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Washington, DC 20548

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Decision

Matter of: FCI Federal, Inc.

File: B-408558.4; B-408558.5; B-408558.6

Date: October 20, 2014

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DIGEST

Protest challenging a contracting officer's affirmative determination of the awardee's responsibility is sustained where the record shows that the contracting officer failed to obtain and consider the specific allegations of fraud alleged by the Department of Justice against the awardee, relying instead on general media reports; failed to consider the close relationship between the awardee and its parent company with respect to the contemplated approach to contract performance, mistakenly believing that the two companies were separate; and apparently misunderstood the legal standards related to affirmative responsibility determinations.

DECISION

FCI Federal, Inc., of Leesburg, Virginia, protests the award of a contract to U.S. Investigative Services Professional Services Division, Inc. (USIS PSD), of Falls Church, Virginia, under request for proposals (RFP) No. HSSCCG-13-R-00002, issued by the Department of Homeland Security, U.S. Citizenship and Immigration Services, for field office support services. FCI challenges the agency's affirmative determination of responsibility.

We sustain the protest.

BACKGROUND

This protest challenges the agency's affirmative determination of responsibility and evaluation of USIS PSD's proposal in connection with the award of a contract. As discussed in greater detail below, FCI contends that allegations of fraud against USIS PSD's parent corporation should have raised questions about whether the awardee was a responsible contractor.

Solicitation and Evaluation of Proposals

The solicitation, issued on March 4, 2013, provided for the award of a fixed-price, time-and-materials contract to provide field office support services, including correspondence management, file operations and maintenance, data reviews and updates, interview scheduling, production of certificates, ceremony support, and interview preparation, in support of 68 U.S. Citizenship and Immigration Services field offices and 10 asylum offices throughout the United States.

Award was to be made on a best-value basis considering the following evaluation factors, listed in descending order of importance: management capability, small business contracting, past performance, and price. RFP at 95. As relevant here, the management capability factor had four subfactors, listed in descending order of importance: operational approach, staffing, management approach, and relevant corporate experience. Id. at 97. With regard to price, the solicitation stated that the agency would evaluate the reasonableness of proposed prices. Id. at 103.

Six offerors, including FCI and USIS, submitted proposals by the April 1, 2013, closing date. The Technical Evaluation Committee (TEC) evaluated proposals under the management capability factor, and the Business Evaluation Committee (BEC) evaluated proposals under the small business, past performance, and price factors. Contracting Officer's (CO) Statement at 1. The agency established a competitive range consisting of USIS PSD and FCI, and conducted discussions.

After reviewing final proposal revisions, the TEC and the BEC evaluated the proposals as follows:

Evaluation Factor and Subfactors	FCi Federal	USIS
Management Capability	Good	Outstanding
Operational approach	Good	Outstanding
Staffing	Good	Outstanding
Management approach	Good	Outstanding
Corporate experience	Outstanding	Outstanding
Small Business Subcontracting	Outstanding	Outstanding
Maximization of small business	Outstanding	Outstanding
Participation in mentor-protégé program	Outstanding	Outstanding
Small disadvantaged participation targets	Acceptable	Acceptable
Past Performance	Low Risk	Low Risk
Price	\$227,304,116.32	\$209,757,145.71

AR, Tab 45, Briefing to SSA, at 14.

Although the TEC assigned higher adjectival ratings to USIS PSD’s management capability proposal, the source selection advisory committee (SSAC) determined that the two proposals were essentially equal from a technical standpoint. AR, Tab 46, SSAC Report, at 3-8. The SSA also concluded that the two proposals were essentially equal, stating “I agree with the SSAC that the proposals are comparable and the strengths assessed to USIS do not provide any particular additional value to [the agency].”¹ AR, Tab 47, Source Selection Decision Document (SSDD) at 5; see also, id. at 6-7. Since the proposals submitted by FCi and USIS were considered to

¹ Under one of the small business subcontracting subfactors, the SSA noted the following: “both FCi and USIS were rated as Outstanding, although the SSAC found FCi’s proposal provided greater value to the Government because it proposed to significantly exceed the DHS subcontracting goals in all categories and provides a corrective action plan to ensure it meets its subcontracting goals which were determined to provide greater value to the government. Nevertheless, both Offerors provided robust small business plans that meet or exceed DHS goals.” AR, Tab 47, SSDD, at 6. Therefore, the SSA found the two offerors to be equal under the small business subfactor.

be equal under each of the non-price factors, the SSA identified USIS's lower-priced proposal as in line for award on May 6, 2014. SSDD at 1, 2, 7.

The Allegations of Fraud and the Determination of Responsibility

In October 2013, approximately six months after the agency received the initial proposals here, but before the award decision, the Department of Justice (DOJ) announced that it was intervening in a qui tam lawsuit filed under the False Claims Act against USIS PSD's parent company, USIS LLC, alleging that the company failed to perform quality control reviews in connection with its background investigations for the Office of Personnel Management (OPM).²

In January 2014, DOJ filed its own complaint under the False Claims Act, alleging the following:

Beginning in at least March 2008 and continuing through at least September 2012, USIS management devised and executed a scheme to deliberately circumvent contractually required quality reviews of completed background investigations in order to increase the company's revenues and profits. Specifically, USIS devised a practice referred to internally as "dumping" or "flushing," which involved releasing cases to OPM and representing them as complete when, in fact, not all ROIs [reports of investigation] comprising those cases had received a quality review as required by the Fieldwork Contracts USIS engaged in the practice of dumping in order to meet budgeted goals and, therefore, increase its revenues and profits. . . . USIS Senior Management was fully aware of and, in fact, directed the dumping practices. Beginning in at least March 2008, USIS's President/CEO established the internal revenue goals for USIS. USIS's Chief Financial Officer determined how many cases needed to be reviewed or dumped to meet those goals. . . . USIS released at least 665,000 background investigations to OPM and represented them as complete when, in fact, one or more of the ROIs comprising those background investigations had not received a quality review as required by the Fieldwork Contracts. This represented approximately forty percent of the total background investigations conducted by USIS during that time frame. . . . The background investigations that were dumped spanned most

² "US Government Intervenes in False Claims Lawsuit Against United States Investigations Services for Failing to Perform Required Quality Reviews of Background Investigations," Oct. 30, 2013, available at <http://www.justice.gov/opa/pr/us-government-intervenes-false-claims-lawsuit-against-united-states-investigations-services>.

government agencies, including . . . Department of Homeland Security. . . . USIS personnel working on the Fieldwork Contracts also improperly used information received by USIS pursuant to its responsibilities under the Support Contract³ in order to prevent OPM from discovering its dumping scheme.

Protester's Comments, Aug. 29, 2014, Ex. 1, DOJ Complaint, at 11, 13, 16, 22. As a result, DOJ sought treble damages under the False Claims Act, plus penalties of not less than \$5,500 and up to \$11,000 for each violation. Id. at 23. In total, the possible damages resulting from this lawsuit have been estimated at over \$1 billion. Protest at 8.

During a hearing conducted by our Office in connection with this protest, the contracting officer testified that she became aware of the allegations of fraud by USIS LLC through media reports sometime in October 2013. Hearing Transcript (Tr.) at 23. The contracting officer further testified that while she was aware that the Department of Justice (DOJ) had joined a qui tam suit against USIS LLC, prior to making the responsibility determination, she did not read DOJ's civil complaint for details regarding the allegations. Id. at 39. In addition, the contracting officer received no information (and requested none) from USIS PSD or USIS LLC regarding the alleged fraud. Id. Nor did the contracting officer discuss the allegations with anyone at OPM. Id. at 40. She also did not seek information from the suspension and debarment officials of OPM or DHS. Id. Further, she did not contact anyone at DOJ to obtain additional information about the allegations. Id. at 40-41. In this regard, the contracting officer testified that her only source of information regarding the allegations of fraud, other than media reports, was information provided by agency counsel. Tr. at 90-91. There is nothing in the record, however, to indicate that agency counsel provided anything more than a generalized description of the allegations of fraud by USIS LLC. Although the contracting officer declined to testify regarding the information she obtained from counsel, when asked whether she was aware of the specific allegations in the DOJ complaint, the contracting officer answered in the negative. See Tr. at 72, 89-90.

On May 22, the contracting officer documented her determination that USIS PSD was a responsible contractor. This determination was documented in a one-page form. AR, Tab 51, Determination of Prospective Contractor Responsibility Form, at 1. With regard to the awardee's record of integrity and business ethics, the form

³ In its proposal here, USIS PSD described the OPM support contract as involving mailroom transactions, administrative support (including responding to inquiries and processing case requests) and case records imaging. AR, Tab 27, Folder 2, USIS Technical Proposal Changes, at 12.

reflects a finding of “satisfactory.” Id. at 1. The rationale for this determination was listed simply as “Past Performance Eval/EPLS.”⁴ Id.

On July 1, 2014, having determined USIS PSD to be responsible, the contracting officer made award to that firm. This protest followed.

DISCUSSION

FCi primarily challenges the agency’s affirmative determination of responsibility. Specifically, FCi contends that the agency unreasonably failed to consider, and to document its consideration of, allegations of fraud against the awardee’s parent company in determining USIS PSD’s responsibility. For the reasons set forth below, we sustain the protest.

Responsibility Determination

With regard to the agency’s responsibility determination, FCi argues that the agency failed to evaluate USIS PSD’s record of integrity and business ethics, as required by Federal Acquisition Regulation (FAR) § 9.104-1(d). FCi contends that this failure is significant because the awardee’s record of integrity and business ethics is unacceptable. In this regard, FCi notes that the Department of Justice’s complaint raises serious allegations of fraud in the performance of a government contract and alleges that USIS LLC management was fully aware of, and participated in the fraud.

Although the offeror here is USIS PSD, not USIS LLC, the protester asserts that USIS PSD is a wholly-owned subsidiary of USIS LLC, that USIS LLC is closely involved in the functioning of USIS PSD, and that USIS LLC will be substantially involved in performance of this contract. FCi contends that, therefore, the contracting officer erred in failing to consider, or failing to give sufficient weight to, USIS LLC’s alleged fraud and the close relationship between USIS LLC and USIS PSD when performing her responsibility determination.

FAR § 9.103(b) provides that “[n]o purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility.” In making the responsibility determination, the contracting officer must determine, among other things, that the contractor has “a satisfactory record of integrity and business ethics.” FAR § 9.104-1(d). Further, “[i]n the absence of information clearly

⁴ EPLS is the Excluded Parties List System maintained by the General Services Administration, which lists all contractors debarred, suspended, or proposed for debarment from federal contracting. See Federal Acquisition Regulation (FAR) § 9.404(a). EPLS has now been replaced by the System for Award Management. See Tr. at 99.

indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility.” FAR § 9.103(b). In addition, FAR § 9.105-2(b) requires that “[d]ocuments and reports supporting a determination of responsibility or nonresponsibility . . . must be included in the contract file.” FAR § 9.105-2(b).

As a general matter, our Office does not review affirmative determinations of responsibility by a contracting officer. 4 C.F.R. § 21.5(c) (2014); CapRock Gov’t Solutions, Inc.; ARTEL, Inc.; Segovia, Inc., B-402490 et al., May 11, 2010, 2010 CPD ¶ 124 at 26; Navistar Defense, LLC; BAE Sys., Tactical Vehicle Sys. LP, B-401865 et al., Dec. 14, 2009, 2009 CPD ¶ 258 at 20. We will, however, review a challenge to an agency’s affirmative responsibility determination where the protester presents specific evidence that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. 4 C.F.R. § 21.5(c); see Southwestern Bell Telephone Co., B-292476, Oct. 1, 2003, 2003 CPD ¶ 177 at 8 (sustaining protest of an affirmative determination of responsibility where the contracting officer had general knowledge through various media outlets of allegations of misconduct by the awardee’s parent company but failed to obtain and consider sufficient information about the allegations).

As set forth above, the contracting officer’s determination that USIS PSD is a responsible contractor is documented in a one-page form. AR, Tab 51, Determination of Prospective Contractor Responsibility Form, at 1. With regard to the awardee’s record of integrity and business ethics, the form reflects a finding of “satisfactory,” with the rationale listed simply as “Past Performance Eval/EPLS.” Id. at 1.

When a contracting officer makes a determination of responsibility, as opposed to a determination of non-responsibility, the FAR does not require the contracting officer to “make, sign and place in the contract file a determination of” responsibility which states the basis for the determination. See FAR § 9.105-2(a)(1); Impresa Construzioni Geom. Domenico Garufi v. U.S., 238 F.3d 1324, 1337-38 (2001). In such cases, it may be necessary to consider the contracting officer’s post hoc explanations offered on the record in response to a protest in order to determine whether there is specific evidence that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. See Impresa Construzioni Geom. Domenico Garufi v. U.S., supra, at 1339 (ordering deposition of contracting officer to determine what information he possessed and considered in making the determination of responsibility).

Here, the statements of the contracting officer in response to the protest indicate that she lacked the facts necessary to make an informed decision about, and thus failed to adequately consider, the specific allegations of fraudulent activity made by

the DOJ. As set forth above, the contracting officer testified that her knowledge of the allegations was based primarily on media reports. According to the contracting officer, she did not read DOJ's civil complaint for details regarding the allegations; she received no information from USIS PSD or USIS LLC regarding the alleged fraud; she did not discuss the allegations with anyone at OPM; she did not seek information from the suspension and debarment officials of OPM or DHS; and she did not contact anyone at DOJ to obtain additional information about the allegations. Tr. at 23, 39, 40-41.

Further, the record indicates that the contracting officer misunderstood, and as a result, failed to consider, the close relationship between USIS PSD and its parent USIS LLC with respect to performing the contemplated contract. During the hearing before our Office, the contracting officer emphasized that her responsibility determination was based, in part, upon her understanding that USIS PSD is a separate legal entity from USIS LLC. See, e.g., Tr. at 24, 27, 61, 102. However, USIS PSD informed the agency during the procurement that it would not operate independently of USIS LLC when performing the contract. Specifically, USIS PSD advised the agency that:

USIS LLC operating divisions [such as USIS PSD] do not operate independently or even semi-independently from each other or from the parent company, the LLC. The whole of USIS LLC is managed by [DELETED], our President. We have one integrated command and control structure. We share a set of common policies and procedures across the corporation Our employees also move across the organization among operating Divisions and the LLC.

AR, Tab 27, Folder 1, USIS Response to Questions, at 11. In addition, the transmittal letters submitting USIS's first revised proposal (FPR1) and second final revised proposal (FPR2) likewise indicated that USIS PSD and USIS LLC were not operating independently of each other for purposes of this contract effort, since the letters were submitted by the president of USIS LLC, the parent company of USIS PSD. AR, Tab 42, USIS FPR2, at 13 (containing signature of USIS LLC's president); AR, Tab 27, Folder 1, USIS Response to Questions, at 2 (containing signature of another individual on behalf of USIS LLC's president).

The record also clearly establishes that the agency accepted, for purposes of the past performance evaluation, USIS PSD's representation that USIS LLC would be substantially involved in performance of the contract. In this regard, the solicitation provided that the agency would consider the past performance of a parent only if an offeror showed that the parent would be "substantially involved in performance of the [field office support services] effort." RFP at 102. Among the awardee's past performance references was a contract performed by its parent, USIS LLC, for investigative fieldwork for the National Reconnaissance Office. In finding this reference relevant, the agency stated that "[f]or those references where USIS

submitted past performance of their parent . . . they provided information regarding how they will be substantially involved in performance of the [field office support services] effort.” AR, Tab 44, Folder 5, BEC Consolidated Past Performance Report, at 21. Thus the agency agreed with USIS PSD that USIS LLC would have substantial involvement in the performance of the contract here.

Finally, there is reason to question whether the contracting officer knew that she had the authority to find a contractor nonresponsible in the absence of a suspension or debarment. In response to the protest, the contracting officer submitted a written statement that “[u]nder the standard of ‘innocent until proven guilty in a court of law’ there is no basis for [the agency] to not award a contract to USIS PSD through a de facto debarment.” CO Statement at 5. Likewise, the agency report indicated that finding the awardee nonresponsible would “amount[] to a de facto suspension or debarment of USIS PSD without due process. . . . In this case, the suspension and debarment matters are under OPM’s purview, and it has not taken action against USIS LLC.” AR at 8-9. At the hearing, the contracting officer provided the following response regarding her ability to find a contractor non-responsible in the absence of a debarment:

[Hearing Officer]: Could you still find a contractor non-responsible whether or not they’ve been debarred?

[Contracting Officer]: I do not believe I can do so.

Tr. at 100.

On redirect, agency counsel indicated to the contracting officer that she may not have understood the question, and attempted to lead her to a different answer, asking: “do you have the discretion, as the contracting officer, to find someone non-responsible when that person has not been suspended or debarred?” Tr. at 101. In contrast to her earlier answer, Tr. at 100, the contracting officer at this point answered in the affirmative. Tr. at 101. In our view, the weight of the evidence indicates that the contracting officer here was unclear of her authority in this regard. Specifically, the contracting officer’s written statement and the agency report, CO Statement at 5 (“[u]nder the standard of ‘innocent until proven guilty in a court of law’ there is no basis for [the agency] to not award a contract to USIS PSD through a de facto debarment”); AR at 8 (“act[ing] in OPM’s stead by finding USIS PSD non responsible . . . amounts to a de facto suspension or debarment of USIS PSD without due process”), as well as her conflicting testimony at the hearing, indicate that the contracting officer may have believed that, in the absence of a suspension or debarment, she was unable to find USIS PSD nonresponsible.

Moreover, we note that the contracting officer also seemed to be mistaken regarding the presumptions to be applied in a responsibility determination. The FAR states that, “in the absence of information clearly indicating that the

prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility.” FAR § 9.103(b). Thus, a contractor is presumed nonresponsible until the contracting officer affirmatively finds that there is information clearly indicating that the offeror is responsible. However, the contracting officer appears to have shifted the presumption to one of responsibility until “proven” nonresponsible. See Contracting Officer’s Statement at 5; see also Tr. at 28-29, 102-103.

We recognize that, in response to this protest, the agency contends that the services required under the instant solicitation differ markedly from those involved in the OPM contracts under which USIS LLC allegedly committed fraud. As a result, the agency argues that USIS LLC’s alleged fraud under the OPM contracts has no bearing on what the agency can expect in USIS PSD’s performance of the contract here. AR at 2. For example, at the hearing, the SSA stated that the services here involve mostly clerical support, which will have a high level of oversight by agency personnel, while the services under the OPM contract (performing background investigations) involved much less supervision and much more discretion on the part of the contractor’s employees. Tr. at 112.

However, in its proposal, USIS PSD itself characterized the OPM field contract as “particularly relevant” to the company’s ability to complete the solicitation’s requirements. AR, Tab 27, Folder 2, USIS Technical Proposal Changes, at 49. In particular, USIS emphasized that the company’s infrastructure and management oversight on the OPM contract was an indication of what could be expected from USIS PSD in performing the contract here:

USIS LLC: OPM Field - In the 15 years that USIS has supported OPM by providing background fieldwork investigative services, USIS has developed the right infrastructure, management oversight, and efficient processes to support tasks in multiple sites and locations. We currently leverage our financial and organizational resources to support a team of well over [DELETED] individuals dedicated to the OPM program The relevance to [field office support services] of this corporate experience is that we have the management infrastructure in-place and business processes to manage a dispersed workforce in multiple locations, performing adjudicative work in support of national security goals.

AR, Tab 27, Folder 2, USIS Technical Proposal Changes, at 49. USIS PSD’s proposal repeatedly emphasized that the OPM field contract was a relevant indicator of the quality of performance that could be expected under the requirements of this contract. Id. at 50 (“The relevance to [field office support services] of this corporate experience is that we are able to manage complex activities with potentially significant national security implications, with a largely

[DELETED] workforce dispersed across the US”), 58, 60; see also, id. at 4, 6, 8, 43, 46, 47, 48, 51, 52, 57, 59 (referencing USIS LLC’s work on the OPM fieldwork contract), and id. at 12, 43, 44, 46, 50, 51, 53, 58 (referencing USIS LLC’s work on the OPM support services contract).

Moreover, “a satisfactory record of integrity and business ethics” is a prerequisite for a prospective contractor to be determined responsible. FAR § 9.104-1(d). In our view, a company’s record of integrity and business ethics is not task specific. That is, the alleged commission of fraud while performing one type of service is not irrelevant to the company’s integrity and ethics in the performance of different services, even where the agency feels it may be in a better position to catch any potential future fraud more quickly due to the level of agency supervision of contractor employees.

In sum, the record in this case includes ample evidence that the contracting officer may not have considered information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. Specifically, the contracting officer failed to obtain and consider the specific allegations of fraud alleged by the DOJ, relying instead on general media reports. The contracting officer also failed to consider the close relationship between USIS PSD and its parent, USIS LLC, with respect to the contemplated approach to contract performance, mistakenly believing that the two companies were separate, when USIS itself informed the agency that USIS PSD was not “independent[], or even semi-independent[]” from its parent. AR, Tab 27, Folder 1, USIS Response to Questions, at 11. The contracting officer also apparently misunderstood the legal standards related to affirmative responsibility determinations, mistakenly believing that a finding of nonresponsibility results in a de facto debarment without due process, and thus was unavailable to the contracting officer. As a result, we find the contracting officer’s affirmative determination of responsibility to be unreasonable. See Southwestern Bell Telephone Co., supra. Therefore, we sustain the protest on this basis.

RECOMMENDATION

In light of our conclusions that the contracting officer failed to consider the specific allegations of fraud against USIS, mistakenly assumed that USIS PSD and USIS LLC operated separately, and apparently misunderstood the legal standards related to responsibility determinations, we recommend that the agency make a new determination about USIS PSD’s responsibility.⁵ Specifically, the agency should

⁵ During the course of this protest, FCi also challenged the agency’s past performance evaluation. This challenge was essentially premised on the same allegations of fraud that led us to sustain FCi’s challenge to the determination that USIS PSD was a responsible offeror. If, in making the new responsibility

(continued...)

reasonably determine that firm's responsibility, taking into account USIS PSD's own description of its relationship with USIS LLC, as well as the specific allegations of fraud raised by the DOJ against USIS LLC. If, at the conclusion of this review, USIS PSD is found to be other than responsible, the agency should terminate USIS PSD's contract and make award to FCi, if otherwise appropriate. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester's certified claim for costs, detailing the time spent and costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Susan A. Poling
General Counsel

(...continued)

determination recommended in this decision, the agency finds that the information leads it to reconsider its evaluation of past performance, it should do so.