

Decision

Matter of: Gulf Civilization General Trading & Contracting Company

File: B-419754; B-419754.2

Date: June 10, 2021

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DIGEST

1. Protest alleging that the agency's evaluation of proposals and basis for award were inconsistent with the solicitation's requirements is denied where the agency's evaluation was consistent with the solicitation's unambiguous requirements, and the protester's objections otherwise constitute untimely challenges to the terms of the solicitation.
2. Protester is not an interested party to challenge the evaluation of the awardee's proposal and resulting award decision where the protester fails to demonstrate that it would have a substantial chance of receiving the award even if our Office were to sustain its protest.

DECISION

Gulf Civilization General Trading and Contracting Company, of Al Salhiya, Kuwait, protests the award of a contract to Asahi General Trading & Contracting Company, of Al Ahmadi Governorat, Kuwait, under request for proposals (RFP) No. SP4510-21-R-0001, which was issued by the Defense Logistics Agency (DLA), for excess personal property management services, material handling equipment repair and maintenance services, and janitorial services in support of DLA's Disposal Support Office at Camp Arifjan, Kuwait. The protester generally challenges the methodology used to evaluate proposals, the specific evaluation of the awardee's proposal, and the resulting award decision.

We deny the protest.

BACKGROUND

The RFP, which was issued on December 15, 2020, and subsequently amended twice, sought proposals for excess personal property management services, material handling equipment repair and maintenance services, and janitorial services in support of DLA's Disposal Support Office at Camp Arifjan, Kuwait. The RFP was issued pursuant to Federal Acquisition Regulation (FAR) part 12 and the streamlined acquisition procedures of FAR subpart 13.5. The RFP contemplated the award of a single indefinite-delivery, indefinite-quantity (IDIQ) contract against which the agency can award fixed-price orders. Agency Report (AR), Tab 1, RFP, at 38, 62. The RFP contemplated that the IDIQ contract would have a 12-month base period, and two, 12-month option periods. *Id.* at 20. Award was to be on a best-value tradeoff basis, considering (1) past performance and (2) price; past performance was significantly more important than price. AR, Tab 1, RFP, amend. 2, at 28.

As to past performance, offerors were required to provide relevant information for up to six references regarding the level of performance, in terms of delivery and quality achieved, under either U.S. government or commercial contracts for the same or similar services for performance in the U.S. Central Command area of responsibility during the last five years. *Id.* at 27. The information submitted was required to be sufficient to allow the agency to qualitatively review the offeror's performance, and/or the offeror's record of performance in the areas of: conforming to specifications; adhering to contract schedule; history of reasonable and cooperative behavior; commitment to customer satisfaction; and business-like concern for the interest of the customer. *Id.* Offerors were also required to provide to their respective past performance references the past performance questionnaire included as attachment 8 to the RFP. *Id.*

DLA was to evaluate the offeror's past performance and experience. For past performance, the agency was to evaluate: conformance to specifications and standards of good workmanship; adherence to contract schedules, including the administrative aspects of performance; history of reasonable and cooperative behavior; commitment to customer satisfaction; and business-like concern for the interests of the customer. *Id.* at 28. As to experience, DLA would evaluate whether the offeror had performed the same or similar contracts in terms of complexities of the services provided. *Id.*

As to price, the RFP provided that "[p]rice will not be numerically scored, but it will be fully evaluated using price analysis techniques." *Id.* at 28.

Although the RFP contemplated a best-value tradeoff between past performance and price, the RFP did not guarantee that the agency would evaluate all proposals. Rather, the RFP incorporated an "Efficiency Competition" provision that provided that:

Offerors are advised that the US Government may not evaluate the past performance proposals of all offerors under this RFP. The US Government will first review the total evaluated price of all proposals received. The past performance proposals of those offerors whose pricing

is determined by the Contracting Officer to be most competitive may be reviewed prior to, or instead of, other past performance proposals received. Based on the initial review of these past performance proposals, the US Government may not evaluate the past performance proposals of other offerors, whose total evaluated pricing was higher than that of one already evaluated and already assigned the highest possible past performance rating. This would occur when the Contracting Officer determines that any possible past performance superiority of an unevaluated (and higher priced) past performance proposal, over (a lower priced) one that was already evaluated and assigned the highest possible past performance rating, would not warrant any additional price premium.

Id.

DLA ultimately received 25 proposals in response to the RFP. AR, Tab 2, Simplified Acq. Award Documentation, at 3. Consistent with the efficiency competition provision, DLA first ranked the proposals by price. Relevant here, Asahi submitted the second lowest-proposed price, and Gulf Civilization’s proposed price ranked twelfth. *Id.* at 4-5. DLA then proceeded to evaluate the past performance of the two lowest-priced proposals. Based on that evaluation, DLA evaluated those proposals as follows:

	Total Evaluated Price (Rank)	Past Performance
Offeror A	\$1,317,324 (1)	Unknown
Asahi	\$1,978,552 (2)	Substantial Confidence

Id. at 4 (prices rounded to nearest whole dollar).

The contracting officer then conducted a tradeoff between the two lowest-priced proposals. Consistent with the RFP’s evaluation criteria, where past performance was significantly more important than price, the contracting officer determined that Asahi’s substantial confidence past performance rating warranted the associated price premium, and, therefore, presented the best value to the government. *Id.* at 5. Based on Asahi proposing the second lowest proposed price and receiving the highest possible confidence rating, the contracting officer declined to consider the past performance for the remaining offerors in accordance with the RFP’s efficiency competition provision. *Id.*

DISCUSSION

Gulf Civilization raises a number of challenges to the agency’s evaluation of proposals and resulting award decision. First, the protester challenges the agency’s methodology for evaluating proposals. In this regard, Gulf Civilization argues that DLA deviated from the RFP’s requirements by failing to evaluate proposed prices for realism, and improperly converted this procurement to a *de facto* lowest-priced, technically acceptable (LPTA) procurement by limiting the agency’s evaluation of proposals to the lowest-priced offerors. Second, Gulf Civilization challenges the agency’s evaluation of

Asahi's proposal. The protester primarily alleges that DLA erred in assessing the awardee's past performance as warranting a substantial confidence assessment because the awardee did not present past performance demonstrating the same or similar contracts in terms of complexities as to each of the RFP's required services. For the reasons that follow, we find no basis on which to sustain the protest.¹

Challenges to the RFP's Evaluation Scheme

Gulf Civilization raises a number of challenges to the agency's methodology for evaluating proposals. For the reasons that follow, we find no merit to these arguments because they are inconsistent with the unambiguous evaluation scheme set forth in the RFP or otherwise present untimely challenges to the RFP's express terms.

First, Gulf Civilization alleges that DLA failed to conduct a price realism evaluation as required by the solicitation. Specifically, the protester argues the RFP contemplated that the agency would conduct a price realism evaluation when it directed that price

¹ Gulf Civilization raises a number of collateral arguments. Although our decision does not address each of these arguments, we have reviewed all of the protester's arguments and find that none provides a basis on which to sustain the protest. For example, Gulf Civilization alleges that DLA improperly relaxed the RFP's anticipated March 2021 contractual start date when the contract as awarded commenced in April 2021. See Protest at 7. DLA responds that the delay was primarily required due to additional time needed to complete the Joint Contingency Contracting System (JCCS) process to allow the contractor to access the U.S. base. DLA asserts, however, that the delayed commencement date did not change the scope of work, the evaluation scheme, or the length of time the contractor will be obligated to perform. See Legal Memorandum at 4, 16. DLA asserts that the same delay would have similarly impacted Gulf Civilization's ability to timely begin performance if it had been selected for award. *Id.* at 16.

Additionally, the agency notes that this is an IDIQ contract, and the government is not obligated to issue any orders beyond the contract's minimum guarantee, so any delay in the commencement of the IDIQ ordering period could not reasonably have prejudiced the protester. *Id.* We find no basis to sustain the protest on this basis. As we have explained, even if a contract as awarded has a later start date (and thus a later potential end date), when the different start date does not change the statement of work, the evaluation scheme, or the length of time for which the contractor would be obligated, there is no requirement that new offers be obtained from offerors. *Avar Consulting, Inc.*, B-417668.3, *et al.*, June 10, 2020, 2020 CPD ¶ 191 at 7; *Mark Dunning Indus., Inc.*, B-405417.2, Nov. 19, 2013, 2013 CPD ¶ 267 at 4. Absent any evidence that the delayed commencement of the IDIQ ordering period had any impact on the evaluation or scope of work solicited by the agency, such a delay provides us with no basis to question the agency's underlying evaluation and award.

would be “fully evaluated using price analysis techniques.” AR, Tab 1, RFP, amend. 2, at 28. We disagree.

As a general matter, when awarding a fixed-price contract, an agency is only required to determine whether offered prices are fair and reasonable. FAR 15.402(a). An agency’s concern in making a price reasonableness determination focuses primarily on whether the offered prices are higher than warranted, as opposed to lower. *Louis Berger Power, LLC*, B-416059, May 24, 2018, 2018 CPD ¶ 196 at 8. An agency may also provide in the solicitation for the use of a price realism analysis for the purpose of measuring the vendor’s understanding of the requirements or to assess price risk in its proposal. *Gulf Civilization Gen. Trading & Contracting Co.*, B-417586, Aug. 23, 2019, 2019 CPD ¶ 300 at 7. However, absent a solicitation provision providing for a price realism evaluation--or expressly stating that the agency will review prices to determine whether they are so low that they reflect a lack of technical understanding, and a proposal can be rejected for offering low prices--agencies are neither required nor permitted to conduct one in awarding a fixed-price contract. *Id.*

Here, the RFP did not provide for a price realism evaluation. Rather, the RFP merely provided that price would “be fully evaluated using price analysis techniques.” AR, Tab 1, RFP, amend. 2, at 28. To the extent that the protester contends that “price analysis” implied that the agency would conduct a price realism analysis, we disagree. Indeed, the term “price analysis” as used in the FAR relates to price reasonableness, not price realism. See FAR 15.404-1(a)(3) (“Price analysis should be used to verify that the overall price offered is *fair and reasonable*.”) (emphasis added). In any event, consistent with the decisions discussed above, absent a provision expressly requiring a price realism evaluation--or a clear direction that the agency would evaluate proposed prices to evaluate technical understanding and could reject proposals with low prices--DLA was prohibited from conducting a price realism evaluation under these circumstances.

Furthermore, to the extent that the protester is arguing that the solicitation should have required a price realism analysis, such an argument is an untimely challenge to the terms of the solicitation. Our Bid Protest Regulations contain strict rules for the timely submission of protests. 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 initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1); *Gulf Civilization Gen. Trading & Contracting Co.*, *supra*, at 8 n.9.

Next, Gulf Civilization challenges DLA’s decision to evaluate the past performance of only the two lowest-priced proposals under the RFP’s efficiency competition provision. The protester contends that the agency’s decision not to evaluate additional proposals effectively and improperly converted this procurement to a *de facto* LPTA procurement in contravention of the RFP’s stated best-value basis of award. In this regard, the protester contends that, even assuming Asahi’s past performance warranted a substantial confidence assessment, the agency nevertheless failed to consider qualitative differences among proposals that could--and should--have been rated

substantial confidence (including the protester's relevant incumbent past performance). As with its challenge to the agency's alleged failure to conduct a price realism evaluation, the protester's challenge to the agency's use of the efficiency competition provision is without merit.

First, we disagree with the protester that the efficiency competition provision improperly converted the basis of award from best value to LPTA. This procurement, conducted pursuant to streamlined procedures under FAR subpart 13.5, did not contemplate a traditional best-value tradeoff as contemplated under the requirements of FAR part 15. In this regard, unlike a FAR part 15 best-value tradeoff, where the agency would generally be required to consider qualitative differences among all proposals (including those with the same overall adjectival ratings), the RFP here explicitly provided that DLA could limit its best-value tradeoff to the lowest priced offeror(s) and the offeror with the lowest total proposed price and substantial past performance. As addressed above, DLA's source selection was consistent with the RFP's stated streamlined procedures when it conducted a tradeoff between Offeror A's lower-priced proposal and Asahi's higher-priced proposal and substantial confidence past performance. Thus, the protester's allegation that DLA made award on a LPTA basis is plainly belied by the record.

In any event, even assuming that DLA's use of the efficiency competition provision resulted in a *de facto* LPTA basis of award, Gulf Civilization's post-award protest is patently untimely where the RFP's proscribed evaluation scheme unambiguously reserved DLA's right to conduct the procurement in the exact manner that it did here. In this regard, the RFP unambiguously provided that: "[b]ased on the initial review of these past performance proposals, the US Government may not evaluate the past performance proposals of other offerors, whose total evaluated pricing was higher than that of one already evaluated and already assigned the highest possible past performance rating." AR, Tab 1, RFP, amend. 2, at 28. Thus, to the extent the protester is displeased that DLA conducted its procurement in the exact manner outlined by the RFP, the protester's objections are untimely raised. 4 C.F.R. § 21.2(a)(1); *Gulf Civilization Gen. Trading & Contracting Co.*, *supra*, at 8 n.10 (dismissing as untimely a similar post-award challenge to DLA's decision to limit its evaluation of past performance to the lowest-priced proposals).²

² Gulf Civilization also alleges that the RFP's efficiency competition provision is based on the application of FAR section 15.306(c)(2)'s principles for establishing a competitive range among "the greatest number that will permit an efficient competition among the most highly rated proposals." See Protester's Comments at 3. This argument fails for at least two independent reasons. First, this procurement was not conducted using FAR part 15 procedures for negotiated procurements. Rather, it was conducted on the basis of the streamlined acquisition procedures of FAR subpart 13.5. Thus, FAR part 15 principles are inapplicable. In this regard, we note that Gulf Civilization raised--and we previously rejected-- a nearly identical argument in an earlier, unrelated protest. See *Gulf Civilization Gen. Trading & Contracting Co.*, *supra*, at 8 n.10. Second, even

Interested Party

As a consequence of the efficiency competition provision allowing DLA to limit its evaluation of proposals and Gulf Civilization's twelfth ranked price, we find that under the unique circumstances presented in this case, the protester has failed to establish that it had a substantial chance of receiving the award, and, therefore, it is not an interested party to pursue the remainder of its protest allegations.

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557, only an interested party may protest a federal procurement. That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a)(1). Determining whether a party is interested involves consideration of a variety of factors, including the nature of the issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. *DNC Parks & Resorts at Yosemite, Inc.*, B-410998, Apr. 14, 2015, 2015 CPD ¶ 127 at 12. Whether a protester is an interested party is determined by the nature of the issues raised and the direct or indirect benefit of the relief sought. *Id.*

In a post-award context, we have generally found that a protester is an interested party to challenge an agency's evaluation of proposals only where there is a reasonable possibility that the protester would be next in line for award if its protest were sustained. *CACI, Inc.-Fed.*, B-419499, Mar. 16, 2021, 2021 CPD ¶ 125 at 5; *OnSite Sterilization, LLC*, B-405395, Oct. 25, 2011, 2011 CPD ¶ 228 at 4. In this regard, we have explained that where there are intervening offerors who would be in line for the award even if the protester's challenge was sustained, the intervening offeror has a greater interest in the procurement than the protester, and we generally consider the protester's interest to be too remote to qualify as an interested party. *HCR Constr., Inc.; Southern Aire Contracting, Inc.*, B-418070.4, B-418070.5, May 8, 2020, 2020 CPD ¶ 166 at 6-7 n.6; *Automated Power Sys., Inc.--Recon.*, B-246795.2, Feb. 20, 1992, 92-1 CPD ¶ 208 at 2.

As an initial matter, we note that DLA, consistent with the RFP's efficiency competition provision, did not evaluate the past performance for any offerors beyond the lowest-priced proposal, which received an unknown confidence past performance rating, and Asahi's second lowest-priced proposal, which received a substantial confidence past performance rating. See AR, Tab 2, Simplified Acq. Award Documentation, at 4-5. In its legal memorandum responding to the protest, DLA argued that at least two intervening proposals demonstrated relevant experience in each of the types of services required by the RFP, and received favorable customer evaluations. See Legal Memorandum at 5. We note that we have previously declined to consider an agency's

assuming for the sake of argument that FAR part 15 principles did or should apply by analogy, as explained above, the protester's post-award objections to the RFP's unambiguous reservation of DLA's right not to evaluate proposals in a manner consistent with a FAR part 15 procurement are patently untimely. 4 C.F.R. § 21.2(a)(1).

arguments that a protester is not an interested party to challenge an intervening offer where the agency did not contemporaneously evaluate the intervening offer. See *Lawson Env't'l Servs. LLC*, B-416892, B-416892.2, Jan. 8, 2019, 2019 CPD ¶ 17 at 3 n.3. Notwithstanding that DLA did not contemporaneously evaluate the past performance of the intervening nine proposals, we conclude that Gulf Civilization has failed to reasonably establish that it would be next in line for award if we were to otherwise sustain its protest.

In this regard, the United States Court of Appeals for the Federal Circuit's recent decision in *HVF West, LLC v. United States*, 846 F. App'x 896 (Fed. Cir. 2021), emphasized a protester's obligation to affirmatively demonstrate its direct economic interest in order to establish that it is an interested party. In that case, the procuring agency issued a solicitation for the purchase and destruction of surplus government military property, including the requirement to demilitarize or mutilate the property. The solicitation contemplated the award to the firm presenting the highest price per pound for the property, and that met certain non-price criteria (e.g., technical ability to perform the work). *Id.* at 897. The procuring agency received four bids, including from the awardee and the protester (who offered the lowest proposed-price). After ranking the four offers by price, the contracting officer only evaluated the technical acceptability of the offeror that proposed the highest bid. *Id.* The protester challenged the technical acceptability of the awardee, as well as raising collateral challenges to the agency's evaluation of the two intervening offerors. *Id.* at 897-898.

The United States Court of Federal Claims sustained the protest, finding that the awardee failed to satisfy all of the non-price criteria. *Id.* at 898. On appeal, the Federal Circuit reversed the Court of Federal Claims's decision, holding that the protester did not demonstrate that it was an interested party where it failed to advance non-speculative allegations with respect to the technical acceptability of the two intervening offerors. In this regard, the Federal Circuit emphasized that to succeed in showing that it has a direct economic interest to be an interested party, a protester must make a sufficient showing that it had a "substantial chance" of winning the contract. *Id.* at 898 (quoting *Eskridge & Assocs. v. United States*, 955 F.3d 1339, 1345 (Fed. Cir. 2020)). The Federal Circuit explained that to demonstrate a substantial chance of winning the award, the protester had to sufficiently challenge the eligibility of not only the awardee, but also the intervening offerors. *HVF West*, 846 F. App'x at 898 (citations omitted). Notwithstanding that the procuring agency had not contemporaneously evaluated the technical acceptability of the intervening offers, the Federal Circuit held that the protester failed to establish that it was an interested party to challenge the agency's award decision where it failed to mount any credible challenges to the technical acceptability of the better price-ranked offers in line and in front of the protester. *Id.* at 899.

Consistent with the Federal Circuit's *HVF* decision, we find that the protester has failed to establish that it had a substantial chance of winning the contract where it failed to advance any credible protest grounds challenging the standing of the nine intervening offerors. Specifically, the agency provided the protester with sufficient information upon

which it could--and should have--challenged its relevant standing with respect to the intervening offerors. Specifically, DLA's agency report disclosed the identities of the nine intervening offerors, as well as produced the complete past performance proposal volumes and past performance questionnaires for at least two of the intervening offerors. AR, Tab 2, Simplified Acq. Award Documentation, at 4; Tabs 9 and 10, Past Performance Proposals & Past Performance Questionnaires. Gulf Civilization obtained the assistance of outside counsel, who requested and was granted admission to a protective order permitting him access to the unredacted record, including the above information. Further, the protester also indicated that it was otherwise aware of the identity (and price ranking) of the offeror that proposed the third-lowest proposed price. See Protester's Comments at 20-21.

Thus, here, upon receipt of the agency report, the protester knew: (1) that its proposed price was the twelfth highest, (2) that the RFP allowed DLA to limit its evaluation to those proposals offering the lowest proposed prices and substantial past performance; (3) the identities of all the intervening offerors; and (4) the content of past performance volumes and past performance questionnaires for at least two intervening firms that DLA's *post hoc* evaluation argued also demonstrated substantial past performance.

Notwithstanding this information, the protester did not argue in its comments or a supplemental protest that none of the intervening firms could have obtained a rating of substantial confidence. Nor did the protester demonstrate how a firm with the twelfth highest price would have had a substantial chance for award if we sustained its protest challenging the evaluation of only Asahi's proposal. Similar to the Federal Circuit's holding in *HVF*, our Bid Protest Regulations require that a protest include a detailed statement of the legal and factual grounds of protest including either evidence or allegations sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. 4 C.F.R. §§ 21.1(c)(4) and (f); *CDO Techs., Inc.*, B-416989, Nov. 1, 2018, 2018 CPD ¶ 370 at 5. Under the unique circumstances presented here, we find that the protester has failed to demonstrate a sufficient showing that it is an interested party to pursue its challenge of the award to Asahi, and, therefore, we dismiss the remaining protest allegations.

The protest is denied.

Thomas H. Armstrong
General Counsel