



Decision

Matter of: Venergy Group, LLC

File: B-422708

Date: September 10, 2024

Ashley Ellis, Venergy Group, LLC, for the protester.
Phillip T. Paradise, Esq., and Nelson J. Van Eck, Esq., Department of the Army, for the agency.
Uri R. Yoo, Esq., and Alexander O. Levine, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. In a procurement conducted under the two-phase design-build selection procedures of Federal Acquisition Regulation subpart 36.3, protest challenging agency's evaluation of protester's phase one proposal is dismissed as untimely where the protest was filed more than 10 days after the protester received information that formed the basis of the protest.
 2. Debriefing provided subsequent to phase one of the two-phase design-build procedures of Federal Acquisition Regulation subpart 36.3 does not constitute a required debriefing under our general timeliness rules because the phase one procurement is not a procurement conducted on the basis of competitive proposals.
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DECISION

Venergy Group, LLC, a small business of Fort Pierce, Florida, protests the exclusion of its proposal from the competition conducted under request for proposals (RFP) No. W912HN-23-R-4002, issued by the Department of the Army, Corps of Engineers for general and design-build construction projects issued by the Army's Savannah District in Georgia. The protester challenges the evaluation of its proposal and the decision to exclude it from the second phase of the competition.

We dismiss the protest as untimely.

BACKGROUND

The agency issued the solicitation on May 5, 2023, and set aside the requirement for small businesses. Req. for Dismissal, Tab A, RFP at 1. The solicitation contemplated award of up to eight indefinite-delivery, indefinite-quantity, multiple-award task order contracts for a base ordering period of five years. *Id.*

The procurement was conducted pursuant to the two-phase design-build provisions of Federal Acquisition Regulation (FAR) subpart 36.3.¹ *Id.* Under phase one, which is the phase at issue in this protest, the agency would evaluate proposals using the following two factors: (1) past performance; and (2) design experience. *Id.* at 11-17. The agency would evaluate the phase-one proposals and determine which offerors, if any, would proceed to phase two. *Id.* at 17. The agency contemplated selecting no more than 15 of the most highly qualified offerors to participate in the second phase of the competition. *Id.* at 1, 5.

On June 12, 2024, the agency notified Venergy that it was not selected to participate in the second phase of the competition. Req. for Dismissal at 1; see Resp. to Dismissal Req., attach. 1, Notice of Unsuccessful Offeror at 1. Enclosed with the notice was the agency's assessment of Venergy's phase one proposal. Resp. to Dismissal Req., attach. 1, Notice of Unsuccessful Offeror at 2-11. The notice stated that the procurement was "being conducted in accordance with the process at [FAR subpart] 36.3, Two-Phase Design-Build Selection Procedures." *Id.* at 1. The notice also informed Venergy that "[i]n accordance with FAR 15.505, [Venergy is] entitled to one debriefing before award of a contract under this solicitation." *Id.*

On June 15, Venergy requested a debriefing. Protest at 1; Resp. to Dismissal Req., attach. 2, Req. for Debriefing at 1. The contracting officer offered to provide a written debriefing and respond to any questions from Venergy. Resp. to Dismissal Req. at 2. On June 19, Venergy submitted one question by email and, on June 20, the contracting officer provided a written response to Venergy's debriefing question. *Id.*; Resp. to Dismissal Req., attach. 3, Debriefing Question at 1; Resp. to Dismissal Req., attach. 4, Resp. to Debriefing Question at 1-2. On June 30, Venergy filed this protest.

DISCUSSION

The protester challenges the agency's evaluation of Venergy's phase one proposal. Specifically, the protester argues that the agency unreasonably found that Venergy's past performance projects were "limited in scope and [did] not include a wide variety of disciplines." Protest at 1. The protester also contends that the agency unfairly noted that Venergy's proposal failed to demonstrate a past working relationship with Venergy's proposed architectural engineering partner when the solicitation did not require such a showing as a "minimum criteria." *Id.* at 2.

¹ The design-build selection procedures are authorized by 10 U.S.C. § 2305a (2006).

The agency requests that we dismiss the protest as untimely because it was filed more than 10 days after Venergy knew the basis of its protest. Req. for Dismissal at 2-3. In this regard, the agency argues that the protest, filed on June 30, is based entirely on the information provided in the Army's June 12 unsuccessful offeror notice. *Id.* The agency also argues that the debriefing provided to Venergy did not toll the 10-day period for filing the protest because it was not a required debriefing under FAR part 15. *Id.*

The protester responds that the basis for its protest was not "formed" until the agency failed to provide an adequate response to Venergy's debriefing question. Resp. to Dismissal Req. at 1-2. The protester also argues that the debriefing exception to our timeliness rules is applicable here because the agency's unsuccessful offeror notice indicated that Venergy was "entitled to one debriefing" before award "[i]n accordance with FAR 15.505." *Id.* at 2-3.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These timeliness 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. *Beckman Coulter, Inc.*, B-421748, July 28, 2023, 2023 CPD ¶ 180 at 3. 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).

An exception to our general timeliness rule is a protest that challenges "a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required," where a protest would be considered timely if filed within 10 days after the debriefing. *Id.* This exception to our timeliness rules does not apply where an agency provides a debriefing that is not required. *Exceptional Software Strategies, Inc.*, B-416232, Jul. 12, 2018, 2018 CPD ¶ 237 at 5. Consequently, where a debriefing is not legally required, a protester that delays the filing of a protest until after that debriefing may be untimely as to any grounds of protest it knew or should have known more than 10 days before filing the protest. 4 C.F.R. § 21.2(a)(1)-(2); *Done By Native, LLC*, B-422270, Mar. 29, 2024, 2024 CPD ¶ 87 at 3.

As noted above, the procurement at issue in this protest was not conducted pursuant to FAR part 15, but pursuant to FAR subpart 36.3. Our Office has previously determined that, where a procurement was not conducted on the basis of competitive proposals, the debriefing exception to our timeliness rules does not apply. See *McKissack-URS Partners, JV*, B-406489.2 *et al.*, May 22, 2012, 2012 CPD ¶ 162 at 4-5 (finding that an architect-engineer procurement conducted under the Brooks Act, 40 U.S.C. §§ 1102-1104 (2006), using procedures implemented in FAR subpart 36.6, is not a procurement conducted on the basis of competitive proposals, under which a debriefing is required when requested); see also, *The MIL Corp.*, B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 6 (finding that procurement conducted pursuant to FAR subpart 8.4, rather than FAR Part 15, was not conducted on the basis of competitive proposals). As discussed below, we conclude that phase one of this procurement

conducted under the two-phase design-build procedures of FAR subpart 36.3 is not a procurement conducted on the basis of competitive proposals under which a debriefing is required when requested. Thus, the debriefing does not qualify for the debriefing exception to our timeliness rules.

Under phase one of a procurement conducted under FAR subpart 36.3 procedures, the contracting officer evaluates phase-one proposals “to determine which offerors will submit proposals for” phase two, and then selects “the most highly qualified offerors . . . and request[s] that only those offerors submit phase-two proposals.” FAR 36.303; 36.303-1(b). These procedures specify that cost- or price-related factors are “not permitted in [p]hase [o]ne.” FAR 36.303-1(a)(2)(iii). In contrast, the phase-two procedures require that solicitations “be prepared in accordance with [FAR] part 15,” and that technical and price proposals be submitted and “evaluated separately, in accordance with [FAR] part 15.” FAR 36.303-2.

Based on these provisions, our Office has previously concluded that “[o]nly phase two of the [FAR subpart 36.3] procurement is to be conducted in accordance with FAR part 15.” *Intercontinental Construction Contracting, Inc.*, B-415040 *et al.*, Nov. 8, 2017, 2018 CPD ¶ 82 at 6 (finding that FAR part 15 requirements regarding exchanges before establishing a competitive range do not apply to phase one of a procurement conducted under FAR subpart 36.3 absent a provision in the solicitation otherwise); *see also Linc Government Servs., LLC*, B-404783.2, B-404783.4, May 23, 2011, 2012 CPD ¶ 128 at 7 (declining to apply discussions requirements of FAR part 15 to phase one of the design-build selection procedures where nothing in the applicable regulations, the authorizing statute (10 U.S.C. § 2305a), or the solicitation makes those requirements applicable).

Consistent with our previous decisions, we find that phase one of the design-build selection conducted here under FAR subpart 36.3 is not a procurement conducted on the basis of competitive proposals under which a debriefing is required when requested. As a result, the protester was required to file its protest not later than 10 days after the protester knew or should have known its protest basis, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Here, the agency’s evaluation, upon which the protest was based, was provided to the protester on June 12, along with the Army’s unsuccessful offeror notice. *Id.* This protest was filed more than 10 days later, on June 30.

Venergy argues that its protest was timely filed because it was not able to form the basis of its protest until it received the contracting officer’s response to Venergy’s debriefing questions. *Resp. to Dismissal Req.* at 2. The protester asserts that it properly filed this protest within 10 calendar days of receiving the contracting officer’s response. *Id.* We disagree. The record shows that the 2-page protest challenges various aspects of the agency’s assessment of Venergy’s phase one proposal, information Venergy knew from the unsuccessful offeror notice. *Protest* at 1-2; *see Resp. to Dismissal Req.*, attach. 1, *Notice to Unsuccessful Offeror* at 2-11. Because the allegation--that the agency unreasonably evaluated the protester’s phase one proposal--was based on information the protester knew upon receipt of its unsuccessful

offeror notice, the protest should have been filed within 10 calendar days of receiving the notice.

The protester also asserts that its protest is timely because the requirements of FAR section 15.505 apply to this procurement.² Resp. to Dismissal Req. at 1-2. In support of this assertion, the protester points to the unsuccessful offeror notice, which informed Venergy that, “[i]n accordance with FAR 15.505, you are entitled to one debriefing before award of the contract under this solicitation.” *Id.*; see Resp. to Dismissal Req., attach. 1, Notice to Unsuccessful Offeror at 1. The protester argues that the agency’s inclusion of this information in the unsuccessful offeror notice demonstrates that FAR section 15.505 applies to this procurement and that the debriefing offered by the notice was a required debriefing. Resp. to Dismissal Req. at 3. We disagree.

The solicitation here expressly stated that the procurement is being conducted under the design-build selection procedures under FAR subpart 36.3. See RFP at 1, 5. In contrast, the solicitation made no mention of incorporating FAR part 15 procedures in phase one of the procurement. See *generally, id.* As discussed above, our Office has previously concluded that only phase two of a FAR subpart 36.3 procurement is to be conducted in accordance with FAR part 15, and we have declined to apply certain FAR part 15 requirements to phase one of a FAR subpart 36.3 procurement absent a provision in the solicitation otherwise. See *Intercontinental Construction Contracting, Inc., supra*. While the protester relies on the contracting officer’s representation that Venergy was “entitled” to the debriefing at issue, a contracting officer’s mischaracterization of a debriefing is not determinative as to whether a debriefing is a required one. See *IR Techs., B-414430 et al.*, June 6, 2017, 2017 CPD ¶ 162 at 6 (finding that “a contracting officer’s mischaracterization is not determinative of whether a debriefing is a required one . . . nor can it alter the fact that this was [a federal supply schedule] procurement to which the procedures of FAR subpart 8.4, rather than FAR Part 15, applied.”). Likewise, a contracting officer’s notice offering a debriefing in accordance with the procedures in FAR section 15.505 does not alter the fact that the debriefing was provided following phase one of a procurement conducted pursuant to FAR subpart 36.3 procedures, rather than FAR part 15.³ See *id.*

In sum, because the debriefing provided to Venergy was not a debriefing in a “procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required,” the exception for such debriefings in our timeliness rules does not apply. 4 C.F.R. § 21.2(a)(2). Therefore, Venergy was

² Section 15.505 of the FAR sets out the pre-award debriefing procedures for offerors excluded from the competitive range or otherwise excluded from the competition before award.

³ We note that the unsuccessful offeror notice expressly stated at the outset that “[t]he subject RFP is being conducted in accordance with the process at [FAR subpart] 36.3, Two-Phase Design-Build Selection Procedures.” Resp. to Dismissal Req., attach. 1, Notice to Unsuccessful Offeror at 1.

required to file its protest within 10 days after the basis of its protest was known or should have been known. Here, Venergy was provided the agency's assessment of the firm's phase one proposal with its unsuccessful offeror notice on June 12, but did not file its protest until June 30.

We therefore dismiss the protest as untimely.

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