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Decision

Matter of: Continuity Global Solutions-Secure Me WLL Security, JV

File: B-419875

Date: August 12, 2021

Robert Nichols, Esq., and Samuel Van Kopp, Esq., Nichols Liu LLP, for the protester. John W. Cox, Esq., Department of State, for the agency. Uri R. Yoo, Esq., and Evan C. Williams, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's rejection of proposal for failure to satisfy the requirement to be registered in the system for award management prior to award and argument the agency should waive the requirement is dismissed for failure to state a valid basis of protest; waiver of a solicitation requirement is a discretionary action, and offerors have no entitlement to waiver.

DECISION

Continuity Global Solutions-Secure Me WLL Security Joint Venture (CGS-SM) of Falls Church, Virginia, protests the rejection of the proposal it submitted in response to request for proposals (RFP) No. 19AQMM21R0012, issued by the Department of State for the provision of local guard services at the United States embassy in Bahrain. The protester contends that the agency improperly rejected its proposal because it was not registered in the system for award management (SAM) at the time of contract award.

We dismiss the protest because, as filed with our Office, it does not establish a valid basis for challenging the agency's action.

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557. Our role in resolving bid protests is to ensure that the statutory requirements for full and open competition are met. *Cybermedia Tech., Inc.*, B-405511.3, Sept. 22, 2011, 2011 CPD ¶ 180 at 2. 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. *Midwest Tube Fabricators, Inc.*, B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

The agency issued the RFP on January 10, 2021, seeking local guard services at the United States embassy in Manama, Bahrain. Agency Req. for Dismissal, attach. 1, RFP at 1, 9. The solicitation was issued under the procedures of Federal Acquisition Regulation (FAR) part 15, Contracting by Negotiation. *Id.* at 1. The RFP provided for award to the responsive and responsible offeror with the lowest-priced proposal meeting or exceeding the technical requirements. *Id.* at 85. The solicitation notified offerors that to be eligible for award, the firm submitting the proposal must be registered in SAM prior to award. *Id.* at 67 (incorporating FAR provision 52.204-7, System for Award Management, (Oct. 2013)).

The October 2013 version of the FAR provision, as incorporated into the RFP, stated that, “[b]y submission of an offer, the Offeror acknowledges the requirement that a prospective awardee shall be registered in the SAM database prior to award, during performance, and through final payment of any contract . . . resulting from this solicitation.” FAR 52.204-7(b)(1). The provision also advised offerors that, “[i]f the Offeror does not become registered in the SAM database in the time prescribed by the Contracting Officer, the Contracting Officer will proceed to award to the next otherwise successful registered Offeror.” FAR 52.204-7(d). Proposals were due on February 15. RFP at 1. The protester timely submitted its proposal.

On April 14, after receipt of proposals and before award, the agency requested that the protester verify that it would be registered in SAM prior to award. Protest at 3. The protester responded to the agency, stating that it had initiated the SAM registration process and expected the registration to become active within two weeks and prior to award. *Id.* More than six weeks later, on May 27, the agency notified the protester of its unsuccessful offer, stating that, although the protester submitted the lowest-priced, technically acceptable proposal, it was not eligible for award for failure to be registered in SAM when the contracting officer checked the system prior to award. *Id.* at 4. In this notice, the contracting officer informed the protester that the agency checked the system on numerous occasions (*i.e.*, on May 20, 22, 25, and 27). *Id.* This protest followed.

In its protest, CGS-SM does not dispute that it was required to be registered in SAM at the time of award or that it was not registered in SAM as of May 27, when it was notified of its unsuccessful offer.¹ *Id.* at 3. Instead, the protester argues that the requirement to be registered in SAM was a “minor informality or irregularity that does not affect the eligibility of a bid” under FAR section 14.405 and, therefore, the agency acted unreasonably in not waiving this immaterial defect. *Id.* at 4.

¹ We note that the agency alleges, and the protester does not dispute, that the protester remained unregistered in SAM at the time it filed this protest. Agency Req. for Dismissal at 2.

The agency responds that, as an initial matter, FAR section 14.405 only applies in the context of FAR part 14 sealed bidding procedures and therefore is not applicable to the negotiated procurement procedures used here. Agency Req. for Dismissal at 2. The agency further argues that, even if FAR section 14.405 applies here, it only requires the agency to give offerors an opportunity to cure the minor informality or irregularity, but does not require the agency to waive the requirement in its entirety. *Id.* at 2-3. The agency contends that it did provide the protester with an opportunity to correct its SAM registration and that the protester failed to do so before award. *Id.* at 3.

Our Office has previously explained that, because registration--or failure to register--in SAM does not affect a firm's obligation to perform in accordance with the terms of the solicitation, compliance with the registration requirement is not a matter of responsiveness, but rather a matter of responsibility. See *Master Pavement Line Corp.*, B-419111, Dec. 16, 2020, 2020 CPD ¶ 404 at 5. In a negotiated procurement, information to be used in determining responsibility could be submitted up until the time of award and an agency properly may provide an offeror with an opportunity to submit the information prior to award. See *Chags Health Info. Tech., LLC*, B-413104.30, B-413104.37, Apr. 11, 2019, 2019 CPD ¶ 145 at 7.

In support of its protest, the protester relies on our conclusions in *Master Pavement Line Corporation* and *Jade Excavation, Inc.* to contend that the SAM registration was a minor informality that the agency was required to waive. Protest at 5-6; Response to Req. for Dismissal at 3, citing *Master Pavement Line Corp.*, *supra*, and *Jade Excavation, Inc.*, B-419515, Mar. 18, 2021, 2021 CPD ¶ 128. However, the protester's reliance on these decisions is misplaced. Aside from the fact that both of these decisions involve sealed bidding under FAR section 14.405, which is not applicable here, neither of these decisions stand for the proposition that the agency should waive the requirement for SAM registration under certain circumstances. Rather, in both of these decisions, our Office concluded that the agency should have given the bidder, who would have been the awardee but for the SAM registration defect, an opportunity to cure the minor defect. See *Master Pavement Line Corp.*, *supra*; *Jade Excavation, Inc.*, *supra*. Thus, these decisions are not only inapplicable to a negotiated procurement under FAR part 15, as here, but also are inapposite to the facts as alleged here, where the agency provided the protester an opportunity to correct its registration defect before award.

Here, the protester has failed to allege a cognizable basis of protest. The facts as alleged by the protester show that the agency gave the protester an opportunity to cure its defect of not being registered in SAM when it notified the protester, on April 14, of its unregistered status and requested verification. Protest at 3; Agency Req. for Dismissal at 3. Therefore, the protester's allegations fail to establish anything improper with the agency's decision, in accordance with FAR provision 52.204-7(d), to proceed with award to the next otherwise successful registered offeror when it found that the protester was not registered in SAM on the date of contract award. As such, the protester's contention that the agency was required to ignore or waive the registration requirement altogether, in contravention of the FAR provision, fails to state adequate legal grounds of protest. 4 C.F.R. § 21.5(f); see *Inalab Consulting, Inc.*, B-418950,

Oct. 9, 2020, 2020 CPD ¶ 327 at 6 (finding that the decision to waive a solicitation requirement, even when permissible, is a discretionary action; an agency is not required to waive a solicitation requirement and offerors have no entitlement to a waiver).²

The protest is dismissed.

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General Counsel

² The protester also alleges that the agency partially waived the registration requirement by not requiring offerors to be registered at the time they submitted their offers. Response to Req. for Dismissal at 4. The record shows that, even though the version of FAR provision 52.204-7 that was current at the time of RFP issuance requires offerors to be registered in SAM at the time of proposal submission, see FAR 52.204-7 (Oct. 2018), the RFP included a reference to the July 2013 version of the provision, as well as the full text of the October 2016 version, both of which only require offerors to be registered at the time of award. RFP at 39, 66-67; Agency Req. for Dismissal at 1 n.1.

On this record, we agree with the agency that, by referring to and incorporating different versions of the FAR provision that contained inconsistent terms, the RFP was patently ambiguous as to the timing of the registration requirement. See Agency Req. for Dismissal at 1 n.1. Because the protester did not challenge the patent ambiguity before proposals were due, the protester's objections now to the agency's reasonable application of the requirement are untimely. See *Master Pavement Line Corp.*, *supra* at 4 ("A bidder or offeror that chooses to compete under a patently ambiguous solicitation does so at its own peril and cannot later complain when the agency proceeds in a way inconsistent with its interpretation.").