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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Brian X. Scott

File: B-298568

Date: October 26, 2006

Brian X. Scott for the protester.
Daniel J. Donohue, Esq., Akerman Senterfitt Wickwire Gavin, P.C., for CACI
Dynamic Systems, Inc., an intervenor.
Capt. Christopher L. Krafchek, Department of the Army, for the agency.
Paul N. Wengert, Esq., and Glenn G. Wolcott, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest is denied where the protester's proposal was properly eliminated from competitive range because, among other reasons, the proposal requested addition of an advance payment term to the contract, and acknowledged that without the advance payment the protester could not perform, and the protester's objections to contracting officer's affirmative responsibility determination did not show a failure to consider available relevant information.

DECISION

Brian X. Scott protests the elimination of his proposal from the competitive range by the Department of the Army under request for proposals (RFP) No. W91GXQ-06-R-0002 for "the full range of pre-award contracting functions (with the exception of contract award) . . . in support of U.S. Government and multi-national agencies" in Iraq. Legal Memorandum at 1-2. The protester argues that his proposal was misevaluated and improperly eliminated from the competitive range, leaving a single remaining offeror, CACI Dynamic Systems, Inc. (CACI), and that the contracting officer improperly made an affirmative determination of responsibility with respect to CACI.

We deny the protest.

The Army's Joint Contracting Command-Iraq/Afghanistan issued the RFP on June 2, 2006 as a commercial item solicitation, seeking proposals to provide various personnel, including 24 contracting specialists, a systems administrator, and a property specialist. The RFP provided for proposal evaluation and risk assessment

with regard to the following factors: technical/management approach, quality assurance plan, past performance, and price. Offerors were advised that the agency intended to award a contract for a 6-month base performance period, with three 6-month option periods. RFP at 2-8.

The protester submitted a proposal on June 20. While that proposal declared that the protester was not taking exception to any RFP requirements, the proposal thereafter requested the Army to change three terms of the RFP. As relevant here, the first requested change was as follows:

I request that FAR [Federal Acquisition Regulation] Clause 52.232-12, Advance Payment, be added, and that an advance payment be made at contract start. This will ensure that sufficient operating capital is available exclusively for this effort so that mobilization and initial operation go smoothly. Without this provision, and this Advance Payment, I am unable to perform this contract.

Protester's Proposal Cover Letter at 2.¹

The evaluators found that the protester's proposal had numerous weaknesses and risks, resulting in a rating of unacceptable and high risk under both the technical/management approach factor and the quality assurance plan factor.² Technical Evaluation Report at 2-3. Upon review, the source selection authority agreed with the evaluator's assessments, concluding that various aspects of the protester's proposal rendered the proposal unworkable or even "catastrophic." Competitive Range Determination Document at 3. Accordingly, the protester's proposal was excluded from the competitive range. Among the reasons cited by the source selection authority was the fact that "Brian Scott proposed three additional contract provisions to which the Government does not agree." Id.

¹ The protester's proposal went on to specify that the initial multi-million dollar advance payment--an amount in excess of one-third of the protester's base period evaluated price--would need to be made "within 7 business days of Contract Award date." Protester's Proposal at 2. Additionally, the protester requested that the RFP be changed to provide for payment of contract line items on a cost-reimbursement basis, and that the awarded contract include an economic price adjustment clause. Id. at 2-3.

² Among other things, the agency concluded that the protester failed to propose all required personnel, failed to submit a sufficient number of resumes, and failed to include an adequate quality control plan. Technical Evaluation Report at 2; Competitive Range Determination Document at 3.

On July 17, the protester was notified of its exclusion from the competitive range. This protest followed.

The protester first argues that it was improper for the agency to exclude its proposal from the competitive range, leaving a competitive range of only one offeror.³

The FAR provides that an agency “shall establish a competitive range comprised of all of the most highly rated proposals.” FAR § 15.306(c)(1). Agencies are not required to retain proposals in the competitive range that the agency reasonably concludes have no realistic chance for award. SDS Petroleum Prods., Inc., B-280430, Sept. 1, 1998, 98-2 CPD ¶ 59 at 5. Consequently, an agency may exclude a proposal from the competitive range where it is determined to have no reasonable prospect of award, even where its exclusion will result in a competitive range of one proposal. TekStar, Inc., B-295444, B-295444.2, Feb. 18, 2005, 2005 CPD ¶ 53 at 8. While a competitive range of one means that the competition is at an end, we will not question a determination to establish a competitive range of one where the contracting officer had a reasonable basis to find that the excluded proposals lacked a reasonable chance of being selected for award. Information Sys. Tech. Corp., B-291747, Mar. 17, 2003, 2003 CPD ¶ 72 at 4.

Here, the record fully supports the agency’s determination to exclude the protester’s proposal from further consideration due to its multiple deficiencies.⁴ In particular, as quoted above, the protester’s own proposal conceded that the protester would be unable to perform the contract under the terms of the RFP.

³ The protester also argues that other offerors’ proposals were improperly excluded from the competitive range. No other offeror has filed a protest with our Office challenging its exclusion, and the protester is not an interested party to challenge the agency’s actions with regard to other offerors’ proposals. Intown Properties, Inc., B-249036.3, Jan. 15, 1993, 93-1 CPD ¶ 45 at 8 n.5 (protester was not an interested party to raise the allegedly improper elimination of other offerors from competitive range).

⁴ On October 11, the protester challenged additional irregularities in the procurement, such as the fact that on July 13, 2006, the Army issued amendment 3, which purported to amend the RFP to “delete all commercial item terms and conditions,” and provided this amendment only to CACI even though the protester was not notified of his elimination from the competitive range until July 17. Since the existence of amendment 3 became known to the protester no later than its receipt of the agency report on September 1, the protester’s new objections are untimely, and will not be considered, because they were raised more than 10 days after the protester knew or should have known of the basis for possible additional grounds of protest. See 4 C.F.R. § 21.2(a)(2) (2006).

Next, the protester challenges the likely award of a contract to CACI⁵ on the grounds that the Army erred in finding CACI to be responsible.⁶ Although no contract has been awarded, the contracting officer states, in response to this protest, that “[t]he Government re-affirms the determination that CACI is a responsible source.” Contracting Officer’s Statement at 5. In challenging the agency’s responsibility determination, the protester refers to various news articles and published reports discussing CACI’s prior contract performance, asserting that, “[b]ased on what is publicly known about CACI’s failures in Iraq, there is no way that the incumbent [CACI] could ever be rated other than ‘unacceptable’ in a fair and impartial process.” Protest at 3.

The underlying premise of every federal contract award is that contracts are only awarded to “responsible prospective contractors.” FAR § 9.103(a). Our Bid Protest Regulations provide that we will consider protests challenging an agency’s affirmative responsibility determination where there is evidence raising serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information. 4 C.F.R. § 21.5(c).

In responding to this issue, the contracting officer indicates that he was aware of the various published reports regarding CACI’s prior performance, but that he also considered CACI’s recent performance on other government contracts, including the predecessor contract. In this regard, the contracting officer concluded: “my prior experience as the Contracting Officer’s Representative in monitoring CACI’s performance on the predecessor contract . . . provided ample basis for me to assess CACI’s capability to responsibly perform this follow-on effort.” Contracting Officer’s Statement at 5. On the record here, there is no basis to conclude that the contracting officer unreasonably failed to consider available relevant information regarding CACI’s responsibility. The protester’s mere disagreement with the contracting officer’s judgment regarding CACI’s responsibility does not provide a basis to challenge the contracting officer’s affirmative responsibility determination. See FN Mfg., Inc., B-297172; B-297172.2, Dec. 1, 2005, 2005 CPD ¶ 212 at 12 (contracting officer properly considered protester’s allegations in making affirmative responsibility determination).

⁵ The record establishes that the Army anticipates awarding a contract to CACI, subject to our decision in this protest. Competitive Range Determination at 1.

⁶ Although the elimination of a protester from a competitive range would ordinarily render the protester not an interested party to challenge award to an offeror remaining in the competitive range, here the protester is an interested party to raise this ground of protest because the Army has limited the competitive range to only CACI.

Finally, the protester argues that a government official “acted very suspicious when I asked if CACI personnel participated in any way in that source selection process” in a debriefing for another contract. Protest at 14. The protester then candidly admits that “on pure speculation, I protest the possible involvement of CACI personnel in the evaluation of my proposal, of their own proposal, or of otherwise participating or providing input to the process.” *Id.* The record, which includes the identification of personnel involved in the procurement,⁷ provides no support for the protester’s explicitly speculative assertions.⁸ Accordingly there is no basis to sustain the protest.

The protest is denied.

Gary L. Kepplinger
General Counsel

⁷ The protester proceeded with its protest without an attorney who could obtain access to nonpublic information pursuant to the terms of a protective order. Accordingly, our discussion of certain matters is necessarily general in nature to avoid reference to nonpublic information. Our conclusions, however, are based on our review of the entire record, including proprietary and source selection sensitive information.

⁸ In its comments responding to the agency report, the protester acknowledges that his “hunch” was not supported by the redacted record. Protester’s Comments at 9. A protest must include a detailed statement of the legal and factual grounds for protest. 4 C.F.R. §§ 21.1(c)(4) and (f). Our Office does not consider a protester’s unsupported speculation to meet these requirements. Siebe Envtl. Controls, B-275999.2, Feb. 12, 1997, 97-1 CPD ¶ 70 at 2.