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United States Government Accountability Office
Washington, DC 20548

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Decision

Matter of: MASAI Technologies Corporation

File: B-298880.3, B-298880.4

Date: September 10, 2007

Janine S. Benton, Esq., and Kathy C. Potter, Esq., Benton & Potter PC, for the protester.

Kenneth D. Brody, Esq., and Thomas K. David, Esq., David Brody & Dondershine, LLP, for Denysys Corp., an intervenor.

Maj. ChristinaLynn E. McCoy, Department of the Army, for the agency.

Glenn G. Wolcott, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably determined that protester's proposal failed to comply with solicitation requirements regarding personnel qualifications, properly evaluating protester's proposal as [deleted] under that evaluation factor.

2. Agency's review of protester's and awardee's prior activities to assess whether potential conflicts of interest existed reasonably supports agency's conclusion that awardee did not have an unfair competitive advantage.

DECISION

MASAI Technologies Corporation (MTC) protests the Department of the Army's award of a contract to Denysys Corporation pursuant to request for quotations (RFQ) No. W81XWH-06-T-02857¹ to provide computer and technical support for the

¹ Although the solicitation is identified on its cover page as an RFQ, the term "proposal," as opposed to "quotation," appears repeatedly throughout the solicitation and the procurement record. As discussed below, the solicitation contemplated an evaluation and source selection scheme similar to those used in negotiated procurements; accordingly whether the vendors' submissions are referred to as proposals or quotations has no effect on the issues raised. See, e.g., LexisNexis, B-299381, Apr. 17, 2007, 2007 CPD ¶ 73 at n.1; GC Servs., Ltd. P'ship, B-298102, B-298102.3, June 14, 2006, 2006 CPD ¶ 96 at n.1. For the sake of consistency, we

(continued...)

Army's new medical logistics information system, known as the "Theater Wide Enterprise Logistics System" (TEWLS). MTC protests that the agency improperly evaluated its proposal and failed to adequately consider an alleged conflict of interest.

We deny the protest.

BACKGROUND

The solicitation was originally issued in August 2006, and contemplated award of a contract for a 1-year base period and two 1-year option periods to provide commercial services for "sustainment support" of TEWLS.² More specifically, the solicitation's performance work statement (PWS) provides that the contractor will "analyze functional business process requirements" and "provide strategic-level consultation and product improvement modifications" in performing this contract. Agency Report (AR), Tab 3, RFQ at 13. The solicitation provided that award would be made on the basis of the proposal considered most advantageous to the government, and established the following evaluation factors, listed in descending order of importance: personnel qualifications, technical approach, past experience,

(...continued)

refer to the firms' submissions as proposals throughout this decision, notwithstanding the fact that they are more properly identified as quotations.

² The solicitation provided the following background regarding TEWLS:

The TEWLS system is the newly developed medical logistics information system for the Army Medical Department. The development of TEWLS is a combination of several U.S. Army Medical Research and Materiel Command (USMRMC) efforts re-hosting the Theater Army Medical Management Information System Medical Supply (TAMMIS MEDSUP) intermediate level supply system capabilities into the (U.S. Army Medical Materiel Agency's) USAMMA Revolution in Logistics (URL). . . . The initial URL information system is the Army's medical logistics modernization and transformation initiative that implements ERP [enterprise resource planning] solution Commercial off the Shelf (COTS) software from SAP AG. . . . TEWLS Release 1 provides data harmonization and synchronization of purchasing/materiel data elements inside [various Army units] (i.e. medical distribution units, Combat Support Hospitals, and Division Medial supply Operations) and linking it with USAMMA's Business Intelligence/Business Warehouse (BI/BW) using SAP Master Data Management (MDM) and NetWeaver tools.

Agency Report (AR) Tab 3, RFQ at 8-9.

and price.³ RFQ at 23-25. Offerors were advised that, “[i]n order to be considered for award, the proposal must achieve at least a satisfactory rating in all non-cost factors.” RFQ at 25.

With regard to the required qualifications of proposed personnel, the solicitation provided, among other things: “At a minimum, all contractor employees must possess approved National Agency Check with Inquiries (NACI) and be a US citizen to gain access to U.S. Government computer systems.” RFQ at 12. The solicitation further stated:

Proposed personnel must be immediately available no more than two business days from contract award. . . . Personnel cannot be substituted or replaced without the written agreement of the Contracting Officer.

RFQ at 23.

Finally, the solicitation stated that the agency intended to award a contract without discussions, RFQ at 21, and provided that “[a]ny offer, modification, revision, or withdrawal of an offer received at the Government office designated in the solicitation after the exact time specified for receipt of offers is ‘late’ and will not be considered.”⁴ RFQ at 20.

Initial proposals were submitted by MTC and Denysys on August 24;⁵ in September, MTC filed its first protest, alleging that an organizational conflict of interest (OCI) existed with regard to BearingPoint, Inc. (BPI), a Denysys subcontractor. More specifically, MTC maintained that BPI had an unfair competitive advantage due to its prior performance of other Army contracts.⁶ In response, the agency stated that it would amend the solicitation to require all offerors to provide representations regarding potential OCIs, and that the agency would thereafter make a determination regarding whether OCIs existed and, if so, whether they could be avoided,

³ With regard to the non-price factors, the agency’s source selection plan provided for application of an adjectival rating system under which proposals were evaluated as “Excellent,” “Good,” “Satisfactory,” “Poor,” and “Unsatisfactory.” AR, Tab 10, at 2-6.

⁴ With regard to late submissions, the solicitation provided for an exception in situations that are not applicable here.

⁵ A third vendor initially submitted a proposal, but subsequently withdrew from the competition.

⁶ BPI is providing support for transitioning the TEWLS project from the Army Medical Department to the Defense Medical Logistics Standard Support program.

neutralized or mitigated. We dismissed MTC's protest based on the agency's pending actions.

The agency subsequently amended the solicitation and, thereafter, MTC and Denysys each submitted a certification stating there were no OCIs created by its participation in the procurement. After reviewing the submissions, the agency performed an analysis of BPI's activities in connection with its prior contracts. Based on the agency's review and analysis, the contracting officer determined that no OCIs existed. AR, Tab 6. Thereafter, a contract was awarded to Denysys and MTC was notified of the award on February 9, 2007.

On February 20, MTC filed a second protest, asserting that the selection of Denysys had not been made in accordance with the solicitation's stated evaluation factors, and again maintaining that the agency had failed to properly consider OCIs. The agency again responded to MTC's protest, stating that it would further amend the solicitation to clarify certain contract requirements, conduct a new source selection, and further address the specific OCI allegations raised by MTC; we again dismissed the protest pending the agency's actions.

On March 20, proposals were again submitted by MTC and Denysys. After reviewing the proposals, the agency's source selection evaluation board (SSEB) asked the contracting officer to seek clarification from both firms regarding their compliance with the solicitation requirement that all proposed personnel be U.S. citizens with NACI security clearances. AR, Tab 14. By e-mails to MTC and Denysys dated March 23, the contracting officer asked each firm to: "Please confirm that all proposed employees are U.S. citizens and have an NACI." AR, Tabs 15, 16.

Denysys responded, stating: "All employees we propose by Denysys and our subs are U.S. citizens and have recent valid NACI." AR, Tab 17. In contrast, MTC responded to the contracting officer's request by suggesting that the solicitation did not, in fact, require all personnel to be U.S. citizens or to hold NACI clearances, asserting that "this security guideline of 'U.S. citizens' has a documented history of being 'relaxed' on Ft. Detrick." AR, Tab 18. Nonetheless, MTC's response further stated that it was "declar[ing] staff member substitutions . . . to some of the proposed MTC personnel originally proposed." Id. In this regard, MTC advised the agency that four of the eight initially proposed individuals were being "replaced" by four other individuals. More specifically, MTC's response contained two personnel lists. Above the first list, which included all of the initially-proposed personnel, MTC's response stated: "MTC Aug 2006 proposed contract personnel." Above the second list, which omitted the four "replaced" individuals and included four new individuals, each of which were described as a "substitute," MTC's response stated: "MTC proposed U.S. citizen personnel with substitutions as of March 2007." Id.

The contracting officer/source selection authority (SSA)⁷ concluded that these substitutions were “late” revisions or modifications not permitted by the solicitation, and did not consider MTC’s revised proposal; for purposes of the source selection decision, the SSA evaluated only the initially-proposed personnel. In evaluating MTC’s proposal, the SSA concluded that MTC’s initially-proposed personnel failed to comply with the solicitation’s requirement that all proposed personnel be U.S. citizens with NACI clearances, and rated MTC’s proposal “Unsatisfactory” with regard to personnel qualifications.⁸ The SSA documented his assessment in the source selection decision memorandum, stating:

Paragraph 1.4 of the solicitation’s Performance Work Statement (PWS) mandates all contractor employees be United States citizens in order to gain access to U.S. Government computer systems. Without access to these systems, contract performance cannot be achieved. Four personnel proposed by MTC are green card holders, but clearly are not U.S. citizens. Thus, MTC failed compliance.

AR, Tab 24 at 1.

Denysys was subsequently selected for award. This protest followed.

DISCUSSION

MTC first protests that the agency was required to accept and evaluate the personnel revisions MTC submitted in response to the agency’s March 23, 2007, clarification request.⁹ In asserting that the agency was obligated to consider those revisions, MTC refers to the Army’s “Key Personnel” clause (USAMRAA 52.042-4033), which was incorporated by reference into the solicitation, contending that this clause authorized an offeror’s substitution of personnel after proposals had been submitted and prior to contract award.

⁷ The contracting officer was also the SSA.

⁸ The SSEB had rated MTC’s proposal as [deleted] with regard to personnel qualifications. Based on his determination that MTC failed to propose personnel that met the requirements regarding U.S. citizenship and NACI clearances, the SSA changed MTC’s rating from [deleted] to [deleted].

⁹ MTC asserts that it was verbally advised that the agency had, in fact, “accepted” its revised proposal. The agency explains that it advised MTC the revised proposal had been received, but properly made no commitment regarding the acceptability of the proposal prior to completing its source selection process. In any event, any verbal “acceptance” would not have legal significance in this matter.

MTC's assertion that the "Key Personnel" clause authorized--and required--the agency to accept and evaluate MTC's post-closing-date revision to its proposal is not supported by the terms of the clause. That clause states: "during the contract performance period substitution of Key Personnel shall not be permitted unless such substitution is necessitated by sudden illness, death, or termination of employment."¹⁰ AR, Tab 32, at 8 (underlining added). Clearly, this solicitation provision applies to post-award substitutions, that is, substitutions "during the contract performance period"--not to post-closing-date, pre-award substitutions. Here, the solicitation expressly prohibited the agency's consideration of a late modification or revision to a proposal, further stating: "Personnel cannot be substituted or replaced without the written agreement of the Contracting Officer."¹¹ RFQ at 23. MTC's protest that the agency was required to accept and evaluate its revised proposal is without merit.¹²

MTC next protests that the agency applied unstated evaluation factors in determining that its proposal was unacceptable. More specifically, MTC asserts that the solicitation did not, in fact, require all personnel to be U.S. citizens or hold NACI clearances prior to award. Protest at 9. We disagree.

As noted above, the solicitation expressly provided that, "[a]t a minimum, all contractor employees must possess approved National Agency Check with Inquiries (NACI) and be a US citizen to gain access to U.S. Government computer systems," RFQ at 12, and further stated that "[p]roposed personnel must be immediately available no more than two business days from contract award." RFQ at 23.

In pursuing this protest, MTC asserts that its substitution of personnel resulted from its discovery (just 8 days after submitting its final proposal) that four of the eight personnel it had offered were "unavailable." Protest at 11. More specifically, MTC maintains that the newly-discovered "unavailability" of the four personnel--not their failure to comply with the solicitation requirements regarding U.S. citizenship and security clearances--led to MTC's attempted substitutions. Accordingly, MTC asserts

¹⁰ Even if this clause authorized proposal revisions, which it does not, it does not appear that MTC met any of the requisite conditions for personnel substitution.

¹¹ There is no dispute that "written agreement of the Contracting Officer" was never provided.

¹² MTC similarly asserts that the solicitation permitted a late modification "of an otherwise successful offer, that makes its terms more favorable to the Government." RFQ at 20. However, as discussed below, the SSA reasonably concluded that MTC's initial proposal was unacceptable; accordingly, MTC's proposal was not "an otherwise successful offer."

it was unreasonable for the agency to conclude that the four “replaced” personnel were not U.S. citizens with NACI clearances.¹³

Based on the record discussed above, we think the SSA reasonably concluded that MTC’s proposed personnel failed to comply with the solicitation requirement that personnel be U.S. citizens with NACI security clearances and be immediately available. In any event, in light of MTC’s clear notice to the agency that it was no longer offering four of the eight initially-identified personnel, the proposal was clearly unacceptable for failing to propose personnel that complied with all of the solicitation requirements.¹⁴ On this record, we do not question the agency’s determination that MTC’s proposal was properly rated [deleted] with regard to MTC’s proposed personnel.

MTC also challenges various other aspects of the agency’s evaluation, including its evaluation of past performance and price. Since, as discussed above, the agency reasonably concluded that MTC’s proposal was [deleted] with regard to personnel qualifications and, as noted above, the solicitation required that “to be considered for award, the proposal must achieve at least a satisfactory rating in all non-cost factors,” RFQ at 25, MTC’s complaints regarding the agency’s evaluation under other evaluation factors need not be considered.

Finally, MTC protests that the agency should have disqualified Denysys from the competition based on MTC’s assertions that Denysys’ proposed subcontractors have OCIs due to their performance of other Army contracts. MTC argues that, by virtue of this performance of other contracts, Denysys had unequal access to information that gave it an unfair competitive advantage. We disagree.

FAR subpart 9.5 sets forth the regulatory guidance governing OCIs. Such conflicts arise where:

¹³ In its multiple submissions to this Office, MTC has presented no evidence supporting the proposition that the four “replaced” individuals are, in fact, U.S. citizens—nor has it made the affirmative representation that such is the case. Rather, MTC argues that the contracting officer had an obligation to question MTC regarding the basis for its substitutions and that, absent such inquiry, MTC has been properly silent.

¹⁴ There can be no reasonable dispute that the four remaining initially-proposed personnel did not offer all of the qualifications necessary to perform the multiple contract requirements or, in the alternative, that MTC’s proposal failed to comply with the solicitation requirement that the proposal “be definitive enough to provide the government a clear understanding of how the Offeror intends to staff this task order [with the four remaining personnel] to meet all the requirements.” RFQ at 23.

because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

FAR § 2.101.

MTC maintains that any time an offeror, through performance of another government contract, gains knowledge or information that is not generally available to other offerors, that offeror has an OCI and must be excluded from the competition. In our view, MTC overstates the requirements of the FAR in this area.

It is well-settled that an offeror may possess unique information, advantages and capabilities due to its prior experience under a government contract—either as an incumbent contractor or otherwise; further, the government is not necessarily required to equalize competition to compensate for such an advantage, unless there is evidence of preferential treatment or other improper action. See FAR § 9.505-2(a)(3); Crux Computer Corp., B-234143, May 3, 1989, 89-1 CPD ¶ 422 at 5. The existence of an advantage, in and of itself, does not constitute preferential treatment by the agency, nor is such a normally-occurring advantage necessarily unfair. Crofton Diving Corp., B-289271, Jan. 30, 2002, 2002 CPD ¶ 32 at 6-7; Government Bus. Servs. Group, B-287052 et al., Mar. 27, 2001, 2001 CPD ¶ 58 at 10.

The responsibility for determining whether an OCI exists, and to what extent the firm should be excluded from the competition, rests with the contracting agency, SRS Techs., B-258170.3, Feb. 21, 1995, 95-1 CPD ¶ 95 at 8-9, and the FAR directs contracting officers to examine each situation individually and exercise “common sense, good judgment, and sound discretion” in determining whether significant conflicts exist. FAR § 9.505. The FAR and this Office's decisions mandate that, in meeting its obligation to identify OCIs, an agency must give thorough consideration to the interests and activities of an offeror that might create OCIs. See, e.g., Alion Sci. & Tech. Corp., B-297342, Jan. 9, 2006, 2006 CPD ¶ 1 at 8-13; Science Applications Int'l Corp., B-293601 et al., May 3, 2004, 2004 CPD ¶ 96 at 4-8. Where an agency has, in fact, given thorough, documented consideration to an offeror's activities and their potential to create OCIs, we will not substitute our judgment for the agency's conclusions drawn from such a comprehensive review, provided the conclusions are otherwise rational and reasonable. See, e.g., Business Consulting Assocs., B-299758.2, Aug. 1, 2007, 2007 CPD ¶ 134 at 9-10; Overlook Sys. Techs., Inc., B-298099.4, B-298099.5, Nov. 28, 2006, 2006 CPD ¶ 185 at 10-18; Alion Sci. & Tech. Corp., B-297022.4, B-297022.5, Sept. 26, 2006, 2006 CPD ¶ 146 at 5-8.

Here, as documented extensively in the agency record, the agency gave thorough and comprehensive consideration to the prior activities of Denysys and its subcontractors, as well as MTC and its subcontractors, in order to assess whether

those activities created OCIs. Specifically, the contracting officer performed an analysis of the work that would be required under the solicitation at issue—that is, operational sustainment of the TEWLS system. AR, Tab 6, 26. The contracting officer then turned to documenting an extensive review regarding the activities previously performed by Denysys and its subcontractors, and MTC and its subcontractors, under prior contracts. Id. In this regard, the contracting officer noted that the TEWLS system is comprised of software owned by SAP AG and that, in performing its prior contracts, neither Denysys nor its proposed subcontractors have been materially involved in development or customizing the TEWLS system, since that function is performed by SAP itself; that Denysys and its subcontractors have not had a role in developing the requirements for the solicitation at issue; that neither Denysys nor its subcontractors have had access to any underlying software code configuration for TEWLS; that neither Denysys nor its subcontractors provided technical direction for TEWLS; and that neither Denysys or its subcontractors have been involved in any discussions where contract sensitive information has been discussed. AR, Tabs 6, 26.

Additionally, the contracting officer found that MTC has had more access to TEWLS-related information, pursuant to MTC's prior contract for sustainment of the URL project,¹⁵ than Denysys and its subcontractors. AR, Tab 26. Based on the agency's review of the offerors' prior activities, the contracting officer concluded that Denysys did not have an unfair competitive advantage in this procurement.

We have reviewed the entire record, including documentation of the contracting officer's review and analysis of the offerors' prior activities, and conclude that the agency's review was thorough and comprehensive; in this regard, MTC has not identified any material flaw in the agency's review. Further, we find no basis to question the agency's conclusions drawn from its review. Finally, we view MTC's protest to be based on an interpretation of the law which would, in effect, exclude virtually any government contractor (including MTC in this procurement) from

¹⁵ As noted above, the solicitation states that the TEWLS system is being developed as a combination of Army projects, specifically including the project referred to as "USAMMA Revolution in Logistics (URL)"; that the URL information system is the Army's medical logistics modernization and transformation initiative that implements COTS software from SAP; and that TEWLS will include the "URL legacy system functionality." RFQ at 8-9.

competing for procurements that in any way relate to the contractor's prior contract performance. FAR subpart 9.5 does not establish such a sweeping exclusionary rule.

The protest is denied.

Gary L. Kepplinger
General Counsel