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Decision

Matter of: Piedmont Propulsion Systems, LLC

File: B-410026.2

Date: March 30, 2015

Darwin A. Hindman III, Esq., and Joshua Mullen, Esq., Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, for the protester.

Thomas P. Humphry, Esq., John E. McCarthy Jr., Esq., James G. Peyster, Esq., and Robert J. Sneckenberg, Esq., Crowell & Moring LLP, for UTC Aerospace Systems, an intervenor.

Kevin J. Malloy, Esq., Department of the Navy, Naval Supply Systems Command, 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 that agency is improperly acquiring services on a sole-source basis is dismissed, where record shows that protester is not an interested party because it is not an approved source to provide the services, and, because of an ongoing private dispute with another concern regarding the protester's right to use certain technical data, protester is unable to submit a timely source approval request that the agency could act upon.

DECISION

Piedmont Propulsion Systems, LLC, of Winston Salem, North Carolina, protests the announcement of a proposed award of a sole-source contract to UTC Aerospace Systems, of Arlington, Virginia, by the Department of the Navy for depot-level repair services to be performed on the NP2000 propeller system. Piedmont maintains that the agency's proposed sole-source announcement is improper because it is capable of performing the work.

We dismiss the protest.

BACKGROUND

The NP2000 propeller system is deployed on several aircraft owned by the agency and is manufactured by UTC. The system is a military, flight-critical system, and requires source approval from the agency prior to a firm being eligible to perform repair and maintenance activities on the system.

In July 2014, Piedmont protested the agency's pre-solicitation announcement of a proposed sole-source award of a contract to UTC for repair of the agency's NP2000 propeller systems, arguing that it had the capability to perform the requirement. In response to Piedmont's July protest, the agency withdrew its announcement, and provided Piedmont with the agency's source approval request brochure in an effort to assist Piedmont in becoming an approved source for the work. Agency Report (AR), exh. 4, E-mail from the Navy to Piedmont, July 8, 2014. Based on the agency's actions, Piedmont withdrew its protest.

Thereafter, the record shows that the acquiring activity contacted the cognizant command responsible for logistics and engineering support of the NP2000 propeller system to determine whether the Navy owned or possessed the technical data that would be necessary to perform the repairs in question. AR, exh. 5, E-mail Correspondence Between the Naval Supply Command (NAVSUP) and the Naval Air Command (NAVAIR), August, 2014. NAVSUP was advised by NAVAIR that the agency did not possess any technical data associated with the NP2000 propeller system; that the technical data was owned or controlled by UTC, the original equipment manufacturer; that the Navy had not contracted to obtain any data rights in UTC's repair manuals; and that, without those manuals, a contractor could not perform qualified repairs to the propeller system. Id.

The agency advised Piedmont that it did not possess the necessary technical data or data rights that would be required to perform the necessary repairs on the NP2000 propeller system. AR, exh. 6, Agency E-mail to the Protester, Oct. 29, 2014. In that same e-mail, the agency advised Piedmont that UTC owned the technical data rights to the necessary repair manuals. Id. In addition, the agency briefly discussed the possibility of affording the protester a site visit to examine an NP2000 propeller system assembly, but advised that such a possibility was unlikely in view of the fact that qualifying Piedmont as an approved source likely could not occur given the lack of essential UTC-proprietary technical data. Id. Finally, the agency advised Piedmont of its intention to once again synopsise its requirements and proceed with an acquisition for the required services. Id.

In an e-mail responding to the agency, Piedmont asserted that it had unspecified additional information that rendered the agency's position "obsolete." AR, exh. 7, Piedmont E-mail to the Navy, Nov. 5, 2014. In that same e-mail, Piedmont requested that the Navy meet with the firm. In response, the agency advised Piedmont that it would welcome an opportunity to examine any information in

Piedmont's possession that the agency may have overlooked in its research. AR, exh. 8, E-mail from the Navy to Piedmont, Nov. 5, 2014. The agency requested that Piedmont furnish the information it had to the agency ahead of any possible meeting, so that the Navy could identify and schedule the appropriate staff for any prospective meeting. Id.

In response to the agency's e-mail, Piedmont represented to the agency that it had purchased a technical data "subscription" from UTC, and that it therefore was, in fact, capable of performing the necessary repairs. AR, exh. 9, E-mail from Piedmont to the Navy, Nov. 10, 2014. Piedmont did not furnish or offer to furnish to the Navy the technical data in its possession in preparation for a prospective meeting, as the agency had requested.

The Navy responded to Piedmont, stating that the firm's apparent possession of the manuals was a significant change that could well make a competitive acquisition possible. The agency, however, requested that Piedmont clarify the circumstances of its acquisition of the manuals, specifically asking whether they had been sold to Piedmont with any restrictions as to Piedmont's use of the information. AR, exh. 10, E-mail from the Navy to Piedmont, Nov. 19, 2014. Piedmont responded, representing that it had purchased the manuals under "normal commercial terms" and that the firm had not signed any restriction concerning its use of the data. AR, exh. 11, E-mail from Piedmont to the Navy, Nov. 24, 2014.

In response to Piedmont's representations, the agency expressed some reservation about whether, in fact, the firm actually had obtained all of the technical data, as well as permission from UTC, that it would need to perform the requirement. AR, exh. 12, E-mail from the Navy to Piedmont, Nov. 24, 2014. The agency therefore requested that Piedmont provide it with a complete list of the manuals and data that the firm had purchased so that it could ask UTC about whether Piedmont's manuals were complete. Id.

There followed an exchange between the Navy and Piedmont, during which Piedmont did not provide either the manuals themselves or a list of the manuals allegedly purchased. Instead, Piedmont continued to insist on a meeting with the Navy, and stated that this would provide the agency an opportunity to "directly audit" Piedmont's capabilities and its technical library of NP2000 manuals. AR, exhs. 14, 15, E-mails Between the Navy and Piedmont, Nov. 26, 2014. Piedmont also questioned the Navy about why the agency thought it necessary to check with UTC about Piedmont's alleged access to UTC's proprietary technical data. Id. Piedmont also stated during this exchange:

Furthermore, Piedmont has made the strategic decision not to be [deleted].

AR, exh. 14, Piedmont E-mail to the Navy, Nov. 26, 2014.

At approximately the same time, the Navy queried UTC regarding its apparent sale of the repair manuals to Piedmont. UTC advised the Navy that it inadvertently had provided Piedmont with a single copy of selected (but not complete) repair manuals; that the manuals that had been provided to Piedmont were outdated manuals that were approximately 8-10 years old that had been prepared for internal use; that those manuals did not include all of the information that would be necessary to perform the repairs; and that Piedmont also did not possess the proprietary special tooling, test equipment or work instructions necessary to complete repairs to the NP2000 propeller system. AR, exh. 23, E-mail from UTC to the Navy, February 2, 2015.

Against this backdrop, the agency issued a notice of its intent to acquire the repair services on a sole-source basis from UTC on December 22, 2014. That notice advised interested concerns that they would be required to submit, among other things, all of the information detailed in the agency's source approval request brochure by January 8, 2015. Piedmont filed a protest challenging the agency's notice of a proposed sole-source to UTC on December 31, 2014.

PROTEST

In its initial protest, Piedmont argued that it was improper for the agency to acquire the repair services on a sole-source basis because it had the necessary technical data to perform the repairs. Piedmont claimed that it had purchased a "subscription" to the necessary repair manuals from UTC, that its technical data for the NP2000 propeller system was complete and up to date, and that the agency therefore was acting improperly in declining to acquire its needs on a competitive basis.

UTC intervened in the protest. During the course of developing the record, it became apparent to our Office that there was disagreement between UTC and Piedmont, both as to the question of whether or not Piedmont properly had acquired whatever repair manuals it had in its possession, and also whether the manuals included all of the technical data that would be necessary for Piedmont to successfully perform the required repairs.

On the one hand, UTC submitted an affidavit from its actuator and propeller systems general manager (APSGM) stating that the manuals obtained by Piedmont were not intended for sale, and had been given to the firm by mistake. UTC Comments, Feb. 12, 2015, exh. B, Affidavit of UTC's APSGM, at 7. In addition, he represented that UTC currently is demanding the return of its repair manuals and has warned Piedmont against using UTC's proprietary data. Id. In that same affidavit, UTC's general manager also stated that Piedmont obtained only six of the repair manuals, and that those six manuals cover only nine of the 13 line replaceable units that comprise the NP2000 propeller assembly. Id. at 3. He also

stated that the information provided to Piedmont was out-of-date by several years. Id. at 2.

In contrast, Piedmont submitted an affidavit from its senior vice president representing that UTC willingly had engaged in a regular commercial sale of its repair manuals until the Navy provided UTC with an “inappropriate tip” about Piedmont’s decision to compete for the requirement. Affidavit of Piedmont’s Senior Vice President, at 4. He also stated that Piedmont has all of the information and capabilities necessary to perform the required repairs. Id. at 5-6. In this latter connection, Piedmont submitted another affidavit from its chief inspector stating that he spoke with an individual at UTC who verbally affirmed that Piedmont had complete, up-to-date technical data for the NP2000 propeller system. Letter of Protest, exh. 12, Piedmont’s Chief Inspector’s Affidavit, at 1-2.

Because of this apparent disagreement between the parties’ understanding about Piedmont’s ability to possess or use UTC’s repair manuals, our Office specifically asked the parties to explain the current state of affairs regarding Piedmont’s possession of the UTC repair manuals. In response to our inquiry, Piedmont represented that it has placed the UTC repair manuals in “quarantine” in order to ensure that the data is not used to perform any maintenance action pending resolution of its dispute with UTC. Piedmont Response to GAO Questions, Mar. 10, 2015, at 2. Piedmont also concedes that its inability to use the repair manuals would, at a minimum, delay its ability to submit a source approval request package to the Navy. Id. at 3.

For its part, UTC states that Piedmont’s possession of the manuals is a matter of an ongoing dispute between UTC and Piedmont. UTC Response to GAO Questions at 1-2. UTC further states that, regardless of the outcome of that dispute, UTC has no intention of selling or otherwise making available to Piedmont the more recent technical data (that is, technical data more recent than the information in Piedmont’s possession) that Piedmont would need to perform the repairs. Id. at 2-3. UTC further states that the verbal confirmation provided to Piedmont’s chief inspector regarding whether or not the information possessed by Piedmont was current, was provided by a low-level employee of a third-party contractor used by UTC, and that there would be no way for that individual to know whether or not the information provided to Piedmont was current. Supplemental Affidavit of UTC’s APSGM, at 2-3.

DISCUSSION

Piedmont’s central allegation is that the agency is acting improperly by soliciting its requirement on a sole-source basis, despite the fact that Piedmont is in a position to meet the agency’s requirement. We dismiss Piedmont’s protest because we conclude that the firm is not an interested party within the meaning of our Bid Protest Regulations. 4 C.F.R. § 21.0(a).

As an initial matter, we note that the apparent dispute between Piedmont and UTC regarding whether Piedmont properly may use UTC's repair manuals is a dispute between private parties that we will not consider, absent government involvement. Athena Sci's. Corp., B-409486, B-409486.2, May 14, 2014, 2014 CPD ¶ 154 at 9. Although Piedmont suggests that Navy personnel gave UTC an "inappropriate tip" about Piedmont's intention to compete for the requirement, there is no evidence that the transmission of UTC's repair manuals involved government personnel or improper agency action of any sort.

In addition, the record shows that the agency took the reasonable step of asking UTC about what information apparently had been provided to Piedmont by UTC. The agency's inquiry to UTC was in connection with its effort to determine whether there potentially was a second source that could be approved to meet its requirements. Especially in view of Piedmont's refusal to provide the agency with even a list of the repair manuals in its possession, it was entirely reasonable for the agency independently to pursue information from UTC --the owner of the intellectual property in question--about the technical data that UTC apparently had provided to Piedmont.

In view of the foregoing, we decline to adjudicate the disagreement between Piedmont and UTC regarding whether or not Piedmont properly obtained the repair manuals currently in its possession because there is no evidence of government involvement or participation in that dispute. Athena Sciences Corp., supra.

Leaving aside the dispute between Piedmont and UTC, the record clearly shows that, because of that dispute, Piedmont is not in a position to submit a source approval request to the agency. As Piedmont concedes, whatever repair information the firm does have in its possession currently is in "quarantine" while the parties resolve their dispute.

One of the central requirements of a source approval request is a certification on the part of the applicant that it possesses, and is legally entitled to use, whatever technical data may be required to furnish the goods or services for which the firm seeks source approval. In this regard, the agency's source approval request brochure requires the verbatim submission of the following, executed, certification with any source approval request:

CERTIFICATION

I hereby represent and certify that the technical data that (name of firm) intends to use or has used to manufacture (name of actual manufacturer, part number and nomenclature) under any resulting NAVICP contract, was obtained or developed in a legal manner and that (name of firm) has the right to use the data to repair (part number, nomenclature) for the U.S. Government. All applicable specifications

required to manufacture this item are in the possession of (name of firm).

NAVSUP Source Approval Request Brochure, Appendix C, Certification Form.

Because Piedmont is not in a position to make the certification quoted above, it cannot submit a source approval request at this time.¹ Since Piedmont is not an approved source for the repair work in question, and cannot submit a request for source approval, it follows that the firm is not an interested party to pursue its protest; even if Piedmont were correct that the agency improperly has issued its acquisition on a sole-source basis, the firm would not be eligible for award. Standard Bent Glass Corp., B-401212, June 23, 2009, 2009 CPD ¶ 143 at 5-6.

As a final matter, Piedmont suggests that it was the agency's actions in delaying or refusing to conduct a face-to-face meeting with it that was the central cause of its being unable to obtain source approval. However, as the above discussion demonstrates, it is Piedmont's ongoing dispute with UTC that underlies the firm's inability to seek and obtain source approval.

The protest is dismissed.

Susan A. Poling
General Counsel

¹ We point out that the agency's sole-source announcement required submission of a source approval request no later than January 8, 2015. At this stage, Piedmont has missed the deadline established for submission of a source approval request package.