



Decision

Matter of: International Center for Language Studies, Inc.--Reconsideration

File: B-418916.2

Date: September 9, 2020

David E. Fletcher, Esq., and Brenna D. Duncan, Esq., Perkins Coie LLP, for the protester.

Daniel B. McConnell, Esq., Department of the Army, for the agency.

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DIGEST

Request for reconsideration is denied where our Office did not commit legal error when we determined that the initial protest allegation was untimely and did not qualify under the “significant issue” exception, or when we dismissed allegations that did not present valid bases of protest.

DECISION

International Center for Language Studies, Inc. (ICLS), of Washington, D.C., requests reconsideration of our decision, *International Center for Language Studies, Inc.*, B-418916.2, July 10, 2020 (unpublished decision), wherein our Office dismissed ICLS’s protest challenging the award of a contract to Chi-Chiack, LLC under request for proposals (RFP) No. W91247-19-R-0017, issued by the Department of the Army for language and culture services.

We deny the request for reconsideration.

BACKGROUND

On March 4, 2020, the Army issued the RFP to procure foreign language support and culture services. Protest, exh. 1, RFP at 1, 28. The selected contractor would provide language instruction, curriculum development, and translation services. *Id.* at 54. The RFP contemplated the award of a fixed-price indefinite-delivery, indefinite-quantity contract to be performed over a 1-month phase-in period, an 11-month base period, and four 1-year option periods. *Id.* at 29, 84. Award was to be made on a lowest-price,

technically acceptable (LPTA) basis, considering mission capability, past performance, and price factors. Protest, exh. 1, RFP at 111.

Four offerors, including ICLS and Chi-Chiack, submitted proposals by the April 17 close of the solicitation period. Req. for Dismissal at 3. The agency determined that the proposals submitted by Chi-Chiack, ICLS, and another firm were technically acceptable. Req. for Dismissal, Ex. 2, Source Selection Decision Document (SSDD) Excerpt at 1. Chi-Chiack was the lowest-priced offeror, the other firm was the second-lowest-priced, and ICLS submitted the highest price of the three. *Id.* Based on the evaluation, the agency made award to Chi-Chiack at a price of \$32,070,885.

On July 13, ICLS filed its protest with our Office. ICLS first alleged that the Army unreasonably made its source selection decision using LPTA procedures because the acquisition did not meet the requisite conditions set forth under Defense Federal Acquisition Regulation Supplement (DFARS) 215.101-2-70. Protest at 10-15. ICLS argued that the allegation was timely under the significant issue exception as provided for in 4 C.F.R. § 21.2(c) because the issue was of widespread concern to the bid protest community, and had not been previously considered by our Office. *Id.* at 13-15

ICLS also alleged that the Army should have evaluated Chi-Chiack's proposal as technically unacceptable because the firm did not propose labor categories satisfying the performance work statement requirements. Protest at 16. Specifically, ICLS argued that Chi-Chiack proposed "tutors" as opposed to "technical instructor/course developers" because the firm was unable to compensate "technical instructor/course developers" in accordance with the Service Contract Act (SCA) at its low total price. *Id.* at 17-18. Alternatively, ICLS alleged that Chi-Chiack must have objected to the requirement that employees be compensated in accordance with the SCA, and therefore should have been found ineligible for award. *Id.* at 18-19.

On August 5, the agency requested dismissal of the protest allegations. Req. for Dismissal. The agency argued that ICLS's allegation challenging the use of LPTA procedures was an untimely challenge to the terms of the solicitation. *Id.* at 7-8. As to the remaining allegations, the agency argued that they were speculative because they were not supported by any factual evidence. *Id.* at 9. The Army also argued that ICLS was not an interested party because another firm was found technically acceptable, and had submitted a lower-priced proposal. *Id.* at 6.

ICLS countered that its challenge to the LPTA source selection scheme was timely because it constituted a significant issue. Response to Req. for Dismissal at 3. The firm also argued that it was an interested party because its challenge to the source selection scheme would render nugatory the fact that its proposal was the

highest-priced, and because it challenged the other offerors' compliance with the solicitation's requirements.¹ *Id.* at 6-8.

On August 10, our Office dismissed the protest. *International Center for Language Studies, Inc., supra.* Our Office determined that ICLS's challenge to the source selection scheme was untimely. *Id.* at 2. We explained that the significant issue exception did not apply because our Office previously considered the application of DFARS 215.101-2-70 in *Verizon Business Network Services, Inc., B-418331.3 et al.,* July 10, 2020, 2020 CPD ¶ 235. *Id.* at 2-3. We also concluded that ICLS was not an interested party to challenge Chi-Chiack's technical acceptability or compliance with the SCA because ICLS was not next in line for award. *Id.* at 3-4.

DISCUSSION

On August 17, 2020, ICLS requested reconsideration of our decision, arguing that our decision contained material errors. Specifically, ICLS argues that our decision contained a factual error because ICLS challenged the second-low offeror's technical acceptability and compliance with the SCA requirement in its response to the agency's request for dismissal and was therefore an interested party to raise its protest. Req. for Recon. at 3-4. ICLS also argues that our decision contained a legal error because the legal issues raised in this protest are distinct from those issues discussed in *Verizon Business Network Services, Inc. Id.* at 4-7.

In its request for reconsideration, ICLS provided a "further explanation" of its previously raised supplemental protest allegation regarding the second-low offeror's technical acceptability and compliance with the SCA requirement. Req. for Recon. at 7-11. As with its challenge to Chi-Chiack, ICLS argues that the second-low offeror did not propose "technical instructor/course developers" because its total proposed price is too low to compensate those employees consistent with the applicable SCA wage rate. *Id.* at 7-9. Alternatively, ICLS argues that the second-low offeror objected to the SCA requirement. *Id.* at 10-11.

Under our Bid Protest Regulations, to obtain reconsideration, a requesting party either must demonstrate that our prior decision contains errors of fact or law, or present new information not previously considered that would warrant reversal or modification of our earlier decision. 4 C.F.R. § 21.14(a); *Bluehorse Corp.--Recon., B-413929.2, B-413929.4,* May 16, 2017, 2017 CPD ¶ 149 at 4. On this record, we conclude that ICLS's request does not meet this standard.

First, we do not find persuasive ICLS's argument that our Office mistakenly declined to apply the significant issue exception to the firm's challenge to the source selection scheme. Our Bid Protest Regulations provide that a protest challenging a solicitation

¹ The agency also requested dismissal asserting that ICLS was not eligible for the award because the firm was not a small business. Req. for Dismissal at 7. The protester responded that it was eligible. Response to Req. for Dismissal at 3-6.

impropriety must be filed prior to the time set for receipt of proposals. 4 C.F.R. § 21.2(a)(1). Our regulations also provide that GAO may consider an untimely protest where it raises issues of significant interest to the procurement system. 4 C.F.R. § 21.2(c).

The significant issue exception is strictly construed and sparingly used in order to prevent the timeliness rules from becoming meaningless. *B&S Transport, Inc.*, B-240906 *et al.*, Sept. 14, 1990, 90-2 CPD ¶ 216 at 1. We will invoke the issue only where the protest raises an issue of first impression that would be of widespread interest to the procurement community, or where the matter has been considered on the merits in prior decisions. *Id.*

On this record, we conclude that our Office did not commit legal error because the protester's challenge does not warrant consideration under the significant issue exception. Our Office previously considered this type of challenge in *Verizon*. To illustrate, both the issues presented here and those in *Verizon* concern whether an agency satisfied some or all of the eight criteria in order to utilize an LPTA source selection scheme. *Compare* Protest at 13 (arguing that the "minimal value" requirement is satisfied because the agency will receive substantial value from more experienced language instructors) *with Verizon Business Network Servs., Inc.*, *supra* at 8-9 (reviewing whether an agency reasonably determined that it would not receive substantial value from an enhanced technical approach). To the extent ICLS draws distinctions between the nature of its challenges and those presented in *Verizon*, see Req. for Recon. at 5-6, we do not find that addressing nuanced differences qualifies as a significant issue. The fact of the matter is our Office already provided the framework for determining whether an agency reasonably elected to use an LPTA source selection scheme in this context, and therefore we do not view ICLS's challenges as offering us an opportunity to provide additional guidance to the bid protest community.

Second, we do not find that our Office committed error when it dismissed the protester's remaining challenges (*i.e.*, that Chi-Chiack's technical approach is unacceptable, or that Chi-Chiack does not intend to comply with the SCA) because those challenges are speculative and do not provide us with any basis to sustain the protest. See Req. for Dismissal at 9-10 (arguing that the protester's challenges are speculative). A protest allegation which relies on speculation does not provide a legally sufficient basis because our Office will not find improper agency action based on conjecture or inference. *Raytheon Blackbird Techs., Inc.*, B-417522, B-417522.2, July 11, 2019, 2019 CPD ¶ 254 at 3.

Here, the protester's allegations are speculative because they are based purely on inference, as opposed to any evidence. To support both allegations, ICLS only points out that Chi-Chiack's price is too low to compensate personnel at the requisite SCA rate. Protest at 17-18. ICLS does not provide us with any actual evidence to substantiate the firm's claim that Chi-Chiack proposed inexperienced or unqualified personnel, or that the firm does not intend to comply with the SCA. Without any evidence demonstrating either of these allegations, we consider these arguments to be

speculative because it is equally plausible that Chi-Chiack proposed to perform this contract below-cost in order to gain additional experience in this industry.² See *Parker Shane Mfg.*, B-220273, Sept. 30, 1985, 85-2 CPD ¶ 367 at 1 (a below-cost offer is legally unobjectionable and does not provide a basis upon which a contract award may be challenged). Thus, we conclude that these protest grounds are speculative because they require us to infer that the agency unreasonably evaluated Chi-Chiack's proposal based entirely on the firm's alleged low price. Accordingly, we do not find that our Office improperly dismissed these allegations because they do not provide valid bases of protest.

To the extent the protester asserts that our Office improperly dismissed its supplemental protest allegation or that we should consider its "further elaboration" presented in its request for reconsideration, we do not find those arguments persuasive. The protester's challenges to the intervening offeror's evaluation are virtually identical to the challenges raised regarding Chi-Chiack. Req. for Recon. at 7-11 (arguing that the intervening offeror did not propose the requisite labor categories, or, alternatively, that the firm did not intend to comply with the SCA). Thus, we conclude that these protest grounds are speculative as well, and therefore, our Office did not improperly dismiss these challenges either.

The request for reconsideration is denied.

Thomas H. Armstrong
General Counsel

² As an aside, we note that the protester did not allege that the agency failed to conduct a price realism evaluation, and the RFP did not provide for one. See Protest, exh. 1, RFP at 114 (price would be evaluated for reasonableness and unbalanced pricing); see *also* Req. for Dismissal, exh. 1, Contracting Officer's Declaration at 4 (price realism was neither required nor conducted).