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# Decision

**Matter of:** Castellano Cobra UTE MACC LEY 18-1982

**File:** B-420429.5

**Date:** October 14, 2022

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Nick R. Hoogstraten, Esq., Peckar & Abramson, P.C., for the protester.  
Casey J. McKinnon, Esq., and R. Dale Holmes, Esq., Cohen Seglias Pallas Greenhall & Furman PC, for Acciona CMS JV LLC, the intervenor.  
Chad L. Diederich, Esq., Department of the Navy, for the agency.  
Katherine I. Riback, Esq., and Alexander O. Levine, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

1. Protest challenging agency's determination that awardee complied with solicitation's certificate of classification requirement is denied where the agency's evaluation of the awardee's proposal was consistent with the terms of the solicitation.
  2. Protester's challenge to the agency's evaluation involves an interpretation of the solicitation that would essentially change the terms of the solicitation. Any such challenge to the solicitation is untimely because it was not filed prior to the due date for receipt of proposals.
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## DECISION

Castellano Cobra UTE MACC LEY 18-1982, a small business located in Rota, Spain, protests the issuance of a task order to Acciona CMS JV LLC,<sup>1</sup> of Bargersville, Indiana, under solicitation No. N62470-21-R-0010, issued by the Department of the Navy, Naval Facilities Engineering Command, for base improvements in Rota, Spain. The protester contends that the agency unreasonably determined that the awardee's proposal met the solicitation's certificate of classification requirements.

We deny the protest.

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<sup>1</sup> Acciona CMS JV LLC, is a joint venture between Acciona Construcción S.A. and Custom Mechanical Systems, Corp. (d/b/a CMS Corporation or CMS). Agency Report (AR), Exh. 12, Castellano Cover Letter *re* JV Status at 1.

## BACKGROUND

The Navy issued the subject task order under its multiple-award contract (MAC) for construction projects located primarily in Rota Spain (Contract No. N62470-21-D-0011). Among the specific requirements for doing business in Spain, is the requirement to have a certificate of classification, which is issued to firms that demonstrate the necessary past performance and resources to perform construction work in that country. Protest (B-420429.3) at 2 n.3. The underlying MAC informed offerors that “Certificate of Classification requirements for future task orders will [be] published when those task orders are advertised.”<sup>2</sup> AR, Exh. 1, MAC at 38 and 83.<sup>3</sup> The MAC also stated the following:

Requirements for future task orders will [be] published when those task orders are advertised.

In the case of [a] Joint Venture offeror, . . . at least one member of the Joint Venture must have the required Certificate of Classification. The Joint Venture member who has the Certificate of Classification must perform the majority of the work pertinent to the certification. The proposal must include information that demonstrates the commitment of the firm holding the certification to perform the majority of the work pertinent to that certification.

*Id.* at 40. The agency issued the instant task order solicitation on July 22, 2021, to the MAC holders, for various Naval Station Rota base improvements in support of helicopter maritime strike wing operations. AR, Exh. 2, Task Order Solicitation at 2. The task order solicitation advised that the agency intended to award a fixed-price task order to “the offeror submitting the lowest total price proposal.”<sup>4</sup> *Id.* at 4.

As relevant here, the task order solicitation required offerors to “[p]rovide the current Certificate of Classification as required in Item A.2,” and stated the following:

**Certificate of Classification:** Offerors must hold an updated Certificate of Classification issued by the “Registro Oficial de Contratistas de Obras” of the “Ministerio de Economía y Hacienda” covering the following groups, subgroups, and categories. Proposals received from firms which do not

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<sup>2</sup> Certificates are issued for every category, group and subgroup for any construction task (*e.g.*, electrical, masonry, demolition, *etc.*). *Id.*

<sup>3</sup> Exhibit 1 of the agency report is a conformed copy of the MAC prepared by the agency.

<sup>4</sup> According to the task order solicitation, the awardee, after receipt of the notice to proceed, is to commence work within 15 calendar days, and complete work within 1,000 calendar days. AR, Exh. 2, Task Order Solicitation at 2.

have individually or jointly an appropriate Certificate of Classification shall be considered non-responsive. The certificate of classification must be included in the proposal package.

*Id.* at 4-5. Under the heading “General Requirements,” the task order solicitation also advised offerors of the following:

**Compliance with Local Laws:** Offeror/Awardee must comply with all Spanish Law requirements for certification and performing work in Spain.

*Id.* at 3. The task order solicitation stated that proposals that did not contain the “appropriate/applicable certificate(s)” would not be considered for award. *Id.* at 5.

The agency received timely proposals from several MAC holders, including Castellano and Acciona CMS. The agency evaluated proposals, and determined that Acciona CMS was the lowest-priced, responsible offeror. The task order was issued to Acciona CMS on December 15. Contracting Officer’s Statement and Memorandum of Law (COS/MOL) at 2.

Following a debriefing, Castellano filed a timely protest of the award decision with our Office on January 10, 2022. Castellano argued that Acciona CMS was ineligible for award because Acciona CMS was a joint venture, yet each member of the joint venture did not hold a certificate of classification. According to the protester, the solicitation required all members of a joint venture to hold a certificate of classification. Protest (B-420429.3) at 7. The protester also argued that even if Acciona CMS has the required certificate of classification, its proposal was still ineligible for award because Acciona CMS did not properly form a joint venture in Spain, as required by Spanish law. *Id.* at 7-8.

On February 22, the agency notified our Office of its intent to take corrective action. Notice of Corrective Action (B-420429.3). The agency advised that it would “review the offerors’ proposals, revise the documentation of the evaluation as needed, and determine whether to confirm or cancel the award,” in accordance with applicable law and regulation. *Id.* On February 25, Castellano submitted questions regarding the agency’s proposed corrective action, which the agency responded to on March 2. Response to Corrective Action Questions (B-420429.3). Our Office dismissed Castellano’s protest as academic on March 7. *Castellano Cobra UTE MACC LEY 18-1982*, B-420429.3, March 7, 2022 (unpublished decision).

On March 10, Castellano filed a protest, challenging the scope of the agency’s corrective action which our Office dismissed in part and denied in part on June 17. *Castellano Cobra UTE MACC LEY 18-1982*, B-420429.4, June 17, 2022, 2022 CPD ¶ 150. In that decision, GAO determined that the solicitation’s broad requirement that the “offeror/awardee” comply with Spanish law requirements was a matter of contract administration which GAO does not review. *Id.* at 5. The decision also dismissed as premature the protester’s challenge to the agency’s proposed reevaluation of proposals since the reevaluation was still ongoing at that time. *Id.* at 4.

The agency subsequently completed the corrective action by reevaluating all offerors' compliance with the solicitation's certificate of classification requirements. AR, Exh. 13, Certificate of Classification Evaluation Report. The agency confirmed award to Acciona CMS on June 23, 2002 (AR, Exh. 14, Post Negotiation Memorandum Addendum Confirming Award), and this protest to our Office followed.<sup>5</sup>

## DISCUSSION

The protester argues that Acciona CMS's proposal should have been evaluated as technically unacceptable. According to Castellano, Acciona CMS did not meet what the protester understands to be the solicitation's requirement for all members of a joint venture to hold a certificate of classification. The protester further contends that Acciona CMS's proposal was also ineligible for award because Acciona CMS did not properly form a joint venture in Spain as required by Spanish law. While we do not address every argument, or permutation of every argument, raised by Castellano, we have reviewed them all and find that none provide a basis to sustain the protest.

### Interested Party

As a preliminary matter, the agency argues that Castellano is not an interested party to challenge the award of the contract because its proposal was properly determined to be unawardable. COS/MOL at 9-11. In this regard, Castellano proposed pricing in the amount of \$54,499,813 for contract line item number (CLIN) 0001, which exceeded the solicitation's statutory cost limitation for CLIN 0001 of \$52,480,000. The agency argues that parties who are ineligible for award do not have the "direct economic interest" required by 4 C.F.R. § 21.0(a)(1) to bring a protest. *Id.* at 10.

Castellano asserts that it is an interested party because, although its CLIN 0001 price exceeded the statutory cost limitation, there would be no eligible offerors in the event that Castellano's protest was sustained. The protester notes that because it submitted the second-lowest priced proposal (See AR, Exh. 10, Additional Debrief Question Response at 2), necessarily the proposals submitted by all of the other unsuccessful offerors also exceeded the statutory cost limitation. Indeed, only Acciona CMS submitted a total proposed price below the statutory cost limitation.<sup>6</sup> Comments at 6. Castellano contends that it is an interested party in this instance because it would compete in the event the agency waived the statutory cost limitation or resolicited the requirement. Comments at 6.

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<sup>5</sup> Because the value of the task order is over \$25 million, this procurement is within our jurisdiction to hear protests related to the issuance of orders under multiple-award, indefinite-delivery, indefinite quantity contracts awarded under the authority granted in title 10 of the United States Code. 10 U.S.C. § 3406(f)(1)(B).

<sup>6</sup> We note that the agency has not represented that any other offeror, besides Acciona CMS, submitted CLIN 0001 pricing below the statutory cost limitation.

Under the bid protest provisions of the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-3557, only an “interested party” may protest a federal procurement. Our regulations implementing CICA define an interested party as an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a)(1). Determining whether a protester is interested involves consideration of a variety of factors, including the nature of the issues raised, the benefit or relief sought by the protester, and the protester’s status in relation to the procurement. *RELM Wireless Corp.*, B-405358, Oct. 7, 2011, 2011 CPD ¶ 211 at 2.

As a general matter, Federal Acquisition Regulation section 36.205(a)(1), provides that contracts for construction shall not be awarded at a cost in excess of the statutory cost limitation, unless these limitations have been properly waived for the particular procurement. Thus, in the absence of a proper waiver, a price exceeding the applicable cost limitation generally must be rejected. *Holbrook Service Co., Inc.*, B-245889, Oct. 4, 1991, 91-2 CPD ¶ 292.

Here, we agree with the protester that it is an interested party. In this regard, although Castellano’s pricing exceeded the statutory cost limitation, if we were to sustain the protest, the record supports that the agency would be left with no awardable offerors, *i.e.*, no offerors whose proposed pricing fell below the statutory cost limitation. In such a scenario, the agency would be faced with resoliciting the requirement. *Hope Village, Inc.*, B-414342.2 *et al.*, Feb. 21, 2019, 2019 CPD ¶ 86 at 8 n.7. Accordingly, we decline to dismiss the protest on the basis that the protester is not an interested party.

#### Certificate of Classification Requirement

Turning to the protester’s allegations, Castellano argues that Acciona CMS does not possess an “appropriate” certificate of classification as required by the task order solicitation. Protest at 1. In this regard, the solicitation required offerors to “have individually or jointly an appropriate Certificate of Classification,” for their proposals to be considered responsive. AR, Exh. 2, Task Order Solicitation at 45. Castellano notes that Spanish law does not recognize limited liability companies as a valid form of business union for a contractor to execute government works. Protest at 7. The protester also contends that Acciona CMS, a U.S. limited liability company, cannot satisfy the certificate of classification requirement because one joint venture member, CMS Corporation, does not have a certificate of classification in its own name. *Id.* Castellano states that Acciona CMS’s reliance on the certificate of classification of Acciona Infraestructuras, SA, a Spanish company, is improper. Under Spanish law, a limited liability company, such as Acciona CMS, cannot use certificates of classification from affiliated companies. *Id.* at 7-8. The task order solicitation, by incorporation of the MAC clauses, required offerors to be capable of meeting the requirements of Spanish legislation for the execution of government works. *Id.* at 7. In order for Acciona CMS to meet the general requirements of Spanish law, it must have a certificate of classification in its own name. *Id.*

The agency contends that the protester's interpretation of the language in the MAC solicitation and the task order solicitation adds an additional requirement, not found in either solicitation, that all members of the joint venture possess a certificate of classification pursuant to Spanish law. Protest at 4-5. The agency notes that the MAC solicitation required that "at least one member of the Joint Venture . . . have the required Certificate of Classification." AR, Exh. 1, MAC Solicitation at 40. The Navy highlights that the MAC solicitation stated that certificate requirements for future task orders would be established in those task order solicitations. *Id.* In concert with the language of the MAC solicitation, the task order solicitation provided that certificates could be held "individually or jointly." AR, Exh. 2, Task Order Solicitation at 7. Therefore, the agency argues, both the MAC solicitation and the task order solicitation allowed joint venture offerors to rely on individual joint venture member's certificates, which were properly considered to be "appropriate/applicable." COS/MOL at 7. The agency contends that Acciona CMS thus met all of the certification of classification requirements of the task order solicitation because an individual member of the joint venture satisfied all of the requirements. AR, Exh. 13, Certificate of Classification Evaluation Report at 6; COS/MOL at 7.

Where, as here, a protester and an agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. *Alluvium LLC*, B-297280, Dec. 15, 2005, 2005 CPD ¶ 223 at 2.

Here, we find that the agency reasonably determined that Acciona CMS met the requirements of the MAC solicitation and the task order solicitation because the Navy determined that at least one member of the joint venture held a certificate of classification. The protester's interpretation of the solicitation, that *all* members of the joint venture must possess a certificate of classification pursuant to its interpretation of Spanish law, conflicts with the language of both the MAC solicitation and the task order solicitation, which supports the agency's interpretation that joint venture offerors can rely on one member's certification. In this regard, the MAC solicitation stated that "at least one member of the Joint Venture must have the required Certificate of Classification," and further stated that firms must hold the certificates "individually or jointly" to be considered responsive. AR, Exh. 1, MAC at 38-39. Taken together, these statements clearly envision that a joint venture offeror for the MAC solicitation can appropriately rely on one joint venture member's certificate of classification. Had the agency intended to apply a different, and stricter rule, at the task-order level as to what constituted an "appropriate" certificate of classification, then it would have made that difference clear in the task order solicitation.

To the extent Castellano argues that the MAC solicitation and the task order solicitation conflict with its interpretation of Spanish law, this is an untimely challenge to the terms of the task order solicitation that should have been raised before the due date for receipt of proposals for the task order solicitation, if not prior to the proposal due date for the

underlying MAC solicitation. If the protester thought that certain obligations, such as the requirements of Spanish law, should have been referenced in or incorporated into the evaluation criteria, it was required to challenge this matter prior to the time for receipt of proposals. Our Bid Protest Regulations contain strict rules for the timely submission of protests. These timeliness rules reflect the dual requirements of providing parties a fair opportunity to present their cases, and resolving protests expeditiously without disrupting or delaying the procurement process. *Per Aarsleff A/S; Copenhagen Arctic A/S; Greenland Contractors I/S*, B-410782 *et al.*, Feb. 18, 2015, 2015 CPD ¶ 86 at 10-11. Under these rules, a protest based on alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of proposals must be filed before that time. Bid Protest Regulation, 4 C.F.R. § 21.2(a)(1).

Castellano also argues that the agency's corrective action unreasonably failed to consider Acciona CMS's compliance with the solicitation's general requirements for compliance with Spanish law for performing work in Spain. Protest at 8. In this regard, the protester asserts that Acciona CMS did not properly form a joint venture in Spain as required by Spanish law. *Id.* As support for this proposition, Acciona CMS notes that on July 7, the Spanish National Commission of Markets and Competition imposed a fine on Acciona, plus a prohibition against contracting with the Spanish Administration. Protest, Tab 9, Article "Six Large Construction Companies Fined."

Our previous decision concerning this procurement (*Castellano Cobra UTE MACC LEY 18-1982*, B-420429.4, June 17, 2022, 2022 CPD ¶ 150), addressed the issue of compliance with Spanish law with regard to the task order solicitation, and determined that the general requirement to comply with Spanish law contained in the task order solicitation is a performance obligation, and thus a matter of contract administration. GAO does not review matters of contract administration under our bid protest function. 4 C.F.R. § 21.5(a).

In sum, we conclude that the agency reasonably evaluated Acciona CMS's proposal, and reasonably found that the firm was eligible for award under the terms of the solicitation. We therefore find no basis to sustain this protest.

The protest is denied.

Edda Emmanuelli Perez  
General Counsel