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Decision

Matter of: Trace Systems, Inc.

File: B-422056.7; B-422056.8

Date: November 8, 2024

Lee Dougherty, Esq., and Everett Dougherty, Esq., Effectus, PLLC, for the protester. Kevin P. Connelly, Esq., Kelly E. Buroker, Esq., Jeffrey M. Lowry, Esq., and Michael P. Ols, Esq., Vedder Price PC, for TeleCommunication Systems, Inc., the intervenor. Wade L. Brown, Esq., Department of the Army, for the agency. Kenneth Kilgour, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the agency's corrective action in response to an earlier protest is denied where the corrective action rendered the earlier protest academic.
 2. Protest challenging the amendment of the solicitation is denied where the protester has not demonstrated that the agency abused its discretion when it eliminated one evaluation factor.
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DECISION

Trace Systems, Inc., of Vienna, Virginia, protests the scope of the Department of the Army's corrective action following Trace's prior protest of the issuance of a task order to TeleCommunication Systems, Inc. (Comtech), of Annapolis, Maryland, under request for task execution plan (RTEP) No. PANAPG-22-P-0000-019320. The task order was issued through the Army's Global Tactical Advanced Communication Systems (GTACS) II multiple award indefinite-delivery, indefinite-quantity (IDIQ) contract. The contractor was to provide global field service representative (GFSR) support services.

We deny the protest.

BACKGROUND

The IDIQ Base Contract

The Army issued the solicitation to GTACS II IDIQ contract holders. Req. for Dismissal, exh. 13, RTEP at 1. The small business participation requirement, at the IDIQ base contract and task order levels, is relevant to this protest. The GTACS II RFP required all offerors to submit a small business participation commitment document (SBPCD). Agency Additional Briefing, exh. 1, GTACS II RFP at 125-126. The SBPCD would be evaluated, in part, on the “extent to which offerors meet or exceed the 30 [percent] quantitative small business participation objective.” *Id.* at 133. Offerors proposing less than 30 percent small business participation would be evaluated on the “data and rationale to support their proposed small business participation target.” *Id.* The GTACS II RFP did not require offerors to propose individual socioeconomic small business categories. See *id.* If awarded a contract, the offeror’s SBPCD would be incorporated into the GTACS II base IDIQ contract. *Id.* at 125. The GTACS II RFP also required other than small businesses to provide a separate small business subcontracting plan (SBSP). *Id.* at 125-126. The SBSP was to be consistent with the SBPCD and would also be incorporated into the GTACS II base IDIQ contract. *Id.* at 126. The contract would be for a period of 5 years with one 5-year option period. *Id.* at 29. The RFP advised offerors that “successful performance” of the contract would be determined in part by whether the “contractor has met or exceeded its planned Small Business Participation Commitment document goals at the base contract level.” *Id.* at 30.

On January 6, 2020, the Army awarded GTACS II base IDIQ contracts to 22 firms, including the protester and the awardee. Agency Additional Briefing at 3. Consistent with the GTACS II RFP, each awardee’s SBPCD percentages/dollars were incorporated into its GTACS II base IDIQ contract. *Id.* To date, the Agency has not made an optional ordering period determination. *Id.*

The Task Order

The task order--referred to as GFSR II--would provide support services for the GFSR effort. RTEP at 1. As relevant to this protest, the RTEP contained a small business participation plan requirement as volume IV of the task execution plan (TEP). *Id.* at 4; see Agency Additional Briefing, exh. 3, Trace TEP attach. 4, Small Business Plan. All offerors were required to identify in a table their small business participation plan (SBPP) percentages--calculated on total task order value--to be accomplished on this task order. Agency Additional Briefing, exh. 3, Trace TEP attach. 4, Small Business Plan. Large businesses were required to complete a second table showing the percentage of their subcontracted dollars under the task order to be accomplished by small businesses. *Id.* If the offeror planned no small business utilization under this requirement, the RTEP required the offeror to include an explanation as to why. RTEP at 19. A proposal would be evaluated as acceptable under this requirement if it provided small business objectives (regardless of amount); a proposal would be

evaluated as unacceptable if it did not provide small business objectives or failed to explain why it did not do so. *Id.* at 24.

Protests and Corrective Action

The Army's conduct of this procurement has been challenged numerous times at GAO.¹ Most recently, on July 8, 2024, Trace protested the Army's June 13 issuance of a task order to Comtech.² Req. for Dismissal at 1. Trace asserted that the agency's evaluation of past performance was unreasonable, that the agency's best-value tradeoff analysis was flawed, that Comtech's proposal should have been found unacceptable under the small business participation factor, that the agency unreasonably converted a best-value solicitation into a lowest-price technically acceptable competition, that the awardee had an unmitigated organizational conflict of interest, that Comtech failed to disclose its subcontractors--as required by the solicitation--and engaged in an improper bait and switch regarding subcontractors, and that Comtech's proposed price was unreasonable. July Protest, *passim*.

We dismissed the protest as academic after the Army notified our Office that it intended to take corrective action. *Trace Sys., Inc.*, B-422056.6, Aug. 14, 2024 (unpublished decision). Specifically, the agency stated that it would: "(1) re-examine the Army's evaluation of Trace's and Comtech's proposals in the areas at issue in Trace's protest; (2) possibly initiate questions with Offerors; (3) following the re-examination, make a new award decision; and (4) if an offeror other than the current awardee is selected for award, terminate the existing awarded contract and make award consistent with the terms of the solicitation and the new award decision." *Id.* at 1.

On August 19, Trace protested the corrective action taken in response to its July 8 protest, arguing that the corrective action notice fails to indicate how a "re-examination" of the evaluations of Trace's and Comtech's proposals will remedy any errors in Trace's protest because the notice "does nothing to explain where the error occurred, if it agrees or sees merit to any of Trace's protest grounds, or how it intends to correct them." Protest at 5.

Also on August 19, while implementing its corrective action, the agency issued Trace an evaluation notice (EN) advising the protester that Trace is not a small business under the North American Industry Classification System (NAICS) code applicable to the RTEP, *i.e.*, 541330. Supp. Protest, EN1. Because Trace was not a small business under the applicable NAICS code, the Army found that the protester had improperly failed--as a large business--to complete the required second table of volume IV, RTEP attachment 4, small business participation addendum, and the Army found Trace's

¹ See *Trace Sys., Inc.*, B-422056, Nov. 6, 2023 (unpublished decision) (dismissing challenge to the issuance of a task order to Comtech after the agency took corrective action); *Trace Sys., Inc.*, B-422056.2 *et al.*, Apr. 2, 2024 (unpublished decision) (same).

² The task order was issued to Comtech for \$544 million.

small business volume unacceptable. *Id.* On August 20, Trace filed a supplemental protest asserting that the Army employed an unstated evaluation criterion in the evaluation of the small business participation requirement to find Trace’s proposal unacceptable. Supp. Protest at 10.

On August 26, the Army requested dismissal of the protest and supplemental protest, asserting that they did not state valid bases of protest and were premature. Req. for Dismissal at 4. GAO advised the parties that it would not further consider the challenge to the corrective action and permit record development of the allegation that the Army unreasonably evaluated Trace’s TEP as unacceptable under the small business participation requirement. Email from GAO to Parties, Sept. 4, 2024.

On September 12, the Army notified our Office that it would take corrective action in response to the supplemental protest by amending the solicitation to delete the small business participation requirement; the agency would then make a new award decision. Second Notice of Corrective Action at 1. Based on this proposed corrective action, the agency sought dismissal of the supplemental protest as academic. Trace objected to the agency’s proposed corrective action, arguing that it was “flawed both in its foundation--where the Agency lacks the authority and discretion to implement it--and in its reasonableness--even if the Agency had the authority, which it does not, the action is arbitrary, capricious, and an abuse of discretion.” Opposition to Second Corrective Action at 1.³

DISCUSSION

Trace challenges the corrective action that preceded this Office’s dismissal of the prior protest. The protester also objects to the corrective action that the agency proposes to take in response to its supplemental protest. As discussed below, we find no basis on which to question the reasonableness of the agency’s first corrective action, and we find the agency did not abuse its discretion when amending the solicitation in response to the supplemental protest.

Agencies have broad discretion to take corrective action where they have determined that such action is necessary to ensure a fair and impartial competition. *CSRA, LLC*, B-418903.9, Feb. 3, 2022, 2022 CPD ¶ 54 at 4. The details of implementing corrective action largely are within the discretion of the contracting agency, and we generally will not object to a corrective action, provided it is appropriate to remedy the concern that prompted the agency to take corrective action. *Id.*

³ This protest is within our jurisdiction to review protests related to the issuance of orders valued over \$25 million under multiple-award IDIQ contracts that were awarded under the authority of title 10 of the United States Code. 10 U.S.C. § 3406(f)(1)(B).

First Corrective Action

As part of its first corrective action, the Army represented that it would “reexamine” the Army’s evaluation of Trace’s and Comtech’s proposals “in the areas at issue in Trace’s protest.” First Notice of Corrective Action at 1-2. Trace objects to the Army’s use of the term “reexamine,” asserting that “[t]he Agency does not specify by what standard this re-examination will take place.” Opposition to First Corrective Action at 3. Trace further asserts that “[t]his word [examine] has no legal meaning, and this notice provides neither Trace nor the GAO any notice of what the Agency intends to do.” *Id.* According to Trace, the agency should have instead used the term “evaluate” and promised to perform a new evaluation of the offerors’ proposals. *See id.*

Notwithstanding the protester’s concerns, an agency’s intent to examine (or reexamine) its evaluation and make a new award decision provides GAO a basis on which to dismiss a protest because it expresses a clear intent to reconsider the award decision that gave rise to the protest. *Avar Consulting, Inc.*, B-417668.3 *et al.*, June 10, 2020, 2020 CPD ¶ 191 at 4 (noting the dismissal of a protest, over objections, where the agency “stated that it would examine its evaluation”); *see also Columbia Ancillary Servs., Inc.*, B-416800.4, Jan. 21, 2020, 2020 CPD ¶ 36 at 2 (dismissing a protest where the agency indicated that it would “reexamin[e] its market research and set-aside decision”).

Again, in its corrective action, the Army committed itself to consider “areas at issue in Trace’s protest,” and, following that, to make a new source selection decision. First Notice of Corrective Action at 1-2. While Trace prefers terminology that in its view is more idiomatic, the Army’s commitments in its corrective action notice were sufficient to render Trace’s protest academic. Consequently, we see no merit to the challenge to the corrective action as insufficient to address Trace’s protest grounds, and this allegation is denied.

Second Corrective Action

As noted above, we did not grant the Army’s request to dismiss the protester’s allegation related to the agency’s implementation of its corrective action. Specifically, we did not dismiss the protester’s argument that the agency had employed an unstated evaluation criterion in evaluating proposals under the volume IV small business participation requirement. The Army subsequently notified our Office that it would take corrective action by deleting that requirement and making a new award decision. Second Notice of Corrective Action at 1. The Army indicated that it did not intend “to request revised proposals in conjunction with its solicitation amendment because deletion of Volume IV Small Business does not reasonably [a]ffect other volumes of offerors’ proposals.” *Id.* at 3. The Army provided the following rationale for its elimination of small business participation as an evaluation consideration:

[T]he Volume IV RTEP instructions explicitly informed offerors they could achieve an “Acceptable” rating based on proposing any amount of small

business participation, even zero. With this structure, Volume IV Small Business was not a discriminator in the evaluation process. Further, since acceptability was achievable with 0 [percent] to 100 [percent] small business participation, it did not provide an incentive for Offerors to propose any particular amount of small business participation. There was no advantage to be gained based on the specific content of an Offeror's Volume IV Small Business.

Id.

Trace asserts two challenges to that corrective action: that the volume IV small business participation requirement acts as a discriminator between proposals; and that the Army was required to evaluate small business participation at the task order level. Second Opposition at 6, 14. As discussed below, we see no basis on which to object to the Army's solicitation amendment removing the volume IV small business participation requirement.

As noted above, contracting officers in negotiated procurements have broad discretion to take corrective action where the agency determines that such action is necessary to ensure a fair and impartial competition, and the details of implementing the corrective action are within the sound discretion and judgment of the contracting agency. *CSRA, LLC, supra*. Agencies are afforded the discretion to determine how to appropriately remedy their reasonable concerns, absent a showing that this discretion is being abused in some way. *Loyal Source Gov't Servs., LLC*, B-420959.6, Mar. 31, 2023, 2023 CPD ¶ 86 at 4. Agency acquisition officials also have broad discretion in the selection of the evaluation criteria that will be used in an acquisition, and we will not object to the absence or presence of a particular evaluation criterion (or the removal of one), so long as the criteria used reasonably relate to the agency's needs in choosing a contractor that will best serve the government's interests. *Id.* at 5; see *Platinum Servs., Inc.; WIT Assocs., Inc.*, B-409288.3 *et al.*, Aug. 21, 2014, 2014 CPD ¶ 261 at 5-6 (denying protest that solicitation amendment improperly deleted corporate experience subfactor).

Small Business Requirement as Discriminator

As noted above, the agency's rationale for deleting the volume IV small business participation requirement is that "Volume IV Small Business does not function in the RTEP as a discriminator between proposals in the evaluation process, as offerors can achieve an 'Acceptable' rating based on any amount of proposed small business participation, including zero small business participation." Second Notice of Corrective Action at 3. The protester asserts that "Volume IV Small Business absolutely was a discriminating factor, because it required offerors to either state how they would meet the small business obligations of the Government or provide an explanation as to why they would not." Second Opposition at 7. Trace also notes that "[a]n offeror can be found ineligible if they fail to comply" with the small business requirement. *Id.* The protester contends that a pass/fail criterion is "the very definition of a discriminator." *Id.*

Neither the solicitation nor the parties defined “discriminator”; one useful definition is those differences in proposals that “provided additional value, or benefit, to the government.” *Savvee Consulting, Inc.*, B-408416.3, Mar. 5, 2014, 2014 CPD ¶ 92 at 8. Trace concedes the Army’s assertion that proposals including zero small business participation could be found acceptable. See Second Opposition at 7 (“Correct as the Agency may be that proposals ‘including zero small business participation’ could be found acceptable. . . .”); see *also* RTEP at 19. Thus, regardless of whether an offeror proposed any small business participation, that offeror’s proposal could be evaluated as acceptable. The agency notes that because the small business factor is evaluated on an acceptable/unacceptable or pass/fail basis, the Army “cannot look behind the ratings of pass/fail criteria to draw distinctions, or discriminate between proposal content, as it does when proposals are adjectively rated.” Resp. to Opposition to Second Notice of Corrective Action at 4, *citing JMark Servs.*, B-417331.2, Jul. 22, 2019, 2019 CPD ¶ 277 at 9 (noting that where a solicitation provides for the evaluation of offers of a pass/fail basis, an agency may not consider degrees of acceptability or discriminators in the technical approach; in this respect the evaluation of offers on a pass/fail basis is fundamentally mechanical).

We agree with the Army that the eliminated small business participation requirement did not serve as a discriminator between proposals; that is to say, an offeror could comply with the requirement without providing benefit to the Army. Thus, to the extent that Trace objects to the corrective action amendment of the solicitation on the basis that it eliminates a discriminator, we see no support in the record for that assertion. Response to Second Opposition at 3. The record does not support a finding that, because the requirement served as a discriminator when comparing proposals, the agency’s elimination of that requirement is an abuse of discretion. *Loyal Source Gov’t Servs., LLC, supra* at 4. Moreover, the Army argues that, even if the requirement was a discriminator, the agency still had the discretion to delete it, and we agree.

Requirement for Evaluation of Small Business Participation

Trace argues that the removal from the RTEP of small business participation as an evaluation consideration is inconsistent with the GTACS II base IDIQ contract. Second Opposition at 17. Trace contends that “[i]t is unreasonable, arbitrary, capricious, and an abuse of discretion for the Agency to now attempt to argue that a small business participation plan is no longer within the needs of the Government.” *Id.* The Army contends that the GTACS II base IDIQ contract does not require a small business participation requirement in GTACS task order solicitations. Response to Opposition at 5. Given the competing claims, GAO requested briefing on this issue.

Responding to that request, Trace asserts that whether the IDIQ contract required a small business participation requirement at the task order level was the wrong question. Protester Additional Briefing at 1. Rather, Trace contends, the proper inquiry would be whether there is “a specific exception in [the] GTACS II contract granting the contracting officer the authority not to require small business participation to be considered in

evaluations in GTACS task order solicitation.” *Id.* Unsurprisingly, Trace identifies no such exception. *See id. passim.*

The Army is emphatic that “[n]o contract provision in the GTACS II base [IDIQ contract] requires the Agency to evaluate small business at the task/delivery order level.” Agency Additional Briefing at 3. Moreover, the Army argues, “[n]othing within the four corners of the GTACS II base IDIQ contract requires the utilization of small business on each individual task and delivery order.” *Id.* at 4. The Army asserts that the GTACS II base IDIQ contract and the Federal Acquisition Regulation (FAR) both require assessment of the contractor’s success in meeting its small business participation goals at the end of the base contract period, and not on a task order by task order basis. *Id.* at 3, quoting GTACS II base IDIQ contract at 30 (defining successful contract performance, in part, as having “met or exceeded its planned Small Business Participation Commitment goals at the base contract level”); at 5-6, quoting FAR 19.705-7 (noting that a contractor’s compliance with its subcontracting plan will be evaluated “at the completion of the bas[e] contract or any option”).

The Army asserts that, if utilization of small business and socioeconomic categories of small business was contractually required on each individual task or delivery order, the Army would have evaluated Trace’s TEP as unacceptable under the small business participation requirement for failing to meet the SDB, WOSB, HUBZone, and SDVOSB percentages in Trace’s IDIQ contract. Agency Additional Briefing at 6. The Army maintains that it did not find Trace’s task order proposal unacceptable for failure to meet the goals set forth in its IDIQ contract “precisely because there is nothing requiring GTACS II contract holders to propose their [IDIQ contract] small business and socioeconomic percentages on each individual task and delivery order.” *Id.*

To drive home the flawed basis for Trace’s argument, the Army notes that Trace’s own proposed small business subcontracting goals for the performance of this task order do not meet the goals established by Trace’s GTACS II contract. Agency Additional Briefing at 5-6. In volume IV of its task order proposal, Trace states that it will utilize [DELETED]. *Id.*, exh. 3, Trace Volume IV- Small Business Proposal. Trace explained that “[w]e planned for [DELETED] for these socioeconomic subcategories after performing market research and determining there are not qualified small businesses within these subcategories aligned to the scope of work for this RTEP.” *Id.* These percentages are inconsistent with Trace’s GTACS II contract, which states it will utilize [DELETED]. *Id.* at exh. 2, Trace GTACS II Contract at 40.

In conclusion, we find no merit to the claim that the eliminated factor was a discriminator. We also find that the GTACS II base IDIQ contract placed no obligation on the agency to require evaluation of small business participation at the task order level; the Army noted that Trace’s own TEP would not have met the small business participation percentages in the protester’s GTACS II contract. The record thus

provides no basis on which to find that the agency abused its discretion when it amended the solicitation to eliminate the small business participation requirement, and this allegation is denied.

The protest is denied.

Edda Emmanuelli Perez
General Counsel