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Decision

Matter of: D+S International, LLC

File: B-422967

Date: December 30, 2024

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DIGEST

Protest that agency unreasonably excluded protester from competition for failing to register its *de facto* joint venture arrangement in the System for Award Management (SAM) is dismissed as an untimely challenge to the terms of the solicitation, where the defect in the solicitation--the impossibility of registering a *de facto* joint venture arrangement in SAM--was readily apparent on the face of the solicitation.

DECISION

D+S International, LLC, of New York, New York, protests the exclusion of its proposal from the competition under request for proposals (RFP) No. 19AQMM-24-R0034, issued by the Department of State, for comprehensive architectural and engineering services. The protester challenges the agency's determination that D+S was not eligible to compete because it failed to meet the solicitation's System for Award Management (SAM) registration requirement.

We dismiss the protest as untimely.

BACKGROUND

The agency posted the solicitation on SAM.gov on February 9, 2024, seeking qualified architect/engineer firm-led teams of licensed professionals to provide comprehensive architectural and engineering services for agency facilities worldwide. Contracting Officer's Statement (COS) at 1; Agency Report (AR), Tab 1, RFP at 1. The solicitation anticipated the award of 12 indefinite-delivery, indefinite-quantity contracts, with at least three contracts set aside for qualified small businesses, for a 1-year base period and

four 1-year option periods. RFP at 1. The solicitation contemplated a three-stage selection process under the Brooks Act, Pub. L. No. 92-582 (40 U.S.C. §§ 1101-1104) and specified the submission requirements and evaluation criteria for stage one proposals. *Id.* at 2, 3-6.

In stage one, offerors were instructed to submit “detailed information of the Prime [architect/engineer’s] design past performance, firm profile and design approach, and portfolio.” RFP at 2. Offerors’ stage one submissions would be reviewed and ranked by the technical evaluation panel and the highest technically qualified offerors would be selected for the shortlist of offerors to advance to stage two of the procurement. *Id.*

The solicitation also required the submission of a “U.S. Person Qualifications (Omnibus certification) as a separate file” in their stage one submission. *Id.* The solicitation advised that “Offerors must be determined eligible as an Omnibus U.S. Person, in order to participate, if short-listed, in the next Stage 2 of the solicitation.” *Id.*

Referred to as the “Omnibus” in the solicitation, the Omnibus Diplomatic Security and Antiterrorism Act of 1986, as amended (Security Act), established several statutory qualification requirements for firms seeking to compete for contracts to design and construct diplomatic facilities located overseas. See 22 U.S.C. §§ 4852-4856. The Security Act requires that, where adequate competition exists, only United States persons and qualified joint venture persons may bid on a diplomatic construction or design project. *Id.* § 4852(a). The term “United States person” is defined in the Security Act as an entity which, among other things, “has performed within the United States, or at a United States diplomatic or consular establishment abroad, administrative and technical, professional, or construction services similar in complexity, type of construction, and value to the project being bid” and “has the existing technical and financial resources in the United States to perform the contract.” *Id.* § 4852(c)(2)(D) and (G). In addition, the term “qualified United States joint venture person” is defined as “a joint venture in which a United States person or persons owns at least 51 percent of the assets of the joint venture.” *Id.* § 4852(c)(3).

As relevant here, the regulations implementing the Security Act permit an offeror entity to qualify under the Security Act through a *de facto* joint venture arrangement as follows:

A prospective bidder/offeror may be an individual organization or firm, a formal joint venture in which the co-venturers have reduced their arrangement to writing, or a *de facto* joint venture where no formal agreement has been reached, but the offering entity relies upon the experience of a related U.S. firm that guarantees performance.

48 C.F.R. § 652.236-72. The Security Act qualification certification form, provided with the solicitation for offerors to complete, confirmed the *de facto* joint venture arrangement as one of the ways in which a firm may qualify as a United States person under the Security Act by stating as follows:

Organizations that wish to use the experience or financial resources of any other legally dependent organization or individual, including parent companies, subsidiaries, or other related firms, must do so by way of a joint venture. A prospective offeror may be an individual organization or firm, a formal joint venture (where the arrangement among the co-venturers has been reduced to writing), or “de facto” joint venture (where no formal agreement has been reached, but the offering entity relies upon the experience of a related U.S. person firm that guarantees performance).

AR, Tab 9, Security Act Certification Pamphlet at 2.

In addition to the Security Act qualification requirements, the solicitation included the following SAM registration requirement:

Active Entity Registration on SAM.gov

Offerors, including any offeror organized as a joint venture, to include a de facto joint venture must have an active SAM registration at the time of Stage 1 submission and throughout the procurement process.

Any offeror whose registration is not active in SAM at the time of Stage 1 submission will be excluded from the process and their Stage 1 submissions will not be evaluated. If the [architect/engineer] proposes as a Joint Venture, the Joint Venture itself must be registered in SAM. The Offeror that prequalified as a “U.S. Person” under Omnibus, must be the same Offeror that is registered in SAM at the time of Stage 1 submission and throughout the procurement process.

RFP at 2; see also *id.* at 8 (stating substantially the same).

The agency received stage one submissions from 145 offerors, including D+S, by the solicitation closing date. COS at 2. After reviewing D+S’s stage one submission, the contracting officer determined that the entity that prequalified under the Security Act was “a *de facto* joint venture comprised of [D+S] and Diller Scofidio+Renfro LLC,” and that this same *de facto* joint venture did not have an active SAM registration. *Id.* at 12. As a result, the agency determined that D+S’s proposal was ineligible to proceed to the next stage of the procurement. *Id.* at 12-13.

On September 12, the agency posted the shortlist of offerors that were selected to proceed to stage two and notified D+S of its nonselection. This protest followed.

DISCUSSION

The protester challenges the agency’s conclusion that the protester’s proposal was ineligible for award because the *de facto* joint venture was not registered in SAM at the

time it submitted its stage one proposal. Protest at 12-14. In this regard, the protester primarily contends that D+S International, LLC, as a stand-alone entity, was the offeror identified in its stage one proposal and that this entity has been and is registered in SAM. *Id.* at 12-13.

The agency responds that its determination of D+S's ineligibility was consistent with the solicitation and reasonable. The agency argues that because D+S qualified under the Security Act as a *de facto* joint venture, that *de facto* joint venture was the entity required to be registered in SAM. Memorandum of Law (MOL) at 16-24. The agency also maintains that the protester's challenges are untimely because the solicitation unambiguously informed offerors of this requirement. *Id.* at 39.

As discussed below, we dismiss the protest because the incongruity of the solicitation's SAM registration requirement was patently obvious on the face of the solicitation, and thus the protester was required to protest that solicitation defect before the due date for stage one proposal submissions.¹

As noted above, the RFP provided that offerors, "including any offeror organized as a joint venture, to include a *de facto* joint venture," must have an active SAM registration at the time of stage one submission. RFP at 2. The solicitation also advised that if the entity proposes as a joint venture, the joint venture itself must be registered in SAM. *Id.* In addition, the solicitation required that the "Offeror that prequalified as a 'U.S. Person' under [the Security Act] must be the same Offeror that is registered in SAM at the time of Stage 1 submission." *Id.*

The record shows that the protester's proposal, in multiple places, identified D+S (the stand-alone entity) as the offeror. See *e.g.*, AR, Tab 2, D+S Certifications at 5 ("All answers to Certifications are given by Diller Scofidio + Renfro, LLC, as a United States person in its capacity as *de facto* joint venturer with D+S International LLC, who is the

¹ The protester raised other arguments not addressed in this decision. We have considered these arguments and conclude that they do not comply with our Bid Protest Regulations. For example, the protester argues that the agency unreasonably failed to conduct discussions regarding the SAM registration requirements. Protest at 13-14; Comments at 8-9. We find, however, nothing in the solicitation required the agency to conduct discussions before eliminating proposals in stage one of the competition. See *generally*, RFP. Moreover, an agency is under no obligation to conduct discussions with an offer to permit it to cure the noncompliance which provided the basis for the proposal's exclusion from the competition. *Americom Gov't Servs. Inc.*, B-292242, Aug. 1, 2003, 2003 CPD ¶ 163 at 5-6. Therefore, we find that this protest argument fails to state a legally sufficient basis of protest. See 4 C.F.R. § 21.5(f); *Midwest Tube Fabricators, Inc.*, B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3 (our regulations require that protesters include a detailed statement of legally sufficient grounds for protest and provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action).

offeror seeking pre-qualification.”); see *also* AR, Tab 3, D+S Stage 1 Portfolio at 4 (“D+S International, LLC, the offeror of this Solicitation, is submitting as a *de facto* joint venture with our affiliate, Diller Scofidio + Renfro, LLC.”). Still other parts of the proposal, however, indicated that the offeror was in fact the *de facto* joint venture, rather than the stand-alone entity. For example, in its Security Act certifications, the protester completed certification number 7 by indicating that “[t]he prospective offeror [X] is, [] is not, a *de facto* joint venture” and signing under the “Name of Company” as “D+S International LLC in *de facto* joint venture with Diller Scofidio + Renfro LLC.” AR, Tab 2, D+S Certifications at 11-12.

The protester does not dispute that it formed a *de facto* joint venture to qualify under the Security Act. The protester, however, contends that because a *de facto* joint venture is not a “legally organized” entity, it could not be “the offeror” for the purposes of submitting a proposal and registering in SAM. Comments at 4-5. In this regard, the protester asserts that the agency’s own implementing regulations allow an offeror to qualify under the Security Act through “a *de facto* joint venture where no formal agreement has been reached, but the *offering entity* relies upon the experience of a related U.S. firm that guarantees performance.” *Id.* at 5-8; Protest at 12-13; 48 C.F.R. § 652.236-72 (emphasis added). Thus, the protester argues, D+S as the stand-alone entity is the “offering entity,” using the permitted *de facto* joint venture arrangement that relies on the experience of Diller Scofidio + Renfro LLC (a related U.S. firm that guarantees D+S’s performance) in order to qualify under the Security Act. Protest at 12-13. Moreover, relying on our decision in *Pernix Fed., LLC*, B-422122.2, Mar. 22, 2024, 2024 CPD ¶ 73, the protester argues that the agency erred in finding D+S ineligible for failing to comply with the impossible requirement for a *de facto* joint venture to be registered in SAM. Protest at 12-13; Comments at 2-3, 8-9.

The agency, in response, argues that it reasonably found “the offeror” of the protester’s proposal to be the *de facto* joint venture, and properly rejected the proposal for failing to register that *de facto* joint venture entity in SAM. MOL at 19-23, 36-47. In this regard, the agency contends that the “Offeror that prequalified as a ‘U.S. Person’ under” the Security Act was not D+S as a stand-alone entity, but the *de facto* joint venture of D+S and Diller Scofidio + Renfro LLC. *Id.* at 27-36. Consequently, that *de facto* joint venture was the offeror required to be registered in SAM. *Id.* The agency does not refute that it is impossible for a *de facto* joint venture to be registered in SAM, but instead posits that in light of the clear solicitation language, D+S should have objected to the solicitation requirement before submitting a solicitation as a *de facto* joint venture that was not (and could not be) registered in SAM. *Id.* at 39.

Where a dispute exists as to a solicitation’s actual requirements, we begin by examining the plain language of the solicitation. *Point Blank Enters., Inc.*, B-411839, B-411839.2, Nov. 4, 2015, 2015 CPD ¶ 345 at 4. We resolve questions of solicitation interpretation by reading the solicitation as a whole and in a manner that gives effect to all provisions; to be reasonable, and therefore valid, an interpretation must be consistent with such a reading. *Unico Mech. Corp.*, B-420355.6, B-420355.7, Aug. 1, 2023, 2023 CPD ¶ 182 at 13.

Here, while the protester may disagree about which entity is the “offeror” for the purposes of the stage one submission, we agree with the agency that the solicitation’s SAM registration requirement was clear and unambiguous. In this regard, the solicitation stated that any offeror “organized as . . . a *de facto* joint venture must have an active SAM registration at the time of Stage 1 submission,” and that the “[o]fferor that prequalified as a ‘U.S. Person’ under [the Security Act] must be the same [o]fferor that is registered in SAM.” RFP at 2. These provisions, on their face, plainly required that an offeror organized as a *de facto* joint venture for the purpose of Security Act prequalification must also be registered in SAM as that *de facto* joint venture.

Nevertheless, we also note that the agency has offered no explanation as to *how* a *de facto* joint venture--an arrangement that, by definition, was not formed under a formal agreement--might achieve registration in SAM, which requires the registering entity to be a legally formed entity with, among other things, a legal business name and a taxpayer identification number. See *e.g.*, GSA Federal Service Desk, Tier 0 Knowledge Base--What information do I need to register my entity in SAM.gov?, https://www.fsd.gov/gsafsd_sp?id=kb_article_view&sysparm_article=KB0016844 (last visited Dec. 30, 2024). Although the agency posits that D+S could have organized into a formal entity, other than a *de facto* joint venture, that could register in SAM, this argument is incongruent with the agency’s own implementing regulation, which expressly provides the *de facto* joint venture arrangement as an alternative for an otherwise non-U.S. person to prequalify to compete in a procurement subject to the Security Act. See *Pernix Fed., LLC, supra* at 12-14 (finding that the failure of a *de facto* joint venture to be registered in SAM was not a reasonable basis to exclude a protester from the competition where the agency was unable to rebut the argument that the requirement was impossible to meet).

Nonetheless, we conclude that the protester’s challenge to the agency’s interpretation of the solicitation is untimely under our Bid Protest Regulations. In this regard, our regulations specifically require that a protest based upon improprieties in a solicitation that are apparent prior to the submission deadline for the receipt of proposals be filed before that time. 4 C.F.R. § 21.2(a)(1). Here, as noted, the requirement that “a *de facto* joint venture must have an active SAM registration at the time of Stage 1 submission” was unambiguous and apparent on the face of the solicitation. See RFP at 2. Accordingly, if the protester believed that only D+S (the stand-alone entity) should have been required to be registered in SAM (despite the protester requesting prequalification under the Security Act as a *de facto* joint venture), it should have challenged this solicitation defect prior to the deadline for submission of proposals.

Even if we were to agree with the protester’s contention that the SAM registration requirement was ambiguous with respect to the use of the term “offeror,” we would still lack a basis to consider the protest because the resulting inconsistency would give rise to a patent, as opposed to a latent, ambiguity. A patent ambiguity exists where a solicitation contains an obvious, gross, or glaring error--for example, where solicitation provisions appear inconsistent on their face--while a latent ambiguity is more subtle.

Pasha Hawaii Holdings LLC, B-419020 *et al.*, Nov. 25, 2020, 2020 CPD ¶ 386 at 10. Here, the protester's interpretation that the stand-alone entity was the offeror required to be registered in SAM is clearly inconsistent with the solicitation's requirement that an offeror "organized as . . . a de facto joint venture must have an active SAM registration." See RFP at 2. An offeror has an affirmative obligation to seek clarification of a patent ambiguity prior to the due date for proposal submission. See *Environmental Sys. Research Inst., Inc.*, B-408847.2, Jan. 17, 2014, 2014 CPD ¶ 53 at 5. When a patent ambiguity exists but is not challenged prior to the proposal submission deadline, we will not consider subsequent untimely arguments asserting the protester's own interpretation of the ambiguous provision. *FFLPro, LLC*, B-411427.2, Sept. 22, 2015, 2015 CPD ¶ 289 at 10.

In *Pernix*, our Office considered the same issue raised here: the agency's failure to harmonize its regulations implementing the Security Act (that permits a *de facto* joint venture to prequalify as a United States person eligible to compete for the requirements) with the solicitation's requirement that a *de facto* joint venture be registered in SAM. See *Pernix Fed., LLC*, *supra* at 11. While the protester in *Pernix* also failed to timely challenge the patent defect in the solicitation, our Office decided the merits of the issue under the "significant issue" exception to our timeliness rules. *Id.* at 10-11. In applying the exception, we explained that we generally regard a significant issue as an issue of widespread interest to the procurement community that has not been previously decided. See *id.*, citing 4 C.F.R. § 21.2(c); *Celadon Labs., Inc.*, B-298533, Nov. 1, 2006, 2006 CPD ¶ 158 at 4. Because we found that the issue raised in *Pernix* was not one that our Office had previously decided and one that could be expected to arise in future Department of State procurements, we considered the merits of the untimely challenge and sustained the protest. See *Pernix Fed., LLC*, *supra* at 11. Here, however, we decline to apply the significant issue exception because the issue raised is the same one as in *Pernix*, and thus, unlike in *Pernix*, it *has* been previously decided.

Because the solicitation defect at issue was readily apparent on the face of the solicitation, the protester was required to challenge the defect prior to the deadline for submission of stage one proposals. Since the protester did not, we dismiss the protest as an untimely challenge to the terms of the solicitation.

The protest is dismissed.

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