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Decision

Matter of: Kaiyuh Services, LLC

File: B-419293; B-419293.2

Date: January 4, 2021

Christopher J. Slottee, Esq., Schwabe, Williamson & Wyatt, P.C., for the protester.
Mark G. Jackson, Esq., Stowell Holcomb, Esq., Jackson Rosenfield LLP, for Chenega Tri-Services, LLC, the intervenor.

Michael L. Graves, Jr., Esq., Department of the Army, for the agency.

Todd C. Culliton, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest allegations are dismissed as premature where they were filed before the debriefing date; supplemental protest allegations are dismissed as untimely because they were filed more than 10 days after the debriefing concluded, or when the protester knew or should have known the basis for the allegations.

2. Protester is not an interested party to challenge the price evaluation because the firm's proposal could not receive award due to deficiencies in its technical evaluation.

DECISION

Kaiyuh Services, LLC, of Anchorage, Alaska, protests the award of a contract to Chenega Tri-Services, LLC, of San Antonio, Texas, under request for proposals (RFP) No. W912DY-20-R-0083, issued by the Department of the Army, Corps of Engineers, for building maintenance services. Kaiyuh asserts that the agency unreasonably evaluated proposals, and improperly made its source selection decision.

We dismiss the protest.

BACKGROUND

On August 7, 2020, the Corps issued the RFP to procure preventative and corrective maintenance services for designated sites and facilities in the Minneapolis region.

Agency Report (AR), Tab 1, RFP at 1, 44.¹ The RFP contemplated the award of a fixed-price contract to be performed over a 1-year base period and four 1-year option periods. *Id.* at 4, 8-17. The procurement was conducted using the procedures applicable to competitive negotiated acquisitions. Contracting Officer’s Statement and Memorandum of Law (COS/MOL) at 1 (stating that the RFP “was issued in accordance with [Federal Acquisition Regulation (FAR)] 15.101-1”).

Award was to be made on a best-value tradeoff basis considering the following factors, listed in descending order of importance: technical approach, price and rates, and past performance.² RFP at 24-25. When combined, the technical and past performance factors were significantly more important than the price and rates factor. *Id.* at 26.

Seven offerors, including Kaiyuh and Chenega, submitted proposals prior to the August 31 closing date. COS/MOL at 1. The source selection authority’s (SSA) evaluation produced the following relevant results:

	Kaiyuh	Chenega
Technical Approach	Unacceptable	Outstanding
Past Performance	Acceptable	Acceptable
Price and Rates	\$14,235,340	\$11,775,356

AR, Tab 12, Source Selection Decision Document (SSDD) at 6. The SSA evaluated Kaiyuh’s proposal as containing two weaknesses and two deficiencies, and noted that the firm’s proposed labor rates were high. *Id.* at 16-17. Due to the technical deficiencies, the SSA evaluated Kaiyuh’s proposal as “unacceptable,” and therefore ineligible for award. *Id.* at 21.

The SSA conducted his tradeoff analysis considering Chenega and another eligible offeror. AR, Tab 12, SSDD at 21-23. The SSA determined that Chenega’s proposal was more favorable given its greater number of advantageous technical features, lower evaluated price, and equivalent past performance. *Id.* As a result, the Corps awarded the contract to Chenega on September 30, 2020. COS/MOL at 2; Protest at 9.

On October 1, Kaiyuh requested a debriefing. Protest, exh. 2, Kaiyuh Debriefing Request. On October 2, the Corps sent Kaiyuh official notice that its proposal was unsuccessful, and stated that “[i]f additional questions are received, the Government will

¹ All references are to the Adobe PDF page numbers.

² Offerors were required to provide proposed pricing for three contract line item numbers--preventive maintenance, corrective maintenance, and contractor manpower reporting. RFP at 6-9; AR, Tab 3b, RFP, amend. 2, Pricing Worksheet. For corrective maintenance, offerors were required to provide proposed labor rates for various categories, and the agency would use these rates to compute evaluated prices. RFP, amend. 2, Pricing Worksheet, Labor Rates Spreadsheet; see *also* COS/MOL at 19.

respond in writing within five (5) business days.” AR, Tab 14, Notice of Unsuccessful Offeror at 1-2.

On October 5, Kaiyuh sent an email to the agency, expressing confusion as to how the firm’s technical and price proposals were evaluated. Protest, exh. 8, Emails from Kaiyuh to the Corps at 2. On October 7, Kaiyuh again sent an email to the Corps, inquiring as to the status of its debriefing request. *Id.* at 1.

On October 9, Kaiyuh filed this protest with our Office. Protest at 1. The firm alleges that its technical proposal should have been evaluated as “acceptable” because its approach met the definition set forth in the RFP. *Id.* at 10-11. The protester also explains the following:

The Agency has failed to respond to Kaiyuh’s requests for a debrief and has provided no explanation for why the Agency determined Kaiyuh’s technical approach to be “unacceptable.” Therefore, Kaiyuh cannot, at this time, respond to any specific issue or problem that the Agency has with Kaiyuh’s technical approach, because the Agency has not yet disclosed those issues. Therefore, Kaiyuh reserves the right to supplement this protest upon receipt of the Agency record and/or additional information provided by the Agency with a debrief, if one is afforded to Kaiyuh.

Id. at 11.

Kaiyuh also alleges that the agency unreasonably evaluated its proposed price. Protest at 11-17. The firm argues that the Corps’s price evaluation methodology was unreasonable because the firm’s evaluated price for corrective maintenance services should not have been so high compared to Chenega’s evaluated price. *Id.* Finally, the firm alleges that the Corps unreasonably conducted its best value tradeoff analysis because the underlying evaluation was unreasonable. *Id.* at 17.

On October 16, the agency provided Kaiyuh with its debriefing. AR, Tab 15, Kaiyuh Debriefing at 1. The debriefing explained that Kaiyuh’s technical proposal was evaluated as having two weaknesses and two deficiencies. *Id.* at 1-2. The weaknesses were assigned because the firm’s quality control plan lacked dedicated inspectors, and the firm’s proposal did not discuss its process for managing subcontractors. *Id.* at 1-2. The deficiencies were assigned because the firm’s proposal omitted its staffing and response time charts. *Id.* at 2-3.

As for the firm’s evaluated price, the Corps explained that several of the labor rates were unreasonably high. AR, Tab 16, Additional Debrief Questions at 1. In response to Kaiyuh’s question from its October 5 email, the Corps explained that the firm’s proposal did not indicate that personnel would simultaneously perform corrective and preventative maintenance; therefore, the agency calculated the firm’s proposed price for

corrective maintenance by multiplying the total estimated labor hours for corrective maintenance against the firm's proposed labor rates. *Id.* at 3.

On October 19, Kaiyuh submitted additional questions to the agency. AR, Tab 16, Additional Debrief Questions at 1. Kaiyuh requested that the agency identify what labor hours estimates were used to calculate proposed pricing. *Id.* at 1-2. Kaiyuh also requested that the agency identify whether the firm's proposed service fee was high relative to other offerors. *Id.* at 2.

On October 29, the Corps responded, identified 10,000 hours as the labor hours estimate used to compute Kaiyuh's proposed price, explained that the estimated labor hours for other offerors could change based on their proposed technical approaches, and stated that the firm's proposed service fee was reasonable in comparison to the other offerors' proposed service fees. AR, Tab 17, Response to Kaiyuh's Additional Debrief Questions at 1-2. This communication closed Kaiyuh's debriefing. *Id.* On November 6, the Corps filed its report responding to the protest allegations with our Office. COS/MOL at 1.

On November 15, Kaiyuh filed its comments and supplemental protest. In its supplemental protest, Kaiyuh alleges that the agency unreasonably assigned deficiencies to the firm's proposal because its proposal included staffing and response times charts. Comments and Supp. Protest at 14-17. Kaiyuh also alleges that the 10,000 estimated labor hours estimate constituted an unstated evaluation criterion, and that the agency's price evaluation was unequal because it applied a lower estimate (*i.e.*, 2,500 labor hours) to Chenega's proposal. *Id.* at 2-14.

DISCUSSION

We have reviewed all of the allegations presented, and conclude that the protest must be dismissed. First, the protest allegations contained in the initial protest filing are premature. Second, the supplemental allegations challenging the firm's technical evaluation are untimely. Third, Kaiyuh is not an interested party to raise the supplemental allegations challenging its or Chenega's price evaluations.

Initial Protest Filing

We conclude that the allegations contained in the initial protest filing are premature because they were filed prior to the firm's debriefing. Our Bid Protest Regulations provide that we will not consider a protest challenging a procurement conducted on the basis of competitive proposals, where a debriefing is required if the protest is filed before the debriefing date offered to the protester; the protest instead should be filed not later than 10 days after the debriefing. 4. C.F.R. § 21.2(a)(2). This rule is designed to encourage early and meaningful debriefings, and to preclude strategic or defensive protests. See *Kord Techs., Inc.*, B-417748.5, Apr. 17, 2020, 2020 CPD ¶ 158 at 5.

Here, this acquisition was conducted on the basis of competitive proposals, and therefore any unsuccessful offeror requesting a debriefing would be provided one. COS/MOL at 2; see *also* RFP at 1. Although Kaiyuh requested a debriefing, it proceeded to file its protest allegations on October 9, one week prior to when the Corps conducted the firm's debriefing. Accordingly, we dismiss these allegations as premature because they were filed before the debriefing. See *Celeris Sys., Inc.*, B-416890, Oct. 11, 2018, 2018 CPD ¶ 354 at 2 (dismissing protest allegations when they were filed prior to the required debriefing).

In any event, the allegations challenging the firm's technical evaluation fail to state a valid legal basis, and are subject to dismissal on this alternate ground. Our Regulations require that any protest allegation include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. 4 C.F.R. § 21.1(c)(4), (f). 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. *1400 Chapman, LLC*, B-418409 *et al.*, Apr. 15, 2020, 2020 CPD ¶ 146 at 7.

These allegations do not state a valid basis because they do not provide us with any factual or legal argument demonstrating that the evaluation was unreasonable. The firm baldly asserts that the content of its proposal should have been evaluated more favorably but, crucially, the firm does not identify any aspect of its proposal that was evaluated unreasonably, or offer any legal argument in support thereof. Protest at 9-10 ("Given the contents of Kaiyuh's technical proposal, it was arbitrary and capricious for the Agency to determine that Kaiyuh's proposal did not meet the requirements of the solicitation."). Accordingly, we dismiss these allegations. *Cf. Raytheon Blackbird Techs., Inc.*, B-417522, B-417522.2, July 11, 2019, 2019 CPD ¶ 254 at 3-4 (allegation dismissed as speculative when not supported by evidence showing the evaluation was unreasonable).

Supplemental Allegations Challenging the Firm's Technical Evaluation

We conclude that the firm's supplemental allegations challenging the firm's technical evaluation are untimely. Our regulations contain strict rules for the timely submission of protests. *Prudential Protective Servs., LLC*, B-418869, Aug. 13, 2020, 2020 CPD ¶ 272 at 3. Under these rules, any post-award challenge to an agency's evaluation must be filed within 10 days after the protester knew or should have known the factual basis supporting its challenge. 4 C.F.R. § 21.2(a)(2); see *also LATA-Atkins Tech. Servs., LLC*, B-418602, B-418602.4, June 10, 2020, 2020 CPD ¶ 192 at 5, n.1.

During its debriefing, Kaiyuh learned that its technical proposal was evaluated as unacceptable because the firm was assigned two weaknesses, and two deficiencies. AR, Tab 15, Kaiyuh Debriefing at 1-3. The agency specifically communicated that the deficiencies were assigned because the firm did not include staffing or response time charts. *Id.* at 2-3. Because the debriefing concluded on October 19, any challenge that the firm's technical proposal was unreasonably assigned these deficiencies should have

been filed by October 29. Thus, since these allegations were not raised until the firm filed its comments and supplemental protest on November 15, we dismiss them as untimely.³

In any event, we disagree that the agency unreasonably assigned the deficiencies. To illustrate, we address the protester's allegation that its technical proposal included a chart detailing response times. See Comments and Supp. Protest at 17-18.

The RFP instructed offerors to describe their management plans in three parts: an organizational chart, a management plan, and a performance plan. RFP at 5-6. As part of the performance plan, offerors were instructed to provide the following:

A narrative explanation of how the Offeror intends to meet the service order response times. This shall include a chart showing the expected response time for each installation and the home location of the responding personnel.

RFP at 6. The RFP advised that proposals would be evaluated for feasibility and thoroughness, and to assess each offeror's understanding of the technical requirements. *Id.* at 24.

In its proposal, Kaiyuh included two depictions addressing response times inside and outside of normal duty hours. AR, Tab 4, Kaiyuh's Tech. Proposal at 17. The depictions provide general response times for emergency, urgent, and routine service calls. *Id.* The firm's narrative explains the main locations for its service technicians, but also explains that the service technicians will report from various remote locations (*i.e.*, home locations) throughout the area which would decrease travel time. *Id.* at 16-17. The agency identified this feature as a deficiency because Kaiyuh did not include a chart depicting actual response times from the service technicians' primary or home locations. AR, Tab 10, Source Selection Evaluation Board Report at 17.

Although Kaiyuh argues that its proposal included a response times chart and that its accompanying narrative provided all of the requisite information, see Comments and Supp. Protest at 17, this argument does not provide us with a basis to conclude that the evaluation was unreasonable. As noted above, the RFP required offerors to provide a chart depicting expected response times for each installation and service technician's home location. RFP at 6.

Kaiyuh's proposal provides general response times, and does not provide specific response times for each location or for the service technicians' home locations. AR, Tab 4, Kaiyuh's Tech. Proposal at 17 (emergency calls would receive a response in 15 minutes, and be mitigated within 4 hours). Further, the accompanying narrative also

³ Additionally, we do not think that the protester learned any new factual information from the agency report which could serve as the basis for its allegations. See COS/MOL at 13-15.

does not provide the specific response times. *Id.* at 16-17. Thus, we conclude that the agency reasonably assigned this deficiency because the firm's proposal omitted required information.

Remaining Supplemental Allegations

We conclude that the firm is not an interested party to raise the supplemental allegations challenging its and Chenega's price evaluations, or the source selection decision. Our regulations provide that only an "interested party" may protest a federal procurement--that is, a protester must be an actual bidder or prospective offeror whose direct economic interest would be affected by the award or the failure to award a contract. 4 C.F.R. § 21.0(a)(1). A protester is not an interested party where it would not be in line for award, were its protest to be sustained. *Bluewater Mgmt. Grp., LLC*, B-418831, Sept. 2, 2020, 2020 CPD ¶ 280 at 4.

Here, Kaiyuh received a technical rating of "unacceptable," which the RFP defined as follows:

Proposal does not meet the requirements of the solicitation, and thus, contains one or more deficiencies, and/or risk of unsuccessful performance is unacceptable. Proposal is not awardable.

RFP at 25. Thus, Kaiyuh is not interested to pursue its remaining challenges because, even if we were to find that the agency unreasonably evaluated proposed prices or improperly made its source selection decision, Kaiyuh could not receive award due to the deficiencies in its technical proposal. Further, the SSDD shows that another offeror received a technical rating of at least "acceptable," and therefore, even if we found that the agency unreasonably evaluated Chenega's proposed price, this intervening offeror would potentially be in line for award, not Kaiyuh. AR, Tab 12, SSDD at 21-22.

The protest is dismissed.

Thomas H. Armstrong
General Counsel