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Decision

Matter of: Battelle Memorial Institute

File: B-420403, B-420403.2, B-420403.3

Date: March 10, 2022

Marques O. Peterson, Esq., Meghan D. Doherty, Esq., Kevin Massoudi, Esq., and Dinesh Dharmadasa, Esq., Pillsbury Winthrop Shaw Pittman LLP, for the protester. Robert J. Symon, Esq., Patrick R. Quigley, Esq., Nathaniel J. Greeson, Esq., and Sabah K. Petrov, Esq., Bradley Arant Boult Cummings LLP, for Geosyntec Jacobs, A Joint Venture, the intervenor.

Michael J. Garcia, Esq., and Jacquelyn K. Wright, Esq., Department of the Navy, for the agency.

Raymond Richards, Esq., Jonathan L. Kang, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the evaluation of a firm’s statement of qualifications submitted in response to a synopsis for architect-engineer work is dismissed as untimely where the firm was not chosen as the “most highly qualified” firm, was offered a pre-award debriefing, elected to defer the debriefing until after the agency negotiated a contract with the most highly qualified firm, and then filed a protest after receiving award notice.

DECISION

Battelle Memorial Institute (Battelle) of Columbus, Ohio, protests the selection of Geosyntec Jacobs, A Joint Venture (Geosyntec Jacobs) of San Diego, California, as the most highly qualified firm to submit a statement of qualifications in response to synopsis No. N39430-21-R-2201, issued by the Department of the Navy for architect/engineering (A/E) services. Battelle challenges the agency’s evaluation of its own statement of qualifications as unreasonable, and argues that it should have been chosen as the most highly qualified firm.

We dismiss the protest as untimely.

BACKGROUND

Legal Framework for A/E Procurements

Generally, A/E procurements such as the one here are conducted pursuant to procedures established by the Selection of Architects and Engineers Statute, also referred to as the Brooks Act, 40 U.S.C. §§ 1101-1104. These procedures are implemented by Federal Acquisition Regulation (FAR) subpart 36.6. Under the competitive procedures established by FAR subpart 36.6, an agency issues a synopsis, which functions in a manner similar to a traditional solicitation. See FAR 36.601-2, 36.602. In response to a synopsis for A/E requirements, interested firms submit a statement of qualifications using Standard Form 330 (SF 330), Architect-Engineer Qualifications. FAR 36.603(b).

Following the issuance of the synopsis and receipt of SF 330s, the agency head convenes an evaluation board to review the statements of qualification. 40 U.S.C. § 1103(c); FAR 36.602-3. The evaluation board conducts discussions with at least three of the most highly qualified firms regarding the anticipated concepts and relative utility of alternative methods of furnishing the required services. 40 U.S.C. § 1103(c); FAR 36.602-3(c). After discussions, the evaluation board prepares a selection report for the agency head or the designated selection authority, recommending at least three firms, in order or preference, considered to be the most highly qualified. 40 U.S.C. § 1103(d); FAR 36.602-3(d). The selection authority reviews the evaluation board's recommendations and makes the "final selection." FAR 36.602-4(b). The final selection is a list, in order of preference, of the firms considered most highly qualified to do the work. *Id.* All firms on the final selection list are considered "selected firms" with which the contracting officer may negotiate a contract in accordance with FAR section 36.606. *Id.*

The final selection authorizes the contracting officer to begin negotiations. FAR 36.606(a). At this point in the process, the contracting officer may release information identifying the firm with which the agency will begin its negotiations. FAR 36.607(a). It is also at this point in the process that debriefings "will be held[.]" FAR 36.607(b). The FAR explains that: "Debriefings of successful and unsuccessful firms will be held after final selection has taken place and will be conducted, *to the extent practicable*, in accordance with [FAR sections] 15.503, 15.506(b) through (f), and 15.507(c). Note that [FAR sections] 15.506(d)(2) through (d)(5) do not apply to [A/E] contracts." FAR 36.607(b) (emphasis added).

Negotiation then begins with the most highly qualified firm. 40 U.S.C. § 1104(b); FAR 36.606(a). If negotiations with this firm fail, those negotiations are terminated and the next most qualified firm is invited to negotiate for a contract. 40 U.S.C. § 1104(b); FAR 36.606(f). This process continues until an agreement is reached. *Id.* When an award has been made, the contracting officer may release the award information in accordance with FAR section 5.401. FAR 36.607(a).

Factual Background of the Instant Protest

On October 13, 2020, the Navy issued the synopsis pursuant to FAR subpart 36.6, architect-engineer services. Agency Report (AR), Attach. 4, Synopsis at 1-2.¹ COS at 1. The synopsis explained that the contemplated work will primarily support the environmental cleanup of domestically located sites managed by the Navy and other federal agencies, but could also include work on international sites. Synopsis at 10-12.

The synopsis contemplated the award of a single indefinite-delivery, indefinite-quantity (IDIQ) contract with a base ordering period of 5 years, and a maximum value of \$100 million. *Id.* at 2. Task orders issued under the contract will be either fixed-price or cost-plus-fixed-fee. *Id.* Highly qualified firms would be identified utilizing seven selection criteria. *Id.* at 3; COS at 2. Award was to be made pursuant to the procedures of FAR subpart 36.6. Synopsis at 2.

The Navy received SF 330s from five firms and evaluated them against the seven selection criteria in order to identify highly qualified firms. COS at 2-3. The agency determined that four firms met the minimum requirements for each selection criterion and selected (or “slated” as stated by the agency) those firms to advance to the interview stage of the procurement.² *Id.*

Interviews were then conducted with the slated firms. *Id.* After completing the interviews, the evaluation board ranked the firms under each selection criterion, and also ranked the firms overall. *Id.* The evaluation board concluded that Geosyntec Jacobs was the highest-ranked firm. AR, Attach. 6, Combined Evaluation Documents at 2. Accordingly, the evaluation board recommended that the selection authority negotiate a contract with Geosyntec Jacobs. *Id.* at 2-3.

The selection authority concurred with the evaluation board’s recommendation on April 22. *Id.* at 6. On April 23, the agency notified all slated offerors that Geosyntec Jacobs was selected as the most highly qualified firm. *Id.* Battelle’s notice included an offer for a pre-award or a post-award debriefing. AR, Attach. 8, Notice to Non-Selected Firms.

On April 24, Battelle requested a pre-award debriefing. AR, Attach. 9, Email from Battelle to Agency, Apr. 24, 2021. On April 26, the agency confirmed receipt of Battelle’s request. *Id.*, Email from Agency to Battelle, Apr. 26 (10:08 a.m.). Also on April 26, Battelle revised its request for a debriefing; Battelle specifically asked the agency to provide a post-award debriefing instead of the previously requested

¹ The synopsis was amended four times; the final amendment was issued on November 4, 2020. AR, Attach. 1, Contracting Officer’s Statement (COS) at 2. As part of its agency report, the Navy filed a conformed copy of the synopsis. Our citations to the synopsis are to the conformed copy.

² The agency eliminated one firm from the competition because it did not meet the minimum requirements for each selection criterion. COS at 3.

pre-award debriefing. *Id.*, Email from Battelle to Agency, April 26. Later that day, the agency confirmed receipt of Battelle's revised debriefing request. *Id.*, Email from Agency to Battelle, Apr. 26 (1:01 p.m.).

About 7 months later, on November 30, the agency awarded the IDIQ contract to Geosyntec Jacobs. COS at 6. Battelle learned of the award on December 1, and was provided with a written debriefing on December 9. *Id.*; AR, Attach. 9, Email from Battelle to Agency, Dec. 1. On December 10, Battelle filed this protest with our Office.

DISCUSSION

Battelle challenges the Navy's evaluation of the firm's SF 330 as unreasonable, and argues that the agency should have selected it as the most highly qualified firm for negotiations.³ After filing an agency report and a supplemental agency report addressing the merits of Battelle's protest and first supplemental protest, the Navy filed a request for dismissal, arguing for the first time that Battelle's entire protest should be dismissed as untimely. Navy Req. for Dismissal at 4. In this regard, the agency argues that where a firm declines a pre-award debriefing and instead elects to receive a post-award debriefing, the firm has failed to diligently pursue any grounds of protest that should have been discovered in the pre-award debriefing. *Id.* The Navy argues that the entire protest should be dismissed as untimely since Battelle's protest is based on information that would have been included in a pre-award debriefing. *Id.* As explained below, we dismiss the protest as untimely.

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. *United Int'l Investigative Servs., Inc.*, B-286327, Oct. 25, 2000, 2000 CPD ¶ 173 at 4. Under these rules, a protest based on alleged improprieties in a solicitation must be filed prior to bid opening or the time established for receipt of proposals, 4 C.F.R. § 21.2(a)(1), and all other protests generally 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).

Our Office interprets these strict timeliness rules as requiring protesters to diligently pursue any information which may form the basis of a protest. *Cf.*, *Integration Techs. Grp., Inc.*, B-419116.3, Dec. 22, 2020, 2021 CPD ¶ 10 at 5 (failure to diligently pursue information in a FAR subpart 8.4 procurement where protester received an

³ Battelle's protest also alleged that a Navy employee had a conflict of interest which tainted the procurement. See Protest at 5-7. In response to a request for dismissal filed by Geosyntec Jacobs and joined by the Navy, Battelle withdrew this allegation. We note that Geosyntec Jacobs's request for dismissal and the Navy's brief in support of the request focused on the conflict of interest allegation and did not specifically address Battelle's remaining ground of protest which challenged the evaluation of its SF 330 under the specialized experience and technical competence evaluation criterion.

unsuccessful vendor notice disclosing the names of the awardees, but waited 5 weeks to file a protest challenging that technical acceptability of the awardees' quotations); *Bart & Assocs., Inc.*, B-414234, B-414234.2, Feb. 24, 2017, 2017 CPD ¶ 75 at 5-6 (failure to diligently pursue information in a FAR subpart 16.5 multiple-award task order procurement where protester did not file a protest with GAO until 71 days had passed since filing a "letter of concern" with the procuring agency regarding the agency's award decisions); *United Int'l Investigative Servs., Inc.*, *supra* at 3-4 (failure to diligently pursue information in a FAR part 15 procurement where protester learned that its proposal was not selected for inclusion in the competitive range, declined a required pre-award debriefing, and filed a protest based on information learned in a post-award debriefing); *Thomas May Constr. Co.*, B-255683, Mar. 23, 1994, 94-1 CPD ¶ 210 at 2 (failure to diligently pursue information in a FAR part 14 procurement where protester failed to seek information which was publicly available at the time of bid opening and instead waited until after receiving an award notice to seek information under the Freedom of Information Act).

An exception to our general timeliness rules exists where a protester challenges a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required. 4 C.F.R. § 21.2(a)(2); see *Loc Performance Prods., Inc.*, B-417431, Apr. 22, 2019, 2019 CPD ¶ 149 at 2. However, our Office has explained that this exception does not apply to procurements conducted pursuant to FAR subpart 36.6 because such procurements are not conducted on the basis of competitive proposals. *McKissack-URS Partners, JV*, B-406489.2 *et al.*, May 22, 2012, 2012 CPD ¶ 162 at 4-6 ("competitive proposals" is a term of art). Therefore, in order to be considered timely, a protest challenging the evaluation of SF 330s in a FAR subpart 36.6 procurement must be filed no later than 10 days after the basis of the protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2).

Battelle argues that its protest is timely for the following three reasons. First, Battelle argues that it learned its basis of protest on December 1, when it was notified of the ultimate award decision. Resp. to Navy Req. for Dismissal at 2. Since the protest was filed on December 10, within ten days of December 1, Battelle contends that it has met the requirements of our timeliness rules. *Id.* Second, Battelle argues that in a FAR subpart 36.6 procurement, a firm not selected as the most highly qualified firm retains an opportunity for award since negotiations with the most highly qualified firm could fail, which would provide other selected firms an opportunity to negotiate. *Id.* at 6-7. In other words, Battelle argues that filing a protest prior to learning the agency's ultimate award decision would be premature. Third, Battelle argues that even if its initial protest is dismissed as untimely, its supplemental protests should not be dismissed because they are based on information disclosed for the first time in the agency reports, and thus were timely filed. *Id.* at 7-8. For the reasons explained below, we disagree with Battelle on all three points.

Battelle argues that it first learned its basis of protest on December 1 after receiving the award notice, therefore its protest filed on December 10 is timely. We disagree regarding the timeliness of the protest. Battelle's protest is not a challenge to the agency's award decision but rather, is a challenge to the agency's decision to select Geosyntec Jacobs as the most highly qualified firm and to begin negotiations with that firm. In this regard, the essence of Battelle's protest is that the Navy's selection of the most highly qualified firm was flawed--specifically, the Navy unreasonably evaluated Battelle's SF 330 in making that selection.⁴ See Protest at 7-9 (challenging the Navy's evaluation of Battelle's SF 330 under the specialized experience and technical competence criterion); Comments & Supp. Protest at 7-8, 18 (arguing that, but for certain evaluation errors committed by the Navy, "Battelle would have been viewed as superior to Geosyntec [Jacobs] under [the] most important criterion[.]" and should have been found to be the most highly qualified firm); Supp. Comments & 2nd Supp. Protest at 23-24 (arguing that had the Navy properly evaluated SF 330s under the past performance factor, Battelle would have been the highest-ranked firm under that criterion). Upon learning in April 2021 that Geosyntec Jacobs was selected as the most highly qualified firm, Battelle had an affirmative obligation under our timeliness rules to diligently pursue information which could have provided a basis to protest the evaluation of SF 330s. Below, we explain why we conclude that Battelle did not diligently pursue such information.

On April 23, in the same notice that announced Geosyntec Jacobs as the most highly qualified firm, Battelle was offered a pre-award or a post-award debriefing.⁵ AR, Attach. 8, Notice to Non-Selected Firms. On April 24, Battelle requested a written, pre-award debriefing. AR, Attach. 9, Email from Battelle to Agency, Apr. 24. Two days later, it revised that request and deferred the receipt of the debriefing--and with it, the receipt of any information on the evaluation of its SF 330--until after award. *Id.*, Email from Battelle to Agency, April 26. While the agency did offer, and Battelle did receive, a post-award debriefing, this did not change Battelle's basis of protest, nor did it toll our general timeliness rules. See *McKissack-URS Partners, JV, B-406489.2 et al.*, *supra*. The essence of the protest is that Battelle was not selected as the most highly qualified firm, and this was learned months prior to the debriefing.

We conclude that under these facts, Battelle was required to diligently pursue information which may have formed the basis of its protest using the most expeditious approach available. See *e.g.*, *United Int'l Investigative Servs., Inc.*, *supra* ("a protester's failure to utilize the most expeditious information-gathering approach may constitute a failure to meet its obligation" to diligently pursue its protest). Here, that meant accepting

⁴ Absent the withdrawn protest ground, Battelle's initial protest challenges only the evaluation of its own SF 330. See Protest at 7-9.

⁵ As discussed elsewhere in this decision, the FAR contemplates holding debriefings after the agency has made the final selection, *i.e.*, after it identified the most highly qualified firm for negotiations.

the pre-award debriefing. Such a conclusion is consistent with our Office's decisions finding that a protester has failed to diligently pursue its protest when it had a reasonable opportunity to learn information which could form the basis of a protest but did not act on that opportunity. *Cf.*, *Integration Techs. Grp., Inc., supra*; *Bart & Assocs., Inc., supra*; *United Int'l Investigative Servs., Inc., supra*; *Thomas May Constr. Co., supra*.

Key here is that Battelle is challenging the evaluation of its own SF 330 and it declined an offered pre-award debriefing. This debriefing would have been the most expeditious information-gathering approach available under these facts, as information regarding the agency's evaluation of Battelle's SF 330 would have likely been disclosed in a pre-award debriefing. See FAR 36.607(b). In any event, deferring receipt of the debriefing until after the Navy made its ultimate award decision (7 months later) does not demonstrate that Battelle diligently pursued the reasons for its protest, as required.

Battelle argues that FAR section 36.607(b) "specifically states that a contracting officer is to provide unsuccessful firms with a post-award debriefing." Resp. to Navy Req. for Dismissal at 7. In this regard, Battelle contends that "an offeror who opts for a post-award debriefing is not turning down something it is entitled to but is, instead, opting to follow the scheme [] in the applicable regulations." *Id.*

Again, we disagree. Battelle's interpretation of FAR section 36.607(b) is contradicted by the plain language of the regulation. The FAR states that debriefings "will be held after final selection[.]" FAR 36.607(b). In a FAR subpart 36.6 procurement, "final selection" is not the ultimate award decision, but rather is the list produced by the selection authority ranking the firms considered most highly qualified to do the work and identifying a most highly qualified firm with which to begin negotiations. See FAR 36.602-4(b) ("The selection authority shall . . . make the **final selection**. This **final selection** shall be a listing, in order of preference, of the firms considered most highly qualified to perform the work. . . . All firms on the **final selection list** are considered 'selected firms' with which the contracting officer may negotiate in accordance with 36.606.") (emphasis added). Here, consistent with FAR section 36.607(b), the agency offered Battelle a debriefing after making the final selection and Battelle declined the opportunity. For these reasons, we find that Battelle's protest is untimely. Accordingly, it is dismissed. 4 C.F.R. § 21.2(a)(2); *cf.*, *United Int'l Investigative Servs., Inc., supra*.

To the extent Battelle argues that filing its protest prior to receiving notice of award would have been premature, we disagree. In multiple publicly available decisions, our Office has decided the merits of protests filed by selected firms challenging an agency's determination of a most highly qualified firm with which to negotiate a contract, *i.e.*, protests filed after the final selection list was established but before the ultimate award decision had been made. See *Nova Consulting, Inc.*, B-419168.3, Aug. 19, 2021, 2021 CPD ¶ 288; *Reid Planning, Inc.*, B-412942, July 8, 2016, 2016 CPD ¶ 202; *AMEL Techs., Inc.*, B-412611, Apr. 1, 2016, 2016 CPD ¶ 103. None of these decisions viewed these protests as premature.

Finally, we conclude that Battelle's supplemental protests are untimely and therefore we dismiss those as well. In this regard, the supplemental protests challenge additional aspects of the Navy's evaluation of Battelle's SF 330 and are based on information obtained in connection with Battelle's untimely initial protest. Considering these grounds to be timely raised would be inconsistent with our goal of resolving protests expeditiously without unduly disrupting or delaying the procurement process. See *Bart & Assocs., Inc., supra* at 5-6.

The protest is dismissed.

Edda Emmanuelli Perez
General Counsel