



Decision

Matter of: CC Software, Inc.

File: B-421566

Date: July 5, 2023

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DIGEST

Protest challenging the agency's award of a sole-source contract is dismissed as premature where the agency has not rejected the protester's response nor determined to proceed with the sole-source procurement.

DECISION

CC Software (CCS), of West Jordan, Utah, protests the intended sole-source award of a contract to Dematic Corporation, of Atlanta, Georgia, under solicitation No. W912NW23R0007, issued by the Department of the Army, Army Materiel Command, for hardware and software upgrades to the automated storage and retrieval system (ASRS) at the Corpus Christi Army Depot (CCAD) in Corpus Christi, Texas. The protester challenges the agency's justification for a sole-source award.

We dismiss the protest.

BACKGROUND

On March 16, 2023, the Army issued a notice of intent to make a sole-source award to Dematic Corporation,¹ using the simplified acquisition procedures of subpart 13.5 of the Federal Acquisition Regulation (FAR), for ASRS infrastructure, communications, and

¹ In its agency report, the Army notes that Dematic is "now part of the KION group of companies." Contracting Officer's Statement/Memorandum of Law (COS/MOL) at 4 n.1. For clarity, this decision continues to refer to the intended sole-source awardee as Dematic.

software upgrades. Agency Report (AR), Tab 16, Notice of Intent to Sole-Source. Specifically, the agency sought contractor support with the knowledge, skills, and capabilities to upgrade the infrastructure, communications, and software of the CCAD's existing ASRS, which supports CCAD's inventory management and material handling operations. AR, Tab 17, March 2023 Solicitation at 33. In addition to a software replacement/upgrade, CCAD's communication network, conveyor and AGV [automated guided vehicles] control hardware needed replacement to ensure the entire ASRS was optimized for performance. *Id.*

Consistent with the requirements of section 13.501(a)(1)(ii) of the FAR, the Army prepared a justification and approval (J&A) for its intended sole-source award to Dematic. COS/MOL at 7. According to the agency, Dematic "is considered the Original Equipment Manufacturer (OEM) of the legacy ASRS and software." AR, Tab 15, J&A at 3. The Army's J&A explains as follows:

Dematic Corp. retains all proprietary rights to the software, configuration files and blueprints of the existing ASRS software and future upgrades. Due to Dematic Corp's proprietary rights, neither the Government nor any other known source has the right or authority to modify or change any of the proprietary software or technical data associated with the system currently in place.

Dematic Corp. is the only source that can perform the required ASRS and software upgrades because as the OEM, it possesses the knowledge, expertise, and capability to modernize CCAD's current legacy ASRS and software.

Id. at 3-4.

The J&A also explains that the Army's decision to proceed with a sole-source award was informed, in part, by the procurement's prior history. In this regard, the agency had initially competed the requirement for the ASRS upgrades in 2021, with the Army making award to CCS on December 30, 2021. *Id.* at 6. After award, CCS conducted a site survey with the Army, and in the site survey report, CCS identified four things the firm needed in order to perform the required upgrades to the ASRS. COS/MOL at 5. Relevant here, two of the items CCS requested were: the system's "AGV site-specific configuration files," and copies of the system's "Oracle database schema and datasets." AR, Tab 5, CCS Email to Army at 2.

The agency sought assistance from Dematic, the OEM, with providing the requested files and database information to CCS. COS/MOL at 5. According to the Army, Dematic "replied stating that it could not share proprietary information," and that Dematic asserted restrictions on the agency's use of certain data and software related

to the ASRS--data that was necessary to performance of the ASRS upgrade contract.² AR, Tab 15, J&A at 3-4. The agency avers that it engaged in follow-on discussions with Dematic “with hopes of finding some resolution,” but that an agreement could not be reached because “Dematic was simply not willing to divulge the necessary information.” *Id* at 6. After consultation with the agency’s intellectual property attorneys, and “based on CCS’s inability to continue performance under its contract without the requisite data rights,” the Army terminated CCS’s contract for convenience of the government on June 28, 2022. COS/MOL at 7; AR, Tab 15, J&A at 6-7.

On March 16, 2023, the agency posted a notice of intent to award a sole-source contract on SAM.gov, advising that any “responsible sources may submit a capability statement that shall be considered by the agency” by no later than April 7, 2023.³ AR, Tab 16, Notice of Intent to Sole-Source at 2. The protester filed its protest with our Office on March 27, 2023.

DISCUSSION

The protester primarily contends that the agency’s intended sole-source award to Dematic is unreasonable. Protest at 7. In addition to responding to the protester’s allegations in the agency report, the Army argues that the protest should be dismissed because, according to the Army, CCS is not an interested party to protest. For the reasons discussed below, we find the protest of the intended sole-source award to be premature.

Premature Protest

Relevant here, the agency’s notice of intent to award a sole-source contract stated the following:

Any responses to this notice must demonstrate clear and convincing evidence that they are capable of performing these services. The Government only knows of one approved source, due to the proprietary rights involved for the Automated Storage and Retrieval System (ASRS) in use at the Corpus Christi Army Depot (CCAD). All responsible sources may submit a capability statement that shall be considered by the agency no later than 07 April 2023, 3:00 pm, Central Daylight Time. Responses should be addressed to [contract specialist’s email address].

² Although the protester was represented, counsel for the protester did not have access to protected information. As such, our discussion of some aspects of the procurement history are necessarily, general in nature to avoid reference to non-public information.

³ SAM.gov is the governmentwide point of entry (GPE), which provides a single consolidated site where government business opportunities valued above \$25,000, including synopses of proposed contract actions, solicitations, and associated information, can be accessed electronically by the public. FAR 2.101.

AR, Tab 16, Notice of Intent to Sole-Source at 2.

Under the Competition in Contracting Act of 1984, an agency may not award a contract using noncompetitive procedures, until it has publicized notice of the proposed noncompetitive award and all bids or proposals received in response to that notice have been considered by the agency. See 41 USC § 3304(e)(1)(c). Consistent with this mandate, as a prerequisite to filing a protest against a sole-source procurement where a notice of intent to make a sole-source award requests statements of capability from interested firms, a protester must have submitted a timely expression of interest in response to the published notice, and the agency must have rejected its capability statement and proceeded with the noncompetitive procurement. *Norden Sys., Inc.*, B-245684, Jan. 7, 1992, 92-1 CPD ¶ 32 at 4; *Technology Advancement Grp., Inc.*, B-417609, Aug. 8, 2019, 2019 CPD ¶ 290 at 7. A protest of a sole-source procurement is premature where the agency has not yet reviewed statements of capability and rejected the statements or proceeded with the noncompetitive procurement. *Forensic Quality Servs.-Int'l*, B-299723, May 23, 2007, 2007 CPD ¶ 97 at 2. Where a sole-source award notice requests statements of interest, a firm's protest to our Office is timely if it is filed within 10 days of when the protester knows or should have known that its response was rejected or that the sole-source procurement is proceeding. *Id.*; *Tyonek Eng'g & Agile Mfg., LLC*, B-419775 *et al.*, Aug. 2, 2021, 2021 CPD ¶ 263 at 8.

Here, CCS filed its protest with our Office on March 27, the same day that the firm submitted its capability statement. The deadline for capability statements was April 7. The agency has yet to review submissions, which would allow the agency to decide whether CCS is capable of meeting its requirements. At this point, the agency has neither rejected the protester's capability statement nor proceeded with making a sole-source award. See May 15 Resp. at 5. Consequently, we find the protest to be premature. *Forensic Quality Servs.-Int'l*, *supra*. If, after review, the agency has rejected CCS's capability statement or proceeded with the award of the sole-source contract, CCS may, consistent with our regulations, protest the agency's action at that time. 4 C.F.R. § 21.2.

Interested Party

The Army, in its agency report, requests that our Office dismiss the protest because, according to the Army, CCS is not an interested party to challenge the intended sole-source award. COS/MOL at 8. Specifically, the agency argues that the protester never submitted a capability statement by the April 7 deadline, and thus cannot protest the intended sole-source award. *Id.* at 10. The protester responds that it did submit a capability statement to the agency on March 27 and provided evidence to support its submission. Comments at 1. During the course of the protest, the Army conducted an investigation into the protester's submission. Although the agency acknowledges that the capability statement did reach the Department of Defense's (DOD) Enterprise Email

Security Gateway (EEMSG),⁴ the Army argues that because the protester's capability statement never reached the email inbox of the agency's designated point of contact, the capability statement was never received by the agency. Agency May 15 Resp. at 2-3 (*citing ManTech Advanced Sys. Int'l, Inc.*, B-414985, Oct. 20, 2017, 2017 CPD ¶ 324 at 3.)

Where, as here, the agency has issued a notice of intent to make a sole-source award and requested statements of capability from interested firms, our Office has found that, to be an interested party to challenge the sole-source award, a firm must, at a minimum, submit a timely capability statement that shows the firm is both interested in and capable of performing the requirement. *Technology Advancement Grp., Inc., supra* (finding protester to be an interested party where protester submitted an initial capability statement, responded to a sources sought request, and understood the agency's subsequent intended sole-source award notice to be a rejection to the protester's capability); *Norden Sys., Inc., supra* (finding protester was not an interested party where the protester conveyed its disagreement with the terms of the sole-source solicitation, but protester never submitted "information which could be construed as a preliminary proposal"); *Simula Gov't Prods., Inc.*, B-274730, Dec. 9, 1996, 96-2 CPD ¶ 219 at 2 (finding protester was not an interested party where protester simply submitted, without more, an "unexplained assertion that it could meet the requirement"). This procedure provides an agency the opportunity to consider any expressions of interest from firms in order to decide whether to open a procurement to competition, while allowing only serious potential offerors to challenge the agency's sole-source decision. *Fraser-Volpe Corp.*, B-240499 et al., Nov. 14, 1990, 90-2 CPD ¶ 397 at 4.

The protester provides evidence that the firm had submitted, via email, a capability statement to the designated agency contact on March 27, well in advance of the April 7 deadline. Comments, Appendix A, CCS Response to Army at 12 (stating "a zip archive of three files" was sent to the Army in response to the sole-source notice, and that one of the zip file attachments was CCS's proposal). The agency, however, asserts that no submission from CCS responding to the notice was ever received by the contract specialist's email inbox. Agency May 15 Resp. at 2. The Army explains that a review conducted by DISA revealed that the protester's March 27 email had been quarantined at the EEMSG. Agency June 1 Resp. at 3. The Army notes that, as a result, the protester's email never arrived to the contract specialist's email inbox on March 27. *Id.*

Here, the record reflects that the protester, in accordance with the sole-source notice, sent its capability statement to the designated agency email address on March 27--

⁴ The EEMSG, managed by the Defense Information Systems Agency (DISA), is the cybersecurity framework that protects DOD servers; it "scans essentially all email sent to '.mil' domains." Agency June 1 Resp., exh. 4 at 1, 2. When an entity external to DOD sends an email to a ".mil" email address, the message is routed to the EEMSG for this screening. Resp. to 2nd Notice of Additional Development, exh. 4, EEMSG Program Manager Declaration at 2. If the email passes the EEMSG policy checks, the EEMSG routes the message to the recipient's destination mail system. *Id.*

11 days before the deadline established by the notice. The Army's receipt of the capability statement was frustrated by the DOD email servers; it was not the fault of the protester. As such, under the facts and circumstances here, we reject the Army's contention that the protester is not an interested party for having failed to submit a capability statement to the agency prior to the deadline set forth in the notice of intent to make a sole-source award.

The agency relies on a series of decisions from our Office that discuss the burden placed on an offeror to ensure its proposal is received by a designated agency official by a designated due date. Agency May 15 Resp. at 2-3 (citing *ManTech Advanced Sys. Int'l, Inc.*, *supra*; *Blue Glacier Mgmt. Grp., Inc.*, B-412897, June 30, 2016, 2016 CPD ¶ 177 at 5; *Ace Elecs. Defense Sys., LLC*, B-420863, Sep. 2, 2022, 2022 CPD ¶ 233 at 3-4.) We note, however, that these decisions relate to the submission of proposals in response to solicitations--and not, as is the case here--the submission of capability statements. Proposals are competitive binding offers to the government for the award of contracts and thus require strict rules that consider fundamental fairness to the firms competing for the government's business. Capability statements, however, are informational responses, which, in this case, are designed solely to benefit the agency in making an informed decision about whether to proceed with a sole-source procurement in lieu of obtaining full and open competition.⁵ Accordingly, under these

⁵ In our view, in the context of determining whether a protester has submitted a capability statement to an agency, we consider capability statements to be more akin to request for quotations (RFQ). A RFQ, unlike a request for proposals or an invitation for bids, does not seek offers that can be accepted by the government to form a contract. See *PricewaterhouseCoopers Public Sector, LLP*, B-415504, B-415504.2, Jan. 18, 2018, 2018 CPD ¶ 35 at 5. Rather, the government's order issued in response to a quotation represents the offer that the vendor may accept through performance or by a formal acceptance document. *DataVault Corp.*, B-248664, Sept. 10, 1992, 92-2 CPD ¶ 166 at 2. Because of the unique legal status of a quotation, our decisions have treated quotations differently than proposals when determining things like the lateness of a quotation. See, e.g., *Armed Forces Merchandise Outlet, Inc.*, B-294281, Oct. 12, 2004, 2004 CPD ¶ 218 at 3 (explaining that language in an RFQ requesting quotations by a certain date cannot be construed as establishing a firm closing date for receipt of quotations, absent a late quotation provision expressly providing that quotations must be received by that date to be considered). Similarly here, we find that the legal status of a capability statement requires that it be treated differently than a proposal in this limited circumstance.

With a competitive procurement, firms are competing for the government's business; strict timeliness rules regarding the submission of proposals to the government office designated in the solicitation by the time specified in the solicitation are paramount to ensuring the fairness and integrity of the procurement process. See FAR 15.208(a). Here, when considering the submission of a capability statement, however, the same considerations regarding competition and fairness to competitors are not involved. Thus, where a firm sends a capability statement to the agency, addressed to the correct

limited circumstances, when considering whether a capability statement has been received by an agency, we decline the agency's invitation to treat the submission of a capability statement as equivalent to the submission of a proposal.⁶

Further, even if we were to consider the submission of capability statements in the manner that the Army suggests, we question whether the protester's capability statement would fall within the safe harbor provisions of section 15.208 of the FAR. Section 15.208 generally requires offerors to submit proposals to the office designated by the solicitation by the time designated in the solicitation. FAR 15.208(a). Any proposal that is received at the designated office after the exact time specified is considered late and will not be considered by the agency. FAR 15.208(b)(1). However, an exception can be made for proposals that are received before award is made, that the contracting officer determines would not unduly delay the procurement, and that where they are "transmitted through an electronic commerce method authorized by the solicitation, [were] received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of proposals." FAR 15.208(b)(1)(i).

Here, the capability statement was transmitted through an electronic commerce method authorized by the solicitation and appears to have been received at an initial point of entry to the agency's infrastructure prior to 5:00 p.m. one working day prior to the

point of contact, before the deadline for receipt of capability statements, and that statement's receipt to the correct point of contact was not in any way thwarted by the firm's wrongdoing, we find that the firm submitted a timely expression of interest in response to the agency's published notice. See *Technology Advancement Grp., Inc., supra*.

⁶ We recognize that the United States Court of Appeals for the Federal Circuit, in ruling that a firm that did not submit a capability statement to the agency was not an interested party to challenge a sole-source award, has indicated that the submission of a capability statement is analogous to the submission of a proposal when determining interested party status. *Digitalis Educ. Sols., Inc.*, 664 F.3d 1380, 1385 (Fed. Cir. 2012). We do not disagree. Our Office has similarly stated that when a firm has not submitted a timely capability statement to the agency prior to the deadline set forth in a notice of intent to award a sole-source contract, that firm is not an interested party to challenge the intended sole-source award. *Norden Sys., Inc., supra*.

In *Digitalis*, there was no dispute that the firm never submitted a capability statement for agency review. *Digitalis*, 664 F.3d at 1384. Here, however, the very issue we grapple with is whether the protester submitted a statement to the agency for review. It is in this context--whether the protester is considered to have submitted a capability statement to the agency when that statement reached the EEMSG, but did not reach the contract specialist--that we find the submission of capability statements to be distinct from the submission of proposals.

deadline.⁷ FAR 15.208(b)(1)(i). Thus, under the circumstances here, where the protester has submitted a capability statement to the agency 11 days prior to the deadline established in the notice of intent to make a sole-source award--and that capability statement was blocked by the agency's EEMSG cybersecurity framework--we decline to find, as the Army suggests and as noted above, that the protester is not an interested party.

We, however, find the protest to be premature because the protester submitted its protest to our Office prior to allowing the agency the opportunity to consider the capability statement. Because the Army has neither in fact rejected CCS's capability statement nor proceeded with the award of the sole-source contract, the protest is premature. See *Forensic Quality Servs.-Int'l, supra*; *Norden Sys., Inc., supra*; *Technology Advancement Grp., Inc., supra*.

The protest is dismissed.

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General Counsel

⁷ In *ManTech*, our Office determined that the agency was not required to consider the protester's proposal where that proposal was blocked by the EEMSG server and never reached the designated point of contact's email inbox. *ManTech Advanced Sys. Int'l, Inc., supra* at 3. There, we noted that "[s]ince the agency never received the proposal in the designated mailbox, none of the late proposal exceptions under Federal Acquisition Regulation (FAR) § 15.208(b)(1) relied on by the protester are applicable here" *Id.* at 4 n.3. It is important to note that the protester, in that case, could not avail itself to the electronic submission exception because it did not send its proposal to the agency prior to 5:00 p.m. one working day prior to the deadline for proposal submission. *Id.* at 2; see FAR 15.208(b)(1)(i).