

Decision

Matter of: Allosense, Inc.

File: B-420201

Date: December 27, 2021

Roman Sandoval for the protester.

Colonel Frank Yoon, Major Thomas F. Pfeifer, Major Brian M. Shust, and Robert E. Beyler, Esq., Department of the Air Force, for the agency.

Christopher Alwood, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging agency's decision not to meet its requirement through the award of a sole-source small business innovation research (SBIR) phase III award is dismissed as untimely where the protester did not protest the terms of the request for quotations that sought to meet the requirement on a competitive basis outside the SBIR program until after the closing date for receipt of quotations.
2. Protest challenging the agency's decision not to consider a vendor's quotation is dismissed for lack of interested-party status where the protester's quotation, even if it were considered by the agency, would not be next in line for award, given the solicitation's lowest price, technically acceptable basis for award.

DECISION

Allosense, Inc., a small business of San Antonio, Texas, protests the award of a contract to Apptricity Corporation, a small business of Irving, Texas, under request for quotations (RFQ) No. F1M2X51194A001, issued by the Department of the Air Force, 628th Contracting Squadron for a telematics tracking system for the tracking of aerospace ground equipment. The protester contends that the agency should have met its requirement through a small business innovation research (SBIR) phase III sole-source contract or, alternatively, should have considered Allosense's quotation requesting an SBIR phase III award on a sole-source basis for award under the RFQ.

We dismiss the protest.

BACKGROUND

The SBIR program was established under the Small Business Innovation Development Act of 1982, which is codified in section 9 of the Small Business Act. 15 U.S.C. § 638. The program was established to assist small business concerns obtain and perform research and development work by requiring that certain federal agencies--including the Department of Defense--reserve a portion of their research and development funds for awards to small businesses. See *id.* § 638(e)(4).

The SBIR program has three phases. Under phase I, small businesses are invited to submit proposals to conduct research on one or more topics specified in the annual SBIR program solicitation. See 15 U.S.C. § 638(e)(4)(A). Under phase II, firms that received phase I awards may submit proposals for further development work on the topic. See *id.* § 638(e)(4)(B). Regarding phase III, the Small Business Act provides that, "where appropriate," there may be a "third phase for work that derives from, extends, or completes efforts made under prior funding agreements under the SBIR program."¹ *Id.* § 638(e)(4)(C).

Pursuant to the National Defense Authorization Act of 2018, the Small Business Act was amended to state:

To the greatest extent practicable, Federal agencies and Federal prime contractors shall--
(B) issue, without further justification, Phase III awards relating to technology, including sole source awards, to the SBIR and STTR² award recipients that developed the technology.

15 U.S.C. § 638(r)(4).

Throughout June and July of 2021, the agency conducted market research for a requirement to provide a telematics tracking system to the Air Force's 437th Maintenance Squadron. Contracting Officer's Statement (COS) at 2-3. As part of conducting the market research, the agency contacted several potential offerors, including Allosense, to see if they would be able to submit quotations for the requirement. *Id.* at 2.

On July 9, Allosense, an SBIR phase I awardee for asset tracking technology, submitted a quotation in response to the agency's inquiries. *Id.*; Agency Report (AR), Tab 4, Allosense Initial Quotation at 3. Allosense submitted the quotation by email to a Technical Sergeant in the 437th Maintenance Squadron. AR, Tab 4, Allosense Initial Quotation at 3; AR, Tab 10, Emails between Agency and Allosense at 14. Allosense's

¹ Unlike phase I and II, phase III does not involve SBIR funds; rather, phase III is funded by commercial or non-SBIR federal sources. 15 U.S.C. § 638(e)(4)(C).

² STTR refers to the Small Business Technology Transfer program.

quotation was submitted with the stated purpose of providing asset tracking technologies “through a[n] SBIR Phase III sole-source contract vehicle.” AR, Tab 4, Allosense Initial Quotation at 2-3.

Based on its market research, the agency concluded that the type of asset tracking technology it was seeking was “common in the commercial market place” and that several small businesses could potentially meet its requirement. COS at 3. Accordingly, the agency decided to conduct a competitive procurement. See *Id.*

On July 27, the agency issued the RFQ as a small business set-aside pursuant to the procedures of Federal Acquisition Regulation (FAR) subpart 12.6 and part 15. See AR, Tab 7, RFQ at 1.³ The agency issued the RFQ by posting it on the System for Award Management website (SAM.gov). *Id.* The RFQ contemplated the award of a contract to provide a telematics system for aerospace ground equipment, including installation and training, for the Air Force’s 437th Maintenance Squadron at Joint Base Charleston in South Carolina. *Id.* at 7. The RFQ established that award would be made on a lowest-price technically acceptable basis, considering a single technical capability evaluation factor and price. *Id.* at 2. The RFQ required quotations to be submitted to the Air Force’s 628th Contracting Squadron no later than August 3 and provided both a mailing and email address.⁴ *Id.* at 1, 6.

The solicitation incorporated by reference FAR provision 52.212-1, Instructions to Offerors-Commercial Items, which provides, in relevant part, that:

- (f) Late submissions, modifications, revisions, and withdrawals of offers:
 - (1) Offerors are responsible for submitting offers . . . so as to reach the Government office designated in the solicitation by the time specified in the solicitation
 - (2) (i) Any offer . . . received at the Government office designated in the solicitation after the exact time specified for receipt of offers is “late” and will not be considered unless it is received before award is made, the Contracting Officer determines that accepting the late offer would not unduly delay the acquisition; and-
 - (A) If it was transmitted through an electronic commerce method authorized by the solicitation, it was received at the initial point of entry to

³ Several of the agency report exhibits, including the RFQ, consist of multiple documents or separately paginated sections. The agency used a page numbering system to provide a single set of page numbers within each exhibit. Citations to agency report exhibits and the solicitation in this decision refer to the page numbers assigned by the agency.

⁴ While the RFQ states that vendors are to submit their quotations “to the following address,” it provides both a mailing address and email address and does not specify a required method of submission.

the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of offers; or
(B) There is acceptable evidence to establish that it was received at the Government installation designated for receipt of offers and was under the Government's control prior to the time set for receipt of offers

RFQ at 2; FAR provision 52.212-1(f).

On July 30, Allosense emailed an updated version of its previously submitted quotation to two members of the 437th Maintenance Squadron and one other person who was not affiliated with either the 437th Maintenance Squadron or the 628th Contracting Squadron. COS at 3-4; AR, Tab 8, Allosense Updated Quotation; AR, Tab 10, Emails between Agency and Allosense at 6-7. Allosense stated that the updated quotation was submitted to reflect an adjustment to Allosense's contracting team. AR, Tab 10, Emails between Agency and Allosense at 6. The updated quotation still stated that its purpose was to provide asset tracking technology "through a[n] SBIR Phase III sole-source contract." AR, Tab 8, Allosense Updated Quotation at 3, 6. In addition, Allosense did not change its \$496,700 price, from the initial Allosense quotation. *Id.*

The 628th Contracting Squadron received three timely quotations in response to the solicitation. COS at 4. Following its evaluation, the agency concluded that Apptricity Corporation submitted the lowest-priced technically acceptable quotation. AR, Tab 9, Proposal Evaluation Abstract. On August 13, the agency awarded the contract to Apptricity Corporation in the amount of \$133,450.

On September 8, Allosense contacted the 437th Maintenance Squadron via email to inquire about the status of its quotation. AR, Tab 10, Emails between Agency and Allosense at 5. On September 9, an agency employee informed Allosense that the agency had conducted a competitive procurement for the requirement and already made an award to another firm. *Id.* at 4. After several emails back and forth with agency personnel, on September 17, the contracting officer spoke with the president of Allosense by telephone to discuss the procurement. See *Id.* at 1-4; COS at 4-5. During the phone call the agency informed Allosense that it had not considered its quotation for award under the RFQ and discussed how Allosense's quotation was used for market research. COS at 4-5. On September 27, Allosense filed the instant protest with our Office.

DISCUSSION

Allosense alleges that the agency's actions here violate the Small Business Act's instructions regarding the award of SBIR phase III contracts. Protest at 3 (*citing* 15 U.S.C. § 638(r)(4)). Specifically, Allosense argues that the agency was required to award Allosense an SBIR phase III sole-source contract to meet the instant requirement because, the protester claims, it developed the technology being procured. *Id.* Alternatively, Allosense contends that the agency unreasonably failed to consider its quotation for award under the RFQ. *Id.*

The agency requests that we dismiss the protest as untimely because the protester filed its protest more than 10 days after it knew the bases for its protest. Req. for Dismissal at 2; Memorandum of Law (MOL) at 11-13. The Air Force argues that Allosense knew the bases for its grounds of protest no later than September 13. MOL at 12. The agency refers to a September 13 email from Allosense, contending that it demonstrates the protester was aware there had been a competitive procurement to fulfill the requirement and that Allosense's quotation was not considered for award under the RFQ. *Id.* (citing AR, Tab 10, Emails between Agency and Allosense at 2-3). As discussed below, we agree with the Air Force that the protester's challenge to the agency's decision not to meet this requirement by awarding Allosense an SBIR phase III contract is untimely. However, we find that the protester's challenge to the agency's failure to consider its quotation for award under the RFQ is ripe for resolution on the merits.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. *Verizon Wireless*, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4. Our timeliness rules specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of proposals be filed before that time. 4 C.F.R. § 21.2(a)(1).

The SAM.gov website is the current government-wide point of entry (GPE), "the single point where Government business opportunities greater than \$25,000, including synopses of proposed contract actions, solicitations, and associated information, can be accessed electronically by the public." FAR 2.101.⁵ Our Office has consistently explained that protesters are charged with constructive notice of the contents of procurement actions published on the GPE. *Boswell & Dunlap, LLP*, B-416623, Oct. 10, 2018, 2018 CPD ¶ 351 at 3. The doctrine of constructive notice creates a presumption of notice in law that cannot be rebutted. *Alphapointe*, B-417834, Sept. 4, 2019, 2019 CPD ¶ 313 at 5. By definition, the doctrine imputes knowledge to a party without regard to the party's actual knowledge of the matter at issue. *Id.*

We agree that the agency's actions and communications, as represented by Allosense with regard to the reason the agency requested a quote from Allosense, were less than clear. Nonetheless, Allosense was put on notice as early as July 27, 2021, when the agency issued the solicitation, that the agency contemplated meeting its need for a telematics tracking system by soliciting quotations and awarding a contract outside the

⁵ Although the FAR currently states the GPE is located at FedBizOpps (www.fbo.gov), beta.SAM.gov was the official government successor website to www.fbo.gov. The beta.SAM.gov website has since merged with SAM.gov, and all content from both sites is now at SAM.gov. See <https://sam.gov/content/home> (last visited December 20, 2021).

SBIR program. The RFQ, posted on SAM.gov with a closing date of August 3, clearly stated that it was a competitive procurement open to all small businesses that met the relevant size standard. See RFQ at 2. To the extent that Allosense wished to challenge the agency's decision not to meet this requirement through the SBIR program--or otherwise challenge the terms of the solicitation--it was required to do so prior to the solicitation closing date.⁶ Allosense filed its protest on September 27, more than a month after the closing date for receipt of quotations. Accordingly, we dismiss these allegations as untimely. 4 C.F.R. § 21.2(a)(1); see *Alphapointe*, *supra* at 6.

Next, we find that that the protester's challenge to the agency's failure to consider its quotation for award under the RFQ was timely filed. A protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2).

As noted above, the agency argues that the September 13 email the protester sent the agency demonstrates Allosense was aware its quotation was not considered for award under the RFQ. MOL at 12. However, the proffered email does not support the agency's argument. While Allosense's September 13 email acknowledges that a competitive procurement had taken place, the email does not discuss whether Allosense's quotation had been considered for award as part of that competition. See AR, Tab 10, Emails between Agency and Allosense at 2-3. Further, our review of the record does not reveal that the protester was aware of, or otherwise should have known, whether the quotation it submitted to the agency was considered for award under the RFQ until it discussed the procurement with the contracting officer on September 17. Protest at 4; COS at 5. Given that the protest was filed on September 27, within 10 days of September 17, we find this protest ground to be timely raised.

Accordingly, since the agency competitively procured its requirement under FAR subpart 12.6 and part 15, the sole timely protest ground before us challenges the agency's decision to not consider Allosense's quotation for award under the resultant RFQ. Protest at 3. We dismiss this remaining allegation because Allosense, having

⁶ To the extent Allosense argues that the doctrine of constructive notice should not apply here because Allosense did not know the RFQ was issued for the same requirement, it has still not demonstrated that its arguments are otherwise timely. See Comments at 6. Protests other than those alleging improprieties in a solicitation that are apparent prior to the closing time for receipt of quotations must be filed no later than 10 days after the protester knew or should have known the basis for protest. 4 C.F.R. § 21.2(a)(2). The record shows that the agency informed Allosense on September 9 that it had met the requirement at issue through a competitive procurement. AR, Tab 10, Emails between Agency and Allosense at 4. Allosense did not file its protest until September 27, more than 10 days after it actually knew the basis for such grounds of protest.

failed to timely protest the terms of the solicitation and not otherwise challenging the technical acceptability of the awardee, is not an interested party to raise it.

Under our Bid Protest Regulations, a protester must be an interested party, that is, an actual or prospective offeror whose direct economic interest would be affected by the award of a contract. 4 C.F.R. § 21.0(a)(1). A protester is not an interested party if it would not be in line for award if its protest were sustained. *BANC3, Inc.*, B-416486, B-416486.2, Sept. 10, 2018, 2018 CPD ¶ 316 at 9.

Here, even were we to view the quotation as properly submitted,⁷ the protester has not demonstrated that it would be in line for award. The RFQ established that award would be made on a lowest-price, technically acceptable basis. RFQ at 2. Allosense quoted a total price of \$496,700. AR, Tab 8, Allosense Updated Quotation at 6. The record shows that the awardee's price was \$133,450. AR, Tab 9, Evaluation Abstract. Further, Allosense has not challenged the technical acceptability of the awardee. Accordingly, Allosense has not demonstrated that, but for the agency's failure to consider its quotation for award under the RFQ, that it would have been in line for award as the lowest-priced technically acceptable quotation.

In summary, even if we found that Allosense's remaining allegation had merit, Allosense's quotation would still not be in line for award and we would have no basis to disagree with the agency's award decision. Accordingly, we dismiss this allegation.

The protest is dismissed.

Edda Emmanuelli Perez
General Counsel

⁷ We do not find that Allosense's quotation was properly submitted. It is a vendor's responsibility, when transmitting its quotation electronically, to ensure the delivery of its quotation to the proper place at the proper time. *Team Housing Sols.*, B-414105, Feb. 10, 2017, 2017 CPD ¶ 55 at 4. Here, the RFQ expressly stated that any quotation received after the deadline would be considered untimely and not eligible for award. RFQ at 2; FAR provision 52.212-1(f). The record shows that Allosense submitted its quotation by email, but not to the points of contact listed on the RFQ. AR, Tab 4, Allosense Initial Quotation; AR, Tab 8, Allosense Updated Quotation; AR, Tab 10, Emails between Agency and Allosense at 6-7, 14. The agency notes, and Allosense does not dispute, that Allosense submitted the quotation to three Air Force employees who were not part of the 628th Contracting Squadron. COS at 3-4. Because Allosense failed to establish that its quotation was submitted to the agency's designated email address prior to the time set for receipt of quotations, Allosense has failed to meet its burden of showing that its quotation was timely delivered to the agency. Accordingly, the agency could not consider the quotation.