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Decision

Matter of: Inchcape Shipping Services (Dubai) LLC

File: B-409465; B-409465.2

Date: May 12, 2014

Craig A. Holman, Esq., and Lauren J. Schlanger, Esq., Arnold & Porter LLP, for the protester.

Walter A.I. Wilson, Esq., Claude P. Goddard, Jr., Esq., Daniel J. Donohue, Esq., Steven J. Weber, Esq., and Grace O. Aduroja, Esq., Polsinelli PC, for MLS-Multinational Logistic Services, Ltd., the intervenor.

Michael D. Rossiter, Esq., Jacqueline McCain, Esq., and Lisa Simon, Esq., Department of the Navy, Naval Supply Systems Command, for the agency.

Matthew T. Crosby, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is denied where even if awardee's notice to agency that while one key personnel went on leave another would perform his duties constituted unequal discussions, protester was not prejudiced because notice did not affect price or relative standing of offerors.

2. Protest alleging awardee is inverted domestic corporation and therefore award violated restriction in Federal Acquisition Regulation § 9.108-2 against award to such corporations is denied where contracting officer knew agency previously investigated matter in response to prior allegations by protester and determined awardee not to be inverted domestic corporation.

DECISION

Inchcape Shipping Services (Dubai) LLC, of Dubai, United Arab Emirates, protests the award of a contract to MLS-Multinational Logistic Services Ltd., of Sliema, Malta, by the Department of the Navy, Naval Supply Systems Command, under request for proposals (RFP) No. N68171-13-R-0004 for maritime husbanding support. Inchcape asserts that the award is improper because MLS made a key personnel change following the close of discussions. Inchcape also asserts that the award violates the prohibition against contracting with inverted domestic corporations.

We deny the protest.

BACKGROUND

The solicitation, which was issued on May 23, 2013, contemplated the award of a fixed-price, indefinite-delivery/indefinite-quantity contract with a one-year base period and four one-year option periods. RFP at 1-4, 89. The solicitation called for maritime husbanding support services for all commercial and military ports in the United States Central Command Fifth Fleet area of responsibility.¹ Id. at 8. The work was to include, among other things, trash removal services; brow, crane and forklift services; ship movement services; water ferry/taxi services; fresh potable water services; ship utility services; and land transportation services. Id. at 15-35.

Award was to be made based on the lowest-priced, technically acceptable proposal. RFP at 97. Acceptability was to be evaluated considering two factors: technical approach and past performance. Id. With regard to the technical approach factor, the solicitation stated:

In order to be considered **Acceptable**, Offerors must address each of the bulleted items [listed in the solicitation's instructions to offerors section] in sufficient detail so that the Government can reasonably determine that the Offeror possesses the requisite ability to perform the contract.

Id. (emphasis in original). Two of the items listed in the solicitation's instructions to offerors section are relevant to this protest. The first is: "A description of your proposed organizational structure identifying key personnel and explaining why these positions are considered to be key." Id. at 91. The second is: "Explain why the organizational structure adopted, is advantageous to the U.S. Government." Id., amend. No. 0006, at 91.

As also relevant to this protest, the solicitation required that proposals include a representation that the offering firm is not an inverted domestic corporation.² RFP

¹ This area includes the Red Sea, Arabian Gulf, Arabian Sea, and parts of the Indian Ocean. See RFP at 8.

² Federal Acquisition Regulation (FAR) § 9.108-2, in conjunction with section 733(a) of the Consolidated Appropriations Act, 2014 (Pub. L. No. 113-76), establishes a prohibition against the award of a federal contract to an inverted domestic corporation. FAR § 9.108-1 defines an inverted domestic corporation as a corporation "that used to be incorporated in the United States, or used to be a partnership in the United States, but now is incorporated in a foreign country, or is a subsidiary whose parent corporation is incorporated in a foreign country, that meets
(continued...)"

at 90. The solicitation provided that the agency would consider this submission when evaluating an offeror's responsibility. RFP at 95.

The agency received a number of proposals by the solicitation's July 25 closing date, including proposals from Inchcape and MLS. Contracting Officer's Statement ¶¶ 9-10.

As required by the solicitation, MLS's proposal included a description of the firm's organizational structure and identified key personnel. AR, Tab 6, MLS Technical Proposal (Excerpts), at 2-9. One of MLS's key personnel was the firm's managing director for the Middle East and Africa. Id. at 4. This individual was described as being the agency's point of contact on "all contract management and compliance matters" and as having "overall responsibility for contract success." Id. at 3-4. MLS's proposal stated that this individual would report directly to MLS's chief executive officer (CEO), who also was identified as key personnel. Id. The CEO was described as having responsibility over "efficient day to day management of MLS Ltd global operations."³ Id. at 5.

As also required by the solicitation, MLS's proposal included a letter certifying that the firm was not an inverted domestic corporation or a subsidiary of an inverted domestic corporation. AR, Tab 10, MLS Certifications and Representations, at 9.

A technical evaluation board (TEB) evaluated the proposals and assigned ratings of acceptable or unacceptable under each of the items listed in the solicitation's instructions to offerors section. See AR, Tab 7, MLS Initial Technical Evaluation (Excerpts), at 1. With regard to MLS's "description of [the] proposed organizational structure identifying key personnel and explaining why these positions are considered to be key," the TEB rated MLS's proposal acceptable. Id. For this item, the TEB noted that MLS's key personnel, including the managing director and CEO, "have required latitude to correct issues, and respond to requirements." Id. With regard to MLS's explanation of "why the organizational structure adopted[] is advantageous to the U.S. Government," the TEB rated MLS's proposal unacceptable based on a perceived lack of information. Id.

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the criteria specified in 6 U.S.C. 395(b), applied in accordance with the rules and definitions of 6 U.S.C. 395(c)."

³ MLS's proposal provided detailed information regarding the qualifications and experience of the managing director and three other high-level key personnel. AR, Tab 6, MLS Technical Proposal (Excerpts), at 5-7. Relatively few details were provided about the CEO's qualifications and experience, although the proposal stated that he had more than 30 years experience in providing maritime husbanding services. Id. at 4.

After the TEB's evaluation of proposals, the agency established a competitive range consisting of Inchcape and MLS. Contracting Officer's Statement ¶ 12. On November 14, the agency conducted discussions with the two firms. Id. ¶ 14. Following discussions, the agency requested the submission of final proposal revisions (FPR) by December 4. Id. ¶ 15. Both firms submitted FPRs by that date. Id.

MLS's FPR provided additional information regarding its organizational structure. See AR, Tab 8, MLS Final Technical Evaluation (Excerpts), at 1. Based on this information, the TEB evaluated MLS's proposal as acceptable under the item regarding an explanation of why the proposed organizational structure is advantageous to the government. See id.

On January 13, 2014, MLS submitted a letter to the agency stating that the firm had placed the managing director it had proposed as key on "leave with pay" after learning of an allegation that he had participated in overbilling schemes while employed by Inchcape. AR, Tab 11, MLS Ltr. to Contracting Officer (Jan. 13, 2014), at 1. The letter also stated that while the managing director was on leave, his role and duties as described in MLS's proposal would be assumed by the firm's CEO, who, as discussed above, also had been proposed as key personnel. Id.

Between January 15 and 24, various agency officials, including the contracting officer, executed a post-negotiation memorandum (PNM) that summarized the evaluation results and set forth the agency's source selection decision. AR, Tab 9, PNM. The PNM reflected that both Inchcape's and MLS's proposals were deemed acceptable and that MLS's proposal was lower-priced. Id. at 1, 5. It also reflected that MLS was determined to be a responsible contractor. Id. at 34-35.

With respect to MLS's January 13 letter, the PNM included a statement that the contracting officer "doesn't consider the [letter] to represent a proposal revision and MLS remains technically acceptable." AR, Tab 9, PNM, at 39. This statement continued as follows:

The letter in no way altered MLS' management structure as stated in its proposal and evaluated as acceptable. MLS' proposal included [MLS's CEO] as a key person and stated [that MLS's managing director] would report directly to [the CEO]. . . . The fact that [the managing director] may be unavailable for some period of time does not materially affect the proposed organization structure or the latitude that managerial level personnel have at MLS. Also, MLS' proposal didn't address (and wasn't require[d] to address) how many hours either [the managing director or the CEO] will expend on the contract, and the solicitation neither included mandatory key personnel labor categories nor a specific number of key personnel for offerors to propose. The purpose of identifying key personnel in the proposals

was to permit the evaluation of the organizational and management structure to perform the contract.

AR, Tab 9, PNM, at 39.

On January 27, the agency awarded the contract to MLS. Contracting Officer's Statement ¶¶ 22. Following a debriefing, Inchcape filed a protest with our Office.

DISCUSSION

Inchcape asserts that MLS's January 13 substitution of its CEO for the managing director renders MLS's proposal unacceptable. Protest at 11-13; Comments at 3, 28-30; Supp. Comments at 3-4, 21-22. In this regard, Inchcape argues that MLS's proposal provides inadequate detail about the CEO's experience and does not explain how he would perform dual responsibilities. See Comments at 3, 24-26, 29-30. Inchcape also asserts that the substitution constitutes a material proposal revision, which, in turn, reflects that the agency improperly conducted a round of post-FPR discussions with only MLS. Id. at 21-28; Supp. Comments at 12-20.

Discussions occur when an agency communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal, or provides the offeror with an opportunity to revise or modify its proposal in some material respect. FAR § 15.306(d); Gulf Copper Ship Repair, Inc., B-293706.5, Sept. 10, 2004, 2005 CPD ¶¶ 108 at 6; International Resources Group, B-286663, Jan. 31, 2001, 2001 CPD ¶¶ 35 at 6. When an agency conducts discussions with one offeror, it must conduct discussions with all competitive range offerors and provide those offerors an opportunity to submit revised proposals. FAR §§ 15.306(d)(1), 15.307(b); University of Dayton Research Inst., B-296946.6, June 15, 2006, 2006 CPD ¶¶ 102 at 8; KPMG Peat Marwick, LLP, B-259479.2, May 9, 1995, 95-2 CPD ¶¶ 13 at 12.

As discussed above, the solicitation required offerors to describe their organizational structure and identify their key personnel. RFP at 91, 97. The issue here is whether MLS's January 13 letter constituted discussions with only one offeror because it advised that while one key person was on leave, another would perform his duties. We need not resolve this issue, however, because Inchcape has not demonstrated competitive prejudice. Where the record does not demonstrate that the protester would have a reasonable chance of receiving award but for the agency's actions, we will not sustain a protest. See Strategic Analysis, Inc., B-270075, B-270075.4, Feb. 5, 1996, 96-1 CPD ¶¶ 41 at 5; Maritime Mgmt., Inc., B-260311.2, B-260311.3, July 11, 1995, 95-2 CPD ¶¶ 11 at 8.

Even assuming that the January 13 letter materially revised MLS's proposal and thus constituted discussions, MSL's reallocation of duties among its existing key personnel did not affect MLS's relative standing in the evaluation. In this regard,

proposals were evaluated as either acceptable or unacceptable, and the agency found that MLS's proposal was acceptable both before and after the submission of the January 13 letter. Additionally, MLS's January 13 letter did not change MLS's price, and Inchcape does not assert that it would have reduced its price had an additional round of discussions occurred, or made any other change to its proposal that could have increased its competitive standing. Because the record does not establish that Inchcape was prejudiced by the agency's actions, this ground of protest is denied.⁴ See Strategic Analysis, Inc., supra; National Med. Staffing, Inc., B-242585.3, July 1, 1991, 91-2 CPD ¶ 1 at 2-3.

Next, Inchcape asserts that MLS is an inverted domestic corporation and, therefore, the agency was barred from making award to the firm. Protest at 13-17; Comments at 2, 6-16; Supp. Comments at 2, 6-12. As stated above, FAR § 9.108-2, together with section 733(a) of the Consolidated Appropriations Act, 2014 (Pub. L. No. 113-76), establishes a prohibition against the award of a federal contract to an inverted domestic corporation. As also stated above, MLS's proposal included a letter certifying that the firm was not an inverted domestic corporation. AR, Tab 10, MLS Certifications and Representations, at 9. The contracting officer states that he relied on this certification in his affirmative responsibility determination for MLS. AR, Tab 21, Contracting Officer's Supp. Statement, ¶ 6.

As noted above, the solicitation advised that an offeror's inverted domestic corporation status would be evaluated as a matter of responsibility. RFP at 95. Our Bid Protest Regulations provide that our Office will not review challenges to an agency's affirmative responsibility determination except when the protest alleges that definitive responsibility criteria have not been met (not the case here) or identifies "evidence raising serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider

⁴ Citing our decisions in Global Assocs. Ltd., B-271693, B-271693.2, Aug. 2, 1996, 96-2 CPD ¶ 100, and SmithKline Beecham Pharm., N.A., B-252226.2, Aug. 4, 1993, 93-2 CPD ¶ 79, Inchcape argues that it was prejudiced on the basis that the agency's post-FPR discussions with MLS allowed MLS to "correct an unacceptable proposal." Comments at 28; Supp. Comments at 19. The circumstances in both Global Assocs. Ltd. and SmithKline Beecham Pharm., N.A. differ materially from those here. In Global Assocs. Ltd., the post-negotiations discussions took place with an offeror whose proposal, prior to the discussions, was unacceptable on its face. Global Assocs. Ltd., supra, at 6. Here, prior to the agency's post-negotiations discussions with MLS, the agency reasonably had determined MLS's proposal to be acceptable. In SmithKline Beecham Pharm., N.A., the post-negotiations discussions took place with an offeror whose pricing, prior to the discussions, was less favorable than the protester's. Global Assocs. Ltd., supra, at 5. Here, Inchcape's pricing--both before and after the agency's post-negotiations discussions with MLS--was higher than MLS's.

available relevant information or otherwise violated statute or regulation.” 4 C.F.R. § 21.5(c) (2014).

Inchcape contends that the contracting officer’s determination was flawed because FAR § 9.108-3(b) provides that a “contracting officer may rely on an offeror’s representation that it is not an inverted domestic corporation unless the contracting officer has reason to question the representation.” Comments at 9-10 (quoting FAR § 9.108-3(b) (emphasis added)). Inchcape argues that here, the contracting officer had reason to question MLS’s representation—and therefore could not rely on it—because Inchcape raised this issue in prior protests before our Office. Id. at 10.

The agency acknowledges that prior to award, the contracting officer was aware of Inchcape’s prior allegations that MLS is an inverted domestic corporation. See AR, Tab 21, Contracting Officer’s Supp. Statement, ¶ 3; Agency E-Mail to GAO (Apr. 11, 2014) at 2. In this regard, the agency explains that prior to award, the cognizant deputy director of contracts as well as an attorney from the cognizant office of counsel informed the contracting officer of Inchcape’s prior allegations and advised him that in this procurement he could rely on MLS’s representation. AR, Tab 21, Contracting Officer’s Supp. Statement, ¶¶ 3, 5; AR, Tab 22, Agency Counsel’s Statement, at 1; AR, Tab 23, Deputy Director of Contracts’ Statement ¶ 4; Agency E-Mail to GAO (Apr. 11, 2014) at 2. The basis for this course of action, the agency explains, was as follows.

In a protest filed with our Office in 2009, Inchcape asserted that MLS was an inverted domestic corporation. Agency Ltr. to GAO (Apr. 3, 2014) at 1. This allegation led the agency’s office of counsel to analyze the issue. Id.; AR, Tab 20, Agency Legal Memorandum (July 28, 2010). The office of counsel’s analysis culminated in a detailed legal memorandum dated July 28, 2010 that set forth factual and legal bases for the conclusion that MLS was not an inverted domestic corporation. AR, Tab 20, Agency Legal Memorandum (July 28, 2010), at 2-4. The aforementioned deputy director of contracts and attorney were aware of these events. AR, Tab 22, Agency Counsel’s Statement, at 1; AR, Tab 23, Deputy Director of Contracts’ Statement, ¶¶ 3-5. The deputy director of contracts also was aware that Inchcape had raised the issue on numerous other occasions, but had “never demonstrated MLS to be an inverted domestic corporation.” AR, Tab 23, Deputy Director of Contracts’ Statement, ¶ 4. Accordingly, the deputy director of contracts and counsel believed that the issue had been vetted and resolved through the appropriate agency channels, and they therefore advised the contracting officer that in this procurement he could rely on MLS’s representation. See AR, Tab 22, Agency Counsel’s Statement, at 1.

Based on the circumstances here, we see no basis to question the contracting officer’s acceptance of MLS’s representation that the firm is not an inverted domestic corporation. The record shows that although the contracting officer was aware of Inchcape’s prior allegations, he nevertheless relied on MLS’s

representation because the agency already had analyzed the issue and determined that MLS was not an inverted domestic corporation. The record also shows that the agency's analysis of the issue considered relevant and detailed information regarding MLS's corporate history, structure, and ownership interests, as well as whether there was a basis to find that each of the three mandatory inverted domestic corporation elements set forth in 6 U.S.C. § 395(b) had been met. AR, Tab 20, Agency Legal Memorandum (July 28, 2010), at 2-4. The agency found that none of the elements were met. Id.

Inchcape disagrees with the agency's findings, characterizing the analysis as "flawed, incomplete, outdated, and insufficient." Inchcape Ltr. to GAO (Apr. 15, 2014) at 3, 12-18. However, based on Inchcape's arguments and the record, we cannot conclude that the agency's analysis was unreasonable. Further, to the extent that Inchcape believed, prior to filing this protest, that the contracting officer should have considered information or arguments that were not raised in its 2009 protest, Inchcape could have--but did not--inform the contracting officer prior to award. In fact, even during this protest Inchcape has not provided any substantive new evidence regarding the issue. Instead, Inchcape simply disagrees with the agency's conclusions. In sum, we see no information in the record--other than Inchcape's prior protest allegations, which the agency analyzed and found to be without merit--that would have provided the contracting officer with a reasonable basis to question MLS's representation. Accordingly, this basis of protest is denied.⁵

The protest is denied.

Susan A. Poling
General Counsel

⁵ Inchcape's protest also raises several allegations that were not developed because they do not meet the minimum requirements of our Bid Protest Regulations. For example, Inchcape asserts that the agency improperly failed to conduct a price realism analysis of MLS's pricing. Protest at 9-10. However, the solicitation did not contemplate a price realism analysis, and none of Inchcape's allegations indicate that the agency performed such an analysis. As another example, Inchcape asserts that the agency's discussions with the firm were misleading because the agency advised Inchcape that some elements of its pricing were too low, yet MLS's final evaluated pricing was lower than the Inchcape's. See id. at 7-8. However, Inchcape does not contend that the allegedly misleading discussions led Inchcape to raise its pricing. Thus, even assuming for the sake of argument that the discussions were misleading, there is no indication of prejudice and, therefore, no basis to sustain this protest ground.