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Decision

Matter of: MCI Diagnostic Center, LLC

File: B-422553.2

Date: August 9, 2024

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DIGEST

1. Protest that the solicitation relied on inaccurate historical data for testing quantity and type that would result in a misleading price evaluation is dismissed where the agency's planned corrective action renders that allegation moot.
 2. Protest that the solicitation's tiered evaluation scheme is improper is denied where, even if the terms are improper, the record does not support a finding that the protester suffered competitive prejudice.
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DECISION

MCI Diagnostic Center, LLC, a service-disabled veteran-owned small business (SDVOSB) of Richardson, Texas, protests the terms of request for proposals (RFP) No. 36C24424R0004, issued by the Department of Veterans Affairs (VA) for Veterans Integrated Service Network (VISN) 04 reference laboratory testing services. MCI asserts that the VA's use of a tiered evaluation scheme violates the Competition in Contracting Act of 1984 (CICA).

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

BACKGROUND

The solicitation contemplates the award of a single fixed-price indefinite-delivery, indefinite-quantity contract with a 5-year ordering period. Agency Report (AR), Tab 2, RFP at 1. Award will be made to the offeror whose proposal represents the best value to the agency, considering three factors: technical approach, past performance, and

price. *Id.* at 164. The technical approach factor will be evaluated on an acceptable/unacceptable basis; the agency will conduct a tradeoff between past performance and price, with past performance being significantly more important. *Id.* at 163.

As relevant to this protest, the solicitation contains the following provision:

SOLICITATION NOTICE OF TIERED EVALUATIONS:

This procurement is set-aside based on an order of priority as established in 38 U.S.C. 8127.^[1]

TIERED EVALUATIONS INCLUDING LARGE BUSINESS CONCERNS: This solicitation is being issued as tiered evaluation with the following tiers: (1) SDVOSBs; (2) VOSBs [veteran owned small business]; (3) [historically underutilized business zone (HUBZone)] small businesses and 8(a) small businesses; (4) all other small businesses with woman-owned small businesses having priority; and (5) large businesses. If award cannot be made, the solicitation will be cancelled, and the requirement resolicited.

At no time will the next tier be considered until the higher tier is withdrawn and all prospective offerors have been notified in writing that their offer is no longer being considered for award.

Proposals for ALL tiers (SDVOSB through Large Business) shall be submitted by the solicitation due date.

RFP at 163.

At the time MCI filed its protest on May 29, 2024, the deadline for the submission of proposals was June 17.² Accordingly, the protest was timely.

DISCUSSION

MCI argues that the agency's use of a tiered evaluation scheme in this procurement is improper because it violates CICA.³ Protest at 7-8. In response, the VA defends its use

¹ Section 8127 of title 38 of the United States Code addresses the establishment of contracting goals and preferences for small business concerns owned and controlled by veterans.

² Subsequent to the filing of this protest, the deadline for submission of proposals was further extended.

³ The protester also alleges that the solicitation relied on inaccurate historical data for testing quantity and type that would result in a misleading price evaluation. Protest at 1. (continued...)

of the tiered evaluation methodology and contends that MCI has failed to make a showing that it is competitively prejudiced by the terms of the solicitation. Resp. to Comments at 6-9. As explained below, we deny the protester's challenge to the tiered evaluation scheme because, even were we to assume for the sake of argument that MCI's challenge has merit, the record fails to demonstrate that the protester is competitively prejudiced by the scheme.

Competitive prejudice is an essential element of every viable protest, and absent a showing of prejudice, we will not sustain a protest. *Selex ES, Inc.*, B-420799, Sept. 6, 2022, 2022 CPD ¶ 234 at 8; *Onesimus Def., LLC*, B-411123.3, B-411123.4, July 24, 2015, 2015 CPD ¶ 224 at 6. In the context of a protest challenging the terms of a solicitation, competitive prejudice occurs where the challenged terms place the protester at a competitive disadvantage or otherwise affect the protester's ability to compete. *People, Tech. & Processes, LLC*, B-418781.4, July 2, 2021, 2021 CPD ¶ 252 at 7; *Onesimus Def., LLC, supra*.

MCI's prejudice argument has two prongs. First, the protester asserts that its competitiveness could be harmed by possible unprofessional conduct on the part of agency officials. Next, the protester contends that other firms' business decisions could competitively harm MCI. We consider these two contentions.

Improper Agency Action

First, MCI asserts that it is at a competitive disadvantage as compared to offerors in lower tiers because the proposal evaluation process could be different at each tier, preventing offerors from competing on an equal basis. Comments at 6. For example, the protester argues, if all SDVOSB proposals, including MCI's, are found to have deficiencies and the contracting officer "cascades" down to the next tier, the contracting officer could decide, at that lower tier, to hold discussions and allow offerors to revise their proposals and cure any deficiencies. *Id.* Under that circumstance, MCI contends that it would not be afforded that same opportunity to cure its deficiencies because there is no mechanism for revisiting previous tiers and allowing the offerors whose proposals were excluded to engage in discussions. *Id.* at 6-7.

The VA argues that, although such actions would be prejudicial to MCI, "holding meaningful discussions with certain offerors, but not others, would be improper in any acquisition--whether or not VA were using a tiered evaluation process." Resp. to Comments at 7. The agency contends that the prejudice does not arise by virtue of the

The agency indicated that it would take corrective action with respect to this allegation by reviewing the quantity and types of tests required and amending the solicitation. Memorandum of Law at 10-11. The protester did not object to this planned corrective action. See Comments. The agency's planned corrective action renders this allegation moot, and we dismiss it. *Ferris Optical*, B-403012.2, B-403012.3, Oct. 21, 2010, 2010 CPD ¶ 265 at 1-2; *Dyna-Air Eng'g Corp.*, B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132.

VA's use of a tiered evaluation scheme, but, rather, "prejudice would occur in any instance of VA inappropriately holding meaningful discussions with some vendors but not with others." *Id.*, citation omitted. Moreover, the VA asserts that "GAO assumes that agencies will conduct procurements in a fair and reasonable manner and will not consider a protest allegation that merely speculates that the agency will not do so." *Id.*, citing *Booz Allen Hamilton, Inc.*, B-414822.5, Oct. 13, 2017, 2017 CPD ¶ 315 at 4. MCI does not respond to the VA's argument that GAO assumes that an agency will conduct a procurement in a fair and reasonable manner. See Reply to Resp. to Comments at 4-5. We agree with the agency that a finding of prejudice cannot be based on anticipated improper agency action, particularly where, as here, that improper behavior does not necessarily follow from the challenged solicitation terms.

MCI also argues that "implicit competitive disadvantages exist." Comments at 7. When conducting an SDVOSB set-aside procurement, MCI asserts, the agency "has more of an impetus to work with SDVOSBs to make their proposals awardable (e.g., through discussions), because the alternative is to cancel the procurement and start again." *Id.* The protester contends that with tiered evaluations, rather than conduct discussions with SDVOSBs to make their proposals awardable, the contracting officer can simply "cascade" down to the next tier. *Id.* Accordingly, MCI contends, "tiered evaluations reduce MCI's competitive advantage, prejudicing MCI." *Id.*

Again, MCI's prejudice rationale presumes unprofessional conduct on the part of agency officials. As stated by the agency above, "holding meaningful discussions with certain offerors, but not others, would be improper in any acquisition--whether or not VA were using a tiered evaluation process." Resp. to Comments at 7. Moreover, as the VA also argues, the possibility that a contracting officer may have no impetus to work with an SDVOSB whose proposal is deficient could happen with a set-aside outside of a tiered evaluation procurement. Resp. to Comments at 8. GAO will not entertain an allegation that agency officials may act unfairly. This rationale provides no basis for finding a reasonable possibility the protester is competitively prejudiced by the solicitation's terms.

Competitive Decision-Making

Next, MCI asserts that tiered evaluations hinder its ability to compete "because they negatively impact MCI's commercial relationships." Comments at 7. MCI argues that "[c]ontrary to procurements set aside for competition exclusively among SDVOSBs, with tiered evaluations, offerors in lower tiers are active competitors (notwithstanding that their proposals may not be reviewed until a later stage of the competition)." *Id.* Thus, MCI contends, "such offerors (e.g., large businesses) have fewer reasons to enter into commercial relationships with higher-tier (e.g., VOSB or SDVOSB) concerns." *Id.* at 8.

VA argues "[t]his type of gaming [the system], if it indeed may occur, can occur in any set-aside procurement, regardless of whether tiered evaluations are being utilized." Resp. to Comments at 8. MCI concedes as much. See Reply to Resp. to Comments at 6 (noting that "it could be that there is gaming when tiered evaluations are not involved"). Nevertheless, MCI argues, tiered evaluations create "more impetus to

engage in gaming” because such evaluation schemes “lack the ‘stick’ of cancellation and reprourement of goods and services and the impetus for contracting officers to make SDVOSB proposals awardable.” *Id.*

This argument fails because a tiered evaluation scheme is not the proximate cause of the potential harm to the protester. The proximate cause of the prejudicial action, as described by MCI, is a calculated business decision by a large firm on whether to partner with an SDVOSB or VOSB firm. The large business’s decision not to enter such a partnership could deprive the small firm of an opportunity to compete, and-- conversely--it could deprive the large firm of any portion of contract performance, if the agency awards the requirement as a set-aside. It is not the tiered evaluation scheme that is the proximate cause that could deprive the small firm of the ability to compete; the agency’s use of such a procurement scheme, alone, would not prejudice MCI. It is the possible response of the large business--that decides to sit out the procurement with a tiered evaluation scheme in the hopes of competing for a contract that is not set aside--that could harm a smaller firm’s chance of participating in the procurement.

MCI recognizes that deciding not to participate in a procurement is a decision the large business could make, regardless of whether the set-aside was part of a tiered evaluation scheme. It is not, then, the tiered evaluation scheme that is the proximate cause of the possible disadvantage MCI might suffer under the terms of the solicitation. This rationale depends on independent actions by other firms to create unfavorable conditions for SDVOSB concerns. For this reason, this assertion also provides no basis on which to find MCI prejudiced by the terms of the solicitation.

The protest is dismissed in part and denied in part.

Edda Emmanuelli Perez
General Counsel