Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

DOCUMENT FOR PUBLIC RELEASE
The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Bunzl Distribution California, LLC

File: B-412475.4

Date: October 21, 2016

Hal J. Perloff, Esq., Steven A. Neeley, Jr., Esq. and Michelle A. Caton, Esq., Husch Blackwell LLP, for the protester.
Lee Dougherty, Esq., and Katherine A. Straw, Esq., Montgomery Fazzone PLLC, for Southeastern Paper Group, the intervenor.
Nikki Musick, Esq., Defense Commissary Agency, for the agency.
Frank Maguire, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is denied where agency reasonably found protester nonresponsible due to its failure to include in its proposal required documentation demonstrating compliance with the Trade Agreements Act.

2. Protester is not an interested party to challenge the technical evaluation of its proposal when the agency properly finds it nonresponsible.

DECISION

Bunzl Distribution California, LLC, of Anaheim, California, protests the rejection of its proposal for clusters A, B, D, and J under request for proposals (RFP) No. HDEC05-15-R-0003, issued by the Defense Commissary Agency (DeCA) for miscellaneous operating supplies. The protester argues that the agency unreasonably found it to be nonresponsible.

We deny the protest.

BACKGROUND

DeCA issued the RFP for miscellaneous operating supplies and paper bags for the Continental United States (CONUS), Puerto Rico, Alaska, Hawaii, and Pacific Theater commissary stores on June 25, 2015. The RFP contemplated the award of

a requirements contract for each of nine geographical “clusters” of store locations for a base year and four option years, with fixed unit prices and fixed unit prices with economic price adjustment. RFP at 101-102. Award was to be made on a lowest-priced technically acceptable basis, considering price, technical acceptability, and past performance. RFP, Amendment 7, at 58.

The RFP incorporated by reference Defense Federal Acquisition Regulation Supplement (DFARS) clause 252.225-7021, “Trade Agreements,” RFP at 141, which implements provisions of the Trade Agreements Act (TAA), 19 U.S.C. §§ 2501-2582.[1] Further, in RFP Amendment No. 1, in response to a question inquiring whether product components must also meet the “country of origin” standard, the agency advised:

> In requesting “Country of Origin” on the Solicitation Pricing Guide, it is DeCA’s intention to determine whether or not supplies purchased under any ensuing contract will comply with DFARS 252.225-7021, “Trade Agreements—Basic.” The awardee has the obligation to comply with all terms and conditions of the contract, including DFARS 252.225-7021, which provides the answer to this question based on the source country.

RFP Amend. No. 1, at 000360.

DeCA received proposals from Bunzl, Southeastern Paper Group (SEPG), and a third offeror. See generally, Southeastern Paper Group--Costs, B-412475.3, May 25, 2016, 2016 CPD ¶ 150 at 2. Following the initial evaluations, discussions, and receipt of revised proposals, a second round of discussions was held and final proposals requested. Id. Based on SEPG’s concerns that other offerors’ prices were lower due to items being sourced from non-compliant countries, the contracting officer (CO) published RFP Amendment No. 6 on August 27, 2015, to incorporate a new pricing sheet, and to incorporate a statement that offerors were required to acknowledge concerning the TAA. Id. at 3. Following receipt of the final proposals, Bunzl and SEPG each provided information to the CO regarding possible lack of TAA compliance by the other. Id. After the CO received assurances from Bunzl and SEPG, she found both companies responsible. Id. The CO awarded contract HDEC05-16-D-0001 to Bunzl on November 9, 2015. Id. at 4.

Following a requested debrief, SEPG protested the award to Bunzl of clusters A, B, D, and J, alleging that the agency failed to “ensure ‘country of origin’ compliance

---

[1] The TAA clause requires offerors to provide only “U.S.-made, qualifying country, or designated country end products,” absent circumstances not relevant here. DFARS clause 252.225-7021(c); see generally Master Lock Co., LLC, B-309982.2, June 24, 2008, 2009 CPD ¶ 2 at 2.

beyond offerors filling in country of origin status on pricing sheets;" that Bunzl did not comply with DFARS clause 252.225-7021, as required by the RFP; and that the agency failed to "verify and validate product sourcing."[2] Id. at 4. On January 7, 2016, the agency took corrective action, including reopening discussions, modifying certain requirements, reviewing new pricing offers, and requesting letters of supply for all goods to be provided. GAO found that this action rendered the protest academic and dismissed it on that basis. Southeastern Paper Group, B-412475, B-412475.2, Jan. 12, 2016 (unpublished decision).[3]

The agency implemented the corrective action outlined above by amending the RFP on February 25, 2016, and opening a third round of discussions. Contracting Officer's Statement (COS) at 1. The following requirements were included in the amendment and discussion letter sent to each offeror:

> 1. Sign, date and submit a new copy of Attachment B "Trade Agreements Act Statement."
> 2. Submit an affirmative statement explaining that items provided will be in compliance with the TAA and the offeror is capable and will perform in compliance with the contract within 30 days of award.
> 3. Submit Letters of Supply for each item on the Solicitation Pricing Sheet. At a minimum, the letters shall contain the following information:
> DeCA Item Number.
> Full Specification (in text form from the Solicitation Pricing Sheet)
> Manufacturer Name
> Manufacturer Item Number
> Country of Manufacture

Id., citing Tab 5a, RFP Amend. No. 7. Offerors were also to submit signed copies of Amendment No. 7 and Amendment No. 8 (which was issued on March 16), and a new pricing sheet. Id. at 2.

On April 4, Bunzl requested a two-day extension of the proposal deadline. Id. Bunzl stated in its email requesting an extension that "Letters of Supply confirming TAA compliance has become excessively time consuming," and for four particular

---

[2] The protester explains that it remained the awardee for the other five clusters, which are not at issue in this protest.

[3] In Southeastern Paper Group--Costs, B-412475.3, supra, we denied SEPG's request that we recommend that the agency reimburse it the costs of filing and pursuing its protest, finding that the record did not show that the initial protest was clearly meritorious and the agency took prompt corrective action in response to a supplemental protest.

items Bunzl had “not found these items to be ‘Commercially Available’ in sufficient quantities from TAA compliant manufacturers.” Id. Bunzl asserted that it had “sources for all four items but these sources are not TAA compliant.” Id. The due date for submissions was extended to April 12 at 4:00 pm. Id.

Beginning on April 11, the protester attempted to email its revised proposal to DeCA. See generally id. at 3. Those emails are summarized as follows:

Date	Time	Sender/Recipient	Contents
April 11	11:33 p.m.	Bunzl to DeCA	A pricing sheet and a 3-page pdf file, containing signed Amendments #0007 and #0008, and a signed “Attachment B – Trade Agreements Act Statement.”
April 11	11:39 p.m.	Bunzl to DeCA	“first batch of letters of supply”
April 12	2:30 a.m.	Bunzl to DeCA	Revised pricing sheet along with a message to “discard our previous pricing sheets and refer to the attached submittal instead.”
April 12	3:53 p.m.	Bunzl to DeCA	“Attached are the remaining letters of compliance.” Included 2 pdf files that contained (1) 15 letters of supply and (2) one letter of supply.
April 12	4:31 p.m.	DeCA to Bunzl	“I only received one email. It contained 16 PDF pages of supply letters.”
April 12	7:16 p.m.	Bunzl to DeCA	“Wait, are you saying you also did not receive our pricing sheets, signed amendments and attachment B that I also sent last night?”
April 13	9:29 -9:35 p.m.	Bunzl to DeCA	Four emails representing the 4MB aborted email, broken up in to smaller file sizes.

Id.; AR Tabs 10-19a.

Thereafter, on April 13, DeCA and Bunzl exchanged several emails in order to verify the information sent by Bunzl and received by the agency. COS at 3. DeCA

confirmed the three emails received by the agency prior to the proposal deadline. Id. Further, Bunzl informed DeCA by phone that Bunzl had started sending the emails with the letters of supply the night of April 11th. DeCA informed Bunzl that no emails with letters of supply were received from Bunzl prior to April 12th at 3:53 p.m. Id. On April 13, 2016, between 9:29 and 9:35 p.m., Bunzl sent DeCA a series of four emails, each of which contained a separate PDF file containing letters of supply, and represented the 4MB file broken up into smaller file sizes. Id. The agency ultimately determined that receipt of Bunzl's April 11th, 11:39 p.m., email was "aborted by the system prior to it being in the possession of the government" and, accordingly, the CO concluded that it could not "be considered." AR, Tab 24 Source Selection Decision Document (SSDD) at 5. Nonetheless, the CO did in fact consider the information included in Bunzl's April 11, 11:33 p.m., email in her source selection decision.[4] The CO noted:

> Had the email been in the possession of the government at any time prior to the due date and time, the following would have been considered: A total of 8 documents were received from Bunzl: The correct pricing sheet (Change 5); Amendment 7, 8 and attachment B; six (6) PDF files containing various Letters of Supply.

SSDD at 5. The CO, however, found "significant issues with Bunzl's Submission," including that 25 items did not have letters of supply and that most of the letters of supply that were received from Bunzl "did not contain the DeCA Full Item Specification as required." Id. The CO concluded:

> If the email in question had been received prior to the due date and time, there are still many significant issues that would preclude Bunzl of California from being considered. Bunzl of California is found to be not responsible, and therefore is not eligible for award.

Id.; see COS at 4. In addition to finding Bunzl nonresponsible, the CO found the protester's proposal to be technically unacceptable. COS at 4-5.

After the final evaluation was conducted, it was determined that SEPG was the awardee and the contract was awarded on July 7, 2016. COS at 6, see AR Tab 32, Contract Award. Also on July 7, DeCA emailed post award notices to the two unsuccessful offerors, which were Bunzl and a third offeror also found nonresponsible. COS at 6, see AR Tab 33, Post Award Notice to Bunzl; SSDD at 7. Bunzl requested a debriefing on July 7 and received the debriefing on July 13. COS

---

[4] The CO explains that the agency reviewed the protester's "entire proposal including the emails received after the proposal deadline" pending her receipt of further information "regarding the timeline of the email receipts at the initial point of entry [into the] Government server." COS at 4.

at 6; see AR Tab 34 (Request for Debriefing); AR Tab 35, (Debriefing). This protest followed on July 15, 2016.

DISCUSSION

Bunzl challenges the CO's negative determination of its responsibility and her finding that its proposal was technically unacceptable.

As an initial matter, Bunzl asserts that the agency improperly deemed Bunzl's proposal late, despite its timely submission. Protest at 4, Comments at 1-2. Bunzl maintains that its April 11 proposal email "hit DeCA's server at 3:39 AM GMT [Greenwich Mean Time] that morning – more than 12 hours before the 4:00 PM EDT deadline," and therefore should have been accepted by the agency under the "Government Control" exception for late proposals. Id. at 5-6; see FAR clause 52.212-1(f)(2)(i)(B).

We decline to consider this argument because the record fails to establish that Bunzl suffered any prejudice as a result of its proposal being considered late. In this regard, it is clear from the above-cited excerpt that the CO considered all of Bunzl's emailed documents in her evaluation, including those included in the "aborted" April 11 email. SSDD at 5; COS at 4.[5] Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found. HP Enter. Servs., LLC, B-411205, B-411205.2, June 16, 2015, 2015 CPD ¶ 202 at 6; Booz Allen Hamilton Eng'g Servs., LLC, B-411065, May 1, 2015, 2015 CPD ¶ 138 at 10 n.16. Here, since the CO evaluated the documents included in Bunzl's April 11 email, despite finding that the email was untimely, Bunzl is without prejudice with regard to that finding.

As noted above, Bunzl argues that the CO unreasonably determined it to be nonresponsible. In making a negative responsibility determination, a contracting officer is vested with a wide degree of discretion and, of necessity, must rely upon his or her business judgment in exercising that discretion. Torres Int'l, LLC, B-404940, May 31, 2011, 2011 CPD ¶ 114 at 4. Although the determination must be factually supported and made in good faith, the ultimate decision appropriately is left to the agency, since it must bear the effects of any difficulties experienced in obtaining the required performance. For these reasons, we generally will not

[5] Even the documentation included in Bunzl's April 11, 2016 11:39 p.m. "aborted" email was ultimately considered by the CO when it was resubmitted, "broken up" into smaller files by Bunzl and successfully transmitted on April 13, 2016, between 9:29 and 9:35 p.m. SSDD at 5.

question a negative determination of responsibility unless the protester can demonstrate bad faith on the part of the agency or a lack of any reasonable basis for the determination. Colonial Press Int'l, Inc., B-403632, Oct. 18, 2010, 2010 CPD ¶ 247 at 2. An offeror's responsibility is to be evaluated based on any information received by the agency up to the time award is proposed to be made, Sygnetics, Inc., B-404535.5, Aug. 25, 2011, 2011 CPD ¶ 164 at 4, and our review is based on the information available to the contracting officer at the time the determination was made. Acquest Dev. LLC, B-287439, June 6, 2001, 2001 CPD ¶ 101 at 3.

Here, the CO concluded that, even if the April 11 email in question had been timely received, there were "still many significant issues that would preclude Bunzl from being considered." SSDD at 5. The CO pointed out that letters of supply were not submitted for 25 items and letters of supply for 7 items did not state a country of origin. COS at 5. Because the protester "failed to demonstrate that it had or would have the ability to comply with TAA sourcing requirements" for 32 of the 316 items to be supplied under the contract, the CO determined that Bunzl was not a responsible offeror. MOL at 7. We find no reason to conclude that this determination was not factually supported and made in good faith.

Bunzl argues that DeCA could have engaged in clarifications to remedy the missing information. Protest at 8; see also Comments at 9. We find this argument unpersuasive. Even to the extent that the CO could have elected to seek further information from Bunzl to address responsibility concerns, she was not required to do so. In this regard, we have previously held that while the CO may elect to open a dialogue with an offeror to address responsibility concerns, such a dialogue is not required where an agency has an otherwise reasonable basis for assessing the firm's responsibility. Rotech Healthcare, Inc., B-409020, B-409020.2, Jan. 10, 2014, 2014 CPD ¶ 28 at 6.

Bunzl also challenges the technical evaluation of its proposal. The protester contends that the agency "timely received from Bunzl all materials necessary to find Bunzl's proposal technically acceptable." Comments at 2.

We conclude that Bunzl is not an interested party to challenge the agency's evaluation of its technical proposal. In order for a protest to be considered by our Office, a protester must be an interested party, that is, an actual or prospective offeror whose direct economic interest would be affected by the award or failure to award a contract. 4 C.F.R. §§ 21.0(a)(1), 21.1(a); Cattlemen's Meat Co., B-296616, Aug. 30, 2005, 2005 CPD ¶ 167 at 2 n.1. A firm is not an interested party if it is ineligible to receive award under the protested solicitation, Acquest Dev. LLC, B-287439, supra, at 6. Here, Bunzl is ineligible for award because, as discussed above, the CO reasonably determined the firm to be nonresponsible. Bunzl therefore lacks the direct economic interest necessary to be an interested party to protest the evaluation of its technical proposal.

Finally, Bunzl argues that the agency applied different standards in evaluating Bunzl's and SEPG's letters of supply, and that if the agency had evaluated them on the same basis, SEPG's proposal would also have been found technically unacceptable. Comments at 6-9. The protester asserts that although the agency found Bunzl's proposal deficient based on "alleged deficiencies" and the "inadvertent omission of a small number of supply letters," the agency "overlooked numerous similar or more egregious deficiencies in SEPG's Letters of Supply." Id. at 6. The protester proffers several examples of deficiencies in SEPG's letters of supply. According to the protester, the "most glaring" example of the agency's double standard pertained to the agency's evaluation of SEPG's documentation for nitrile gloves, in which SEPG listed the country of origin as "USA" in the pricing sheet, but the supplier's letter of supply states that the country of origin is Korea, and the protester's investigation indicated the supplier actually sources the gloves from Pakistan. Id. at 7-8.

We find Bunzl's analysis here unpersuasive. Although Bunzl identifies several apparent errors in SEPG's submissions, the identified examples appear to be generally clerical, rather than substantive. In our view, the asserted deficiencies in SEPG's letters of supply differ both in volume and gravity from the deficiencies found in the protester's letters, which, as noted above, included the failure to submit letters of supply for 25 items. Accordingly, we find no indication of disparate treatment.

The protest is denied.

Susan A. Poling
General Counsel