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Decision

Matter of: Castellano Cobra UTE MACC LEY 18-1982

File: B-420429.4

Date: June 17, 2022

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Casey J. McKinnon, Esq., and R. Dale Holmes, Esq., Cohen Seglias Pallas Greenhall & Furman PC, for Acciona CMS JV LLC, the intervenor.

Ciara L. Miller, Department of the Navy, for the agency.

Katherine I. Riback, Esq., and Alexander O. Levine, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging agency's proposed corrective action is dismissed as premature where the protest merely anticipates improper, prejudicial agency action.
 2. Solicitation's broad requirement that the "offeror/awardee" comply with Spanish law requirements is a matter of contract administration which GAO does not review under its bid protest function.
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DECISION

Castellano Cobra UTE MACC LEY 18-1982, of Rota, Spain, protests the corrective action taken by the Department of the Navy, Naval Facilities Engineering Command (NAVFAC), in connection with the agency's issuance of a task order to Acciona CMS JV LLC, of Bargersville, Indiana, under solicitation No. N62470-21-R-0010, for base improvements in Rota, Spain. Castellano argues that the agency's corrective action is unreasonably limited in scope, and fails to address certain aspects of its earlier protest filed with our Office.

We deny the protest in part and dismiss the protest in part.

BACKGROUND

The Navy issued the subject task order under its multiple-award contract (MAC) for construction projects primarily in Rota Spain (Contract No. N62470-21-D-0011). The

underlying MAC informed offerors that “Certificate of Classification requirements for future task orders will [be] published when those task orders are advertised.”¹ Req. for Dismissal, exh. 1, MAC at 38 and 83.² The MAC also stated the following:

Requirements for future task orders will [be] published when those task orders are advertised.

In the case of [a] Joint Venture offeror . . . at least one member of the Joint Venture must have the required Certificate of Classification. The Joint Venture member who has the Certificate of Classification must perform the majority of the work pertinent to the certification. The proposal must include information that demonstrates the commitment of the firm holding the certification to perform the majority of the work pertinent to that certification.

Id. at 40. The agency issued a task order solicitation on July 22, 2021, to the MAC awardees for various Naval Station Rota base improvements in support of helicopter maritime strike wing operations. Req. for Dismissal, exh. 2, Task Order Solicitation at 2. The task order solicitation advised that the agency intended to award a fixed-price task order to “the offeror submitting the lowest total price proposal.”³ *Id.* at 4.

As relevant here, the task order solicitation required offerors to “[p]rovide the current Certificate of Classification as required in Item A.2,” and stated the following:

Certificate of Classification: Offerors must hold an updated Certificate of Classification issued by the “Registro Oficial de Contratistas de Obras” of the “Ministerio de Economía y Hacienda” covering the following groups, subgroups, and categories. Proposals received from firms which do not have individually or jointly an appropriate Certificate of Classification shall be considered non-responsive. The certificate of classification must be included in the proposal package.

Id. at 4. The task order solicitation also, under the heading “General Requirements,” advised offerors of the following:

¹ Among the specific requirements for doing business in Spain, is the certificate of classification, issued to firms that demonstrate the necessary past performance and resources to perform construction work in that country. Protest (B-420429.3) at 2 n.3. Certificates are issued for every category, group and subgroup for any construction task (e.g., electrical, masonry, demolition, etc.). *Id.*

² Exhibit 1 of the Request for Dismissal (B-420429.3) is a conformed copy of the MAC prepared by the agency.

³ According to the task order solicitation, the awardee, after receipt of the notice to proceed, is to commence work within 15 calendar days, and complete it within 1,000 calendar days. Req. for Dismissal, exh. 2, Task Order Solicitation at 2.

Compliance with Local Laws: Offeror/Awardee must comply with all Spanish Law requirements for certification and performing work in Spain.

Id. at 3.

The agency received timely proposals from several MAC holders, including Castellano and Acciona CMS. The agency evaluated proposals, and determined that Acciona CMS was the lowest-priced, responsible offeror. The task order was issued to Acciona CMS on December 15. Req. for Dismissal at 1.

Following a debriefing, Castellano filed a timely protest of the award decision with our Office on January 10, 2022. Castellano argued that Acciona CMS was ineligible for award because Acciona CMS did not comply with the solicitation requirement that all members of the joint venture have a certificate of classification.⁴ Protest (B-420429.3) at 7. The protester also argued that even if Acciona CMS has the required certificate of classification, its proposal was still ineligible for award because Acciona CMS did not properly form a joint venture in Spain, as required by Spanish law. *Id.* at 7-8.

On February 22, the agency notified our Office of its intent to take corrective action. Notice of Corrective Action (B-420429.3). The agency advised that it would “review the offerors’ proposals, revise the documentation of the evaluation as needed, and determine whether to confirm or cancel the award,” in accordance with applicable law and regulation. *Id.* On February 25, Castellano submitted questions regarding the agency’s proposed corrective action, which the agency responded to on March 2. Response to Corrective Action Questions (B-420429.3). Our Office dismissed Castellano’s protest as academic on March 7. *Castellano Cobra UTE MACC LEY 18-1982*, B-420429.3, March 7, 2022 (unpublished decision). On March 10, Castellano filed the instant protest, challenging the scope of the agency’s corrective action.⁵

DISCUSSION

The protester argues that the agency’s corrective action is unreasonably limited to a review of whether Acciona CMS submitted a certificate of classification. Castellano contends that this limited scope will prevent the agency from reviewing whether Acciona CMS complies with additional Spanish law requirements or whether each joint venture member of Acciona CMS possesses a certificate of classification. Protest at 8. While

⁴ Acciona CMS JV LLC, is a joint venture between Acciona Construcción S.A. and Custom Mechanical Systems, Corp. (d/b/a CMS Corporation or CMS). Req. for Dismissal, exh. 12, Castellano Cover Letter *re* JV Status at 1.

⁵ Because the value of the task order is over \$25 million, this procurement is within our jurisdiction to hear protests related to the issuance of orders under multiple-award, indefinite-delivery, indefinite quantity (IDIQ) contracts awarded under the authority granted in Title 10 of the United States Code. 10 U.S.C. § 3406(f)(1)(B).

we do not address every argument raised by Castellano, we have reviewed them all and find that none provide a basis to sustain the protest.

As a general rule, contracting officers in negotiated procurements have broad discretion to take corrective action where the agency determines that such action is necessary to ensure a fair and impartial competition. *Northrop Grumman Sys. Corp.*, B-410990.3, Oct. 5, 2015, 2015 CPD ¶ 309 at 8. The details of a corrective action are within the sound discretion and judgment of the contracting agency, and we will not object to any particular corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. *MSC Indus. Direct Co., Inc.* B-411533.2, B-411533.4, Oct. 9, 2015, 2015 CPD ¶ 316 at 5.

The protester primarily contends that Acciona does not hold a certificate of classification as required by the solicitation. Specifically, the protester contends that, while conducting its reevaluation of proposals, the agency will not evaluate whether each joint venture member of Acciona CMS holds a certificate of classification, individually, as required by Spanish law. Protest at 8. The protester contends that Acciona CMS cannot meet this requirement because CMS Corporation does not have its own certificate of classification. *Id.* at 9.

In light of the ongoing nature of the corrective action, we need not resolve this dispute at this time. In this regard, we find that the protester's assertion--that the agency will not review whether CMS Corporation holds a certificate of classification--is premature since the reevaluation contemplated in the corrective action is still ongoing. *Erickson Helicopters, Inc.*, B-415176.3, B-415176.5, Dec. 11, 2017, 2017 CPD ¶ 378 at 6; see *Computer Assocs. Int'l, Inc.*, B-292077.2, Sept. 4, 2003, 2003 CPD ¶ 157 at 4 (protests that merely anticipate prejudicial agency action are speculative and premature). In this respect, the agency has stated that it "intends to review and confirm its evaluation of the Certificates of Classification submitted by all offerors in connection with this task order, in light of Protester's arguments." Response to Corrective Action Questions (B-420429.3) at 2. Accordingly, we dismiss this protest ground as premature.

Castellano also argues that the agency's corrective action unreasonably fails to consider Acciona CMS's compliance with all of the general requirements for compliance with Spanish law for certification and performing work in Spain. Response to Summary Dismissal (B-420429.3) at 4. According to Castellano, under Spanish law only Spanish or European Union companies are eligible to perform public construction contracts unless the company is a member of a joint venture formed under Spanish law. Protest at 2.

The agency responds that the general requirement to comply with Spanish law contained in the task order solicitation is a performance obligation. Agency Summary Dismissal Request (B-420429.3) at 5. The agency maintains that because the solicitation requirement--that the "Offeror/Awardee" must comply with all Spanish law requirements for certification and performing work in Spain--is singular, it is clearly a requirement that will apply to the awardee during performance. *Id.* Thus, the agency

contends the solicitation did not require that the requirement be met prior to the award of the contract, and therefore performance of the requirement is a matter of contract administration. *Id.*

The protester responds that the agency's interpretation is incorrect because it gives no meaning to the term "Offeror," which by definition, indicates a pre-award application. Protest at 9.

We find the agency's interpretation to be reasonable and note that the requirement to comply with Spanish law was located in the "General Requirements" section of the task order solicitation. We view compliance with such a requirement to be a condition of performance that the awardee must meet. As such, whether the awardee complies with the requirement is a matter of contract administration which we will not consider. *Dalma Tech² Co.*, B-411015, Apr. 22, 2015, 2015 CPD ¶ 135 at 7 (denying protest concerning RFP requirement to maintain an acceptable facility at Dhahran, Saudi Arabia); *see also General Sales Agency*, B-247529.2, Aug. 6, 1992, 92-2 CPD ¶ 80 at 7 (dismissing protest that the awardee's facility failed to comply with municipal fire code prior to award). GAO does not review matters of contract administration under our bid protest function. 4 C.F.R. § 21.5(a).

The protest is denied in part and dismissed in part.

Edda Emmanuelli Perez
General Counsel