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Decision

Matter of: Kolb Grading, LLC

File: B-420310.2

Date: December 8, 2021

Jeffery M. Chiow, Esq., Alexandria Tindall Webb, Esq., and Neil O'Donnell, Esq., Rogers Joseph O'Donnell, PC, for the protester.
Sabah Petrov, Esq., Nathaniel Greeson, Esq., Patrick Quigley, Esq., and Robert J. Symon, Esq., Bradley Arant Boult Cummings LLP, for the intervenor.
Deena G. Braunstein, Esq., James Zaleski, Esq., Amber Jackson, Esq., and Susan E. Symanski, Esq., Department of the Army, for the agency.
Mary G. Curcio, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly failed to consider protester's proposal is dismissed as untimely where protester failed to diligently pursue the information on which the protest is based.

DECISION

Kolb Grading LLC, of Weldon Spring, Missouri, protests the award of a contract to Phillips & Jordan, Inc., of Knoxville, Tennessee, under request for proposals (RFP) No. W912EP21R0024, issued by the Department of the Army, Army Corps of Engineers, for the construction of canals and a maintenance road in Palm Beach County, Florida. The protester argues that the agency improperly failed to consider its timely submitted proposal.

We dismiss the protest as untimely because it was filed more than 10 calendar days after the protester received constructive notice of the basis for its protest.

The agency issued the solicitation on July 16, 2021. Proposals, which were due on August 17, at 10:00 am (EDT), were required to be submitted electronically via the agency's secure access file exchange (SAFE) website. The agency awarded the contract to Phillips on September 23, and posted notice of the award on the System for Award Management (SAM) Contract Opportunities website (beta.SAM.gov) on

September 28.¹ According to the protester, it learned of the award on October 7 through social media. On October 11, the protester asked the contracting officer to provide it with the notice of award. On October 12, the contracting officer notified the protester that the agency never received a proposal from the protester.

On October 21, Kolb submitted its protest to our Office. Kolb asserts that it timely submitted its proposal through the SAFE website and followed all relevant directions in doing so. Kolb requests that we require the agency to review its proposal.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, 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). Publication on the beta.SAM.gov website, which has been expressly designated by statute and regulation as the official public medium for providing notice of contracting actions by agencies, constitutes constructive notice of contracting actions. *Prudential Protective Services, LLC*, B-418869, Aug. 13, 2020, 2020 CPD ¶ 272 at 3. Where a protester has not diligently or expeditiously pursued the information that forms the basis for its protest, we will not view the protest as timely. *Id.*

Here, Kolb had constructive knowledge on September 28 from the award notice published that day on SAM.gov that the award was made to Phillips.² Kolb requested that the agency provide it notice of the award on October 11. Kolb's delay of 13 days--from the public notice of the award to the protester's request for additional information about the award--shows a lack of diligent pursuit.³ Accordingly, we find that the protest is untimely.

Kolb also asserts that if GAO concludes that the protest is untimely, GAO should consider it under the significant issue exception to our timeliness rules.

¹ Publication on the Government Point of Entry (formerly www.fbo.gov, now beta.SAM.gov) has been designated by statute and regulation as the official public medium for providing notice of contracting actions by federal agencies. *Prudential Protective Services, LLC*, B-418869, Aug. 13, 2020, 2020 CPD ¶ 272 at 3.

² Kolb asserts that it should not be charged with constructive notice of the award from the publication of the notice of award on SAM.gov because it was unable to readily locate the notice on SAM.gov. In response, the agency submitted documents showing that the notice had been posted to SAM.gov on September 28, and was readily available. Hence, we conclude that Kolb had constructive notice of this award.

³ Kolb also asserts that it filed an agency-level protest on October 18. We do not decide whether Kolb's communication with the agency concerning its missing proposal is an agency-level protest since this protest would also be untimely for failure to diligently pursue the information on which it is based.

Our office may consider the merits of an untimely protest where good cause is shown or the protest raises issues significant to the procurement system. 4 C.F.R. § 21.2(c). In order to prevent our timeliness rules from becoming meaningless, exceptions are strictly construed and rarely used. *Vetterra, LLC*, B-417991 *et al.*, Dec. 29, 2019, 2020 CPD ¶ 15 at 3. What constitutes a significant issue is decided on a case-by-case basis. *Cyberdata, Techs., Inc.*, B-406692, Aug. 8, 2012, 2012 CPD ¶ 230 at 3. However, we generally regard a significant issue as one of widespread interest to the procurement community that has not been considered on the merits in a prior decision. *Vetterra, LLC, supra*. Moreover, invoking the significant issue exception is a matter entirely within GAO's discretion. *Capital Brand Group, LLC-Recon.*, B-418656.2, July 9, 2020, 2020 CPD ¶ 231 at 4.

Here, Kolb has failed to show both good cause for GAO to consider this protest and that the issue is one of widespread interest to the procurement community not previously considered on the merits by our Office. Accordingly we decline to consider it under the significant issue exception to our timeliness rules.

The protest is dismissed.

Edda Emmanuelli Perez
General Counsel