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Decision

Matter of: Superlative Technologies, Inc.

File: B-310489; B-310489.2

Date: January 4, 2008

Kenneth D. Brody, Esq., and Thomas K. David, Esq., David, Brody & Dondershine, LLP, for the protester.

Rafael A. Madan, Esq., and John L. Pensinger, Esq., Department of Justice, 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

Agency did not have a reasonable basis for canceling solicitation where agency states that cancellation was necessitated by the agency's disclosure of source selection information, which the agency believed gave an "unfair advantage" to at least one offeror, and where the agency subsequently awarded a sole-source contract to a contracting team that included the same contractor to whom the source selection information was disclosed.

DECISION

Superlative Technologies, Inc. (SuperTec) protests the Department of Justice (DOJ), Office of Justice Programs' (OJP) cancellation of request for quotations (RFQ) No. 2007Q-025 for services to support the information security programs of OJP's Office of the Chief Information Officer (OCIO),¹ and the agency's subsequent sole-source acquisition of those services from a team comprised of Technical Management Resources, Inc. (TMR) and ManTech International Corporation (ManTech).

We sustain the protest.

¹ OJP is the primary grant-making bureau of the Department of Justice, and the OCIO is responsible for providing information security protection for OJP information.

BACKGROUND

On June 21, 2007, OJP issued RFQ No. 2007Q-025², “seek[ing] contractors to provide support for the OCIO Information Technology Security Division (ITSD),”³ and stating that “award will be made under the GSA [General Services Administration] Information Technology Contract Schedule 70.”⁴ RFQ 2007Q-025, at 1. The solicitation contemplated award of a contract for a 12-month base period, with four 12-month option periods, and a total estimated value of \$13.5 million. The solicitation provided for award based on the proposal “most advantageous to OJP,” and established various technical and cost/price evaluation factors, stating that “technical merit is more important than cost or price.” *Id.* at A-3.

On July 12, proposals were submitted by three offerors, including SuperTec and ManTech.⁵ Thereafter, the agency determined that, although ManTech’s proposal “came the closest” to meeting the solicitation requirements, none of the initial proposals met all of the solicitation requirements, and that discussions were necessary. Contracting Officer’s Statement, Nov. 5, 2007, at 2.

² Although the solicitation identified itself as an “RFQ,” the term “proposal,” as opposed to “quotation,” appears repeatedly throughout both the solicitation and the agency’s procurement record. As discussed below, the solicitation contemplated an evaluation and source selection scheme similar to those used in negotiated procurements. For the sake of consistency, our decision adopts the terminology used by the solicitation and the agency record.

³ Within OCIO, ITSD is responsible for “building and maintaining the OJP Security Program Framework, Certification and Accreditation of systems, maintaining an acceptable risk posture, and providing vulnerability management, monitoring, incident response, contingency planning, and security engineering services.” Agency Report (AR), Tab 1, RFQ 2007Q-025, at 1.

⁴ SuperTec is the incumbent contractor, and has been performing the requirements at issue under its GSA 8(a) STARS (streamlined technology acquisition resources services) GWAC (government-wide acquisition contract). Section 8(a) of the Small Business Act authorizes the Small Business Administration to enter into contracts with government agencies and to arrange for performance of the contracts by awarding subcontracts to socially and economically disadvantaged small businesses. 15 U.S.C. § 637(a) (2000). The 8(a) STARS GWAC is a set-aside contract for small disadvantaged businesses under which directed-source (that is, non-competed) task orders valued at less than \$3.5 million may be issued.

⁵ The proposal submitted by the third offeror is not relevant to disposition of this protest, and is not further discussed.

On July 23, the agency opened discussions with the offerors, identifying various aspects of their proposals that required revision. Each offeror was provided with the agency's evaluation documents related to its proposal; these documents identified various technical strengths and weaknesses. Id.

On July 24, the ITSD director, who was also the contracting officer's technical representative (COTR) and had been involved in developing the statement of work (SOW) for this solicitation, sent an email to the contracting officer and the deputy chief information officer stating that she (the COTR) should be "recused from further proceedings." AR, Tab F. The email revealed that, prior to submission of proposals, the COTR had "consulted with ManTech and [the third offeror]" regarding "requirements, pricing and labor categories," and that her communications "may have provided an unfair advantage to ManTech and [the third offeror] because they had an idea what the labor categories might be in advance." Id. She concluded that she "needed to disclose what [she] had done in order to protect the reputation of OJP as well as [her own] reputation as Director of ITSD." Id.⁶

⁶ The email states:

I am the Director of ITSD for the office of the OCIO. I am handling my first big procurement and felt that I had enough on the job training to see my way through the process. Because this is my first big contract, I have had to rely on information from other staff, contractors and my own skill set of knowing what was needed to get the job done for OJP. I am taking the COTR certification course and today is day two. I am learning many things in the class, which indicated to me that I have made mistakes.

I was told that I could discuss the procurement before it was let. When figuring out requirements, pricing and labor categories, I consulted with Man Tech and [the third offeror]. Because our labor categories were so restricted and every one failed, but Man Tech came close, I felt that I may have provided an unfair advantage to ManTech and [the third offeror] because they had an idea what the labor categories might be in advance. As I was listening in class today, I also learned that a protest could happen if the contract was too restrictive. After learning there are laws with civil penalties associated with them for disclosure that provides unfair advantage, I felt that I needed to disclose what I had done in order to protect the reputation of the OJP as well as my reputation as Director of ITSD. . . . I feel that it is in the best interest of the government and OJP if I am recused from further proceedings and to start the procurement over to make sure that the playing field is level for all parties.

AR, Tab F.

Thereafter, the contracting officer cancelled the solicitation, summarizing the basis for cancellation as follows:

Prior to receipt of revised proposals, [I] learned of a potential procurement integrity issue that occurred during market research activities. The COTR, an OCIO employee, engaged in activity that appeared to raise concerns about the integrity of the pending procurement because of the disclosure of information about pricing and labor categories to the offerors.⁷ Upon further research and consultation with the Office of the General Counsel, [I] cancelled the solicitation due to the tainted procurement.

Contracting Officer's Statement, Nov. 5, 2007, at 2.⁸

⁷ The record does not identify with any specificity the information "about pricing and labor categories" that the COTR disclosed, nor when disclosure occurred, or to whom. Agency counsel suggests that the COTR provided information to all of the offerors. Agency Legal Memorandum, Nov. 29, 2007, at 3. However, the COTR's email states that ManTech and the third offeror were potentially recipients of an "unfair advantage," which does not support counsel's suggestion, and, instead, implies an advantage over a firm that did not receive the information. AR, Tab F.

⁸ Agency counsel characterizes the situation as an "organizational conflict of interest," and also acknowledges that cancellation was intended to avoid the scrutiny of a bid protest, stating:

The COTR was new to the position and disclosed information about proposed staffing, pricing, and labor categories to the offerors. After negotiations concluded, prior to the receipt of revised proposals, the CO learn[ed] of this potential organizational conflict of interest (OCI) issue. . . . Upon further research and consultation with the OGC, the contracting officer cancelled the solicitation due to the tainted procurement.

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Also, this cancellation was a prudent course of action under the circumstances as . . . the agency was concerned about a possible bid protest (on the basis of the OCI). . . .

Legal Memorandum, Nov. 5, 2007, at 3, 5.

On July 25, the contracting officer wrote to SuperTec, stating:

OJP has determined it is in the best interests of the Government to cancel this procurement. Therefore, RFQ 2007Q-025 is hereby canceled effective immediately.

OJP intends to issue a new RFQ for the OCIO ISSS [information security support services] requirement very soon. When it is available, OJP will send a copy of the forthcoming RFQ to your company.

AR, Tab 2.

In August 2007, the agency states that it “conducted additional market research in order to identify other schedules and procurement vehicles.” Contracting Officer’s Statement, Nov. 5, 2007, at 2. In this regard, the record contains an email from the COTR to the contracting officer in which, under the heading of “Contract Vehicles,” the COTR lists various existing contracts—all of which are ManTech contracts.⁹ AR, Tab O.

On August 20, the agency states that it “met with [TMR]. . . to discuss their interest in [the] pending requirement and later forwarded this vendor the formal RFQ.”¹⁰ Contracting Officer’s Statement, Nov. 5, 2007, at 2. On August 24, the agency issued RFQ No. 2007Q-045, which contained a SOW virtually identical to the SOW contained in the cancelled solicitation.¹¹ AR, Tab 1; AR, Tab 9. However, RFQ No. 20007Q-45 contemplated only one 12-month performance period, with an estimated procurement value of \$2.7 million.¹² The new solicitation provided that, “pending an

⁹ The COTR’s activities in identifying ManTech contracts were performed notwithstanding her previous statement that she should be “recused from further proceedings.” AR, Tab F.

¹⁰ TMR is a small business 8(a) contractor who holds a GSA 8(a) STARS contract; as discussed below, TMR subsequently teamed with ManTech to perform the requirements at issue. The agency has not produced any documents regarding communications leading up to that meeting, the substance of that meeting, or the attendees.

¹¹ The agency agrees that “[t]he requirements remained virtually the same.” Agency Legal Memorandum, Nov. 5, 2007, at 7.

¹² The agency states: “The Government estimate for the Group IT 70 procurement [RFQ No. 2007Q-025] was \$13.5 million. Based on a five-year award, this figure is an average of \$2.7 million per year. For the 8(a) STARS GWAC [RFQ No. 2007Q-045], the CO used this [\$2.7 million] figure as the Government estimate.” Agency Legal Memorandum, Nov. 5, 2007, at 3.

acceptable proposal,” the agency anticipated a sole-source award to TMR pursuant to its GSA 8(a) STARS GWAC, stating: “Since the estimated value of this award will not exceed the 8(a) STARS competitive threshold of \$3.5 million for directed 8(a) awards, the resultant award will be issued to your company on a sole source basis.” AR, Tab 9, at 1.

On September 4, TMR submitted a proposal, offering to use ManTech as its primary subcontractor. The agency expressly acknowledges that TMR “subcontracted with ManTech to develop [the September 4] proposal.” Contracting Officer’s Statement, Nov. 5, 2007, at 2-3. Much of the ManTech-developed September 4 proposal is virtually identical to the July 12 proposal ManTech submitted in response to the cancelled solicitation. AR, Tab B, Mantech Proposal (July 12, 2007); AR, Tab D, TMR-ManTech Proposal (Sept. 4, 2007).¹³ The proposal was evaluated as “technically exceptional under every evaluation factor.”¹⁴ AR, Tab 3, Memo from COTR to Chief Information Officer, at 6.

On September 19, in response to a request from SuperTec regarding the status of the procurement, the agency advised SuperTec that the contract “will be a directed source under the \$3.5 M[illion] threshold.” Protest Exh. B. On September 28, SuperTec filed this protest.¹⁵

¹³ References to ManTech in the earlier proposal are replaced with references to the TMR-ManTech team, and it appears that some of the personnel initially proposed as ManTech employees are now proposed as either TMR employees or as “other direct costs” of TMR. AR, Tab B; AR, Tab D.

¹⁴ Again, this evaluation appears to have been performed by the COTR—despite the fact that she had previously stated that she should be “recused from further proceedings.” AR, Tab F.

¹⁵ The agency initially argued that SuperTec’s protest was not timely filed, because SuperTec was notified by a September 14 email that the agency had decided to “make award to another vendor,” but did not file its protest until September 28, more than 10 days thereafter. The agency’s assertion regarding timeliness is without merit. The agency did not advise SuperTec that it intended to make a sole-source award for the cancelled requirements until September 19. Further, SuperTec did not learn of the agency’s basis for canceling the prior procurement, or the identity of the contracting team to which the sole-source award was made, until after its September 28 protest was filed. On this record, we deny the agency’s request that the protest be dismissed.

DISCUSSION

SuperTec protests, among other things, that the agency's cancellation of RFQ No. 2007Q-025 was merely a pretext to avoid conducting a competitive procurement and resolving a potential bid protest. Because we find, based on the specific facts presented, that the cancellation was improper, we sustain the protest on this basis.

We recognize that contracting agencies generally enjoy broad discretion in determining whether to cancel a solicitation, and need only have a reasonable basis for doing so. See, e.g., Surgi-Textile, B-289370, Feb. 7, 2002, 2002 CPD ¶ 38 at 2; Encore Management, Inc., B-278903.2, Feb. 12, 1999, 99-1 CPD ¶ 33. In this regard, a contracting agency's determination that the integrity of a procurement has been compromised may form a reasonable basis for cancellation. See Federal Acquisition Regulation (FAR) § 3.104-7. Nonetheless, where a protester has alleged that an agency's rationale for cancellation is but a pretext, that is, the agency's actual motivation is to avoid awarding a contract on a competitive basis or to avoid resolving a protest, we will closely examine the reasonableness of the agency's actions in canceling the acquisition. Gonzales-McCaulley Inv. Group, Inc., B-299936.2, Nov. 5, 2007, 2007 CPD ¶ 192 at 5; SMF Sys. Tech. Corp., B-292419.3, Nov. 26, 2003, 2003 CPD ¶ 203 at 4-6; Miller, Davis, Marter & Oper, P.C., B-242933, B-242933.2, Aug. 8, 1991, 91-2 CPD ¶ 176 at 4. Further, in considering a protest raising that concern, we view an agency's discretion, though broad, as not unfettered. In that regard, the overarching guidance of the FAR has direct relevance:

Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships.

FAR § 3.101-1.

Based on the record here, we conclude that the agency did not have a reasonable basis for canceling the RFQ. Specifically, as explained above, the COTR disclosed information to ManTech that she believed may have provided ManTech with an "unfair advantage." Thereafter, the agency cancelled the procurement citing concerns about "the integrity of the pending procurement," "potential organizational conflicts of interest," and "a possible bid protest"—but then awarded a sole-source contract for the canceled requirements to a contracting team that included ManTech. Further, the sole-source award was based on a ManTech-developed proposal that was substantially similar to the earlier ManTech proposal for which the COTR suggested ManTech had obtained an "unfair advantage."

Nothing in the record indicates that the agency gave any consideration to whether its contract award to the TMR/ManTech team complied with statutory or regulatory requirements regarding procurement integrity or OCIs.¹⁶ See, e.g., 41 U.S.C. § 423 (2000)¹⁷; Federal Acquisition Regulation (FAR) § 3.104¹⁸; FAR Subpart 9.5¹⁹. More importantly, in light of the integrity concerns expressed by the agency itself, the cancellation and subsequent sole-source award to the TMR/ManTech team did nothing to address, much less remedy, those concerns. In fact, the events, viewed as a whole, support the protester's allegation that the solicitation was cancelled to, in effect, avoid further review of the issues raised. On this record, the agency did not have a reasonable basis for canceling the solicitation.²⁰

The protest is sustained.

¹⁶ In responding to this protest, agency counsel appears to argue that the procurement integrity and OCI requirements are inapplicable to ManTech due to its status as a subcontractor. Legal Memorandum, Nov. 29, 2007, at 4. It is well settled that, where a subcontractor's knowledge or interests create an unfair competitive advantage, that advantage is generally imputed to the prime contractor. See, e.g., Ktech Corp., B-285330, Aug. 17, 2000, 2002 CPD ¶ 77 at 4-6. Here, where the award to TMR was specifically based on the ManTech-developed proposal, the agency's assertion that ManTech's status as a subcontractor somehow shields the procurement from scrutiny regarding procurement integrity or OCI issues is without merit.

¹⁷ The Office of Federal Procurement Policy Act prohibits a government official from knowingly disclosing contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates. 41 U.S.C. § 423(a).

¹⁸ Section 3.104 of the FAR contains various procurement integrity provisions, including section 3.104-7, which provides: "A contracting officer who receives or obtains information of a violation or potential violation of [procurement integrity provisions] must determine if the reported violation or possible violation has any impact on the pending award or selection of the contractor."

¹⁹ FAR Subpart 9.5 establishes responsibilities, general rules, and procedures for identifying, evaluating, and resolving organizational conflicts of interest.

²⁰ Supertec's protest raises several additional matters regarding the agency's contract award to the TMR/ManTec team, including TMR/ManTech's pricing of certain categories of labor as "other direct costs," and argues that the contract award is outside the scope of TMR's GSA contract. In light of our decision regarding cancellation of the procurement, we do not address these matters.

RECOMMENDATION

We recommend that the agency rescind the cancellation notice regarding RFQ No. 2007Q-025, and document its consideration of the procurement integrity and/or OCI issues presented by the COTR's disclosure of information, as contemplated by the procurement integrity provisions of the Office of Federal Procurement Policy Act, 41 U.S.C. § 423, and FAR § 3.104, and the OCI requirements of FAR Subpart 9.5. In this regard, the agency's actions should include, but not necessarily be limited to, determining what information was disclosed and to whom, whether ManTech or any other offeror should be disqualified from the competition, and/or whether a level playing field can be established by disclosing the information provided to ManTech to all offerors. Following that consideration, the agency should conduct a competitive procurement for the requirements under the original RFQ, if otherwise appropriate. We also recommend that SuperTec be reimbursed its costs of filing and pursuing its protest, including reasonable attorneys' fees. SuperTec should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the agency within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1) (2007).

Gary L. Kepplinger
General Counsel