, KSJ filed this protest with our Office.

DISCUSSION

KSJ challenges the agency’s evaluation of its technical proposal, alleging that it should not have been rated “marginal” based on the three weaknesses and two significant weaknesses assessed against its technical proposal. Protest at 9-10. KSJ admits that it learned of the DHA’s determination that its proposal failed to meet the PWS’s deliverables during the agency’s brief explanation of the award, but asserts that the agency “failed to explain or demonstrate . . . how these alleged oversights in KSJ’s

proposal warranted . . . an overall ‘marginal’ technical rating”³ Id. at 10. In addition, the protester states that, given the RFP’s page limit for technical proposals, “it would not be possible for KSJ to address at length every aspect” of the PWS requirements. Id.

In response, the agency contends that KSJ’s protest fails to provide any supporting rationale or explanation as to how the agency allegedly misevaluated its proposal. Agency’s Request for Dismissal at 1, 3-5. The agency points out, on multiple occasions, that the protester, despite being “given an un-redacted version of its technical consensus [report] at the brief explanation on August 6, 2019,” and “having the specific assessment” of its identified weaknesses in its technical proposal, fails to “point out where [its] proposal addressed the identified Agency concerns.” MOL at 12. The agency alleges that KSJ’s protest fails to provide a detailed statement of any legal and factual grounds, and asks our Office to dismiss it.

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984. See 31 U.S.C. §§ 3551-3557. Our role in resolving bid protests is to review whether a procurement action constitutes a violation of a procurement statute or regulation. 31 U.S.C. § 3552. To achieve this end, our Bid Protest Regulations, 4 C.F.R. §§ 21.1(c)(4) and (f), require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. See, e.g., Midwest Tube Fabricators, Inc., B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

Here, we agree with the agency and the intervenor that KSJ has failed to allege a cognizable basis of protest. Although KSJ complains that the agency “failed to reasonably evaluate KSJ’s technical proposal,” Protest at 9, the protester has provided no specific factual support for its claim that its proposal contained sufficient detail or warranted a higher rating. In fact, KSJ’s protest is devoid of any clear statement or detail as to what exactly the agency did wrong, or how KSJ’s proposal complied with the RFP. For example, KSJ notes that the agency determined that KSJ’s proposal failed to address the PWS tasks in five (out of 74) deliverables sections, and assessed weaknesses or significant weaknesses for these sections. The protester first argues that it did, in fact, address those tasks--without demonstrating where, or how, in its proposal it did so--and, next, argues that it was unreasonable to expect an offeror to provide sufficient information in this regard, given the page limit here.

³ In its comments on the agency report, the protester provides, for the first time, some details on how the agency improperly assessed weaknesses in its technical proposal. However, as discussed below, because those additional allegations were filed with our Office more than 10 days after the protester knew the basis for protest, we dismiss them as untimely.

Overall, KSJ's protest makes only general challenges to the agency's evaluation, claiming that its evaluation of KSJ's technical proposal was "unreasonable." See CAMRIS Int'l, Inc., B-416561, Aug. 14, 2018, 2018 CPD ¶ 285 at 5 ("The protester's assertion of improper agency action alone, without any supporting explanation or documentation, does not satisfy [our bid protest requirement that protesters state legally sufficient grounds of protest]."). As such, the protester's allegations are legally insufficient. Our Office will not find improper agency action based on conjecture or inference. See Raytheon Blackbird Techs., Inc., B-417522, B-417522.2, July 11, 2019, 2019 CPD ¶ 254 at 3-4 (protest allegation was speculative because it was not supported by any evidence); see also Mark Dunning Indus., Inc., B-413321.2, B-413321.3, Mar. 2, 2017, 2017 CPD ¶ 84 at 2 (a protest allegation which is speculative fails to state a valid basis of protest).

To the extent the protester does provide specific examples from its proposal, it does so--for the first time--in its comments on the agency report. Protester's Comments at 3-9. Such new arguments, based on information that the protester had when it filed its protest, constitute a piecemeal presentation of issues. Our Bid Protest Regulations contain strict rules for the timely submission of protests. All protest allegations must be filed not later than 10 calendar days after the protester knew, or should have known, of the basis for protest. 4 C.F.R. § 21.2(a)(2). The timeliness requirements of our regulations do not contemplate the piecemeal presentation or development of protest issues. See Battelle Memorial Institute, B-278673, Feb. 27, 1998, 98-1 CPD ¶ 107 at 24 n.32; 4 C.F.R. § 21.2(a)(1). This includes the identification of "examples" of flaws in the agency's evaluation generally alleged, as here, in the initial protest, and descriptions of alleged strengths in the protester's proposal that could have been raised earlier. Accordingly, because KSJ cannot cure the defects of its protest by now providing factual support for the initial allegations in its comments on the agency report, these protest grounds are dismissed.

Finally, to the extent the protester complains about the RFP's page limit for the technical proposal, KSJ raises an untimely challenge to the terms of the solicitation. As noted above, our regulations contain strict rules for the timely submission of protests. These timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without disrupting or delaying the procurement process. CDO Techs., Inc., B-416989, Nov. 1, 2018, 2018 CPD ¶ 370 at 5; Dominion Aviation, Inc.--Recon., B-275419.4, Feb. 24, 1998, 98-1 CPD ¶ 62 at 3. Specifically, protests of alleged apparent solicitation improprieties must be filed prior to the closing time for receipt of quotations. See 4 C.F.R. § 21.2(a)(1); Allied Tech. Group, Inc., B-402135, B-402135.2, Jan. 21, 2010, 2010 CPD ¶ 152 at 9 n.10. If the protester objected to the specific terms of the solicitation--or, more precisely, believed that the 60 single-sided page limit was too restrictive and provided insufficient space to fully describe its proposed approach to achieve the RFP's objectives--it was required to raise this challenge prior to the time set for receipt of proposals, i.e., September 28, 2018. KSJ, however, did not file its protest challenging the RFP's page limit until after the

RFP's closing date and time. Accordingly, we view this protest ground as an untimely challenge to the terms of the solicitation, and dismiss it.

The protest is dismissed.

Thomas H. Armstrong
General Counsel