



Decision

Matter of: MCG Energy Solutions, LLC

File: B-421143

Date: January 10, 2023

Brenda Huebsch, MCG Energy Solutions, LLC, for the protester.
Kevin R. Hilferty, Esq., Stephanie B. Young, Esq., Elizabeth S. Cypers, Esq., and John D. Kral, Esq., Department of Energy, for the agency.
Uri R. Yoo, Esq., and Alexander O. Levine, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of agency's sole-source award of a follow-on contract for a highly specialized system is denied where the record shows the agency reasonably concluded that award to any other source would likely cause substantial cost duplication and unacceptable delays in fulfilling the agency's requirements.

DECISION

MCG Energy Solutions, LLC, a small business located in Minneapolis, Minnesota, protests the award of a sole-source contract to Open Access Technology International, Inc. (OATI), of Minneapolis, Minnesota, by the Department of Energy, Western Area Power Administration (WAPA), for the provision of web-hosted applications for power industry energy scheduling, trading, settlements, e-tagging, and operations. The protester argues that the agency improperly failed to use full and open competition to procure the requirement.

We deny the protest.

BACKGROUND

The procurement at issue seeks the provision of web-hosted applications for power industry energy scheduling, trading, settlements, e-tagging, and operations to support WAPA's mission. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 1, 3. As one of four power marketing administrations within the Department of Energy, WAPA operates and maintains 17,280 miles of transmission lines, 326 substations, and other related facilities in a service area that covers

1.3 million square miles, providing service to consumers in 15 western states through its wholesale power customers. *Id.* at 2. The application and software being procured support WAPA in its administrative, development, and maintenance duties associated with North American Energy Standards Board standards for transmitting information regarding every electric power interchange transaction. *Id.*

To serve the 15 western states, WAPA operates in five regions: Rocky Mountain Region; Desert Southwest Region; Sierra Nevada Region; Upper Great Plains Region (UGP); and Colorado River Storage Project (CRSP). *Id.* at 2-3. Until 2014, each of the five regions separately procured and managed contracts with OATI for its web-hosted applications for energy scheduling, trading, and operations. *Id.* In 2014, the agency decided to consolidate these separate regional contracts into one WAPA-wide contract to eliminate administrative inefficiency, and completed this consolidation in 2017. *Id.* The consolidated contract provided the required services to all five WAPA regions. *Id.* The current procurement seeks to reprocure these services from OATI on a sole-source basis after the agency determined that OATI is the only responsible source that can meet the agency's needs. *Id.* at 3.

On November 24, 2021, WAPA issued a notice of intent to contract with OATI for this requirement by means other than full and open competition under Federal Acquisition Regulation (FAR) section 6.302-1. *Id.* at 4. Only one entity, MCG, responded to the notice of intent. *Id.* After reviewing MCG's capability statement, the agency determined that the statement was not directly responsive to the criteria contained in the notice and did not adequately demonstrate that MCG could meet the agency's requirements. *Id.*

After the agency notified MCG that it intended to proceed with the sole-source award, MCG filed a protest with our Office, which we docketed as B-420495.1. On February 16, 2022, WAPA notified our Office of its intent to take corrective action in response to the protest by revisiting its requirements and acquisition strategy and then either reaffirming its sole-source decision or making a new determination. *MCG Energy Sols., LLC*, B-420495.1, Feb. 22, 2022 (unpublished decision). Based on this corrective action, our Office dismissed the protest as academic.

On August 26, citing FAR section 6.302-1, the agency published a new notice of intent to issue a sole-source contract to OATI for the requirement. Agency Report (AR), Tab A.1, Aug. 26 Notice of Intent. The notice of intent invited responsible sources to "submit a capability statement, proposal, or quotation" in response to the notice. *Id.* at 3. Once again, only MCG responded to the notice, expressing its interest in, and capability to perform, the requirement. COS/MOL at 5; AR, Tab C.1, MCG Response to Aug. 26 Notice. On August 31, the agency amended the notice of intent, noting that the period of performance of the proposed sole-source contract would be five years. AR, Tab A.2, Notice of Intent, Amend. 0001. MCG responded to the amended notice on September 1, 2022 by again expressing its interest in, and capability to perform, the requirement. AR, Tab C.2, MCG Response to Amended Notice of Intent.

On September 23, the agency executed a justification for the use of other than full and open competition (JOFOC), citing FAR section 6.302-1 (Only One Responsible Source). AR, Tab E.1, JOFOC. On September 29, WAPA awarded the sole source-contract to OATI. This protest followed.

DISCUSSION

MCG argues that the agency unreasonably determined that OATI was the only responsible source for the requirement because MCG can provide the same functionalities without causing substantial duplication of costs or unacceptable delays. Protest at 3-6. The protester also contends that the system services being procured do not constitute the “continued development or production of a major system or highly specialized equipment” as contemplated by FAR section 6.302-1(a)(2)(ii). *Id.* at 3, 6. While we do not address every argument raised by the protester, we have reviewed each one and find no basis to sustain the protest.¹

The Competition in Contracting Act (CICA) mandates “full and open competition” through the use of competitive procedures in government procurements. 10 U.S.C. § 3201(a)(1). CICA, however, provides several exceptions to this requirement, including when an agency’s requirements can only be satisfied by one responsible source, and no other type of supplies or services will satisfy agency requirements. See 10 U.S.C. § 3204(a)(1); FAR 6.302-1(a)(2). As relevant here, in the case of a follow-on contract for the continued development or production of a major system or highly specialized equipment, or the continued provision of highly specialized services, such supplies or services may be deemed to be available only from the original source. See

¹ After the agency’s early production of documents on October 7, the protester raised a number of arguments based on the provided documents, challenging, among other things, the agency’s market research and price reasonableness determination. See *generally*, Comments on Agency Documents, Oct. 19, 2022. The agency requested that our Office dismiss these new arguments as untimely to the extent they constituted supplemental protest arguments, asserting that the arguments were raised more than 10 days after the agency provided the documents to the protester on October 7. Req. for Dismissal of Supp. Protest at 1-3. In response, the protester noted that it did not object to the dismissal of the new arguments and we advised the agency that it need not respond to the challenged grounds. See Electronic Protest Docketing System No. 13.

The protester however, later resubmitted those arguments together with its October 26 comments on the agency report. See Comments at 7-18. These arguments are based on the agency’s early production of documents filed on October 7. Therefore, we dismiss as untimely any protest arguments raised by the protester based on the agency report documents provided on October 7. See *Graham Services, LLC*, B-419588, B-419588.2, May 12, 2021, 2021 CPD ¶ 204 at 7 (dismissing as untimely supplemental challenges based on the agency’s early document production when those challenges were raised more than 10 days after the early document production).

10 U.S.C. § 3204(b)(B); FAR 6.302-1(a)(2)(ii). Such supplies or services may be procured through procedures other than competitive procedures when it is likely that award to a source other than the original source would result in: substantial duplication of costs, which is not expected to be recovered through competition; or unacceptable delays in fulfilling the agency's needs. See *id.*

When an agency uses noncompetitive procedures pursuant to 10 U.S.C. § 3204(a)(1), it is required to execute a written justification and approval with sufficient facts and rationale to support the use of the cited authority. See 10 U.S.C. § 3204(e); FAR 6.302-1(d)(1). Our review of an agency's decision to conduct a sole-source procurement focuses on the adequacy of the rationale and conclusions set forth in the justification and approval; where the justification and approval sets forth a reasonable basis for the agency's actions, we will not object to the award. *FN America, LLC*, B-415261, B-415261.2, Dec. 12, 2017, 2017 CPD ¶ 380 at 5; *Chapman Law Firm Company, LPA*, B-296847, Sept. 28, 2005, 2005 CPD ¶ 175 at 3.

We have reviewed the record in light of the protester's arguments and find no basis to question the agency's determination that only OATI could satisfy WAPA's requirement for web-hosted applications for power industry energy trading and operations.

Only One Responsible Source

As noted above, WAPA justified its sole-source award based on its determination that OATI is the only available source for the requirement and the agency set forth its rationale in the JOFOC. See AR, Tab E.1, JOFOC at 6. Specifically, the agency documented that OATI is the original source of a highly specialized and complex system of integrated web-hosted applications for power industry energy trading and operations, and that award to a source other than OATI would result in both substantial duplication in transition costs and unacceptable delays in meeting WAPA's critical needs. *Id.*

In challenging the agency's sole-source determination, MCG first argues that the agency knew or should have known from MCG's capability statements that MCG could provide the same products and services as OATI at a substantially lower cost. Protest at 2-3. In support of this argument, MCG offers that it has an active General Services Administration contract and has provided the same services to several divisions within WAPA and to other Department of Energy agencies. *Id.* at 3.

In response, the agency disputes the protester's contention that MCG can meet all of the requirements. For example, the agency notes that MCG lacks a critical module, the Open Access Same-Time Information System (OASIS), and associated digital certificates, which is only provided by OATI. COS/MOL at 7. The agency contends that it thoroughly evaluated the MCG-suggested alternative approach of acquiring OASIS separately from the rest of the system and concluded that it was not feasible. The agency explains that separating OASIS from its related services would cost "millions of dollars to recreate the functionality that already exists when these services are provided by a single vendor." *Id.* The agency also notes that OATI has developed multiple

modules and interfaces for the use of OASIS for WAPA's business process, such that it would "create inefficiency, increase the risk of errors and compliance violations, and threaten the integrity of" the electrical grid if the agency used different contractors to provide OASIS and other required modules. *Id.* at 7-8.

Our review of the JOFOC shows that the agency reasonably concluded that OATI was the only responsible source that could meet its requirements. MCG acknowledges that it cannot provide OASIS, but argues that the agency should bifurcate this requirement and separately obtain OASIS. See Protest at 5-6. While the protester contends that OASIS is open source and that MCG has "countless clients that seamlessly integrate with this one element," the protester does not provide any evidence to credibly rebut the agency's thorough analysis and conclusion to the contrary. *Id.* at 6. We find no basis here to question the agency's reasonable finding that OATI is the only contractor that can provide OASIS, a required module, and that separately procuring the remaining applications from another vendor would create unacceptable inefficiency and risk for the agency's critical mission. The protester's disagreement with the agency's reasonable decision does not render the decision unreasonable.

Major System or Highly Specialized Equipment

MCG also argues that the web-hosted applications for power industry energy trading and operations are not a major system or highly specialized equipment. Protest at 6. The protester asserts that these applications are commercial-off-the-shelf (COTS)² software and that MCG's product provides the same out-of-the-box functionality that can be integrated and further customized to meet WAPA's needs. *Id.* In this regard, MCG contends that its COTS software has been integrated and customized to serve the Southwestern Power Administration (SWPA) and Bonneville Power Administration (BPA), as well as WAPA's hydroelectric operating entities at UGP and CRSP. *Id.*

² The FAR defines COTS item as:

- (1) . . . any item of supply (including construction material) that is--
 - (i) A commercial product . . . ;
 - (ii) Sold in substantial quantities in the commercial marketplace;
and
 - (iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and
- (2) Does not include bulk cargo, as defined in 46 U.S.C. 40102(4), such as agricultural products and petroleum products.

FAR 2.101.

The agency responds that even though OATI's applications started as COTS software, OATI has extensively customized these applications and developed WAPA-specific functionalities. For example, the agency states that OATI's solution now provides market optimization and bidding systems that include "customizable algorithms set up for WAPA's specific bidding methods," as well as a customized subscription product to automatically convert e-tagging data into scheduling data. COS/MOL at 8; see Tab E.1., JOFOC at 2, 5. The agency also explains that OATI has developed and implemented various customized modules to fit WAPA's business requirements, including a unique checkout tool for resolving tie line values and an advanced user-defined interface as part of the e-tagging system. AR, Tab E.1, JOFOC at 7. Moreover, the agency notes that it has worked with OATI over a number of years to integrate WAPA's regional systems, as well as many bulk electric systems, transmission providers, and customers across WAPA's 15-state territory, into the consolidated OATI applications, resulting in a highly specialized and unique system. COS/MOL at 8-9.

While MCG asserts that its COTS software provides the same functionalities for other power administrations, including WAPA's regional hydroelectric operating entities, the agency disputes MCG's contention that the same COTS product could meet the WAPA-wide requirements being procured here. *Id.* at 9. The record shows that the agency, after thoroughly reviewing MCG's capability statements, determined that MCG's solutions (including its commercial off-the-shelf software integrated and customized at some WAPA hydro-electric operating entities and other Department of Energy agencies) could not be easily adapted for the highly specialized operating environment of the WAPA-wide contract. See AR, Tab B.1., Acquisition Alternatives at 7-8. In this respect, the agency found that the requirements at each of the entities currently using MCG's applications are significantly smaller and far less complex than WAPA's requirement. *Id.* For example, the agency notes that WAPA-CRSP only provides energy management and marketing office services without any reliability centered services, while WAPA-UGP is not a transmission service provider or transmission planner and operates one of the smallest balancing areas³ in North America. *Id.* at 8.

Although CICA and the FAR do not define the phrase "highly specialized equipment," our Office has concluded that equipment specially developed for an agency was "highly specialized," notwithstanding that the underlying technology was mature and had been in production for a number of years. *Magnavox Electronic Sys. Co.*, B-258076.2,

³ Balancing areas are geographic boundaries within which power system operators designated as "balancing authorities" maintain the balance of electricity supply and demand. Balancing Area Coordination: Efficiently Integrating Renewable Energy into the Grid, <https://www.nrel.gov/docs/fy15osti/63037.pdf> (last visited Jan. 6, 2023). There are 66 balancing areas in the continental United States. Today in Energy, <https://www.eia.gov/todayinenergy/detail.php?id=27152> (last visited Jan. 6, 2023). As part of the bulk electrical system, WAPA operates three balancing areas and one sub-balancing area under a non-WAPA-owned balancing area. AR, Tab B.1, Acquisition Alternatives at 1.

B-258076.3, Dec. 30, 1994, 94-2 CPD ¶ 266 at 6. We have also concluded that commercial equipment specially modified to meet an agency's specific needs was "highly specialized." *Unitron LP*, B-406770, Aug. 14, 2012, 2012 CPD ¶ 247 at 3; see also *FN America, LLC*, *supra*, at 9 (finding commercial item (a rifle) that had been modified in a nontrivial way for the agency's use to be highly specialized equipment, notwithstanding the fact that other rifles, including the protester's, "may well also be highly specialized equipment in exactly the same sense"). Here, notwithstanding the protester's arguments otherwise, we cannot conclude that OATI's system of web-hosted applications, which has been significantly customized and modified over a period of five years for specific agency use, is other than highly specialized equipment.

Substantial Duplication of Costs

The protester also contends that the agency's assertions of cost duplication are unfounded because the agency has not yet asked for price quotes, and because MCG is willing to implement the contract replacement at no additional cost. Protest at 4. In this regard, the protester asserts that there would be no cost duplication because MCG "would not charge WAPA until the MCG systems go[] live and the Agency is no longer paying OATI." *Id.* at 5. The protester further contends that it would provide the same functionalities at a large discount over the OATI contract amount. *Id.* at 5.

The agency responds that MCG's offer of a "no-cost" transition is illusory and fails to take into account WAPA's internal costs to replace its highly specialized system with a COTS product from another contractor. COS/MOL at 12-14. First, WAPA notes that the estimated cost provided in MCG's capability statements was wholly unsupported and less than what MCG currently receives to implement far less complex systems for SWPA and BPA. *Id.* at 12-13. The agency also contends that any new COTS product would require extensive customizations to meet WAPA's unique regional and regulatory requirements, customizations which OATI has implemented on WAPA's system over the past five years. *Id.* at 12. The agency states that it would reasonably expect to pay a new contractor making these modifications to the commercially available product. *Id.*

Moreover, the agency notes that, even if MCG offered to make these WAPA-specific customizations and modifications free of charge, WAPA's internal costs for the transition would be substantial. *Id.* at 12-13. Specifically, the agency estimates that it would incur more than \$8.4 million for the internal cost of WAPA integration, over \$1.3 million for third-party consultant fees to migrate proprietary applications, and between \$7.9 and \$17.2 million to re-train staff on the new applications, as well as an additional \$500,000 to separately procure OASIS and related digital certificates from OATI. *Id.* at 13-14; see AR, Tab D.3, OATI Replacement Cost Estimates at 3. Taken together, the agency argues that these costs would result in a significant duplication of costs to achieve the same functionalities already developed in the current system, and significantly higher overall cost compared to the intended sole-source contract to OATI, estimated to be \$13.25 million. COS/MOL at 13-14.

The protester dismisses the agency's argument by asserting that WAPA's calculations are "predicated on a lack of understanding [of] alternative solutions" that MCG could address if "given the opportunity to quote the work." Comments at 13. MCG also argues that the agency's estimated training costs are overstated because the agency's employees should be of the "quality and caliber" to "absorb change or new knowledge" without such extensive re-training. *Id.* at 15. The protester further contends that it has "completed many, many integrations into all the markets listed" and offers a unique approach of "leverag[ing] the already existing customer and third party interfaces" to keep implementation costs down. *Id.* at 13-14.

Based on our review of the record, we find reasonable the agency's conclusion that procuring a new set of COTS software from a contractor other than OATI would result in substantial duplication of costs. As noted above, the agency has shown that OATI has made extensive WAPA-specific customizations and modifications to its web-hosted applications, not only to accommodate user interfaces within WAPA, but also to integrate transactions with customers and other third-party entities. Notwithstanding MCG's disagreement, the agency provides detailed calculations of the duplication of costs that would be necessary to recreate these same functionalities in MCG's COTS product. See *generally*, AR, Tab D.3, OATI Replacement Cost Estimates. Nothing in the protester's generalized disagreement with the agency's articulated need for WAPA-specific customizations demonstrates that the agency's calculations are unreasonable. On this record, we find that the agency reasonably determined that there would be substantial duplication of costs not expected to be recovered through competition.

Unacceptable Delays

CICA and the FAR provide that either substantial duplication of costs to the government or unacceptable delays in fulfilling the agency's requirements are alternative bases to support a sole-source to a follow-on contract for highly specialized equipment. Because we find above that the agency reasonably determined there would be substantial duplication of costs, there is sufficient basis to deny this protest. We will, however, briefly address the protester's unacceptable delay arguments as well.

The protester argues that any unacceptable delay would be caused by the agency's lack of planning and failure to timely conduct a full and open competition. Protest at 6. In addition, the protester once again disputes the agency's finding that WAPA requires extensive customizations and modifications of its web-hosted applications. MCG argues, based solely on its experience with other entities, that it can implement its solution without a lengthy delay. *Id.*; Comments at 10.

Based on our review of the record, we find the protester's assertions to be without merit. In this regard, the agency estimates the time to return to current levels of functionality after onboarding a new contractor for this requirement would take approximately four years, which include the required integrations, customizations, and training. COS/MOL at 14; see AR, Tab B.1, Acquisition Alternatives at 3-5. Moreover, the agency noted that MCG's integration at WAPA-CRSP, a simpler process than the vastly more

complex, multi-regional integration required for this procurement, took 30 months to complete. COS/MOL at 14; AR, Tab B.1, Acquisition Alternatives at 3.

Other than to assert that delays in the integration at WAPA-CRSP were “due to WAPA internal issues,” MCG offers no evidence to support its claim that it can provide the required implementation within a shorter timeframe than the agency’s estimate of four years. On this record, we find no basis to question the agency’s conclusion that obtaining the required applications from a contractor other than OATI would result in unacceptable delays in fulfilling the agency’s critical requirements.

The protest is denied.

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