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Decision

Matter of: FAS Support Services, LLC

File: B-402464; B-402464.2; B-402464.3

Date: April 21, 2010

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Thomas C. Papson, Esq., and Todd J. Canni, Esq., McKenna Long & Aldridge LLP, for Vinnell Brown & Root LLC, an intervenor.

Maj. Theodore T. Richard, and Larry M. Anderson, Esq., Department of the Air Force, for the agency.

Jonathan L. Kang, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Firm's challenge to an agency's refusal to reinstate the protester into an on-going competition after the lifting of the firm's suspension from contracting with the federal government is denied, where the record shows that the agency reasonably concluded that reinstatement would cause unacceptable delay to the procurement.

DECISION

FAS Support Services, LLC, of Dallas, Texas, challenges the award of a contract by the Department of the Air Force to Vinnell Brown & Root LLC (VBR), of Herndon, Virginia, under request for proposals (RFP) No. FA5613-08-R-5010 for base operation and maintenance services at facilities in Turkey and Spain. During the procurement, FAS was suspended from contracting with the federal government. Although this suspension was lifted prior to award, the agency declined to reinstate FAS into the on-going competition. FAS contends that the Air Force acted unreasonably in refusing to reinstate its proposal, and also challenges the agency's evaluation of VBR's proposal.

We deny the protest.

BACKGROUND

The RFP was issued on February 13, 2009, and sought proposals to provide base operation and maintenance services at six facilities in Turkey and Spain. The proposed contract consolidates two existing contracts for performance of agency requirements in Turkey and Spain, and also adds certain additional requirements. The solicitation anticipated award of a fixed-price contract with an approximately 10-month phase-in and base period, followed by 4 option years.

The RFP advised offerors that proposals would be evaluated on the basis of the following three factors: (1) price; (2) technical acceptability, which was evaluated on a pass-fail basis and had subfactors of phase-in and technical proposal; and (3) performance confidence, which considered the recency, relevance, and quality of offerors' past performance. RFP § M.3.0. The RFP stated that only proposals rated as technically acceptable would be considered for award. Id. § M.3.4. The RFP further stated that the agency would make award to the lowest-priced offeror whose technically-acceptable proposal received a performance confidence score of substantial confidence; if no offeror received a substantial confidence rating, the agency would make an "integrated assessment best value award decision" or conduct additional discussions. Id. § M.3.4.1.

The Air Force received proposals from two offerors, FAS and VBR. At the time it submitted its proposal, FAS was a joint venture between First Support Services, Inc. (FSSI) and Taos Industries, a subsidiary of Agility Defense & Government Services. FSSI owned [deleted] percent of the joint venture and served as its managing partner, while Taos/Agility owned [deleted] percent of the joint venture. VBR is a limited liability corporation whose members are Northrop Grumman Enterprise Management Services Corp. and Kellogg Brown & Root Services, Inc.

Proposals were evaluated by the agency's source selection evaluation team (SSET), which initially rated each offeror's proposal as follows:¹

	FAS	VBR
Technical Acceptability	Susceptible to being made acceptable	Susceptible to being made acceptable
Past Performance	Satisfactory Confidence	Satisfactory Confidence
Price	\$[deleted]	\$[deleted]

¹ Proposals could be rated under the technical acceptability factor as acceptable, susceptible to being made acceptable, or unacceptable, and under the past performance factor as substantial, satisfactory, limited, unknown, or no confidence. RFP §§ M.3.1, M.3.3.4.

AR, Tab 10b, Revised Initial SSET Briefing, at 18.

Following discussions, each offeror submitted a revised proposal, which the SSET rated as follows:

	FAS	VBR
Technical Acceptability	Acceptable	Acceptable
Past Performance	Substantial Confidence	Substantial Confidence
Price	\$[deleted]	\$[deleted]

AR, Tab 10c, Final Proposal Revision Briefing, at 31-32.

The agency conducted a second round of discussions with both offerors and requested revised proposals. FAS did not make any revisions to its proposal; VBR submitted revisions to its technical proposal, and lowered its price. The Air Force found VBR's revised proposal unacceptable under the phase-in subfactor, which resulted in the following revised ratings:

	FAS	VBR
Technical Acceptability	Acceptable	Unacceptable
Past Performance	Substantial Confidence	Substantial Confidence
Price	\$300,984,994	\$285,668,291

AR, Tab 10d, SSA Briefing, at 17.

On November 16, based on the above ratings, the SSET and contracting officer (CO) recommended to the source selection authority (SSA) that award be made to FAS as the only technically-acceptable offeror with a substantial confidence rating for past performance. CO Statement at 19.

Also on November 16, the Defense Logistics Agency (DLA) announced the suspension from contracting of a number of companies and their affiliates, including The Public Warehouse Company (PWC), PWC Logistics Services Co., Agility Defense & Government Services, Inc., and Taos Industries, Inc. AR, Tab 12a, DLA Suspension Notice, at 1. The suspensions were based on criminal indictments filed against PWC, and were extended to the other companies based on their affiliations with that contractor. *Id.* at 2. The companies were listed on the excluded parties list system (EPLS), which is maintained by the General Services Administration and lists all

contractors debarred, suspended, or proposed for debarment from federal contracting. See Federal Acquisition Regulation (FAR) § 9.404(a).

On November 17, as part of a pre-award survey, the CO became aware of the suspension of PWC, Agility and Taos, based on their listing on the EPLS. The CO states that she was concerned because Taos/Agility was one of the two FAS joint venture partners. CO Statement at 19. On November 27, DLA suspended FAS from contracting, based on Taos/Agility's participation the joint venture. AR, Tab 12e, EPLS Listing for FAS. On December 2, the Air Force advised FAS that, based on the company's suspension from contracting, its proposal was excluded from further consideration. AR, Tab 15, Notice of Exclusion, at 1.

On December 8, the Air Force conducted further discussions with VBR regarding the technically unacceptable areas in its proposal. VBR addressed the agency's concerns regarding its technical proposal, but did not revise its price. As a result of the discussions, the agency concluded that VBR's technical proposal was acceptable. CO Statement at 21.

On December 9, FAS informed the CO that DLA had lifted the firm's suspension, based on the company's statement that it would divest itself of Taos/Agility's ownership in the joint venture. On December 11, the CO issued a written determination stating that FAS would not be reinstated in the competition. In her determination, the CO noted that FAR § 9.504(d)(3) provides that a CO "may, but is not required to" consider an offeror's proposal if its suspension from contracting is lifted prior to award. The CO cited two primary bases for denying FAS's request: (1) reinstatement of FAS's proposal would cause unacceptable delay to the procurement because FAS would need to "substantially revise" its proposal to account for the removal of Taos/Agility as a joint venture partner, and the agency would need to conduct discussions and perform new evaluations; and (2) FAS did not have a reasonable chance for award, in light of VBR's lower price and the need for FAS to revise its proposal. AR, Tab 17, Reinstatement Decision, at 4-7.

On December 11, FAS filed an agency-level protest with the Air Force, challenging the agency's refusal to reinstate its proposal. The agency denied the protest on January 22, 2010. On the same date, the agency awarded the contract to VBR. This protest followed.

DISCUSSION

FAS argues that the Air Force unreasonably refused to reinstate its proposal into the competition following the lifting of its suspension from contracting. The protester also argues that the agency unreasonably evaluated VBR's proposal. As discussed below, we find that the Air Force reasonably exercised its discretion to not reinstate FAS's proposal. Because we conclude that FAS was reasonably excluded from the

competition, FAS is not an interested party to challenge the Air Force's evaluation of VBR's proposal.²

Agency Denial of Reinstatement Request

The FAR prohibits an agency from awarding a contract to a debarred or suspended contractor. FAR § 9.405. The FAR also provides, however, that “[i]f the period of ineligibility expires or is terminated prior to award, the contracting officer may, but is not required to, consider” an offeror’s proposal. FAR § 9.405(d)(3). The FAR clearly commits the decision whether to reinstate an offeror into a competition following the lifting of a suspension to the discretion of a CO. See South Texas Turbine Supply, B-272163, Sept. 5, 1996, 96-2 CPD ¶ 105 at 3.

As a preliminary matter, FAS makes extensive arguments that its suspension from contracting was improper, and that the agency abused its discretion by improperly relying on that suspension in concluding that reinstatement of FAS’s proposal into the competition was not warranted. In its report on the protest, the Air Force argues that DLA properly concluded that, under the facts of PWC’s suspension, FAS’s suspension was proper. Agency Legal Memo at 9-10. We need not resolve whether FAS’s suspension by DLA was improper. As our Office has held, suspension and debarment of a contractor is a matter of agency contract administration that we do not review.³ Shinwha Elec., B-291064 et al., Sept. 3, 2002, 2002 CPD ¶ 154 at 4.

As discussed above, the Air Force’s refusal to reinstate FAS’s proposal into the competition was based on the CO’s concerns regarding the delay to the procurement, and the CO’s view that FAS’s proposal did not have a likely chance for award. AR, Tab 17, Reinstatement Decision, at 4-7. We think that the agency’s

² The Air Force requested that our Office provide “outcome prediction” alternative dispute resolution regarding the merits of the protest. After the protester and intervenor submitted their comments on the AR, the GAO attorney assigned to the protest conducted outcome prediction and advised that, in his view, the protest would likely be denied. The protester subsequently advised that it would not withdraw its protest, and requested that our Office issue a decision.

³ The protester contends that our Office once reviewed agency debarment and suspension decisions to “to ensure that the agency has not acted arbitrarily to avoid making an award to an offeror otherwise entitled to award, and also to ensure that minimum standards of due process have been met.” SDA, Inc., B-253355 et al., Aug. 24, 1993, 93-2 CPD ¶ 132 at 4. As we advised in Shinwha Elec., however, “our Office will no longer review, even under limited standards, protests that an agency improperly suspended or debarred a contractor from receiving government contracts.” Shinwha Elec., *supra*, at 5. For this reason, we will examine only whether the CO’s actions in responding to DLA’s lifting of the suspension were reasonable.

concern regarding delay to the procurement was reasonable, and in turn, provided a reasonable basis for declining to reinstate FAS's proposal into the competition.⁴

First, the CO concluded that the removal of Taos/Agility as a joint venture partner would require the agency to conduct a new evaluation of FAS's past performance because FAS itself had no past performance, and instead relied on the past performance of its two joint venture partners. AR, Tab 17, Reinstatement Decision, at 5. FAS's proposal cited four past performance examples: (1) the incumbent contract for the agency's maintenance requirements in Spain, which was performed by a different joint venture between FSSI and Taos/Agility; (2) a base operations contract at Diago Garcia, performed by a joint venture where FSSI was the managing partner; (3) a base operations contract in Guam where FSSI was a joint venture partner; and (4) a warehouse design/build and management contract in Kuwait, which was performed by Taos/Agility. The CO found that the Kuwait contract was actually performed by Taos/Agility and thus was not relevant to the agency's review of past performance for FAS. Id. at 5. With regard to the other contracts--particularly the FSSI and Taos/Agility joint venture for the Spain maintenance contract--the CO stated that FAS's past performance would need to be reconsidered in light of the fact that FSSI would be performing the contract entirely on its own. Id.

Next, with regard to the technical acceptability factor, CO concluded that the agency would need to conduct a new evaluation to determine the extent to which FAS's technical proposal relied on the resources of Taos/Agility. Id. at 5. The CO also concluded that the agency would need to reopen discussions to allow FAS to revise its technical approach to account for the removal of the suspended partner. Id. The record shows that FAS's technical proposal discusses in numerous areas the capabilities of both FSSI and Taos/Agility. For example, the protester's proposal states that the joint venture is "structured to capitalize on the collected capabilities and assets" of FAS and Taos/Agility. AR, Tab 9, FSS Initial Proposal, Vol. 3, at 26. With regard to management, the proposal states that "FAS is governed by a streamlined Board of Directors whose members are selected from [FSSI] and Agility . . . [which] will oversee the contract and represent the shareholders." Id. Additionally, FAS's proposal cites the experience of FSSI and Taos/Agility in performing the Spain contract's requirements, as evidence of the protester's technical capabilities, as follows: "A key discriminator for this contract is the composition of the phase-in team . . . [which is comprised of] core members of the [Spain contract] phase-in team that successfully transitioned the contract in 60 days." See, e.g., AR, Tab 9, FAS Initial Proposal, at ES6.

⁴ As discussed herein, given our view that the agency's concern regarding delay provided a reasonable, and independent basis to not reinstate FAS's proposal into the competition, we do not resolve whether the Air Force reasonably concluded that FAS would have had a reasonable chance for award, if discussions were held.

With respect to the amount of delay at issue, the CO concluded that reinstatement of FAS's proposal would require an estimated 6 months to address the anticipated additional discussions, proposal revisions, and evaluation. AR, Tab 17, Reinstatement Decision, at 6. The CO viewed this delay as unacceptable because it would require sole-source extensions of the two incumbent contracts. Id. In this regard, the CO was concerned that such an extension would present difficulties for the agency because the incumbent contract for the requirements in Spain was performed by a joint venture between FAS's sole remaining partner, FSSI, and Agility, one of the companies that had been suspended by DLA in November. Id. In contrast, the CO stated that VBR had addressed all of the technical acceptability concerns and the agency was ready to proceed with award. Id. at 3-4.

FAS does not dispute that it would need to revise its proposal to account for the removal of Taos/Agility from the joint venture. See Protester's Comments on AR at 10-11. Instead, the protester contends that it could have addressed all of the agency's concerns through discussions. See id. The protester further argues that the magnitude of required revisions would not be "substantial" because, in the protester's view, FSSI is capable of performing all of the contract requirements. See id.

We think that the agency's concerns regarding delay were reasonable. As discussed above, the record clearly shows that FAS's proposal was based on the combined experience and past performance of FSSI and Taos/Agility. We agree with the agency that, at a minimum, the protester would need to revise its proposal to address how FSSI would perform the contract on its own, and the agency would need to conduct a new evaluation of FSSI's technical acceptability and past performance. In sum, we think the agency reasonably declined to reinstate FAS's proposal into the competition.

Other challenges to award decision

FAS raises several additional challenges to the Air Force's evaluation of VBR's proposal and the agency's award decision. FAS argues that the agency abused its discretion in conducting discussions with VBR after the protester was suspended from contracting.⁵ The protester also argues that the agency treated the offerors

⁵ FAS argues that the agency abused its discretion in conducting discussions with VBR to make its proposal acceptable because the RFP stated that "[o]nly those proposals determined technically acceptable or reasonably susceptible to being made acceptable will be considered for further evaluation." RFP § M.3.1. Because VBR was rated technically unacceptable prior to FAS's exclusion from the competition, the protester argues that the agency's actions were inconsistent with the terms of the RFP. We note, however, that the RFP also explained that the agency could conduct discussions as follows: "The Government anticipates awarding

(continued...)

unequally by refusing to reopen the competition to allow FAS an opportunity for discussions. Finally, FAS argues that the agency unreasonably evaluated VBR's proposed price. Because, as discussed above, we conclude that the Air Force's rationale for declining to reinstate FAS's proposal was reasonable, the protester is not an interested party to raise any of these additional issues.⁶ Bid Protest Regulations, 4 C.F.R. § 21.0(a) (2009); Moreland Corp., B-291086, Oct. 8, 2002, 2002 CPD ¶ 197 at 4.

The protest is denied.

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Acting General Counsel

(...continued)

without discussions; however, any proposal rated as 'reasonably susceptible of being made acceptable' will be reviewed to determine if communications or discussions are warranted. The Government reserves the right to conduct discussions if deemed in its best interests." RFP § M.3.6. We do not agree with the protester's interpretation of this solicitation provision as restricting the agency's broad discretion regarding discussions. See Synectic Solutions, Inc., B-299086, Feb. 7, 2007, 2007 CPD ¶ 36 at 11. Moreover, we think that the solicitation advised offerors that the agency retained discretion to conduct discussions if it determined that they were in the "best interests" of the government.

⁶ In any event, we find no merit to FAS's challenges to the agency's evaluation of VBR's proposed price. The protester argues that the agency did not reasonably evaluate the basis for the awardee's reduction to its proposed price following the second round of discussions. The record shows, however, that the awardee explained that the reduction was based on a revised exchange rate calculation, and that the agency accepted this explanation. AR, Tab 11, VBR Discussions Evaluation Memorandum, Dec. 7, 2009, at 1. The protester also argues that the awardee may have reduced its price by shifting costs to certain contract line item numbers (CLINs) that were not evaluated by the agency. In this regard, the protester notes that the RFP stated that certain CLINs, regarding, for example, contingency costs, were not to be evaluated for award, but instead would be negotiated after award. See RFP § 4.2.3. In the protester's view the express terms of the RFP allowed offerors to "improperly game their offers . . . [b]y significantly reducing prices on evaluated CLINs and moving those costs to CLINs which were to be negotiated after award." First Supp. Protest at 16. We find this argument untimely because it is a challenge to the terms of the solicitation that was not raised prior to the time for receipt of proposals. 4 C.F.R. § 21.2(a)(1). Moreover, the protester does not identify any costs that may have been shifted from evaluated to non-evaluated CLINs, and thus merely speculates that VBR could have "gamed" its proposed price. Such speculation is not a valid basis of protest. See Kellogg Brown & Root Servs., Inc., B-298694.7, June 22, 2007, 2007 CPD ¶ 124 at n.6.