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Decision

Matter of: QED Group LLC d/b/a Q2 Impact

File: B-421775.4

Date: November 12, 2024

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DIGEST

1. Protest challenging the elimination of a proposal from consideration for award is denied where the agency's decision was in accordance with the plain language of the Federal Acquisition Regulation.
 2. Protest alleging disparate treatment fails to state a valid basis for protest where the protester's allegations are based only on speculation.
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DECISION

QED Group LLC, d/b/a Q2 Impact, a small business of Arlington, Virginia, protests the General Services Administration's (GSA) disqualification of Q2 Impact's proposal from consideration for award under request for proposals (RFP) No. 47QRCA23R0001. GSA issued the RFP for the award of multiple indefinite-delivery, indefinite-quantity governmentwide acquisition contracts for a variety of services-based solutions, known as One Acquisition Solution for Integrated Services Plus (OASIS+). Q2 Impact contends that the agency's decision to remove its proposal from consideration for award is contrary to the Federal Acquisition Regulation (FAR) and asserts that the agency treated offerors disparately.

We deny the protest in part and dismiss it in part.

BACKGROUND

The agency issued the solicitation on June 15, 2023. Agency Report (AR), Tab 4, RFP

at 1.¹ The OASIS+ contract is intended “to provide Government agencies with total integrated solutions for a multitude of services-based requirements on a global basis.” *Id.* at 21. The OASIS+ contract consists of six distinct indefinite-delivery, indefinite-quantity contract vehicles for different socioeconomic programs (*i.e.*, unrestricted, small business, woman-owned small business, 8(a), service-disabled veteran-owned small business, and Historically Underutilized Business Zone). *Id.* at 12. The small business category is relevant to this protest, and it was organized into the following seven domains: management and advisory; technical and engineering; research and development; intelligence services, environmental services; facilities; and logistics. RFP at 23.

The solicitation provided that a proposal would be selected for award if the proposal was submitted by a qualifying offeror² and the proposal received at least 36 of the 50 available credits for a specified domain. RFP at 202. Offerors could earn credits in the following evaluation elements: qualifying project experience; federal prime contractor experience; systems, rates, and clearances; certifications; and past performance. *Id.* at 197. The credits available for each elevation element varied by domain, and the RFP included a qualifications matrix and scorecard for each domain. *Id.* The RFP anticipated the award of an unlimited number of contracts. RFP at 194, 196.

As relevant here, the solicitation incorporates by reference FAR clause 52.204-25, which includes two prohibitions regarding covered telecommunications equipment.³ See RFP at 97. The first prohibition states that, per section 889 of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year 2019, executive agency heads are prohibited from “procuring or obtaining, or extending or renewing a contract to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.” FAR clause 52.204-25(b)(1). The clause adds that contractors are also prohibited from providing agencies with “any equipment, system, or service that uses covered telecommunications equipment . . .” unless certain exceptions apply “or the covered telecommunication equipment or services are covered by a waiver described in

¹ The agency issued six amendments to the RFP. Citations are to the conformed copy.

² The RFP defined a qualifying offeror as an offeror that met the following criteria: (1) is determined to be responsible, (2) submits a proposal that conforms to the RFP requirements, (3) meets all technical requirements of the RFP, (4) submits fair and reasonable pricing, and (5) is otherwise eligible for award. RFP at 196.

³ The FAR defines covered telecommunications equipment or services as equipment produced by Huawei Technologies, other named companies, and subsidiaries or affiliates of such entities. FAR clause 52.204-25(a).

FAR 4.2104.”⁴ *Id.* The second prohibition mirrors the language of the first but prohibits the head of an executive agency “from entering into a contract, or extending or renewing a contract, **with an entity that uses . . . covered telecommunications equipment or services**” unless the equipment or service has been covered by a waiver described in FAR section 4.2104. FAR clause 52.204-25(b)(2) (emphasis added).

As relevant here, the RFP requires offerors to “complete and submit all required Representations and Certifications as prescribed in Section K.” RFP at 158. Section K incorporates the text of FAR clause 52.204-24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment and requires offerors to self-certify that they do or do not use covered telecommunications equipment or services. RFP at 132; AR, Tab 5, Q2 Section K Representations at 13.

On November 30, 2023, the agency sent the offeror a request for clarification regarding the information it provided in its proposal’s representations and certifications section. Contracting Officer’s Statement (COS) at 6. Specifically, the agency requested confirmation that Q2 Impact’s representation that it does use covered telecommunications equipment or services was correct. *Id.* Pursuant to section K, Q2 Impact represented that it would not provide covered telecommunications equipment or services to GSA, but affirmatively represented that it does use such equipment or services. AR, Tab 5, Q2 Section K Representations at 13.

Q2 Impact confirmed its affirmative representation, responding that it is currently implementing the U.S. Agency for International Development (USAID) “Egypt-funded Egypt Learning Activity” and explaining that due “to the inability to access telecommunications and internet infrastructure in Egypt that does not use covered equipment as a major component of the equipment used in providing the services, Q2 Impact uses covered services.” AR, Tab 8, GSA Clarification and Q2 Response at 1. Q2 Impact added that it had obtained a waiver for the section 889 prohibitions regarding covered telecommunications equipment through USAID. *Id.* The contracting officer confirmed in the System for Award Management (SAM.gov) that Q2 Impact certified that it does use covered telecommunications equipment or services. COS at 7.

Proposals were due no later than October 20, 2023, and Q2 Impact submitted a timely proposal for the management and advisory domain. RFP at 143; Protest at 2. When the agency evaluated Q2 Impact’s proposal, GSA found that it was not eligible for award because the protester affirmatively represented that it does use covered telecommunications equipment or services, and GSA consequently could not enter a

⁴ The waiver process involves a list of items to be included in a submission to the “head of the executive agency” in order for a waiver to be issued, while limiting the timeframe in which a waiver can be issued: “The waiver may be provided, for a period not to extend beyond August 13, 2021 for the prohibition at 4.2102(a)(1), or beyond August 13, 2022 for the prohibition at 4.2102(a)(2).” FAR 4.2104(a)(1). As relevant here, FAR section 4.2102(a)(1) mirrors the language in FAR clause 52.204-25(b)(1), and FAR section 4.2102(a)(2) mirrors the language in FAR clause 52.204-25(b)(2).

contract with Q2 Impact absent an exception or applicable waiver issued by GSA for this procurement.⁵ COS at 5.

On July 30, 2024, GSA notified Q2 Impact that its proposal had not been selected for award, and it provided Q2 Impact with a written debriefing in which it advised that “GSA is unable to enter into a contract with any entity that represents that it ‘DOES’ use covered telecommunications equipment or services per Section K.5 [of the RFP].” AR, Tab 7, Unsuccessful Offeror & Pre-Award Debriefing Letter. On August 5, this protest followed.

DISCUSSION

The protester challenges the agency’s removal of its proposal from consideration for award. First, Q2 Impact argues that the agency’s decision contradicts the FAR, contending that it has a waiver for its use of covered telecommunications equipment pursuant to FAR section 4.2104. Next, the protester asserts that the agency treated Q2 Impact unequally by penalizing it, and not other offerors, for its affirmative representation under RFP Section K. After reviewing the record, we find no basis to sustain Q2 Impact’s protest.⁶

Waiver

The protester argues that the agency’s disqualification of its proposal violates the FAR because it alleges that it already has a waiver for using covered telecommunications equipment and services. Protest at 10. Specifically, Q2 Impact argues that the section 889 waiver issued by USAID is applicable to the GSA procurement at issue here. *Id.*; Comments at 2. The protester contends that the plain language of FAR clause 52.204-25 and section 4.2104 enables Q2 Impact to apply its preexisting USAID waiver because “FAR 52.204-25(b)(2) [] covers prohibitions on entities that are *already* using covered telecommunications equipment and services and when it is permissible to contract with them, *i.e.*, when the entity’s work is being performed under a valid waiver.” Comments at 6. The protester reasons that because its work using covered telecommunications equipment and services is already covered by the USAID waiver, “GSA does not have to reinvent the wheel and issue a new waiver for a set of facts outside of its purview or for a waiver authority that has expired.” *Id.*

GSA responds that its decision to remove Q2 Impact’s proposal from consideration for award is supported by the FAR. The agency points to FAR clause 52.204-25, which

⁵ As Q2 Impact did not argue in its protest that an exception applied, only the waiver issue is relevant here and will be discussed in this decision.

⁶ In its various protest submissions, Q2 Impact has raised arguments that are in addition to, or variations of, those specifically discussed below. While we do not specifically address all the protester’s arguments, we have considered all of them and find that they afford no basis on which to sustain the protest.

prohibits an executive agency from entering into a contract with an entity that uses covered telecommunications equipment or services, like Q2 Impact, absent an exception or waiver. Memorandum of Law (MOL) at 7; FAR clause 52.204-25(b)(2). GSA contends that the plain language of this prohibition “does not differentiate the use of equipment or services on one contract or another,” meaning that if a contractor uses covered equipment or services on a non-GSA contract, it cannot then enter into a contract with GSA unless GSA issues a waiver. MOL at 7. The agency also points to the following waiver language in the FAR: “The head of an executive agency may, on a one-time basis, waive the prohibition at 4.2102(a) with respect to a [g]overnment entity [] that requests such a waiver.” FAR 4.2104(a). GSA argues that using the USAID waiver for the procurement at issue “would run afoul” of the FAR language stating that the waiver is to be issued on a “one-time-basis.” *Id.*; MOL at 8 n.5. Further, the agency asserts that it would be illogical for the USAID waiver to apply to a GSA contract, as the purpose of the waiver is to allow an agency to take an action that would otherwise be prohibited by regulation in limited circumstances. MOL at 8.

We agree with the agency that its decision to disqualify the protester’s proposal from consideration for award is supported by the FAR. Where, as here, the language of a regulation is plain on its face, and its meaning is clear, there is no reason to move beyond the plain meaning of the text. *Mechanix Wear, Inc.*, B-416704, B-416704.2, Nov. 19, 2018, 2018 CPD ¶ 395 at 5. Section 889 of the NDAA for Fiscal Year 2019, as implemented in the FAR, prohibits executive agencies from entering into a contract with an entity that uses covered telecommunications equipment or services absent an exception or waiver. See FAR clause 52.204-25(b)(2); FAR 4.2102(a)(2). The record shows that Q2 Impact affirmatively represented that it uses covered telecommunications equipment and services. AR, Tab 5, Q2 Section K Representations at 13.

Further, section 889 waivers exist “on a one-time basis.” FAR 4.2104(a). Nothing in the plain language of the FAR indicates that a firm with a waiver from an agency under one procurement can then use that waiver in another procurement with an entirely different agency.⁷ The plain language of the FAR clearly states that waivers are for one-time use and must be sought from the head of an executive agency when that agency is conducting a procurement. See FAR 4.2104(a)(1)-(2). Q2 Impact affirmatively represented itself as an entity that uses covered telecommunications equipment or services, and it has not received a waiver from GSA. As a result, in accordance with

⁷ Language from the Federal Register directly support this reading: “Since a waiver is based on the agency’s judgment concerning particular uses of covered telecommunications equipment or services, a waiver granted for one agency will not necessarily shed light on whether a waiver is warranted in a different procurement with a separate agency.” Federal Acquisition Regulation: Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment, 85 Fed. Reg. 42665, 42667 (July 14, 2020).

the FAR, GSA cannot contract with Q2 Impact absent the issuance of a waiver by the head of GSA.⁸ This protest ground is denied.

Disparate Treatment

Next, the protester argues that the agency engaged in disparate treatment. Q2 Impact contends that other awardees do business “within the same geographic region covered by USAID’s waiver” and must have affirmatively represented themselves as entities using covered telecommunications equipment. Protest at 13-14. As a result, Q2 Impact asserts that the agency must have ignored these affirmative representations. *Id.*; Comments at 8. Alternatively, the protester argues that these offerors misrepresented their status and the agency failed to properly investigate. Comments at 8. In its comments on the agency report, though not in the initial protest, the protester names two firms with overseas experience such that they “must also have used covered telecommunications equipment and services.” *Id.* at 9.

The agency responds that it did not engage in disparate treatment. GSA argues that Q2 Impact’s protest is vague and fails to state a legally or factually sufficient ground of protest. MOL at 14-15. The agency also asserts that it checked offerors’ SAM.gov profiles, and when there was a discrepancy between those profiles and the information in the proposals, GSA issued clarifications to the offeror. The agency confirms that in one case there was such a discrepancy, and when the agency reached out to the offeror, the offeror clarified that it does not use covered telecommunications, unlike Q2 Impact, which clarified that it does. *Id.*

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.

We find that the protester’s disparate treatment argument is based on speculation. Q2 Impact initially failed to name any awardees that affirmatively represented themselves as entities using covered telecommunications equipment and services. When it later named awardees, the protester provided minimal factual bases or evidence to support its argument, contending that because those offerors had certain overseas experience, they “must [] have” used covered telecommunications equipment and services. Comments at 9. Such broad and non-specific facts provide no basis for the agency to reasonably examine or defend the facts surrounding these statements. Thus, this

⁸ The protester has not represented that it has obtained or even requested a waiver from GSA.

ground is dismissed as failing to provide a valid basis for protest.

The protest is denied in part and dismissed in part.

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