



Decision

Matter of: Caddell Construction Company, Inc.

File: B-401281

Date: June 23, 2009

James F. Archibald III, Esq., Bradley Arant Boult Cummings LLP, for the protester.
John S. Pachter, Esq., Jonathan D. Shaffer, Esq., and Mary Pat Gregory, Esq., Smith
Pachter McWhorter PLC, for Framaco International Inc., the intervenor.
Dennis J. Gallagher, Esq., Department of State, for the agency.
Peter D. Verchinski, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Post-award protest challenging awardee's eligibility for award as a "United States person" is untimely, where, before the submission of proposals, the agency prequalified firms as United States persons and posted a list of prequalified firms on FedBizOpps and where the protester knew, prior to the submission of proposals, the basis of its allegations that the awardee did not satisfy the requirement to be a United States person.

DECISION

Caddell Construction Company, Inc. of Montgomery, Alabama, protests the award of a contract to Framaco International Inc. under request for proposals (RFP) No. SAQMMA-08-R0079, issued by the Department of State, Overseas Buildings Operations, to design and construct a new embassy complex in Belgrade, Serbia. Caddell asserts that the award is improper because Framaco fails to satisfy the requirement that the firm be a "United States person."

We dismiss the protest as untimely.

On November 7, 2007 the agency published a notice, inviting firms to provide prequalification submissions for the design and construction of Standard Embassy Design projects in various locations, including Belgrade. In accordance with the Omnibus Diplomatic Security and Antiterrorism Act of 1986, 22 U.S.C. § 4852, the procurement was limited to "United States persons." Potential offerors were informed that the procurement would be conducted in two phases. First, firms

would submit various certifications and other information to allow the agency to determine whether the firm qualified as a United States person. Then, prequalified firms were invited to attend a pre-proposal conference/site visit and to submit proposals.

In January, 2008, Framaco submitted its prequalification package. The agency initially determined that Framaco was not a United States person, and Framaco protested this determination to our Office. In response to the protest, and in light of the information provided therein, the agency determined that the firm did, in fact, qualify as a United States person. On May 13, the agency posted a list of prequalified firms, including Framaco and Caddell, on the FedBizOpps website.

On November 21, the agency issued the RFP for the Belgrade embassy to the prequalified firms. The RFP provided that award would be made to the prequalified offeror submitting the lowest priced, technically acceptable offer. RFP § M.3.1. Approximately 2 weeks later, the agency conducted the pre-proposal conference/site visit for prequalified firms. Only Framaco and Caddell attended the conference/site visit, and these were the only two firms to submit proposals by the RFP's January 29, 2009 closing date. Following the evaluation of proposals, award was made to Framaco, and this protest followed.

Caddell complains that Framaco is not a United States person within the meaning of the Omnibus Diplomatic Security and Antiterrorism Act, and is therefore not qualified to compete for award under the RFP. Specifically, Caddell challenges the agency's determination that Framaco has "achieved total business volume equal to or greater than the value of the project being bid in 3 years of the 5-year period before [the issuance of the solicitation]," and that Framaco has "the existing technical and financial resources in the United States to perform the contract." See 22 U.S.C. § 4852(c)(2)(E), (G).

We conclude that the above issues are untimely and therefore not for consideration by our Office. Our Bid Protest Regulations contain strict rules requiring timely submission of protests. Under these rules, protests based upon alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial proposals must be filed prior to that time; similarly, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1) (2009). We think that, under the circumstances presented here, Caddell's challenge--that Framaco is not eligible to compete as a United States person--concerns a challenge to the ground rules for the conduct of the procurement, that is, to the terms of a solicitation.

Although, as a general rule, a protester is not required to protest that another firm should be excluded from the competition until after the firm has been selected for award, see, e.g., REEP, Inc., B-290688, Sept. 20, 2002, 2002 CPD ¶ 158 at 1-2 (protest that awardee had impermissible organizational conflict of interest), we have applied

a different rule where a protester is aware of the facts giving rise to its allegation that another firm should be ineligible to compete and where the protester has been expressly advised that the agency has determined that the firm in question is eligible. See Abt Assocs., Inc., B-294130, Aug. 11, 2004, 2004 CPD ¶ 174 at 2; International Sci. & Tech. Inst., Inc., B-259648, Jan. 12, 1995, 95-1 CPD ¶ 16 at 3-4. In such cases, we have found that the protester cannot wait until an award has been made to file its protest, but instead must protest before the closing time for receipt of proposals. Similarly, we have found that other protests of the ground rules of how a procurement will be conducted will be treated as challenges to the terms of a solicitation. See, e.g., Domain Name Alliance Registry, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 (post-closing argument that agency should have held discussions with protester is untimely where agency unequivocally indicated prior to closing that agency did not contemplate holding discussions).

Here, the record shows that Caddell was on notice, prior to the closing date for the second phase of the procurement, of the facts necessary to argue that Framaco did not satisfy the statutory requirements to be a United States person. In this regard, Caddell knew that the agency had evaluated Framaco's United States person status in the first phase of the procurement process and had specifically concluded that the firm satisfied the United States person requirements. Furthermore, Caddell does not dispute that it was aware of the basis of its protest allegations prior to the closing time.

Instead, Caddell argues that a challenge to Framaco's eligibility prior to award would have been premature. Caddell points out that it could not know which, if any, of the prequalified firms were going to submit offers under the second phase of the procurement, and thus a requirement to protest qualified firms prior to closing time would be wasteful and inefficient. In this regard, the protester points that, even though five firms were prequalified after the first phase, only 2 firms submitted proposals here.

We disagree that Caddell's protest would have been premature, if it had been submitted prior to award. Here, as noted above, the agency structured the procurement to allow for the prequalification of firms' eligibility as United States persons and publicly identified prequalified firms. This specifically provided offerors with an opportunity to challenge the eligibility of other potential offerors before the submission of proposals and would have allowed for the early resolution of any eligibility questions. Underlying our timeliness rules regarding solicitation improprieties is the principle that challenges which go to the heart of the underlying ground rules by which a competition is conducted, should be resolved as early as practicable during the solicitation process, but certainly in advance of an award decision if possible, not afterwards. See Armorworks Enters., LLC, B-400394,

B-400394.2, Sept. 23, 2008, 2008 CPD ¶ 176 at 7. Here, Caddell's post-award protest does not satisfy this goal or our timeliness rules.

The protest is dismissed.

Daniel I. Gordon
Acting General Counsel