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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Newsun, Inc. d/b/a Internal Computer Services

File: B-409582

Date: June 17, 2014

Eric M. Sudin, Newsun, Inc. d/b/a Internal Computer Services, for the protester. Michael P. Chiffolo, Esq., Defense Logistics Agency, 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 alleging awardee should have been eliminated from competition during agency's corrective action review is dismissed as untimely where protest on same grounds initially was filed at agency level and denied, and was not filed with GAO until months later.
 2. Protest alleging agency unreasonably decided not to hold discussions through reverse auction procedures is denied given that contracting officer has broad discretion in deciding whether to hold discussions and nothing in record indicates contracting officer abused this discretion.
 3. Protest alleging agency bias is denied where protester does not support allegations with convincing proof and record does not reflect bias.
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DECISION

Newsun, Inc. d/b/a Internal Computer Services (ICS), of Richmond, Virginia, protests the award of a contract to Eiden Systems Corporation, of Richmond, Virginia, under request for quotations (RFQ) no. SP470313Q5034 for information technology support. ICS asserts that Eiden should have been disqualified from the competition as part of corrective action that the agency took in response to an agency-level protest filed by ICS. ICS also asserts that the agency should have conducted a reverse auction as part of its corrective action and that the agency acted with bias against ICS.

We deny the protest.

BACKGROUND

On May 28, 2013, the agency issued the solicitation as a total small business set-aside pursuant to Federal Acquisition Regulation subpart 8.4 through the General Services Administration (GSA) eBuy system to vendors holding contracts under Federal Supply Schedule 70, Information Technology Equipment, Software, and Services.¹ RFQ at 1, 4. The solicitation requested proposals² for Windows 2003 and 2008 system support and Citrix/Windows administration support for the agency's Information Operations organization in Richmond, Virginia. Id. at 1, 6.

The solicitation contemplated the award of a fixed-price task order with a 1-year base period and two 1-year option periods. RFQ at 2. Award was to be made based on the proposal determined to represent the best value to the government considering price and the following factors, listed in descending order of importance: technical/risk; and past performance/performance confidence assessment. Id. at 39. The technical/risk factor included three subfactors: management approach and capabilities; technical approach; and personnel qualifications. Id. The past performance/performance confidence assessment factor included two "aspects": relevancy of prior contracts; and quality of historical projects. Id. The non-price factors, when combined, were stated to be significantly more important than price. Id.

The solicitation incorporated a performance work statement (PWS) that set forth the agency's requirements. RFQ at 6-31. As relevant here, under the heading "key personnel requirements," the PWS stated that "[t]he Government estimates the range of hours to complete [the PWS] taskings for the base period and two option periods to be 21,000-25,000 hours." Id. at 20.

The solicitation also incorporated the clause at Defense Logistics Acquisition Directive § 52.215-9033, Competing Individual Delivery Orders Through On-Line Reverse Auctioning (July 2012). RFQ at 2, 47-48. This clause states that "[t]he Contracting Officer may utilize on-line reverse auctioning as a means of conducting price negotiations." Id. at 47. However, the solicitation advised that "[i]f the Government does not conduct a reverse auction, it intends to evaluate proposals and make award without discussions." Id. at 2. Further, the solicitation provided that "the Government reserves the right to conduct discussions and request proposal revisions if it is determined to be necessary." Id. at 3.

¹ The solicitation was designated GSA eBuy no. 777334. RFQ at 1.

² Although the solicitation was an RFQ, it sought proposals from offerors. See, e.g., RFQ at 1, 5, 32-35, 42-43. Because the distinction between a quotation from a vendor and a proposal from an offeror has no bearing on our analysis in this protest, we use the terms proposal and offeror throughout this decision.

The agency received a number of proposals by the solicitation's closing date. Supp. Agency Report (AR), Tab 8, Initial Contracting Officer Negotiation Memorandum, at 1. The agency evaluated the proposals, established a competitive range, and then conducted a reverse auction. Id. Thereafter, the agency selected Eiden for award. AR, Tab 16, Award Decision Document (ADD), at 1.

On October 9, ICS received a debriefing and filed an agency-level protest. AR, Tab 3, ICS Ltr. to Agency (Oct. 9, 2013), at 1. In its protest, ICS argued that the procurement was flawed to the extent that the agency, after the reverse auction, permitted Eiden to reduce its total proposed labor hours below the solicitation's estimate of 21,000-25,000 hours. Id. at 2-4.

On October 30, the agency sustained ICS's protest on the basis that after the reverse auction, Eiden alone had been allowed to submit a revised non-price proposal. AR, Tab 4, Agency Ltr. to ICS (Oct. 30, 2013), at 1. The letter informed ICS that the agency would do three things: reopen the competition; "clarify the government's man hour tasking requirements"; and allow all competitive range offerors to submit revised price and non-price proposals. Id.

On October 31, the agency issued letters informing the competitive range offerors that negotiations were being reopened. AR, Tab 5, Agency Ltrs. to Competitive Range Offerors (Oct. 31, 2013), at 1-3. The letters stated that new price and non-price proposals must be submitted by November 22. Id.

On November 5, ICS filed what amounted to a second agency-level protest. AR, Tab 6, ICS Ltr. to Agency (Nov. 5, 2013). In this protest, ICS argued that rather than reopening the competition, the agency should disqualify Eiden and make award based on the original proposal submissions of the remaining competitive range offerors. Id. at 3-4.

On November 13, the agency issued a letter to ICS that denied the second protest. AR, Tab 7, Agency Ltr. to ICS (Nov. 13, 2013), at 1.

On November 20, the contracting officer executed a determination not to conduct a reverse auction in the reopened competition. AR, Tab 9, Contracting Officer Determination to Waive Use of Reverse Auction Tool, at 1. In relevant part, the determination stated as follows:

Because competition is expected and because the nonprice factors are significantly more important than price . . . , it is in the Government's interest to forgo a reverse auction for this requirement. Beyond a certain point further reductions in price, either through reduction in skill level of contractor personnel or reduction in the actual number of proposed contractor personnel, could adversely affect the quality of technical support provided to the customer.

AR, Tab 9, Contracting Officer Determination to Waive Use of Reverse Auction Tool, at 1.

The agency timely received revised price and non-price proposals from only ICS and Eiden. AR, Tab 16, ADD, at 3. Following an evaluation, the proposals were assigned identical ratings under each of the non-price factors and subfactors. Id. at 4. ICS's total evaluated price was \$1,671,674. Id. at 6. Eiden's total evaluated price was \$1,589,545. Id. The contracting officer documented a lengthy, detailed analysis as to why, in her view, Eiden's lower-priced, equally-rated proposal represented the best value to the government. AR, Tab 11, Contracting Officer's Negotiation Memorandum, at 6-10. The source selection official considered the procurement record and agreed with the contracting officer's analysis. AR, Tab 16, ADD, at 1, 9. The agency then awarded the task order to Eiden under the reopened competition. AR at 4.

On February 26, the agency informed ICS that Eiden had been selected for award. AR, Tab 18, Award Notification Ltr, at 1. On March 10, ICS filed a protest with our Office.

DISCUSSION

ICS's primary allegation is that Eiden should have been eliminated from the competition as part of the corrective action that the agency took in response to ICS's initial agency-level protest. See Protest at 2; Comments at 2-3, 5; Supp. Comments at 4. As explained below, this allegation is untimely.

Our Bid Protest Regulations provide that where a matter first is protested with an agency, any subsequent protest to our Office, to be considered timely, must be filed within 10 calendar days of "actual or constructive knowledge of initial adverse agency action." 4 C.F.R. § 21.2(a)(3) (2014). The term "adverse agency action" means any action or inaction on the part of an agency that is prejudicial to the position taken in the protest, including a decision on the merits of the protest, the receipt of proposals, or the award of a contract. Id. § 21.0(e).

In its second agency-level protest, ICS alleged that Eiden should have been eliminated from the competition as part of the agency's corrective action. AR, Tab 6, ICS Ltr. to Agency (Nov. 5, 2013), at 3-4. The agency denied ICS's second agency-level protest by letter on November 13, 2013. AR, Tab 7, Agency Ltr. to ICS (Nov. 13, 2013), at 1. ICS did not file its protest with our Office until March 10, 2014, which was months after the agency denied ICS's second agency-level

protest. Accordingly, ICS's allegation that Eiden should have been disqualified from the competition is untimely.³ 4 C.F.R. § 21.2(a)(3).

ICS also challenges the agency's decision not to conduct a reverse auction in the reopened competition. Protest at 2, 8-9; Comments at 3-5; Supp. Comments at 3-4. ICS asserts that this was prejudicial to the firm as follows: "ICS not[ed] that all terms and conditions from the original solicitation would be active, [and] ICS did not change its original bid submittal knowing that the reverse auction was to be used, just as it had been for the original submission." Comments at 3 (emphasis omitted).

As stated above, the solicitation advised that "[t]he Contracting Officer may utilize on-line reverse auctioning as a means of conducting price negotiations." RFQ at 47 (emphasis added). As also stated above, the solicitation further advised that "[i]f the Government does not conduct a reverse auction, it intends to evaluate proposals and make award without discussions." Id. at 2. Accordingly, the solicitation did not mandate a reverse auction, but instead communicated that the agency had the discretion to decide whether or not to conduct a reverse auction.

After reopening the competition, the contracting officer documented her determination not to conduct a reverse auction. AR, Tab 9, Contracting Officer Determination to Waive Use of Reverse Auction Tool, at 1. The bases for her determination were the expectation of competition and concern that further price reductions could adversely affect the quality of service that the government would receive. Id.

A contracting officer's discretion in deciding not to hold discussions is quite broad, and an agency's decision not to initiate discussions is a matter we generally will not review. L-3 Servs., Inc., B-406292, Apr. 2, 2012, 2012 CPD ¶ 170 at 14; Trace Systems, Inc., B-404811.4, B-404811.7, June 2, 2011, 2011 CPD ¶ 116 at 5. Here, ICS has provided no basis, and we see none in the record, to call into question the agency's decision not to engage in discussions through a reverse auction.

Finally, ICS alleges that the agency was biased against the firm. Protest at 2, 8-9; Comments at 2-3; Supp. Comments at 2. In this regard, ICS contends that the agency showed "favoritism" to Eiden and that the agency "always wanted Eiden to be the winner." Protest at 2, 8. However, the only support that ICS offers for this allegation is the agency's admission that before ICS's initial agency-level protest, the agency permitted Eiden, but not the other competitive range offerors, to revise

³ We note that the bulk of the allegations in ICS's filings throughout this protest are complaints about agency's admitted error of initially allowing only Eiden to submit a revised non-price proposal. Protest at 2, 5-9; Comments at 2-3, 5; Supp. Comments at 2. In light of the agency's corrective action on this issue, as well as the sequence of ICS's filings, these allegations are both academic and untimely.

its proposal. Protest at 8. As stated previously, after sustaining ICS's initial agency-level protest on this issue, the agency reopened the competition and requested revised proposals from ICS and the other competitive range offerors.

Government officials are presumed to act in good faith, and a protester's contention that procurement officials are motivated by bias or bad faith must be supported by convincing proof; our Office will not consider allegations based on mere inference, supposition, or unsupported speculation. Career Innovations, LLC, B-404377.4, May 24, 2011, 2011 CPD ¶ 111 at 7-8; Shinwha Elecs., B-290603 et al., Sept. 3, 2002, 2002 CPD ¶ 154 at 5 n.6. ICS's allegations fail to meet these threshold requirements, and we will not further consider them.

The protest is denied.⁴

Susan A. Poling
General Counsel

⁴ ICS's protest seemingly alleges that after the agency reopened the competition, Eiden submitted a revised proposal that offered fewer hours than the 21,000-25,000 range set forth in the solicitation. Protest at 6. Our Office developed this issue. ICS later retracted any such allegation, stating it was aware that in the reopened competition, Eiden did not propose fewer than 21,000 labor hours. Supp. Comments at 1; ICS E-Mail to GAO (Apr. 21, 2014), ¶ 2.