



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

DOCUMENT FOR PUBLIC RELEASE

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Matter of: Babel Street, Inc.

File: B-418730

Date: June 16, 2020

Damien C. Specht, Esq., R. Locke Belle, Esq., and Victoria Dalcourt Angle, Esq., Morrison & Foerster LLP, for the protester.

Seth H. Locke, Esq., Lee P. Curtis, Esq., and Julia M. Fox, Esq., Perkins Coie LLP, for Dataminir, Inc., the intervenor.

Kyle E. Gilbertson, Esq., and Alexis J. Bernstein, Esq., Department of the Air Force, for the agency.

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

DIGEST

Protest is dismissed where the protester is not an interested party to challenge the agency's actions because even if its protest grounds were sustained, it would remain ineligible for award.

DECISION

Babel Street, Inc., a small business of Reston, Virginia, protests the award of a contract to Dataminir, Inc., of New York, New York, under request for proposals (RFP) No. FA7014-20-R-0005, issued by the Department of the Air Force for the publicly available information alerting Department of Defense enterprise license subscription (PADELS) service. The protester contends that the agency engaged in unequal discussions, unreasonably evaluated technical proposals, and performed an impermissible price realism analysis. Protest at 2-3.

We dismiss the protest because Babel Street is not an interested party to challenge the award.

The RFP, issued on November 13, 2019, was set aside for small businesses and contemplated the award of a contract for a PADELS service. Protest, exh. A, RFP Memo at 1. Award was to be made on a best-value tradeoff basis, considering price

and non-price factors. *Id.* The non-price factors consisted of an initial gateway factor¹ and, for proposals satisfying the gateway requirement, technical approach and past performance. Protest, exh. B, RFP attach. B, Proposal Evaluation at 1.

As relevant here, under the past performance factor, the agency would evaluate past performance submissions for recency, relevance, and quality, which together would form the overall past performance adjectival rating. *Id.* at 5. The overall past performance adjectival ratings were substantial confidence, satisfactory confidence, neutral confidence, limited confidence, and no confidence. *Id.* at 6. The RFP stated that “[o]nly Offerors with a past performance confidence rating of ‘Satisfactory’ or ‘Substantial’ will be eligible for award. Any proposals receiving a confidence rating below ‘Satisfactory’ for past performance will not be eligible for award.” *Id.* at 5.

On April 23, 2020, the agency advised Babel Street of the award to Dataminr. Protest, exh. H, Notice of Unsuccessful Offeror. The award notice also informed the protester that its technical rating was unacceptable, its total evaluated price was considered not fair and reasonable, and its overall past performance adjectival rating was limited confidence. *Id.* at 1.

On May 11, after a debriefing, Babel Street filed its protest with our Office, challenging the agency’s technical and price evaluations and alleged failure to engage in equal discussions, but not the agency’s past performance evaluation. Protest at 2-3, 12-28.

The intervenor asserts that Babel Street is not an interested party to pursue its protest, because, even if the protest grounds were sustained, the protester would remain ineligible for award. Intervenor Request for Dismissal at 1. Specifically, the intervenor contends that the limited confidence rating assigned to the protester’s proposal under the past performance factor rendered the proposal ineligible for award, and Babel Street’s failure to challenge this rating means that the proposal would remain ineligible for award even if the protest is sustained. *Id.* On this basis, the intervenor requests that our Office dismiss the protest. *Id.* The agency concurs with the intervenor’s analysis and joins the intervenor in the request for dismissal. Agency Response to Intervenor Request for Dismissal at 1-2.

In response, Babel Street argues that the protest should not be dismissed because the protest “identified specific factual errors” in the agency’s past performance evaluation and that, if our Office sustains its challenge to the agency’s alleged unequal discussions with regard to the technical and price factors, the firm would also have the opportunity to

¹ The gateway factor consisted of a preliminary assessment of the proposal’s completeness, relevance, and compliance with the Department of Defense’s terms of service requirement. Protest, exh. C, RFP attach. 8, Instructions to Offerors at 5.

revisit and revise its past performance submission.² Protester Opp'n to Intervenor Request for Dismissal at 1-3.

We find that Babel Street is not an interested party to challenge the procurement. Our Bid Protest Regulations define an interested party as an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a)(1). A protester is not an interested party where it could not be considered for an award if its protest were sustained.

Yoosung T&S, Ltd., B-291407, Nov. 15, 2002, 2002 CPD ¶ 204 at 4.

As stated in the solicitation, if a proposal received a rating below satisfactory under the past performance factor, it was not eligible for award. Protest, exh. B, RFP attach. B at 5. Babel Street's proposal received a rating of limited confidence, which is below the satisfactory rating, rendering it ineligible for award. Protest, exh. H, Notice of Unsuccessful Offeror. Here, the protester did not challenge the agency's past performance rating of limited confidence. In the protest, the past performance factor is only discussed in the background section of the protest and does not appear in any protest ground, and the summary of protest grounds does not include a challenge to the past performance rating.

Because the past performance rating of limited confidence rendered Babel Street's proposal ineligible for award and the protester did not challenge the agency's past performance evaluation, Babel Street is not an interested party to pursue this protest. 4 C.F.R. § 21.0(a)(1); *VetsTec, LLC*, B-418164, Nov. 7, 2019, 2019 CPD ¶ 384 at 3 (finding that a protester is not an interested party where, even if the protest is sustained, the protester will be ineligible for award under the remaining terms of the solicitation); *RELM Wireless Corp.*, B-405358, Oct. 7, 2011, 2011 CPD ¶ 211 at 4 (same).

The protest is dismissed.

Thomas H. Armstrong
General Counsel

² The protester is mistaken here in two respects. First, an agency is not required to identify every weakness in discussions, so even if discussions were reopened, the agency would not necessarily raise the past performance issues with the protester as they were apparently not identified as weaknesses. Protest at 10; *General Dynamics C4 Sys., Inc.*, B-407069, B-407069.2, Nov. 1, 2012, 2012 CPD ¶ 300 at 3 (agency is not required to advise an offeror of a minor weakness that is not considered significant). Second, even if the agency opened discussions with offerors regarding their technical proposals and price, the agency would not necessarily be required to allow offerors to revise the past performance volume. *Consolidated Eng'g Servs., Inc.*, B-293864.2, Oct. 25, 2004, 2004 CPD ¶ 214 at 2 (an agency, in conducting discussions to implement a recommendation of our Office, may reasonably decide to limit the scope of proposal revisions).