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Decision

Matter of: ARINC Engineering Services, LLC

File: B-403471.2

Date: November 5, 2010

Philip J. Davis, Esq., Daniel P. Graham, Esq., Thomas J. Warren, Esq., and Craig Smith, Esq., Wiley Rein LLP, for the protester.

Gregory F. Ircink, Esq., Department of the Navy, for the agency.

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DIGEST

Protest challenging a solicitation for Russian-made helicopters to be provided to the Afghanistan Air Force as a de facto sole source procurement because of the possible role of a Russian government entity is dismissed where it fails to state a valid basis for protest.

DECISION

ARINC Engineering Services, LLC, of Annapolis, Maryland, protests the terms of request for proposals (RFP) No. N00019-10-R-0032, issued by the Department of the Navy, Naval Air Systems Command (NAVAIR), for Mi-17 variant helicopters for the Afghanistan Air Force. ARINC contends that the solicitation was unduly restrictive of competition because it created a de facto sole source award because of the role of a Russian government entity, which, the protester believes, controls the export of the helicopters. The protester contends that the agency should have included a solicitation clause to address the potential anti-competitive effects stemming from the role of the Russian entity.

We dismiss the protest.

BACKGROUND

The RFP was issued on July 8, 2010, and sought proposals to provide 21 new Mi-17 variant helicopters, along with tool kits and spare parts, and pre-acceptance testing. The Mi-17 is the export version of a multi-use transport helicopter designed by the Soviet Union for use in Afghanistan. The aircraft is currently manufactured in Russia

by two companies.¹ Contracting Officer (CO) Statement at 1. Offerors could propose either the Mi-17V5 or Mi-171/172 variants of the helicopters. RFP at 3. The contractor must deliver the helicopters to Afghanistan, where they will be provided to the Afghanistan Air Force.

As relevant here, Rosoboronexport State Corporation is a Russian business entity that represents itself as having, under Russian law, the exclusive right to negotiate contracts for the export of Russian military technology. CO Statement at 2; see also Rosoboronexport Website, available at <http://www.roe.ru>. On October 23, 2008, the Department of State (DOS) imposed sanctions on Rosoboronexport for violations of U.S. nonproliferation laws, and prohibited U.S. government agencies from doing business with the company without the permission of DOS. 73 Fed. Reg. 63226-27 (2008). On May 21, 2010, DOS terminated the sanctions. 75 Fed. Reg. 28673 (2010). Rosoboronexport was not mentioned in the RFP, and offerors were neither required to enter, nor discouraged from entering, a relationship with Rosoboronexport.

On August, 5, the Navy received proposals from [deleted] offerors, [deleted]. [Deleted]. [Deleted]'s proposal stated that [deleted], but that the [deleted] approach would not involve Rosoboronexport or require that entity's approval. AR, Tab 5, [deleted] Proposal, vol. 1, at 6-7.

ARINC did not submit a proposal in response to the solicitation. Instead, it states that it was unable to reach an agreement to acquire Mi-17 helicopters from Rosoboronexport, and was therefore "effectively eliminate[ed] from the competition." Protest at 6.

DISCUSSION

ARINC primarily argues that the Navy has not provided for full and open competition because, in its view, Rosoboronexport is the de facto sole source for Mi-17 helicopters. In this regard, the protester argues that the agency did not reasonably assess, prior to issuing the RFP, the potential anti-competitive effect of Rosoboronexport's role in the competition. To address this concern, the protester argues that the agency should have included a contract clause contained in a NAVAIR policy publication. See NAVAIR Clause 5252.215-905, "Exclusive Teaming Arrangements that Inhibit Competition (Oct. 2005)," NAVAIR Clause Book, available at: http://www.navair.navy.mil/doing_business/open_solicitations/clauses_uploads

¹ On June 30, 2010, prior to issuing the RFP, the Acting Secretary of the Navy issued a determination and findings, under the public interest exception to the Competition in Contracting Act, which authorized a competition that was limited to Mi-17 helicopters. 10 U.S.C. § 2304(c)(7) (2006); AR, Tab 20, Determination and Findings, at 1. The protester does not challenge the agency's limitation of the competition to the Mi-17 helicopter.

%5CFINAL NAVAIR ClauseBk May 2008.doc. For the reasons discussed below, we conclude that ARINC fails to state a valid basis of protest.

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (2006). Our role in resolving bid protests is to review whether a procurement action constitutes a “violation of a procurement statute or regulation.” 31 U.S.C. § 3552. To achieve this end, our Bid Protest Regulations require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. 4 C.F.R. § 21.1(c)(4) and (f) (2010). These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action.

We first note that NAVAIR Clause 5252.215-905 is not a Federal Acquisition Regulation (FAR) clause promulgated in the Code of Federal Regulations, and is instead listed in an agency policy guide that contains contract clauses that “are not mandatory, but are available for use throughout NAVAIR in accordance with their prescriptions for use.” NAVAIR Clause Book at 1. The NAVAIR Clause Book states that the Exclusive Teaming Arrangements clause may be used “when as a result of market research done during acquisition planning, it is believed there is a possibility for exclusive teaming arrangements that would limit competition.” Id. at 24. The clause states as follows:

Offerors who propose teaming arrangements on an exclusive basis will be evaluated to determine whether such teaming agreements inhibit competition. In order for the Government to evaluate whether the proposed agreements inhibit competition, offerors are required to (1) provide a copy of all teaming arrangements, and (2) explain why the teaming arrangements do not inhibit competition. . . . The burden of proving that any exclusive teaming arrangement proposed does not restrict competition shall rest with the offeror. Offerors are advised that should the Government determine that any such proposed, exclusive teaming arrangement inhibits competition, (1) that determination may render the offeror’s proposal ineligible for award, and (2) the Contracting Officer shall forward the matter to the appropriate authorities as prescribed by [FAR] Part 3.3.

Id. at 25.

In our view, ARINC’s argument fails to state a valid basis of protest because the clause it contends should have been included in the RFP was a non-mandatory contract provision contained in an agency policy guidance document. Because this clause and the guidance for its use are only internal agency policy, rather than mandatory procurement regulations, the protester’s argument that the agency did not adhere to the policy guidance is not subject to our review. See BMY, Div. of

Harsco Corp., B-233081, B-233081.2, Jan. 24, 1989, 89-1 CPD ¶ 67 at 4. In short, we see no way in which the Navy can be said to have violated a procurement law or regulation by failing to include this clause.

ARINC also fails to state a valid basis of protest because it does not demonstrate that it would have been able to submit a proposal, even if the Navy had included this clause in the solicitation. In this regard, the protester acknowledges that it was unable to reach a deal with Rosoboronexport; ARINC also states that without such a deal it cannot submit a proposal. Protest at 6. We do not see anything in this clause that would have barred Rosoboronexport from participating in the competition, required Rosoboronexport to deal with ARINC, or otherwise ensured that ARINC could participate in the competition.²

In any event, ARINC's arguments here are premised on its assumption that Rosoboronexport is the de facto sole source for Mi-17 helicopters. The record does not support this assumption. First, the Navy states that, prior to issuing the RFP, it did not believe that Rosoboronexport was the sole source for Mi-17 helicopters. In this regard, the agency states that [deleted] previously provided [deleted] Mi-17 helicopters to the Navy during the time Rosoboronexport was subject to DOS sanctions.³ CO Statement at 2. During this period, [deleted] was able to export the helicopters without Rosoboronexport's participation, notwithstanding the fact that Rosoboronexport—then and now—represents that it is the only source for Mi-17 exports from Russia. Id.; AR at 2. On this record, we do not think that the protester has demonstrated that the agency, prior to the closing date for receipt of proposals, should have viewed Rosoboronexport as the de facto sole source for the helicopters.

Furthermore, the Navy contends that [deleted]'s submission of a proposal to provide the Mi-17 helicopters without the participation of Rosoboronexport, and its responses to various queries by the Navy on this subject, are evidence that Rosoboronexport is not a necessary party to the procurement, and is therefore not the de facto sole source of the helicopters. In this regard, the issue of whether Rosoboronexport had to be involved in this contract was raised with the Navy after receipt of proposals, which caused the CO, on September 8, to advise [deleted] that its "proposal contains a deficiency" because it "does not reflect approval by

² ARINC also argues that the Navy improperly failed to disclose in the solicitation that the DOS sanctions against Rosoboronexport had been lifted. This fails to state a valid basis of protest because, as discussed above, the lifting of sanctions was publicly announced in the Federal Register in May 2010, well prior to the issuance of the solicitation.

³ ARINC notes that it also obtained Mi-17 helicopters during the period under which Rosoboronexport was subject to sanctions through entities not affiliated with Rosoboronexport. Protest at 4.

Rosoboronexport.”⁴ AR, Tab 25, Navy Letter to [Deleted] (Sept. 8, 2010), at 1. The CO requested that the offeror “clarify its approach” and “provide confirmation from appropriate Russian authorities that the approach is within Russian law and acceptable to them.” Id.

[Deleted] responded that [deleted]. Thus, [deleted] represented that it would be able to provide the helicopters without Rosoboronexport, in compliance with Russian law. AR, Tab 28, [deleted] Letter to Navy (Sept. 10, 2010); see AR, Tab 30, [deleted], at 1. [Deleted] also stated that [deleted], the helicopters [deleted] are therefore, under Russian law, not subject to Rosoboronexport’s approval for export. AR, Tab 28, [deleted] Letter to Navy (Sept. 10, 2010).

To the extent that the protester argues that [deleted]’s interpretation of Russian law is incorrect and that the offeror will not be able to successfully provide Mi-17 helicopters without the participation of Rosoboronexport, these arguments are essentially challenges involving a matter of contract administration which our Office does not review.⁵ 4 C.F.R. 21.5(a).

ARINC also argues that the agency could have obtained the helicopters on a sole-source basis from Rosoboronexport, and then conducted a separate competition for the testing and delivery of the helicopters. This argument, which essentially contends that the agency engaged in an improper bundling of the procurement of the helicopters with the testing and delivery of the helicopters, was first raised in the protester’s comments on the agency report, after the time for

⁴ The Navy sent this letter to [deleted] after it received, via [deleted], letters from a Russian government agency, the Federal Service for Military-Technical Cooperation (FSMTC), concerning the procurement. The FSMTC letters, which were in Russian and translated into English, stated that any sale of Mi-17 helicopters would be considered military exports, and therefore required the participation of Rosoboronexport. CO Statement at 2; AR, Tab 22, FSMTC Letter (Aug. 2, 2010); Tab 23, FSMTC Letter (Aug. 9, 2010).

⁵ The securing of licenses and permits is a performance requirement that may be satisfied during contract performance and does not affect the award decision except as a general responsibility matter. United Seguranca, Ltda., B-294388, Oct. 21, 2004, 2004 CPD ¶ 207 at 4. We note for the record that the CO acknowledges that, in light of the FSMTC correspondence and other information, “new revelations raise the possibility that factions within Russia, including Rosoboronexport, could take post-award actions to thwart [deleted] contract performance,” and “there is great uncertainty concerning what actions Rosoboronexport may take if I were to award a contract [deleted].” AR at 1 n.1; CO Statement at 4. The CO further states that although “[deleted], I cannot say at this point what my FAR [§] 9.103 Responsibility determination would ultimately determine.” CO Statement at 4.

receipt of proposals. Protester's Comments at 17-18. For this reason, we will not consider the argument because it was untimely raised under our Bid Protest Regulations. 4 C.F.R. § 21.2(a)(1).

ARINC finally argues that the solicitation contained an unreasonable and unrealistic delivery schedule and sets forth an unreasonable payment schedule. Because we conclude that because the solicitation is not defective with regard to the role of Rosoboronexport, and because the protester states that it cannot provide the Mi-17 without the participation of Rosoboronexport, the protester is not an interested party with regard to the other arguments. 4 C.F.R. § 21.0(1)(1); Merlin Int'l, Inc., B-310611, Jan. 2, 2008, 2008 CPD ¶ 66 at 3.

The protest is dismissed.

Lynn H. Gibson
Acting General Counsel