



# Decision

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**Matter of:** Fidelis Logistic and Supply Services

**File:** B-414445; B-414445.2

**Date:** May 17, 2017

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## DIGEST

1. Protest challenging a contracting officer's affirmative responsibility determination is denied where the record shows that the contracting officer did not ignore information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible.

2. Protest that the agency improperly issued a delivery order to an awardee is denied where there was no significant countervailing evidence that the awardee would not, or could not, meet the delivery order requirements.

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## DECISION

Fidelis Logistic & Supply Services, of Kabul, Afghanistan, challenges the issuance of delivery order No. 0005 under contract No. W56KJD-15-D-0010 to the Awardee<sup>1</sup> for fuel supply for the Government of the Islamic Republic of Afghanistan's (GIROA) National Security and Defense Forces (ANDSF). Fidelis challenges the agency's affirmative responsibility determination and also asserts that the available evidence demonstrates

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<sup>1</sup> During the course of this protest, the agency redacted the name of the awardee, due to an Army policy to not release the identity of host-nation awardees. Consistent with our prior practice in relation to this policy, we have withheld the name of the awardee from this decision. See Omran Holding Grp., B-409769, May 28, 2014, 2014 CPD ¶ 165 at 1 n.1.

that the Awardee will not comply with the delivery order's fuel sourcing and security requirements.

We deny the protest.

## BACKGROUND

In July 2015, the Army's Expeditionary Contracting Command-Afghanistan (ECC-A) issued a solicitation seeking to award up to eight indefinite-delivery, indefinite-quantity (IDIQ) contracts for fuel to be provided by the Army's Combined Security Transition Command--Afghanistan (CSTC-A) to the ANDSF. Contracting Officer's Statement (COS) at 2. These contracts were intended by the agency to provide "back-up" to the Army's existing efforts to fund the ANDSF's direct contracts with fuel vendors. Id. In August, the Army selected five contractors, including both the Awardee and the protester, for the award of a 1-year contract with a single 1-year option period. Id. The IDIQ contract envisioned that contractors would compete every 90 days to supply fuel at different locations over the course of a 90-day period of performance. Id.

The IDIQ contract included a provision, adopted from Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 252.225-7992, which required the contractor to provide products only from a "Central Asian state or Afghanistan." Agency Report (AR), Tab 3, IDIQ Contract, at 21. A product from a "Central Asian state or Afghanistan" was defined as "a product (including a commercial item) that is mined, produced, or manufactured in the Kyrgyz Republic, the Republic of Kazakhstan, the Republic of Tajikistan, the Republic of Uzbekistan, Turkmenistan, or Afghanistan." Id. Russia was not included in this definition. The contract's statement of work also stated that:

The Government requires that the contractor maximize their fuel sourcing from Central Asian States (CAS) in accordance with DFARS Clause 252.225-7992. At no point shall vendors provide petroleum products under this contract that are sourced from Iran or other countries as prohibited by clause or federal statute.

Id. at 32.

In addition, the statement of work provided that the contractor would be responsible for the security of all tank vehicles, personnel and all government property including "all petroleum products being transported." Id. The contract noted that offerors submitting proposals including the use of armed private security companies "shall not be considered." Id.

Prior to the first delivery order competition, two of the five IDIQ contracts were terminated for the convenience of the government due to security concerns. COS at 2. In August 2016, the agency exercised its option with the protester and the Awardee, but did not renew its contract with a third contract holder due to security concerns. Id. at 3.

At around this same time, the GIRoA decided to compete ANDSF's full fuel requirement through the instant IDIQ contract because of allegations of fraud and corruption in connection with ANDSF's direct contracts with fuel vendors. Id.

On February 27, 2017, the agency issued a request for delivery order proposals (RFDOP), the fifth RFDOP issued under the IDIQ contract. Id. The RFDOP sought the provision of various fuel products at 34 different provinces in Afghanistan. Id. at 3-4. The RFDOP anticipated that offerors would compete on the basis of price and that each offeror would be awarded the portion of the delivery order (i.e., the contract line item number broken out by province) on which the offeror had proposed the lowest price. RFDOP at 1.

Both Fidelis and the Awardee timely submitted proposals in response to the RFDOP. On March 2, the Army sent delivery orders to both companies for their signature, in the amount of \$64,067,706 for the Awardee and in the amount of \$3,301,960 for Fidelis. AR, Tab 17, Basis for Award, at 14.<sup>2</sup>

On March 8, Fidelis filed the instant protest with our Office.<sup>3</sup>

## DISCUSSION

Fidelis challenges the Army's determination that the Awardee is a responsible contractor. In support of this argument, the protester points to the Awardee's prior performance history on the contract as well as numerous allegations of criminal and contractual violations committed by the Awardee. Fidelis asserts that the contracting officer (CO) improperly ignored this specific evidence that the Awardee does not have a satisfactory record of integrity and business ethics. In addition to challenging the agency's responsibility determination, the protester asserts that the evidence demonstrates that the Awardee cannot comply with the security and fuel sourcing requirements applicable to the delivery order. For the reasons set forth below, we deny the protest.

### Responsibility Determination

Federal Acquisition Regulation (FAR) § 9.103(b) provides that "[n]o purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility." In making a responsibility determination, the CO must determine,

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<sup>2</sup> The awarded value of the delivery order exceeds \$25 million. Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of delivery orders under multiple-award indefinite-delivery, indefinite-quantity contracts. See 10 U.S.C. § 2304c(e)(1)(B).

<sup>3</sup> On March 11, the Army approved an override of the automatic stay of the award of the delivery order, and the agency subsequently executed the delivery orders.

among other things, that the contractor has “a satisfactory record of integrity and business ethics.” FAR § 9.104-1(d). Further, the FAR provides that “[i]n the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility.” FAR § 9.103(b).

The protester alleges that the CO’s responsibility determination failed to adequately consider the Awardee’s record of integrity and business ethics and instead assumed that the Awardee’s record was satisfactory, despite substantial evidence to the contrary. In support of this argument, Fidelis points out that, during performance of the previous task order, the Awardee violated the IDIQ contract’s fuel sourcing requirement, which required that fuel be imported only from a “Central Asian state or Afghanistan.” AR, Tab 3, IDIQ Contract, at 21 (quoting DFARS § 252.225-7992). Indeed, the Awardee submitted monthly fuel sourcing reports to the agency, which demonstrated that in January 2017, 45.45 percent of the fuel it provided originated from Russia, a country that does not qualify as a “Central Asian state.” See AR, Tab 9, Awardee Fuel Reporting, at 2. The protester additionally asserts that publicly available fuel exchange records do not support the Awardee’s claim to have purchased more than \$7.3 million worth of fuel from Turkmenistan. See Supp. Comments at 7. Fidelis also notes that the Awardee provided fuel that was rejected by the Afghan Ministry of Defense due to poor quality and contamination, fuel which the chairman of the National Defense Commission (NDC) alleged “most likely [came] from Iran.” Protest at 7.

In addition to questioning the Awardee’s compliance with applicable fuel sourcing requirements, the protester points out that entities with similar names to the Awardee have been proposed for debarment by the Afghan National Procurement Authority (NPA). Additionally, Fidelis provided documents evidencing that the chairman of the NDC has alleged that the Awardee was involved in numerous illegal activities, including tax evasion, corruption, and the falsification of documents, and also evidencing that at least some of these allegations were discussed with, and investigated by, CSTC-A and ECC-A. See Supp. Comments, Ex. 1, NDC Presentation, Mar. 5, 2017; Supp. Comments, Ex. 2, CSTC-A Report on Fuel Contract Potential Challenges, Mar. 8, 2017; Supp. Comments, Ex. 5, Email from CSTC-A Vendor, Feb. 28, 2017.

As a general matter, our Office does not review affirmative determinations of responsibility, which are typically matters within a CO’s broad discretion. 4 C.F.R. § 21.5(c); FN Mfg., Inc., B-297172, B-297172.2, Dec. 1, 2005, 2005 CPD ¶ 212 at 8.<sup>4</sup>

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<sup>4</sup> Additionally, once an offeror is determined to be responsible and is awarded a contract, there is no requirement that an agency make additional responsibility determinations during contract performance, though an agency is not precluded from doing so. ESCO Marine, Inc., B-401438, Sept. 4, 2009, 2009 CPD ¶ 234 at 12. Where, as here, an agency chooses to make an affirmative responsibility determination in connection with a task or delivery order, we will review the agency’s actions, consistent with our general standards for review of affirmative responsibility determinations. Id. at 13 n.8.

We will, however, review a challenge to an agency's affirmative responsibility determination where the protester presents specific evidence that the CO may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. 4 C.F.R. § 21.5(c); DynCorp Int'l LLC, B-411465, B-411465.2, Aug. 4, 2015, 2015 CPD ¶ 228 at 19. The FAR does not require COs to contemporaneously document, or provide a written explanation for, an affirmative responsibility determination. FAR § 9.105-2(a)(1); Precision Std., Inc., B-310684, Jan. 14, 2008, 2008 CPD ¶ 32 at 4 n.3. Accordingly, in reviewing an affirmative responsibility determination, our Office has found that it is sometimes necessary to consider the agency's post hoc explanations. See, e.g., FCI Fed., Inc., B-408558.4 et al., Oct. 20, 2014, 2014 CPD ¶ 308 at 7.<sup>5</sup>

Based on our review here, we find no basis to conclude that the CO ignored relevant information that would be expected to have a strong bearing on whether the awardee should be found responsible. In response to this protest, the CO explained that he was aware of several of the facts alleged by the protester and considered those facts in his responsibility determination. Specifically, the CO stated that he was aware of, and considered, the fact that the Awardee had improperly provided fuel from Russia on a prior delivery order, the fact that one shipment of fuel under that delivery order had been rejected for poor quality, and the fact that companies with names similar to the Awardee were on the NPA's proposed debarment list. Supp. COS at 1-2.

With regard to the Russian fuel provided by the Awardee, the CO stated that he believed the Awardee's provision of such fuel stemmed from an ambiguity in the IDIQ contract. As noted above, the IDIQ contract included the language found in DFARS clause 252.225-7992, which expressly required the contractor to provide products only from a "Central Asian state or Afghanistan." AR, Tab 3, IDIQ contract, at 21. The IDIQ also included, however, a provision in the statement of work which required the contractor to "maximize" its fuel sourcing from Central Asian states in accordance with the DFARS clause, and prohibited providing petroleum products "that are sourced from Iran or other countries as prohibited by clause or federal statute." Id. at 32. In addition, the IDIQ contract included a sample monthly fuel sourcing report as guidance, which listed six countries as sources: Turkmenistan, Kazakhstan, Tajikistan, Uzbekistan, Azerbaijan, and Russia. COS at 5. Azerbaijan and Russia, however, are not Central Asian states, as defined in DFARS § 252.225-7992. In the CO's view, the net effect of these differing contractual provisions was "at best ambiguous, at worst contradictory," because it created the misleading impression that contractors were only obligated to provide a maximum amount of fuel from Central Asian states, rather than all of the fuel. COS at 5.

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<sup>5</sup> Here, the CO's written responsibility determination included a finding that the Awardee had a satisfactory record of business integrity and ethics, but did not provide an explanation for this finding. See AR, Tab 4, Responsibility Determination, at 1. During the course of this protest, however, the CO provided several statements further explaining his conclusion.

In response to this perceived ambiguity, the CO clarified the fuel sourcing requirement by issuing an express statement in the RFDOP for the instant delivery order:

Note that the contract Statement of Work contains a technical error, only recently discovered. The contract includes Defense Federal Acquisition Regulation Supplemental clause 252.225-7992, which limits this acquisition to fuels refined in the Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Tajikistan, Turkmenistan, the Republic of Armenia, the Republic of Azerbaijan, Georgia, or Pakistan. However, the Contract's Statement of Work suggests that contractors need only "maximize" sourcing of fuels from these countries; further, the Contract's Attachment E "Self-Certification of Country of Origin of Fuel," suggests that fuel from Russia is permissible. **This is not correct. All fuel must be provided from the nations identified above. No fuel may be provided from Russia. The contractor is not authorized to "maximize" sourcing of fuel from the nations identified above; all fuels must be sourced from one or more of the identified countries.**

RFDOP at 1-2 (emphasis in the original).<sup>6</sup>

The record thereby reflects that the CO did not ignore evidence of the Awardee's noncompliance with the contract fuel origin requirements. Instead, the CO reasonably considered the available information, but determined that the Awardee's noncompliance was likely the result of the contract language noted above, which the CO subsequently clarified in the RFDOP. We do not find this determination to be unreasonable.<sup>7</sup>

Similarly, the CO stated that he was aware of the NPA's proposed debarment of two companies with similar-sounding names to the Awardee, and considered that information, as well as advice from counsel, as part of his responsibility determination. Supp. COS at 2. Ultimately, because the proposed debarment related to two companies that were not the actual, named Awardee and because the entity proposing the debarment was not a U.S. Government entity, the CO determined that such

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<sup>6</sup> The new RFDOP language is still inconsistent with DFARS § 252.225-7992 because Armenia, Azerbaijan, Georgia, and Pakistan are not "central Asian states." The CO explained, however, that the inclusion of these additional countries was consistent with updated guidance from the Director, Defense Procurement and Acquisition Policy on the class deviation applicable to this procurement. COS at 5-6.

<sup>7</sup> Additionally, with regard to the incident where the Awardee's fuel was rejected by the ANDSF due to poor quality and contamination, the CO stated that he was aware of this incident. COS at 6. The CO, however, explained that this shipment was the only instance of poor quality noted by the ANDSF in over 2,000 contract deliveries, and that the Awardee replaced the rejected fuel as required by the contract. *Id.* at 7.

information did not cast significant question on the Awardee's responsibility. Id. We do not find this determination to be unreasonable in light of the lack of concrete information suggesting a direct connection between these entities and the Awardee.

The CO stated that he was not aware of the protester's additional allegations pertaining to the Awardee's responsibility, which include allegations of tax evasion, corruption, and the falsification of documents. In our view, the record supports the CO's contention that he was not aware of these assertions. While some of these assertions appear to have been discussed with CTSC-A and ECC-A, there is no evidence in the record before us that they were ever shared, or discussed, with the CO, or that he was otherwise aware of them. And, while some of the information may have been considered during the agency's vendor vetting process, the CO stated that he was not privy to the underlying intelligence discussed during that process. See Second Supp. COS at 2.<sup>8</sup>

Ultimately, our review of the information known by the CO does not support the conclusion that the CO ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. See 4 C.F.R. § 21.5(c); Mountaineers Fire Crew, Inc. et al., B-413520.5 et al., Feb. 27, 2017, 2017 CPD 77 at 11 (denying protest where protester fails to identify specific available information that the contracting officer failed to consider that should have caused the agency to conclude that the awardee was not a responsible contractor). Accordingly, we decline to sustain this protest ground.

#### Compliance with Contract Fuel Sourcing and Security Requirements

The protester additionally relies on the above examples of noncompliant fuel to argue that the Awardee cannot meet the fuel sourcing requirements applicable to the delivery order in question. In the protester's view, the Awardee's past history of noncompliance, coupled with the lack of evidence supporting the Awardee's representations that it provided fuel from Turkmenistan, demonstrates that the Awardee will not supply fuel from countries permitted under the contract.

Our Office has explained that, in certain circumstances, an agency may not accept at face value a proposal's promise to meet a material requirement where there is significant countervailing evidence reasonably known to the agency that should create doubt as to whether the offeror will or can comply with that requirement. For example,

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<sup>8</sup> By virtue of this protest, the CO has now been apprised of these allegations, which include new information, such as allegations of fraud and corruption, that could be expected to have a strong bearing on whether the awardee should be found responsible. In conducting a responsibility determination, a contracting officer should not wait until a prospective contractor is "proven nonresponsible." FCi Fed., Inc., supra, at 9. Instead, the FAR requires a determination of nonresponsibility where there is an absence of information clearly indicating that the prospective contractor is responsible. FAR § 9.103(b).

in MMI-Federal Mktg. Serv. Corp., B-297537, Feb. 8, 2006, 2006 CPD ¶ 38, we sustained a protest where the agency unreasonably determined that the awardee's quotation demonstrated compliance with a domestic production requirement despite countervailing pre-award information that the awardee would not comply.

Here, we do not find the Awardee's prior provision of noncompliant fuel to constitute significant countervailing evidence that the Awardee will not, or cannot, comply with the requirement to provide fuel only from Central Asian states or Afghanistan. As discussed above, the Awardee's provision of Russian fuel was considered by the CO, who reasonably determined that it was the likely result of unclear IDIQ contract language. To correct this, the CO provided further clarification in the RFDOP, expressly stating that, despite the suggestion that fuel might be permissible from Russia, so long as fuel was "maximized" from Central Asian states, in fact, "[n]o fuel may be provided from **Russia**." RFDOP at 1 (emphasis in the original).

In light of this context, we do not find that the agency was required to question, as a matter of technical acceptability, whether the Awardee would comply with the newly-clarified fuel sourcing requirements.<sup>9</sup> As the agency noted, the Awardee has previously demonstrated that it could provide compliant fuel from Central Asian states, and, additionally, had corrected prior instances of noncompliance with the contract fuel requirements. Accordingly, we do not find the agency's position--that the RFDOP clarification would bring about a similar correction--to be unreasonable. While the protester disagrees with the agency's conclusion, and contends that the Awardee will not perform the contract as required, the issue of the Awardee's after-award contract performance is ultimately a matter of contract administration, which our Office does not consider under its bid protest function. See Cornische Aviation & Maint., LTD, B-405013.4, Jan. 25, 2013, 2013 CPD ¶ 42 at 5.

The protester also argues that there is significant countervailing evidence that the Awardee will not comply with applicable contract security requirements. In this regard, section 2.18 of the contract statement of work, provides that "[t]he Contractor is responsible for all . . . security of tank vehicles, personnel and all Government property, to include all petroleum products being transported. Offerors submitting proposals that include the use of Armed Private Security Companies shall not be considered." AR, Tab 3, IDIQ Contract, at 32. Fidelis contends that to meet this requirement, contractors were required to contract with the Afghan Public Protection Force (APFF), a state-owned enterprise that has assumed all non-governmental personal security activities. The protester asserts that the Awardee has not entered into a contract with the APFF.

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<sup>9</sup> Additionally, we note that the terms of the RFDOP envisioned that the delivery order would be issued "to the lowest price[d] offer for each [type of] fuel at designated provinces." RFDOP at 1. While this evaluation scheme would not permit the agency to ignore an offeror whose proposal was noncompliant on its face, neither did it require the agency to scrutinize the proposals it received in order to second guess each offeror's willingness and ability to meet the technical requirements of the delivery order.



In support of this contention, the protester relies on a listing of APFF contracts maintained by a third-party company, Red RMC, which Fidelis contends shows that the Awardee will not comply with the applicable security requirements.

We do not find that the listing of APFF contracts relied upon by the protester rises to the level of “significant countervailing evidence reasonably known to the agency that should create doubt [as to] whether the [offeror] will or can comply with [a material] requirement.” MMI-Fed. Mktg. Serv. Corp., supra, at 5. As an initial matter, there is no evidence that Red RMC’s listing of APFF contracts was reasonably known by the agency. Additionally, the agency points out that there is no government property being transported under the delivery order, and that the fuel being transported is free on board destination, meaning that the government does not own the fuel until it arrives at its destination. COS at 10. Accordingly, while contractors remain responsible under the contract for their own security, such that they bear the risks stemming from any security threat to the petroleum products being transported, it is not clear that there is an affirmative obligation under the contract for the Awardee to provide security, whether with the APFF or otherwise. We therefore do not find that there is significant countervailing evidence reasonably known to the agency that the Awardee would not comply with the contract’s security requirements.

The protest is denied.

Susan A. Poling  
General Counsel