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Decision

Matter of: Leidos Innovations Corporation

File: B-414289.2

Date: June 6, 2017

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Katherine S. Nucci, Esq., and Scott F. Lane, Esq., Thompson Coburn LLP, for Adams Communication & Engineering Technology, Inc., the intervenor.

George P. Farley, Esq., Wade L. Brown, Esq., and Justin Wilde, Esq., Department of the Army, for the agency.

K. Nicole Willems, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency unreasonably found a firm nonresponsible because its subcontractor was ineligible for access to bases where the contract was to be performed is denied where the record shows that the agency reasonably based its determination on available information, including classified materials that could not be disclosed to the protester but were reviewed by our Office.

DECISION

Leidos Innovations Corporation, of Marlton, New Jersey, challenges the issuance of a task order to Adams Communication and Engineering Technology, Inc., of Waldorf, Maryland, by the Department of the Army, U.S. Army Contracting Command, Aberdeen Proving Ground, under request for task order execution plan (RTEP) No. R2-3G-0871, for operational and sustainment logistics support services for the U.S. Special Operations Command's Tactical Airborne Multi-Sensor Platform (STAMP). Leidos maintains that the agency unreasonably found the firm nonresponsible, and argues that the agency should have conducted discussions or other exchanges regarding the responsibility determination.

We deny the protest.

BACKGROUND

The RTEP, issued on February 4, 2016, to firms holding indefinite-delivery, indefinite-quantity (IDIQ) awards under the Army's Rapid Response Third Generation (R2-3G) contract, sought to provide various logistics support services for the STAMP program, including training, primary mission equipment operations, maintenance and sustainment, system integration and installation, engineering services and system deployment, and relocation and demobilization support. RTEP at 1. The RTEP contemplated the issuance of a hybrid cost-plus-fixed-fee task order for a 1-year base period and two 1-year option periods, on a best-value basis, considering technical, cost, past performance, and property management plan factors. Id. at 1-2.

As relevant here, the RTEP advised offerors that performance would take place at the contractor's facilities or at government facilities or both, within and outside of the United States, and could include operating in remote, primitive, or austere environments. Id. at 1. The performance work statement (PWS) accompanying the RTEP also informed offerors that contractors were subject to certain Defense Federal Acquisition Regulation Supplement clauses, including provisions that allowed the Combatant Commander for the U.S. Central Command (USCENTCOM) Area of Responsibility (AOR) to exercise oversight to ensure compliance with Combatant Commander and subordinate task force commander policies and directives. AR, Tab 5, PWS, at 51.

The RTEP also advised that the government intended to evaluate proposals and issue a task order without discussions, although the agency reserved the right to conduct discussions if deemed necessary by the contracting officer (CO). RTEP at 6. Of importance here, the RTEP informed offerors that the CO would make a responsibility determination prior to award. Id. at 34.

The agency received six quotations, and after conducting evaluations and discussions, concluded that Leidos was in line for award with the highest-rated technical proposal and the lowest evaluated cost. Contracting Officer's Statement/Memorandum of Law (COS/MOL) at 5-7. Prior to making award, the contracting officer sought to assess the potential awardee's responsibility, as required by the RTEP and Federal Acquisition Regulation (FAR) § 9.103. Ultimately, the contracting officer found Leidos to be nonresponsible--and thus ineligible for award--based on issues identified with one of the protester's subcontractors, [DELETED]. AR, Tab 8, Determination of Nonresponsibility, at 1.

In assessing Leidos' responsibility, the CO reviewed the Joint Contingency Contracting System (JCCS) database, and learned that [DELETED] had an adverse finding, resulting in being assigned a "DELTA" status, indicating that it did not have base access

in the USCENTCOM AOR.¹ COS/MOL at 7. Thereafter, the CO reviewed a classified report, detailing information supporting [DELETED] “DELTA” rating in JCCS, and the CO verified that the JCCS rating was “current and reliable.” *Id.* On January 17, 2017, the CO completed his responsibility review and issued a written determination finding Leidos to be nonresponsible. Specifically, the CO determined:

Based on [DELETED] lack of base access status and because there is substantial subcontracting proposed on this effort, for which [DELETED] is a major subcontractor, in accordance with [FAR §] 9.104-4(c), subcontractor [DELETED] has been determined to be [nonresponsible]. Further, in accordance with [FAR §§] 9.104-4(a) and 9.104-1[,] the [nonresponsibility] of [DELETED] renders the Prime [Leidos] [nonresponsible] and ineligible for award. . . . As such, I hereby determine [Leidos] to be “Not Responsible” and ineligible for award of STAMP services.

AR, Tab 8, Determination of Nonresponsibility, at 1-2.

On February 23, the agency informed Leidos that it had not been selected for issuance of a task order because it had been found nonresponsible due to force protection concerns. Protest at 11. On the same day, the agency also provided Leidos with a letter explaining the basis for its nonresponsibility determination. AR, Tab 12, Notice to Leidos Regarding Nonresponsibility Determination at 1. The agency provided a debriefing to Leidos on March 2, and this protest followed.²

DISCUSSION

Interested Party

As a preliminary matter, the agency, in its agency report, requested that we dismiss the protest because the quotation at issue was submitted by Lockheed Martin Integrated Solutions (LMIS) with a proposal to use Leidos as a subcontractor; thus, the agency argues that Leidos does not qualify as an interested party to bring this protest. We disagree.

¹ The JCCS is a contract database maintained by USCENTCOM to, among other things, vet vendors for access to USCENTCOM installations and relay the Commander’s determination regarding base access. COS/MOL at 6.

² The awarded value of the task order is approximately \$272,000,000. Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of delivery orders under multiple-award indefinite-delivery, indefinite-quantity contracts. See 10 U.S.C. § 2304c(e)(1)(B).

On August 16, 2016, a subsidiary of Leidos Holdings, Inc., merged with Lockheed Martin Corporation's Information Systems and Global Solutions business, resulting in a new entity, Leidos Innovations. AR, Tab 16, Evaluation Notice Response, at 1. As part of the transaction, the IDIQ contract under which this procurement is being conducted was transferred from LMIS to Leidos Innovations. Id.

In a December 2, 2016 response to evaluation notices, Leidos (as LMIS) explained that:

Lockheed Martin submitted to the DCMA [Defense Contract Management Agency] on August 26, 2016 a novation package that included a request to novate the [R2-3G IDIQ] contract to Leidos Innovations, which, in accordance with the FAR, will be effective retroactive to August 16, 2016. That novation request is pending approval. Leidos Innovations is the full successor-in-interest to the former Lockheed Martin [Information Systems and Global Solutions] business responsible for this proposal and proposed for performing the resulting task order. Pending novation, Leidos Innovations will be performing all task order(s) awarded as a result of this proposal pursuant to a Subcontract Pending Novation Agreement between Leidos Innovations and Lockheed Martin.

Id. Accordingly, the agency evaluated the proposal submitted by LMIS "for performance by successor in interest/subcontractor Leidos Innovations." AR, Tab 11, Source Selection Decision Document at 4.

According to the agency, until the novation is completed, Leidos is only a subcontractor and thus not an interested party to bring this protest. In responding to the agency's argument, however, the protester provided information indicating that DCMA had, in fact, finalized the novation agreement, recognizing Leidos as the successor in interest for a number of contracts, including the R2-3G IDIQ contract, and had done so prior to the issuance of the subject task order. Protester's Comments, Exhibit P, Novation Agreement and Accompanying E-mail. In light of the completed novation agreement, indicating that the government recognizes Leidos as the successor in interest to the R2-3G IDIQ contract with all of the "rights, titles, and interests" of the original contract holder, we have no basis to conclude that Leidos is not an interested party for purposes of this protest.³ Id. See generally Lockheed Martin Aeronautics Co., et al., B-295401 et al., Feb. 24, 2005, 2005 CPD ¶ 41 at 5 n.8 (protester is an interested party to pursue protest where it is the complete successor in interest to the business entity that submitted a proposal under the solicitation at issue); McNeil Techs., Inc., B-254909, Jan. 25, 1994, 94-1 CPD ¶ 40 at 3-5 (finding a successor in interest to be an interested party).

³ There are a number of references to LMIS in the record, since LMIS submitted the proposal for this procurement. For the sake of simplicity and consistency, we refer to Leidos as the vendor in this decision.

Responsibility Determination

Leidos argues that the agency's responsibility determination was based on outdated information about [DELETED] in the JCCS database, and challenges the agency's decision not to engage in exchanges or other communications regarding the nonresponsibility determination. Based on our review of the record, we have concluded that none of the protester's arguments forms a basis for sustaining the protest.⁴

With regard to the information about [DELETED] in the JCCS database, the crux of the protester's argument is that the information must have been outdated. In this respect, Leidos argues that, following completion of an asset purchase agreement [DELETED] should be properly classified as a United States company--rather than a foreign company. Comments at 5. According to the protester, [DELETED] could not therefore be properly assigned a DELTA status in JCCS because DELTA status is not available for United States companies.⁵

In response, the agency asserts that all contractors and subcontractors operating in the USCENTCOM AOR, not just foreign companies, are vetted pursuant to [DELETED]. COS/MOL at 12; [DELETED]. Accordingly, the agency argues that "since [DELETED] required access as a subcontractor, notwithstanding its country of incorporation, it was registered in JCCS." COS/MOL at 12. The agency further explained that the Combatant Commander makes the determination to prohibit base access to a contractor, and that the Combatant Commander's determination is what drives a contractor's status in the JCCS database, not, as presumed by the protester, the national origin of a company. *Id.* at 12-13. According to the agency, a contracting officer lacks authority to overturn determinations of base access by the Combatant

⁴ For example, Leidos alleges that the agency was required to refer the matter to the Small Business Administration (SBA) for a Certificate of Competency before finding the protester to be nonresponsible. Protest at 24. We find this assertion to have no merit, because Leidos is not a small business subject to the requirements of FAR subpart 19.6 or the Small Business Act. Likewise, we also find unavailing the protester's argument that [DELETED] was not a major subcontractor, and therefore not subject to the contracting officer's decision to determine a prospective subcontractor's responsibility (and resultant responsibility of Leidos as the prime contractor) under FAR § 9.104. Even if we were to agree with Leidos that [DELETED] was not a major subcontractor--which the agency disputes--FAR § 9.104(c) allows the contracting officer to directly determine the responsibility of a subcontractor when it is in the government's interest to do so.

⁵ According to the protester, the agency was aware of the corporate transaction based on, among other things, briefings provided by Leidos during discussions. Protest at 19-22.

Commander, and is prohibited from awarding a contract to an offeror who is found nonresponsible.⁶ Id. at 11.

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 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. 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.

We recognize that, under these circumstances, the contracting officer's judgment is limited by a military command decision to deny [DELETED] access to military installations. We have explained that the commanding officer of a military base has wide discretion as to whom he or she can exclude from the base. Sohail Global Group, B-413132, August 9, 2016, 2016 CPD ¶ 215 at 3. Further, as the United States Court of Federal Claims has stated, although the vendor vetting rating process does not provide a contractor with prior notice of its ineligible status or an opportunity to present rebuttal evidence, requiring traditional due process in the rating process would adversely affect national security. Afghan Premier Logistics, B-409971, Sept. 26, 2014, 2014 CPD ¶ 293 at 3 citing NCL Logistics Co. v. United States, 109 Fed. Cl. 596, 620 (2013). The court elaborated that the requirements of due process vary given the circumstances and, in the environment of a warzone, when the required notice would necessarily disclose classified material and could compromise national security, normal due process requirements must give way to national security concerns. Id. We agree.

Here, in considering Leidos' protest and the agency's response thereto, our Office reviewed information, including classified material, supporting the agency's nonresponsibility determination. In light of our review of the record, we think the agency's decision to find Leidos' nonresponsible, based on its subcontractor's lack of base access, was reasonable.

The protester also argues that the agency should have engaged in a conversation with Leidos, in an effort to get additional information related to the responsibility

⁶ In its response to the protest, the agency also noted that the information in JCCS was recent, as it had been updated on December 27, 2016, and stated that country of incorporation was not relevant to the responsibility determination here. COS/MOL at 11.

determination. Even assuming, for the sake of argument, that Leidos' claim regarding the JCCS database containing outdated information concerning [DELETED] status as a U.S. company has merit--which it does not--we conclude that it was reasonable for the CO to make the nonresponsibility determination without any additional dialogue with Leidos. As the agency has explained, neither the Combatant Commander's decision to prohibit [DELETED] access to bases, nor the contracting officer's determination of [DELETED] nonresponsibility, was dependent on [DELETED] country of incorporation. COS/MOL at 9-12; AR, Tab 8, Determination of Nonresponsibility at 1. The CO's determination was grounded in the fact that [DELETED] was ineligible for base access in USCENTCOM's AOR. Id. To the extent that the CO could have elected to seek further information from the protester to address responsibility concerns, he was not required to do so. In this regard, we have previously explained that while a CO may elect to open a dialogue with an offeror to address responsibility concerns, such a dialogue is not required where, as in this case, an agency has an otherwise reasonable basis for assessing the firm's responsibility. Bunzl Distribution California, LLC, B- 412475.4, October 21, 2016, 2016 CPD ¶ 314 at 7.

The protest is denied.

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General Counsel