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Decision

Matter of: UNICA-BPA JV, LLC

File: B-422580.3

Date: January 8, 2025

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DIGEST

Protest challenging protester's elimination from competition for failing to have active registration in the System for Award Management is sustained where the agency included protester in competitive range and protester had active registration at time of final proposal revision.

DECISION

UNICA-BPA JV, an 8(a) small business joint venture of Dallas, Texas, protests its elimination from competition under request for proposals (RFP)

No. 70LGLY24RGLB00001, issued by the Department of Homeland Security, Federal Law Enforcement Training Center (FLETC), for dormitory management support services.¹ UNICA argues that it was improperly excluded from the competition for failing to have an active System for Award Management (SAM) registration at the time of initial proposal submission.

¹ 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. Federal Acquisition Regulation (FAR) 19.800. This program is commonly referred to as the 8(a) business development program (or simply "8(a) program").

We sustain the protest.

BACKGROUND

The agency issued the solicitation on November 29, 2023, as an 8(a) set-aside under the procedures of FAR parts 12 and 15. Agency Report (AR), Tab 1, RFP at 1-2, 24; Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 2.² The RFP contemplated the award of a fixed-price contract for one 6-month base period and five 1-year options. RFP at 71. The agency sought management support services to provide custodial and housekeeping services, desk clerk services, locksmith services, and maintenance services for dormitories, student centers, and other facilities at the FLETC campus in Glynco, Georgia. AR, Tab 2, Source Selection Plan at 3. Award would be made on a best-value tradeoff basis, considering the following evaluation factors: management and technical approach; prior experience; hazardous waste management plan; past performance; and price. RFP at 207-208.

UNICA submitted a proposal by the January 2, 2024, due date set by the RFP.³ COS/MOL at 6. On April 25, after evaluation of initial proposals was completed, the agency notified UNICA that it had been excluded from the competitive range. AR, Tab 6, April 25 Notice of Exclusion. UNICA subsequently protested its exclusion to our Office, which we docketed as B-422580. In response, the agency elected to take corrective action by including UNICA in the competitive range and entering into discussions with UNICA. *UNICA-BPA JV, LLC*, B-422580, May 28, 2024 (unpublished decision). Consequently, we dismissed the protest as academic on May 28. *Id.*

On May 30, the agency opened discussions with UNICA, identifying the areas in the firm's proposal requiring additional information, clarification, verification, or resubmission. AR, Tab 7, UNICA Discussion Letter. At the close of discussions, and after the agency amended the solicitation, UNICA submitted its final proposal revision on July 10. AR, Tab 11, UNICA Final Proposal Revisions. On August 6, pursuant to FAR section 15.503(a)(2), FLETC issued a preaward notice for small business programs, which identified UNICA as the apparent successful offeror. AR, Tab 14, Preaward Notice at 2. Another offeror, T47 International, Inc., filed a protest with our Office, arguing that UNICA could not be awarded the contract because UNICA did not have an active SAM registration at the time of initial proposal submission. COS/MOL at 7. The agency thereafter indicated that it would rescind the preaward notice, and T47 withdrew its protest. *Id.*

On August 23, FLETC rescinded its preaward notice, which had identified UNICA as the apparent awardee. AR, Tab 16, Rescission of Preaward Notice at 2. Subsequently, the agency issued a "notice of exclusion" to UNICA, informing the firm that it was not

² Citations are to the Adobe PDF pagination of documents.

³ UNICA is an SBA certified joint venture between UNICA Enterprises, an SBA 8(a) firm, and BPA Facility Services Inc., an 8(a) graduate firm. Protest at 2.

eligible for award due to UNICA's failure to have an active SAM registration at the time of initial proposal submission. AR, Tab 17, September 26 Notice of Exclusion at 2-3. The protester requested a debriefing, which the agency provided on September 30. AR, Tab 19, Preaward Debriefing at 2-7. UNICA filed this protest with our Office on October 4.

DISCUSSION

The gravamen of UNICA's protest is that the agency erred in eliminating the firm from consideration for award when UNICA was properly registered in SAM, consistent with the requirements of the FAR. Protest at 4; Comments at 2-4. Specifically, the protester challenges the agency's decision to retroactively eliminate UNICA from the competition for failing to have an active SAM registration at the time the firm submitted its initial proposal. According to the protester, UNICA had an active SAM registration at the time the firm submitted its final proposal revision--the proposal from which award had been made--and, therefore, should not have been eliminated from the competition. Protest at 4; Comments at 3-4. The agency defends its decision to eliminate UNICA from the competition as reasonable and in accordance with the FAR. COS/MOL at 9. For the reasons discussed below, we sustain the protest.

Here, the RFP incorporated by reference FAR provision 52.204-7, System for Award Management. RFP at 26. The provision states, in relevant part:

An Offeror is required to be registered in SAM when submitting an offer or quotation, and shall continue to be registered until time of award, during performance, and through final payment of any contract, basic agreement, basic ordering agreement, or blanket purchasing agreement resulting from this solicitation.

FAR 52.204-7(b)(1).⁴ The RFP also advised offerors that noncompliance with any terms of the solicitation may result in the agency finding a proposal unacceptable. RFP

⁴ The quoted language is from the FAR provision that was in effect at the time the protest was filed and is, therefore, the language applicable to our analysis. The FAR Council has since issued an interim rule, effective November 12, 2024, amending the language of FAR section 52.204-7(b)(1). Federal Acquisition Regulation: Clarification of System for Award Management Preaward Registration Requirements, 89 Fed. Reg. 89472, 89472 (Nov. 12, 2024). The provision, as amended, now reads:

An Offeror is required to be registered in SAM when submitting an offer or quotation and at time of award (see FAR clause 52.204-13, System for Award Management Maintenance, for the requirement to maintain SAM registration during performance and through final payment).

FAR 52.204-7(b)(1). The amended FAR provision does not impact or change our analysis of the issues presented in this protest.

at 207 (“Offerors are cautioned that any noncompliance with the terms and conditions of this solicitation may cause their proposal to be determined unacceptable.”).

The relevant facts here are not in dispute. The only question is whether the protester had met the FAR requirement to be registered in SAM at the time UNICA submitted its offer. That is, the parties disagree about which offer triggers the requirement for an offeror to have an active SAM registration. The protester contends that the applicable offer is the final proposal revision (FPR), which is the only offer upon which an agency may make award. Protest at 4; Comments at 3-4. Because UNICA was registered and active in SAM at the time the firm submitted its FPR, the protester contends it met the requirement to have an active SAM registration at the time of offer submission. Protest at 4. The agency, on the other hand, reads FAR section 52.204-7 as requiring active SAM registration at the time UNICA submitted its initial offer. COS/MOL at 9-10. According to the agency, because UNICA did not have an active SAM registration at the time the initial offer was submitted on January 2, the agency’s decision to eliminate UNICA from the competition, on September 26, was reasonable.⁵ *Id.* at 9.

Where parties disagree as to the interpretation of a regulation, our analysis begins with the language of the disputed provision. *TLS Joint Venture, LLC*, B-422275, Apr. 1, 2024, 2024 CPD ¶ 74 at 3. If the regulation has a plain and unambiguous meaning, the inquiry ends with that plain meaning. *Coast to Coast Comput. Prods.*, B-419624.2, June 28, 2021, 2021CPD ¶ 237 at 10. Further, it is a fundamental canon of interpretation that words contained with the regulation, unless otherwise defined, will be interpreted consistent with their ordinary, contemporary, common meaning. See *ESCO Marine, Inc.*, B-401438, Sept. 4, 2009, 2009 CPD ¶ 234 at 5.

Here, the word at issue is “offer,” as it is used in the FAR provision discussing the requirement to be registered in SAM. See FAR 52.204-7(b)(1) (“An Offeror is required to be registered in SAM when submitting an offer . . .”). The FAR defines an “offer” as:

a response to a solicitation that, if accepted, would bind the offeror to perform the resultant contract. Responses to invitations for bids (sealed bidding) are offers called “bids” or “sealed bids”; responses to requests for proposals (negotiation) are offers called “proposals.”

FAR 2.101. In the context of an RFP, the submission of a final proposal revision demonstrates an offeror’s intent to modify or replace its initial offer, thus extinguishing an agency’s ability to accept the earlier offer. *Integrated Bus. Sols., Inc.*, B-292239, July 9, 2003, 2003 CPD ¶ 122 at 4 (“[S]ubmission of an FPR effectively revoked [offeror’s] initial proposal.”); see FAR 15.307(b) (“Requests for final proposal revisions

⁵ As discussed above, UNICA submitted an offer by the RFP’s January 2 due date. The contracting officer states that when she checked offerors’ registrations on January 3, UNICA was not listed as having an active registration in SAM. COS/MOL at 6. On January 9, the contracting officer explains that she rechecked SAM and, at that time, it “indicated that UNICA was registered in SAM with an ‘Activation Date’ of January 4.” *Id.*

shall advise offerors that the final proposal revisions shall be in writing and that the Government *intends to make award without obtaining further revisions.*") (emphasis added).

In this regard, we agree with the agency that FLETC could have reasonably eliminated UNICA from the competition after the contracting officer, on January 3, determined that the firm failed to comply with the SAM registration requirement. The agency, however, did not do so, at the time.⁶ Instead, the agency: (i) evaluated UNICA's proposal; (ii) conducted discussions with UNICA, including identifying several matters of concern; and (iii) asked UNICA to submit a revised proposal. COS/MOL at 6-9; see AR, Tab 7, Notice of Inclusion in Competitive Range at 2 ("The Government has completed its initial evaluation of your proposal submitted in response to the subject solicitation. We have determined that your proposal is in the competitive range for the purpose of conducting discussions with your company."); AR, Tab 11, UNICA Final Proposal Revisions. The record reflects that, during discussions, the agency requested UNICA revise its "original proposal submission," to include technical and price changes. AR, Tab 7, Notice of Inclusion in Competitive Range at 6. Subsequently, the agency issued two amendments to the solicitation and requested revised proposals responding to the amendments. AR, Tab 9, RFP amend 2; AR, Tab 10 RFP amend 3. UNICA complied and submitted its final proposal revisions on July 10. AR, Tab 11, UNICA FPR.

On this record, it is clear that UNICA's initial proposal was superseded by FLETC's entry into discussions with the protester, which resulted in the agency's request for final proposal revisions. By submitting the FPR, UNICA's initial proposal was extinguished, and only UNICA's FPR could be considered as the offer upon which an award could be made. *Integrated Bus. Sols., Inc., supra* at 4-5. Because the agency allowed UNICA to continue through the evaluation process and accepted the submission of UNICA's final proposal revision, the protester's initial offer had been revoked (or extinguished) and could no longer serve as a response to the solicitation that could bind UNICA to perform the resultant contract, if it were accepted by the agency. *Id.*; FAR 2.101; 15.307(b). Thus, UNICA's January 2 initial proposal submission no longer constituted an "offer," as defined by the FAR--*i.e.*, "a response to a solicitation that, if accepted, would bind the offeror to perform the resultant contract." FAR 2.101. Moreover, it was UNICA's FPR from which the agency, initially, selected for award. COS/MOL at 7; AR, Tab 14, Preaward Notice.

⁶ Regarding the agency's decision to continue to evaluate UNICA's proposal, the contracting officer provides the following:

I continued to evaluate offers received, including UNICA's, and forgot to address the issue regarding UNICA's initial lack of SAM registration. I did not recall the SAM registration failure until the preaward protest was received in August 2024 that pointed out the issue.

Supp. COS at 1.

Consequently, under the unique timing requirements presented here and for the limited purposes of interpreting the SAM registration requirement, the “offer” that the agency was required to review for compliance with FAR section 52.204-7(b)(1) was UNICA’s FPR, submitted on July 10.⁷ See *Hanford Tank Disposition All., LLC v. United States*, 173 Fed. Cl. 269, 315, 318 (2024) (holding “only revised final offers are the proposals for an agency to properly consider under the requirements of FAR 52.204-7(b)(1). . . . After the revised proposals were submitted and evaluated by the agency, the [agency] could no longer accept either of the initial proposals, and the initial proposals were not before the Source Selection Authority when making a decision on contract award”).⁸

Here, the agency eliminated UNICA, retroactively, from the competition on September 26 for failing to be actively registered in SAM at the time UNICA submitted its initial proposal submission on January 2. As discussed, however, the protester’s initial proposal had been extinguished when UNICA submitted--and the agency accepted--the firm’s final proposal revision. Therefore, the protester did, in fact, have an active SAM registration when it submitted its offer on July 10. Under these circumstances, we find unreasonable the agency’s decision to eliminate the protester from the competition for failing to have an active SAM registration at the time of offer submission.⁹

Competitive prejudice is an essential element of every viable protest. *TLS Joint Venture, LLC, supra* at 8. Our Office will not sustain a protest unless the protester

⁷ There is no dispute that UNICA was actively registered in SAM at the time the firm submitted its FPR on July 10, as well as on August 6, when the agency identified UNICA as the apparent awardee. AR, Tab 5, UNICA SAM Profile, Jan. 9, 2024 at 3-4 (indicating active registration date of January 4, 2024, and an expiration date of December 20, 2024).

⁸ *But see Zolon PCS II LLC v. United States*, 172 Fed. Cl. 742, 753-54 (2024) (holding that under FAR section 52.204-7(b)(1) “the relevant triggering event for purposes of the SAM registration requirement . . . is the date the offerors submitted their initial proposals”).

⁹ UNICA also argues that whether an offeror has an active SAM registration is a matter of responsibility, and thus, UNICA was not required to have an active SAM registration at the time of proposal submission. Protest at 4. Because we sustain the protest for the reasons discussed above, we need not address this alternative argument. We note, however, that in a negotiated procurement, we have found the question of whether a firm is required to have an active SAM registration to be governed by the terms of the solicitation itself. *CGS-ASP Sec. JV LLC*, B-420497, Feb. 18, 2022, 2022 CPD ¶ 39 at 3. In instances where the solicitation required an active SAM registration at the time of proposal submission, our Office has found this to be a matter of technical acceptability, rather than responsibility, in the context of a negotiated procurement. *TLS Joint Venture, LLC, supra* at 3 n.1 (“A challenge that an offeror did not comply with a mandatory solicitation requirement, such as FAR provision 52.204-7, does not constitute part of the agency’s responsibility determination.”).

demonstrates a reasonable possibility that it was prejudiced by the agency's actions; that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. *Chugach Logistics & Facility Servs., JV, LLC*, B-421451.3, B-421451.4, Sept. 8, 2023, 2023 CPD ¶ 270 at 6. Here, we conclude that, but for the agency's error in eliminating the protester from consideration for award--where UNICA met the requirement to be registered in SAM at the time of offer submission--UNICA would have had a substantial chance of receiving award as the presumptive awardee. AR, Tab 14, Preaward Notice at 2. Accordingly, we find the protester was competitively prejudiced by the agency's action, and we sustain the protest.¹⁰

RECOMMENDATION

As discussed above, we conclude the agency unreasonably found UNICA failed to meet the SAM registration requirement at the time of offer submission, and as a result, improperly eliminated UNICA from the competition. We recommend that, at a minimum, the agency include UNICA in the pool of offerors eligible for award and make a new award decision. We also recommend that the agency reimburse the protester its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester's certified claim for costs, detailing the time expended and

costs incurred, must be submitted to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f).

The protest is sustained.

Edda Emmanuelli Perez
General Counsel

¹⁰ The protester also challenges the agency's evaluation of UNICA's technical proposal. Protest at 7-11. The agency responds, however, that award has yet to be made for the current requirement. COS/MOL at 8 ("To date, no award has been issued . . ."). In light of our recommendations below to include UNICA in the pool of eligible offerors to be considered for award, we view UNICA's assertions of improper evaluation as premature, given that an award decision has not yet been made. See *Quotient, Inc.*, B-416473.4, B-416473.5, Mar. 12, 2019, 2019 CPD ¶ 106 at 5 (finding protester's assertion of improper technical evaluation premature when no award decision had been made); *Advisory Tech. Consultants*, B-416981.3, June 4, 2019, 2019 CPD ¶ 209 at 6 n.6. Consequently, we need not resolve this allegation at this juncture.