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Decision

Matter of: Bravura Information Technology Systems, Inc.

File: B-418755

Date: August 18, 2020

E. Sanderson Hoe, Esq., J. Hunter Bennett, Esq., Evan R. Sherwood, Esq., and Brooke Stanley, Covington & Burling, LLP, for the protester.

Richard P. Rector, Esq., and Ryan P. Carpenter, Esq., DLA Piper LLP- US, for TCOM, L.P., the intervenor.

Wade L. Brown, Esq., and David A. Machado, Esq., Department of the Army, for the agency.

Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's decision to execute a foreign military sales contract on a sole-source basis is denied where record shows that protester is not capable of meeting the buyer's requirements.

DECISION

Bravura Information Technology Systems, Inc. (BITS), of Aberdeen, Maryland, protests the proposed sole-source award of a contract to TCOM, L.P., of Columbia, Maryland, announced under notice No. W56KGY-20-R-KSA_PSST, issued by the Department of the Army for aerostat systems and related services to be acquired on behalf of the Kingdom of Saudi Arabia (KSA). BITS argues that the agency unreasonably has determined to acquire the aerostat systems on a sole-source basis rather than competitively.

We deny the protest.

BACKGROUND

This acquisition is being conducted under the authority of the Arms Export Control Act, 22 U.S.C. §§ 2751-2799aa-2, which authorizes the Department of Defense to enter into contracts for purposes of resale to foreign countries or international organizations. Agency Report (AR), exh. 3, Letter of Offer and Acceptance (LOA), at 1. The record

shows that the Army entered into an LOA between itself and the KSA that contemplates the sale to the KSA of a quantity of 10 aerostat systems each consisting of an aerostat envelope (essentially a large, lighter-than-air, blimp-like envelope measuring between 28 and 35 meters), a ground control station, a mobile mooring platform, a transportable office facility, and a lightweight payload enclosure and tether cable. *Id.* at 14. The LOA further specified certain performance capabilities, including that the systems have to be capable of lifting a payload of up to 500 kilograms (1,100 pounds), capable of operating at an altitude of 2,440 meters (8,000 feet) and capable of operating at wind speeds of up to 55 knots, and surviving at wind speeds of 75 knots when moored. *Id.*

In connection with the KSA's requirement, the agency conducted extensive market research to determine whether there were one or more firms capable of meeting the parameters specified in the LOA for the aerostat systems by issuing a series of requests for information (RFIs) and providing draft specifications and performance work statements to enable prospective concerns to identify their capabilities in relation to the requirement. AR, exhs. 2A-2E, Various Notices.

Based on the responses to the market research, the agency prepared a market research report that concluded that only TCOM was capable of fulfilling the requirement. Although BITS provided information in response to the agency's market research, the agency nonetheless concluded that it was not capable of performing the requirement. The principal basis for the agency's finding was that BITS was not an original equipment manufacturer (OEM) of the aerostat systems but, rather, was only an integrator that would have to purchase the aerostat systems from another source. AR, exh. 4, Market Research Report, at 10.

After concluding its market research, the agency published its notice that it intended to acquire the aerostat systems on a sole-source basis from TCOM. AR, exh. 2, Notice of Intended Sole-Source Acquisition. That notice advised that the agency had executed an international agreement for competitive restriction (IACR) pursuant to Federal Acquisition Regulation § 6.302-4, Defense Federal Acquisition Regulation § 206.302-4 and Army Federal Acquisition Regulation § 5106.302-4 permitting the use of other than full and open competition.¹ After learning of the agency's intended course of action, BITS filed the instant protest.

DISCUSSION

BITS argues that it was unreasonable for the agency to have concluded that only TCOM is capable of fulfilling the requirement. The firm principally argues that the agency erred in concluding that it was not capable of fulfilling the requirement by entering into a teaming arrangement with either TCOM or another concern, Worldwide Aeros

¹ All of these regulatory provisions are based on the statutory exception to full and open competition found at 10 U.S.C. § 2304(c)(4) relating to acquisitions conducted on behalf of foreign governments or international organizations.

Corporation. According to BITS, the agency should allow it to compete for the requirement.

We find no merit to the protest. The agency's market research shows that there were three potential OEM firms that manufacture aerostat systems, TCOM (the firm selected by the agency for award that has manufactured comparable aerostat systems for the Army in the past), Lockheed Martin (another firm capable of manufacturing the aerostat systems) and a third firm known as Worldwide Aeros.

With respect to the three firms, the record shows that TCOM has advised the agency that it intends to pursue the requirement as a prime contractor and will not consider a teaming arrangement with BITS; that it does not have any agreement with BITS that would allow the protester to have access to the TCOM aerostat systems; and that BITS does not have access to any of TCOM's intellectual property. AR, exh. 6, Letter from TCOM to the Army.

With respect to Lockheed, the firm specifically advised the agency that it has decided to exit the lighter-than-air market, AR, exh. 4F, Email, Lockheed Martin to the Army. Thus, Lockheed effectively is no longer an OEM capable of fabricating aerostat systems that could potentially serve as a subcontractor to BITS.

Finally, the record shows that the agency investigated the commercial capabilities of Worldwide Aeros and concluded that the firm did not have the capability to fabricate an aerostat system that would meet the parameters specified by the KSA. In this connection, the agency's research shows that Worldwide Aeros manufactures five aerostat systems commercially, but that none of those systems meets the altitude or payload requirements outlined by the KSA. AR, exh. 4G, Market Research Analysis of Worldwide Aeros.

We point out as well that BITS made only a passing reference to Worldwide Aeros in a submission made to the agency approximately two years before the agency made its determination. AR, exh. 4E, BITS Response to Agency Questions, at 2. In none of its subsequent submissions to the agency did BITS even mention Worldwide Aeros by name. Instead, BITS referred only to "another aerostat manufacturer, based in California" Protest, exh. B, Response to RFI, July 1, 2019, at 5. BITS also alluded to alleged arrangements with three aerostat manufacturers in a subsequent submission to the agency, but did not identify either Worldwide Aeros or Lockheed by name. Protest, exh. C, Response to RFI, Dec. 6, 2019, at 2. The record therefore shows that, throughout the agency's market research activities, BITS provided the agency with almost no information relating to the identity of Worldwide Aeros, the nature of its alleged relationship with the firm, or the capabilities of Worldwide Aeros as a possible manufacturer of the aerostat systems.

In the final analysis, there is no information in the record to support BITS's claim that it has a viable teaming partner with which to perform the requirement. As noted, Lockheed has exited the lighter-than-air business sector, TCOM refuses to partner with

BITS, and Worldwide Aeros does not appear to have the capability to manufacture an aerostat system that meets the requirements of the KSA, nor is there any evidence to show that the Worldwide Aeros is interested in a teaming arrangement with BITS.

Even during the pendency of the current protest, BITS did not provide any evidence of either its capabilities to produce an aerostat system capable of meeting the KSA's requirements, or to have a viable teaming arrangement that would enable it to compete for the KSA's requirements. This absence of evidence to demonstrate its alleged capabilities is consistent with the agency's express finding in its market research report that:

This company [BITS] was shown to be a high risk based on the lack of understanding and approach of the KSA total package approach (TPA) requirements provided in the SSA [sources sought announcement]. *They did not provide any substantiating evidence to accomplish the production and manufacturing of the KSA system requirements.*

AR, exh. 4, Market Research Report, at 10 (emphasis supplied). In light of this record, we have no basis to object to the agency's decision to acquire the aerostat systems from TCOM on a sole-source basis.²

As a final matter, BITS raises several issues that do not merit our detailed consideration. First, BITS argues that the agency failed to consider whether TCOM is capable of performing the related integration and support services elements of the requirements in addition to its manufacturing capabilities. However, BITS has produced no evidence that would cast doubt on the agency's findings relating to TCOM's capabilities, despite BITS's claim of a previous contractual relationship with TCOM.

² The agency produced a redacted copy of its market research report that deleted the names of all respondents to the agency's RFIs except those of Lockheed, TCOM and BITS. A review of that report shows that the agency received expressions of interest from a total of 16 firms, including TCOM, BITS and Lockheed. Of the 13 firms whose identities are redacted, the overwhelming majority of the respondents either were systems integrators or support services contractors, and none of them had identified any capability to manufacture the aerostat systems meeting the requirements of the KSA. AR, exh. 4, Market Research Report, at 9-14. One firm is identified as specializing in the production of "tactical size" aerostats based in Israel. *Id.* at 14. Inasmuch as Worldwide Aeros apparently is located in California, this is not the firm identified in the agency's market research.

The record therefore appears to show that Worldwide Aeros itself did not respond to the agency's RFIs, which lends further support to the agency's research showing that Worldwide is not capable of manufacturing an aerostat system capable of meeting the KSA's requirements.

Second, BITS argues with respect to both the market research performed relating to the capabilities of Worldwide Aeros (which is undated), as well as the letter in the record from TCOM stating its unwillingness to enter into a teaming relationship with BITS (which was provided to the agency one day after the protest was filed), that we should ignore this information because, in its view, it is evidence produced during the protest, and thus of only minimal probative value. BITS cites our decision in *Boeing Sikorsky Aircraft Support*, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15 in support of its position.

The protester misunderstands our analysis in the *Boeing* case. In that case the agency performed an entirely new, *post hoc* reevaluation and source selection decision during the pendency of the protest, which we concluded may not have represented the agency's fair and considered judgment because that reevaluation and source selection occurred in the heat of the adversarial process. Here, in contrast, the agency has not advanced any new conclusion about the outcome of its market research. Rather, the agency simply has provided additional evidence that supports its original finding, namely, that BITS is not capable of manufacturing an aerostat system that will meet the KSA's requirements, and also has no viable prospective teaming partners.

Third, BITS raises a procedural challenge to the sufficiency of the agency's IACR, along with a challenge to the adequacy of the agency's advanced planning. We need not consider these aspects of its protest in any detail because BITS is not an interested party to maintain these allegations given its fundamental inability to meet the KSA's requirements. *HealthRev, LLC; DLH Solutions, Inc.*, B-416595, B-416595.2, Oct. 25, 2018, 2018 CPD ¶ 367 at 6 n.6.

Finally, BITS argues that the agency erred in adequately failing to evaluate the capabilities of other firms that were proposing to accomplish the requirement using a teaming arrangement. However, even if BITS were correct about the sufficiency of the agency's review of the capabilities of other concerns, this would not show that the agency's actions were prejudicial to BITS. As we conclude above, the agency's investigation of BITS's capabilities was adequate for purposes of concluding that BITS

is not capable of meeting the KSA's requirements. Any alleged failure on the part of the agency to evaluate the capabilities of these other firms could not have competitively prejudiced BITS. *AECOM Management Services, Inc.--Advisory Opinion*, B-417506.12, Sept. 18, 2019, 2019 CPD ¶ 342 at 10.³

The protest is denied.

Thomas H. Armstrong
General Counsel

³ In supplemental comments filed in connection with a supplemental filing by the agency, BITS alleges that the agency revealed for the first time in its supplemental filing that it does not have a complete technical data package, and that this provides an independent basis to question the adequacy of the agency's determination to proceed on a sole-source basis. However, the record reflects BITS's ongoing concern with the adequacy of the agency's technical data package. See *e.g.*, Protest, exh. C, RFI Response, Dec. 6, 2019 at 3. To the extent that BITS thought there was a problem with the adequacy of the agency's technical data package, it was required to raise that allegation in its initial protest. Any subsequently-raised concern is untimely, since it was not filed within 10 days of when BITS knew of this alleged concern. 4 C.F.R. § 21.2(a)(2). We therefore need not consider this aspect of BITS's protest.