



## Decision

**Matter of:** Terra Klean Solutions, Inc.

**File:** B-420991, B-420991.2

**Date:** September 28, 2022

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### DIGEST

Protest is dismissed where challenges to the agency's evaluation of proposals fail to state a valid basis for protest.

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### DECISION

Terra Klean Solutions, Inc. (Terra Klean), of San Antonio, Texas, protests the award of a contract for environmental cleaning and related services to L5MBM JV, of San Antonio, Texas, by the Department of the Army, under request for proposals (RFP) No. W81K04-22-R-0012. Terra Klean challenges the agency's evaluation of L5MBM JV's proposal under the technical and price factors, as well as the award decision.

We dismiss the protest.

### BACKGROUND

The agency issued the RFP as an 8(a) set-aside<sup>1</sup> on February 3, 2022, seeking a contractor to provide healthcare environmental cleaning and related services at Bassett

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<sup>1</sup> Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes the Small Business Administration (SBA) to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. See 13 C.F.R. § 124.501(a) (SBA may enter

Army Community Hospital in Alaska and other medical treatment facilities in the health service area of Bassett Army Community Hospital.<sup>2</sup> Req. for Dismissal, exh. 1, RFP, Performance Work Statement (PWS) § 1. The RFP contemplated the award of an indefinite-delivery, indefinite-quantity contract under which fixed-price task orders would be issued. RFP at 13. The RFP provided for award on a lowest-priced, technically acceptable (LPTA) basis. RFP at 193. The solicitation also advised that the resulting contract would be subject to the Service Contract Act (SCA). *Id.* at 175; Req. for Dismissal at 4. In addition, the CBA stated that employees would receive higher wages and additional fringe benefits effective March 1, 2020, and it provided wages for various labor categories. Req. for Dismissal, exh. 2, CBA at 2-5.

The solicitation stated that proposals would be evaluated using the following three factors: technical approach, past performance, and price. RFP at 193. With respect to the technical approach factor, the RFP instructed offerors to “demonstrate how the offeror intends to meet the solicitation requirements.” *Id.* at 172. The solicitation required offerors to submit several supplements with their proposals, including supplement B-1, Supply and Equipment List, and supplement C-2, Staffing Chart. *Id.* at 173, 174. The supply and equipment list was to “include a list of proposed supplies, materials, and equipment sufficient in detail, as a minimum: quantities, product/brand names, unit of issue, quantity per unit of issue, and frequency of purchase to demonstrate compliance and understanding of the solicitation requirements in PWS Section 4.” *Id.* at 173. Within the staffing chart, the RFP instructed offerors to address each type of healthcare environmental cleaning service required by building and include the number of employees proposed by labor category for each shift by building. *Id.* at 174. The RFP advised offerors that a proposal would be rated acceptable if the offeror demonstrated its compliance with and understanding of the requirements. *Id.* at 196.

As for the price volume, the RFP directed offerors to submit their proposed prices using a matrix provided with the solicitation. RFP at 176. Within the pricing matrix, each offeror would propose unit prices for each building; offerors were not asked to propose labor rates. *Id.* As also relevant here, the RFP stated prices would be evaluated for reasonableness, and noted that the agency did not intend to conduct a price realism analysis. *Id.* at 193.

The agency received seven initial proposals and established a competitive range of four offerors, including Terra Klean, L5MBM JV, and offeror No. 4. Req. for Dismissal, exh. 4, SSDD at 2, 5. All of the offerors in the competitive range were rated acceptable

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into all types of awards, including contracts and orders). This program is commonly referred to as the 8(a) program.

<sup>2</sup> The agency issued two amendments to the RFP. Req. for Dismissal exh. 4, Source Selection Decision Document (SSDD) at 1-2. As relevant here, amendment No. 2 provided the collective bargaining agreement (CBA) applicable to the incumbent contract. *Id.* at 2.

under the non-price factors. *Id.* at 6. L5MBM JV proposed the lowest price, offeror No. 4 proposed the second lowest price, and the protester proposed the third lowest price. *Id.* Because L5MBM JV proposed the lowest price and was rated technically acceptable, it was selected for award. Terra Klean's protest followed.

## DISCUSSION

Terra Klean alleges that the Army's evaluation of L5MBM JV's proposal was unreasonable and inconsistent with the solicitation because (1) L5MBM JV proposed key personnel and equipment that it did not intend to provide, and (2) the agency failed to ensure that L5MBM JV would comply with the SCA.<sup>3</sup> Protest at 1-2. The agency filed a request for dismissal, arguing that the protest does not state a valid factual or legal basis of protest.<sup>4</sup> Req. for Dismissal at 2. The protester responds that it has raised factually and legally sufficient grounds of protest because the agency should have meaningfully analyzed the offerors' proposals to discern potential misrepresentations, as well as wages that did not comply with the SCA. Resp. to Req. for Dismissal at 16, 21. For the reasons discussed below, we find that Terra Klean has not stated legally and factually sufficient protest grounds.

### Technical Evaluation

The protester contends that L5MBM JV's proposal was unacceptable under the technical approach factor because L5BMB JV misrepresented the resources and staff

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<sup>3</sup> The protester also challenges the award decision, asserting it was premised on flawed technical and price evaluations. Protest at 21. Because the protester's arguments concerning the technical and price evaluations are legally and factually insufficient, Terra Klean's challenge of the award decision, which is derivative of its technical and price evaluation challenges, is also insufficient.

<sup>4</sup> Additionally, the agency argued the protest should be dismissed because the protester is not an interested party because there was an unchallenged intervening offeror, referred to as "offeror No. 4." Req. for Dismissal at 2. The protester was not aware of the existence of an intervening offeror prior to receiving the request for dismissal. Resp. to Req. for Dismissal at 12-13. In a supplemental protest filed after the agency requested dismissal, the protester has challenged the agency's evaluation of a lower-priced technically acceptable offer, by raising similar arguments as those used to challenge the awardee. *Id.* at 10. The protester argues that because the agency's evaluation of offeror No. 4's proposal was unreasonable, the protester would be next in line for award. *Id.* at 10, 15. For the reasons discussed below, Terra Klean's protest grounds are legally and factually insufficient and do not provide a valid basis to challenge the awardee or the intervening offeror; we therefore do not address the issue of interested party status.

that would be used during performance.<sup>5</sup> Protest at 10. As support for these allegations, Terra Klean cites a post-award employment offer made by the awardee to the protester's executive housekeeper and post-award inquiries to purchase the protester's equipment made on the awardee's behalf. *Id.* at 14, 16-17. The protester further argues that the Army's evaluation was unreasonable because the agency failed to "meaningfully analyze" whether the offerors could meet the minimum solicitation requirements. *Id.* at 19. The agency responds that the protester's arguments are based on speculation and are inconsistent with the RFP. Req. for Dismissal at 6-7, 9.

Our Bid Protest Regulations require that a protest include a sufficiently detailed statement of the grounds supporting the protest allegations. 4 C.F.R. §§ 21.1(c)(4), 21.1(f), and 21.5(f). That is, a protest must include sufficient factual bases to establish a reasonable potential that the protester's allegations may have merit; bare allegations or speculation are insufficient to meet this requirement. *Ahtna Facility Servs., Inc.*, B-404913, B-404913.2, June 30, 2011, 2011 CPD ¶ 134 at 11. Unsupported assertions that are mere speculation on the part of the protester do not provide an adequate basis for protest. *Science Applications Int'l Corp.*, B-265607, Sept. 1, 1995, 95-2 CPD ¶ 99 at 2.

The protester alleges that the awardee proposed to use personnel and equipment that it did not have a reasonable basis to expect it would be able to provide. Protest at 10. As an initial matter, the protester's allegations concerning the content of L5MBM JV's proposal--including any representations that L5MBM JV made--are entirely speculative. Post-award recruitment efforts or offers to purchase equipment do not establish that an awardee proposed to provide resources that it did not reasonably expect to provide. See *Xenith Grp., LLC*, B-420706, July 14, 2022, 2022 CPD ¶ 184 at 4; *ICF Inc., L.L.C.*, B-419049.3, B-419049.4, Mar. 9, 2021, 2021 CPD ¶ 117 at 8-9. As previously stated, unsupported assertions that are mere speculation by the protester do not provide an adequate basis for protest and will be dismissed. *Science Applications Int'l Corp.*, *supra*; 4 C.F.R. § 21.5(f).

The protester's argument is also inconsistent with the solicitation. As pertinent here, for the technical approach factor, the RFP required each offeror to "provide a technical

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<sup>5</sup> The protester also contends that L5MBM JV engaged in an improper "bait-and-switch" with respect to the executive housekeeper, a key personnel position. Protest at 10-15. To sustain a protest contending that an awardee has made an impermissible bait-and-switch of personnel, a protester must show: (1) that the awardee either knowingly or negligently represented that it would rely on specific personnel that it did not have a reasonable basis to expect to furnish during contract performance; (2) that the misrepresentation was relied on by the agency; and (3) that the agency's reliance on the misrepresentation had a material effect on the evaluation results. *M.C. Dean, Inc.*, B-418553, B-418553.2, June 15, 2020, 2020 CPD ¶ 206 at 7 n.8 (*citing Patricio Enters. Inc.*, B-412738, B-412738.2, May 26, 2016, 2016 CPD ¶ 145 at 4). As discussed herein, the RFP did not ask offerors to identify specific personnel in their proposals. As such, there is no factual basis to support this protest ground, and it is dismissed.

approach detailing how it intends to meet the solicitation requirements” and “provide specific narrative details and/or descriptions of its technical approach with actual methods, processes, and procedures that demonstrates the offeror’s compliance and understanding of . . . contractor-furnished supplies/property requirements.” RFP at 172. To the extent the awardee may not have possessed the types of equipment listed within supplement B-1, supply and equipment list, or employed particular personnel to fill all of the types of positions listed within supplement C-2, staffing chart, at the time of proposal submission, that would not constitute a misrepresentation, as the RFP did not impose such requirements. Because the solicitation did not provide for offerors to represent that they had agreements in place prior to proposal submission for the provision of particular individuals or equipment during performance, there is no basis for the protester’s otherwise unsupported contention that the awardee included in its proposal the types of misrepresentations Terra Klean has alleged.

Furthermore, although the protester contends that the agency was required to “meaningfully examine” proposals to determine whether each offeror “could actually meet the solicitation requirements” (Resp. to Req. for Dismissal at 16), the solicitation did not contemplate such an evaluation. Rather, the agency was to assess whether the offeror proposed an approach that demonstrated “compliance and understanding of the solicitation requirements.” RFP at 196.

As stated above, our Bid Protest Regulations require protesters to present protest grounds that are factually and legally sufficient. 4 C.F.R. § 21.1(c)(4) and (f); see also *Xenith Grp., LLC*, B-420706, July 14, 2022, 2022 CPD ¶ 184 at 3. If a protester’s allegations are based on speculation, factual inaccuracies, or flawed legal assumptions, we will summarily dismiss a protest without requiring the agency to submit a report. *Id.*

The RFP did not require offerors to make the representations the protester claims the awardee made, and it did not require the Army to undertake the kind of evaluation the protester contends should have been done. In short, even accepting for the sake of argument Terra Klean’s assertions regarding L5MBM’s post-award efforts to recruit personnel and obtain equipment, the protest fails to state a valid basis for protest. Accordingly, this allegation is dismissed.

#### Price Evaluation

The protester argues that the agency’s price evaluation was unreasonable because the agency failed to consider whether L5MBM JV “took the updated wage adjustment into account.” Protest at 20. The protester also contends that offerors were competing on an unequal basis because some offerors developed their proposed prices using rates from the CBA and others did not. *Id.* The Army responds that it was not required to assess whether an offeror could profitably pay the wages provided for in the CBA at the proposed fixed price. Req. for Dismissal at 10.

On a fixed-price contract, a proposal that does not take exception to the solicitation’s SCA provisions, yet is premised on labor rates that are less than the SCA-specified

rates, may simply constitute a below-cost offer. An award to a responsible firm on the basis of such an offer is legally unobjectionable. *Nirvana Enter., Inc.*, B-414951.2, B-414951.3, Dec. 19, 2017, 2018 CPD ¶ 5 at 3-4. Regardless of the wage rates used in calculating its proposed cost, an offeror must compensate its employees at the appropriate prescribed SCA wage rates. *Group GPS Multimedia*, B-310716, Jan. 22, 2008, 2008 CPD ¶ 34 at 4. In contrast, where there is an indication that the offeror does not intend to be bound by the terms of the SCA, its offer must be rejected. *Nirvana Enter., Inc.*, *supra*.

Here, the RFP did not require the agency to determine whether an offeror's proposal used rates lower than the rates in the CBA. Indeed, the solicitation did not require offerors to propose, submit, or otherwise identify any labor rates with their proposals; rather, prices were largely comprised of monthly unit prices for a variety of cleaning services at various locations. As explained above, below-cost offers are unobjectionable, thus offerors could choose to propose prices using rates below those specified in the CBA. To the extent offerors chose to do so, and the agency found the offer acceptable, that did not render the evaluation unequal. As stated above, protesters are required to present protest grounds that are factually and legally sufficient. 4 C.F.R. § 21.1(c)(4) and (f); *see also Xenith Grp., LLC, supra*. Here, offerors did not propose labor rates for the agency to evaluate. Because the agency was not required to ensure that offerors matched the rates provided for in the CBA--or to ensure that all offerors based their proposed prices on the CBA-specified rates--the protester has not provided a factual or legal basis to support its allegation. Accordingly, this allegation is dismissed.

The protest is dismissed.

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General Counsel