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Decision

Matter of: DynCorp International LLC

File: B-408516; B-408516.2; B-408516.3

Date: October 29, 2013

Richard P. Rector, Esq., and C. Bradford Jorgensen, Esq., DLA Piper LLP (US), for the protester.

William A. Roberts, III, Esq., Richard B. O’Keeffe, Jr., Esq., and Samantha S. Lee, Esq., Wiley Rein LLP, for M1 Support Services, LP, the intervenor.

Col. Barbara Shestko, Michael G. McCormack, Esq., Lt. Col. Frank Yoon, and Walter C. Mullen, Esq., Department of the Air Force, for the agency.

Matthew T. Crosby, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly failed to resolve an alleged procurement integrity issue is denied where record reflects that after investigating the issue, agency reasonably determined that by operation of a “savings provision” of the Procurement Integrity Act, no procurement integrity violation occurred.

2. Protest that agency unreasonably determined awardee’s proposal to be technically acceptable is denied where record reflects that evaluation was reasonable and consistent with the solicitation’s evaluation criteria.

DECISION

DynCorp International LLC, of Fort Worth, Texas, protests the Department of the Air Force’s award of a contract to M1 Support Services, LP, of Denton, Texas, under request for proposals (RFP) No. FA8106-11-R-0002 for contractor logistics support (CLS) for the Air Force’s fleet of C-21 aircraft. DynCorp asserts that the agency improperly failed to resolve an alleged procurement integrity issue and that the agency’s evaluation of M1’s proposal was unreasonable.

We deny the protest.

BACKGROUND

The solicitation, which the agency issued on December 9, 2011, contemplated the award of a fixed-price contract with a base period of six months, six 1-year option periods, and one 7-month option period. RFP at 4-286; RFP amend. No. 0005 at 2. The solicitation incorporated a performance work statement (PWS), which stated that the C-21¹ CLS services being solicited included “organizational and depot level maintenance, data, Contractor Operated and Maintained Base Supply[,]
modification design and installation support, as well as launch and recovery of the C-21 aircraft at their Main Operating Bases (MOBs) and any other Deployment Operating Locations (DOLs) worldwide.” PWS § 1. DynCorp is the incumbent contractor for the agency’s C-21 CLS requirement. Protest at 1.

The solicitation established three evaluation factors: technical, past performance, and cost/price. RFP amend. No. 0005, attach. 2, Addendum to Federal Acquisition Regulation (FAR) § 52.212-2 (hereinafter “RFP § M”) § 2.1.1. The technical factor included three subfactors: program management, logistics support, and small business participation. Id. Under the technical factor, proposals were to be evaluated on a technically acceptable/unacceptable basis. Id. § 2.2. Under the past performance factor, proposals were to be evaluated using a performance confidence assessment methodology whereby proposals would be assigned adjectival ratings of satisfactory confidence, limited confidence, no confidence, or unknown confidence. Id. § 2.3. The source selection decision was to be made considering only those proposals deemed technically acceptable under all three technical subfactors, and by performing a tradeoff between past performance and price. Id. § 2.1.2. Past performance and price were stated to be of approximately equal importance. Id.

The agency received five proposals by the solicitation’s closing date, including proposals from DynCorp and M1. Contracting Officer’s Statement at 19. Following an evaluation of the proposals, the source selection authority (SSA) established a competitive range consisting of four offerors, including DynCorp and M1. See id. at 19-20. The agency then conducted discussions and requested and received final proposal revisions (FPR) from all four offerors. Id. at 20.

While evaluating FPRs, the technical evaluation team (TET) identified a number of passages within the DynCorp and M1 proposals that were identical. Supp. AR, Tab 6, Memorandum for Record, Determination and Finding for Procurement Integrity (hereinafter “PI MFR”), at 1. The TET notified the source selection

¹ The Air Force’s C-21 fleet consists of 28 Learjet Model 35A aircraft. PWS § 1.1. The primary mission of the C-21 aircraft is transportation of government personnel and cargo. Id. Secondary missions include pilot seasoning and medical evacuation. Id.

evaluation board, the source selection advisory council, the judge advocate general (JAG) team advisor, and the office of special investigations of the issue. Supp. AR, Tab 6, PI MFR, at 1. Thereafter, the TET investigated the issue as part of an effort that was coordinated with other cognizant agency officials, including the contracting officer. Id. at 1-2. During the investigation, the TET learned that M1 was a subcontractor to DynCorp under the predecessor C-21 CLS contract. Id. at 2. The TET located DynCorp's proposal for the predecessor contract (which was prepared in 2004), and found several of the identical proposal passages therein. Id.

After deliberating, agency officials decided to proceed by submitting an evaluation notice (EN) regarding the issue to M1. Id. at 3. They also decided not to communicate with DynCorp regarding the issue because of "the potential of revealing source selection sensitive information if anything was presented to [DynCorp]." Id. The EN to M1 informed the firm that its proposal included "instances of the exact same language or very similar language as a technical proposal received by the government in 2004 for the current C-21 contract." Supp. AR, Tab 3, EN M1-CO-020, at 1. The EN requested that M1 "explain the source of the duplicate material and provide documentation authorizing your company to use this information." Id.

M1 submitted a lengthy response to the EN. Among other things, M1's response stated that "[a]ny information that is the same as or similar to information set forth in the 2004 proposal would have come to M1 through its dealings with the prime contract offeror in that procurement (CSC [Computer Sciences Corporation], now DynCorp International)" ² Id. at 2. Additionally, M1's response stated:

It is reasonable to expect that there are similarities in the approaches to support the C-21 fleet in the 2004 and current proposals, because the individuals who helped to write the M1 proposal for this procurement are the same persons who wrote M1's input to the 2004 CSC proposal.

Id. M1's response further explained that it participated in the 2004 proposal effort pursuant to a teaming agreement which provided that information shared in the effort was protected from unauthorized disclosure for a period of three years, i.e., until 2007. Id. M1's response emphasized that "M1 is fully authorized to use all information in the proposal submitted in this procurement" and that "M1 owns each and every word in its proposal." Id. at 1-2. M1's response also referenced an effort in 2006 in which M1 and CSC jointly prepared a proposal in response to a

² The 2004 C-21 CLS proposal was submitted by DynCorp Technical Services (DTS), a corporate predecessor to the protester. Supp. Comments at 9. At the time, DTS was owned by CSC. Id. In 2005, CSC spun off various entities, and DynCorp International LLC (the protester) was formed. Id.

solicitation for CLS services for the Air Force's fleet of C-26 aircraft. Supp. AR, Tab 3, EN M1-CO-020, at 2.

After receiving M1's response, the agency submitted a follow-up EN to M1 requesting copies of the 2004 and 2006 teaming agreements. Supp. AR, Tab 4, EN M1-CO-20A, at 1. M1 provided copies of the teaming agreements. See id. at 2.

After reviewing the teaming agreements and receiving a legal opinion from the JAG team adviser, the contracting officer documented her determination that "there is no violation of the Procurement Integrity Act [(PIA)], therefore M1 is a responsive and responsible offeror and hereby eligible for award."³ Supp. AR, Tab 6, PI MFR, at 7. The underlying bases for this determination were that "whether M1 had the right to use the data from DynCorp would be [a] private dispute between the two companies," and language in FAR § 3.104-4(e)(1) does not restrict a contractor from disclosing its own bid or proposal information or the recipient from receiving that information.⁴ Id. at 6-7.

Based on the contracting officer's determination and the legal opinion from the JAG team adviser, the TET evaluated the identical passages in the DynCorp and M1 FPRs as belonging to each offeror independently. See AR, Tab 19.1, Final Source Selection Brief to SSA, at 3. At the conclusion of the evaluation, both the DynCorp and M1 proposals were found technically acceptable under all of the technical subfactors, and both proposals were assigned past performance ratings of satisfactory confidence.⁵ AR, Tab 20.1, SSDD, at 6. M1's evaluated price of \$232,069,023 was the lowest evaluated price of any offeror. Id. at 11. Based on a comparative analysis of the proposals and the fact that M1's proposal was assigned the highest available rating under the past performance factor and the lowest evaluated price, the SSA determined that M1's proposal represented the best value to the government. AR, Tab 20.1, SSDD, at 12. After award was made to M1,

³ Among other things, the JAG team adviser's legal opinion informed the contracting officer that "I am unable to definitively determine whether M1 is correct in its assertion that it owns all the information" and "[t]hat is a matter between [DynCorp] and M1." Supp. AR, Tab 5, Contracting Officer/JAG Team Advisor E-Mails (May 7-May 28, 2013), at 2. The SSA concurred with the contracting officer's determination that no PIA violation had occurred. AR, Tab 20.1, Source Selection Decision Document (SSDD), at 12.

⁴ FAR section 3.104-4 is one of several regulations within FAR subpart 3.1 that implement the PIA. See FAR § 3.104-2(a).

⁵ It was documented that without the duplicate proposal passages, the TET would not have considered M1's proposal to be technically acceptable. See Supp. AR, Tab 12, TET Co-Chair E-Mail (Apr. 3, 2013), at 1-2; Supp. AR, Tab 5, Contracting Officer/JAG Team Advisor E-Mails (May 7-May 28, 2013), at 4.

DynCorp received a debriefing, and then filed a protest with our Office.

DISCUSSION

DynCorp asserts that the agency failed to adequately resolve an apparent procurement integrity issue regarding the duplicate language in the proposals. DynCorp also asserts that the agency's evaluation of M1's proposal was unreasonable with regard to M1's approach to supplying certain C-21 support equipment and parts. We have considered all of DynCorp's arguments, and we conclude, based on the record, that none have merit. Below we discuss DynCorp's principal contentions.⁶

Procurement Integrity Act

DynCorp alleges that the agency "failed to appropriately investigate and resolve a significant procurement integrity issue stemming from [M1's] plagiarism and unauthorized use of DynCorp's proprietary information." Supp. Comments at 1. In this regard, DynCorp asserts that a review of the teaming agreements submitted by M1 should have led the agency to conclude that M1 was prohibited from using the passages that appeared in DynCorp's 2004 C-21 CLS proposal. Supp. Protest at 6; Supp. Comments at 9-11. More specifically, DynCorp asserts that the terms of its 2004 teaming agreement with M1--as well as the terms of the subcontract that followed that agreement and the terms of an overarching consulting agreement--expressly prohibit M1's use of any proposal language in a competitive context and require M1 to comply with the PIA. Supp. Protest at 5-6; 2d Supp. Protest at 5, 7-8. DynCorp also asserts that the 2006 M1/CSC teaming agreement submitted by M1 to the agency is immaterial to the issue because DynCorp was not a party to that agreement. Supp. Comments at 2, 8-9.

The procurement integrity provisions of the Office of Federal Procurement Policy Act, as amended, 41 U.S.C. §§ 2101-2107 (West 2013), known as the PIA, provide, among other things, that "[e]xcept as provided by law, a person shall not knowingly obtain contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates." 41 U.S.C. § 2102(b). Under the heading "Savings provisions," the PIA expressly provides: "This section does not . . . restrict a contractor from disclosing

⁶ DynCorp's initial and supplemental protests included numerous other claims regarding the agency's evaluation of M1's proposal. DynCorp later withdrew all of these other claims. Comments at 2; Supp. Comments at 2. Additionally, DynCorp's protest included allegations challenging the agency's responsibility determination. Protest at 28-31. Our Office did not develop these allegations because they did not meet the threshold requirements of our Bid Protest Regulations for challenges against an agency's responsibility determination. See 4 C.F.R. § 21.5(c) (2013).

its own bid or proposal information or the recipient from receiving that information.” Id. § 2107(2).

Here, DynCorp acknowledges that M1 personnel themselves prepared the proposal passages at issue in connection with the 2004 C-21 CLS proposal effort. 2d Supp. Protest at 4; see also Supp. Protest at 5; Supp. Comments at 8; Supp. AR, Tab 3, EN M1-CO-020, at 2. Thus, to the extent that M1 obtained DynCorp’s proprietary information, the record reflects that DynCorp provided it to M1 voluntarily, pursuant to its prior teaming relationship with M1. These circumstances fit squarely within the PIA “savings provision” that expressly does not restrict “a contractor from disclosing its own bid or proposal information or the recipient from receiving that information.” 41 U.S.C. § 2107(2).

At base, DynCorp’s complaint is that M1 failed to abide by the terms of private agreements between the two firms. We have repeatedly determined that the PIA’s savings provision applies notwithstanding the fact that voluntarily provided information is subsequently misused or improperly safeguarded. See The GEO Group, Inc., B-405012, July 26, 2011, 2011 CPD ¶ 153 at 5; Telephonics Corp., B-401647, B-401647.2, Oct. 16, 2009, 2009 CPD ¶ 215 at 7; Pemco Aeroplex, Inc., B-310372, Dec. 27, 2007, 2008 CPD ¶ 2 at 17. Accordingly, DynCorp’s allegation constitutes a private dispute not for resolution by our Office and provides no basis for sustaining the protest.

DynCorp also alleges that by deciding not to solicit the firm’s input regarding the issue, the agency acted contrary to FAR § 3.104-7(b) and (c) which, as alleged by DynCorp, required the agency to “‘review all information available,’ ‘take appropriate action,’ and request information from ‘appropriate parties regarding the violation or possible violation.’” Supp. Comments at 3, 6-7 (quoting FAR § 3.104-7(b), (c)). DynCorp argues that had the agency solicited the firm’s input, DynCorp could have provided information to cast doubt on M1’s representations that it was authorized to use the proposal passages at issue. Id.

As an initial matter, the provisions of FAR § 3.104-7(b) and (c) describe procedures for a head of a contracting activity to follow if a contracting officer determines that a violation or possible violation of the PIA “impacts” the procurement. See FAR § 3.104-7(a)(2). Here, the contracting officer reasonably determined that, based on the PIA “savings provision,” no PIA violation had occurred. Supp. AR, Tab 6, PI MFR, at 7. Thus, we do not see the procedures described in FAR § 3.104-7(b) or (c) as necessarily applicable. In any event, based on the record, we find the agency’s decision not to communicate with DynCorp regarding the issue to be unobjectionable because M1 provided information from which the agency could reasonably determine that to the extent that a procurement integrity issue existed, the issue fell within the rubric of the PIA “savings provision.” DynCorp’s claim that

the agency failed to adequately resolve an apparent procurement integrity issue is denied.⁷

Evaluation of M1's Proposal

DynCorp alleges that the agency unreasonably evaluated M1's proposal with respect to M1's approach to obtain C-21 ground support equipment (GSE) needed to perform the contract. Protest at 13-17; Comments at 4-11. DynCorp points out that section 1.10 of the PWS provided that "[t]he Contractor shall furnish and maintain all support, test, and fault and isolation equipment" and that "[t]he Contractor shall maintain [support equipment] at each [main operating base] and [deployment operating location]." Protest at 13 (citing PWS § 1.10); Comments at 5 (same). DynCorp claims that it will not sell the C-21 GSE that it uses under the incumbent contract to M1 and that "market research" performed by DynCorp shows that C-21 GSE "is not readily available in the commercial marketplace in the quantities required to support CLS operations at multiple facilities." Protest at 14. According to DynCorp, this "shortfall" of GSE will prevent M1 from meeting the minimum transition and performance requirement of the contract, and, therefore, the agency should have evaluated M1's proposal as unacceptable under the technical factor. Id.

The evaluation of technical proposals is a matter within an agency's discretion since an agency is responsible for defining its needs and for identifying the best methods for accommodating those needs. U.S. Textiles, Inc., B-289685.3, Dec. 19, 2002, 2002 CPD ¶ 218 at 2. Our Office will not reevaluate technical proposals; rather we review a challenge to an evaluation to determine whether the agency acted reasonably and in accordance with the solicitation's evaluation criteria and applicable procurement statutes and regulations. Id. A protester's mere

⁷ DynCorp claims that it is not alleging a violation of the PIA, but, rather, "a violation of [the Competition in Contracting Act of 1984] regarding an agency's obligation to reasonably [assess] potential unfair competitive advantages in a procurement." DynCorp Letter to GAO (Sept. 9, 2013) at 1, 6-7. Given the nature of DynCorp's allegations and the fact that DynCorp predicates core allegations on FAR provisions that implement the PIA, see Supp. Comments at 3, 4, 8, 9, 11, we find it appropriate to consider the allegations in the context of the PIA. Nevertheless, we note that based on our review of the record, we see nothing to suggest that the agency here unreasonably assessed what the agency itself identified as a possible procurement impropriety. We note also that in a second supplemental protest, DynCorp alleges that M1's responses to the ENs constituted material misrepresentations regarding the firm's rights to the duplicate proposal passages. 2d Supp. Protest at 3-8. These allegations stem from DynCorp's view that M1 violated the terms of agreements between the two firms. Thus, DynCorp's allegations concern a private dispute, which we will not consider.

disagreement with the agency's judgments does not render the evaluation unreasonable. SDS Int'l, Inc., B-291183.4, B-291183.5, Apr. 28, 2003, 2003 CPD ¶ 127 at 6.

DynCorp ties its allegation to technical subfactor 1, program management, and technical subfactor 2, logistics support. Comments at 2-3, 11. The solicitation included detailed evaluation criteria for both of these subfactors. RFP §§ M.2.2.1, M.2.2.2. In describing the requirements against which the agency would evaluate proposals, these evaluation criteria referenced approximately 30 specific subsections of the PWS. Id. PWS section 1.10--the section on which DynCorp's arguments principally rely--is not referenced within the subfactor 1 or 2 evaluation criteria. Id. Thus, because the solicitation did not call for an evaluation of an offeror's approach relative to PWS section 1.10, to the extent that the agency's evaluation of M1's proposal did not address M1's approach to PWS section 1.10, we see no basis to object.⁸

DynCorp also argues that M1's approach to acquiring GSE should have rendered the firm's proposal technically unacceptable based on subfactor 1 and 2 evaluation criteria that reference PWS sections other than section 1.10. Comments at 4. DynCorp apparently views the acquisition of GSE to be integral to or implicit within these evaluation criteria. Even assuming for the sake of argument that DynCorp's position is valid, for the reasons discussed below, we view the agency's evaluation of M1's proposal as reasonable.

It is true, as DynCorp points out, that M1's proposal stated that M1 would "[DELETED]." AR, Tab 18, M1 FPR, Vol. II, Technical Proposal, at 7. However, M1's proposal also stated that "[DELETED]." Id.

Additionally, with respect to C-21 support equipment, M1's proposal represented that:

[DELETED].

Id. at 7. M1's proposal also represented that the firm "[DELETED]." Id. at 40. Further, in response to a tooling-related EN, M1 informed the agency that "[DELETED]" and that "[DELETED]." AR, Tab 14c, M1 Cost/Price ENs, at 78-79. Finally, M1's proposal stated that M1's operations plan "[DELETED]." AR, Tab 18, M1 FPR, Vol. II, Technical Proposal, at 38. On this record, we see no merit to DynCorp's claim that the agency's evaluation of M1's approach to acquiring GSE was unreasonable.

⁸ If DynCorp believed that the solicitation should have included PWS section 1.10 in the evaluation criteria, DynCorp was required to raise this issue prior to the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1). DynCorp did not do so.

Lastly, DynCorp complains that the agency evaluated M1's proposal unreasonably with respect to M1's approach to the installation and modification of certain C-21 interior parts, such as crew entry doors, seating material, cabin tables, and cabin armrests. Protest at 19; Comments at 11-12. In this regard, DynCorp asserts that only [DELETED] has the Federal Aviation Administration supplemental type certificates required to install and modify these parts, and DynCorp has an exclusive agreement with [DELETED] for the provision of these parts. Protest at 19; Comments at 12.

Section 1.12 of the PWS pertains to aircraft appearance standards and states: "The Contractor shall match all repaired or replaced items to the existing color and texture of the installed components to meet OEM [original equipment manufacturer] and applicable C-21 Supplemental Type Certificate specifications . . ." PWS § 1.12. The solicitation's evaluation criteria for subfactor 2 included consideration of an offeror's "[a]pproach to perform organizational level maintenance and maintain the aircraft appearance standards . . . in accordance with PWS 1.5.2, 1.12." RFP § M.2.2.2.

As discussed above, M1's proposal provided detail regarding the firm's approach to acquiring parts and services related to C-21 maintenance. With respect to PWS section 1.12 specifically, M1's proposal stated, among other things, that "[DELETED]" and that M1 "[DELETED]." AR, Tab 18, M1 FPR, Vol. II, Technical Proposal, at 48. Notwithstanding DynCorp's claim of an exclusivity agreement with [DELETED], on the record here, we view the agency's evaluation of M1's approach to meeting PWS § 1.12 as reasonable.

The protest is denied.

Susan A. Poling
General Counsel