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Decision

Matter of: A. Finkl and Sons, Co. DBA Finkl Steel

File: B-416582.4

Date: December 10, 2018

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DIGEST

Protest challenging the agency's non-responsibility determination based on foreign ownership, control, and influence concerns is denied where the record shows that the agency reasonably identified concerns with the accuracy of the protester's initial ownership disclosures and afforded the protester an opportunity to address the agency's concerns, but the protester failed to adequately respond.

DECISION

A. Finkl and Sons, Co. DBA Finkl Steel, of Chicago, Illinois, challenges the Department of the Air Force's decision to terminate the contract awarded to Finkl under request for proposals (RFP) No. FA8681-17-R-0036 for BLU-137/B Penetrator Warhead production. Finkl challenges the agency's determination that the protester was ineligible for award under the terms of the RFP due to an impermissible foreign, ownership, control, or influence (FOCI) issue arising from its ownership by a foreign parent.

We deny the protest.

BACKGROUND¹

On June 22, 2017, the Air Force issued the RFP contemplating the award of a fixed-price, indefinite-delivery, indefinite-quantity (IDIQ) contract for the production of BLU-137/B Penetrator Warheads. RFP, Evaluation Factors for Award, ¶ M-1.2.² The RFP advised that the agency would issue five production lots on an anticipated schedule of one annual production lot each year for five years. RFP, Statement of Work (SOW), ¶ 2. The RFP informed offerors that the agency intended to make two or more contract awards with each production lot buy being competed among the contract holders, but it also expressly reserved the right to make one award or no awards. RFP, Evaluation Factors for Award, ¶ M-1.2. Award was to be on a lowest-priced, technically acceptable basis, considering technical and price. Id., ¶ M-1.1.

Relevant to the issues in this protest, the RFP included a special responsibility criterion pursuant to Federal Acquisition Regulation (FAR) § 9.104-2(a) prohibiting the participation of foreign firms or U.S. companies determined to be under FOCI. See AR, Tab 25, Non-responsibility Determination, ¶ 6.³ Specifically, the RFP provided that in accordance with “Section 3 of the National Industrial Security Program Operating Manual (NISPOM), foreign firms or U.S. companies determined to be under [FOCI] will not be permitted to participate.” RFP, Instructions, Conditions, and Notices to Offerors or Respondents, ¶ L-1.2. Additionally, the RFP included FAR clause 52.204-17, Ownership or Control of Offeror, which requires an offeror to identify in the System for Award Management (SAM) whether it has an immediate owner, which is defined as “an entity, other than the offeror, that has direct control of the offeror.” FAR clause 52.204-17(a). The clause further requires that if the offeror’s immediate owner is owned or controlled by another entity, the offeror must identify the highest-level owner, which is defined as “the entity that owns or controls an immediate owner of the offeror, or that owns or controls one or more entities that control an immediate owner of the offeror.” Id.

On June 27, 2018, the Air Force made contract awards to Finkl and Superior Forge and Steel Corporation, of Lima, Ohio. The estimated ceiling of Finkl’s IDIQ contract was

¹ The following background section is limited to the facts relevant to the issues in this protest. Additional background regarding this procurement is set forth in our decision in connection with another disappointed offeror’s protest challenging the agency’s award decision under the RFP. See Ellwood Nat’l Forge Co.--Protest & Costs, B-416582 et al., Oct. 22, 2018, 2018 CPD ¶ 362.

² The RFP was subsequently amended four times; references herein are to the RFP as amended. Additionally, references to page numbers are to the Bates numbering used by the Air Force in its agency report (AR).

³ Pursuant to FAR § 9.104-2(a), an agency may develop special standards of responsibility in addition to the general responsibility standards of FAR § 9.104-1 when it is necessary for a particular acquisition or class of acquisitions.

\$419,633,500, and the estimated ceiling of Superior's IDIQ contract was \$476,935,075. Contracting Officer's Statement of Fact (COSF) at 7. On July 16, another disappointed offeror, Ellwood National Forge Company, filed a protest with our Office. Among other grounds of protest, Ellwood specifically alleged that award to Finkl was improper because Finkl was foreign-owned or controlled in violation of the RFP's terms. Specifically, Ellwood alleged that Finkl was owned and controlled by a Swiss corporate parent. On July 31, the Air Force notified our Office of its intent to take partial corrective action in response to Ellwood's protest. Specifically, the agency represented its intent to take corrective action in response to the FOCI allegations by issuing clarification evaluation notices to all offerors in the competitive range. Based on the Air Force's proposed corrective action, our Office dismissed the FOCI-related protest allegations as academic. Ellwood Nat'l Forge Co., B-416582, Aug. 6, 2018 (unpublished decision).

On August 7, the Air Force issued the clarification evaluation notices to the offerors. See, e.g., AR, Tab 19, Evaluation Notice to Finkl. With respect to Finkl, the Air Force requested confirmation regarding the accuracy of Finkl's SAM FAR clause 52.204-17 representations, as well as clarification of the company's relationship with Schmolz & Bickenbach Group, a Swiss company. In this regard, Finkl's certification in SAM indicated that it had an immediate owner, Schmolz & Bickenbach USA Holdings Inc., and that its immediate owner was not owned or controlled by another entity. See AR, Tab 15, Finkl SAM Report for Oct. 18, 2017 through Oct. 18, 2018, at 2. The evaluation notice directed Finkl to address the following items:

- Please confirm that Finkl has an "immediate owner and the CAGE code" is correct as indicated in your representation of Provision FAR 52.204-17 Ownership or Control of Offeror found in SAM.

- Please confirm that Finkl's "immediate owner is NOT owned or controlled by another entity" as indicated above in your representation of Provision FAR 52.204-17 Ownership or Control of Offeror found in SAM.

- There is some information publicly available that indicates that Finkl and SCHMOLZ & BICKENBACH USA HOLDINGS INC may be owned or controlled by SCHMOLZ & BICKENBACH GROUP, a Swiss company. Please explain the ownership and control arrangements that allow Finkl to comply with RFP paragraph L-1.2 prohibiting participation in this acquisition by companies under [FOCI]. Please confirm that the "highest-level owner CAGE code" should be blank as indicated above in your representation of Provision FAR 52.204-17 Ownership or Control of Offeror found in SAM.

- Please provide documentation to substantiate your clarification response.

AR, Tab 19, Evaluation Notice to Finkl, at 3 (emphasis in original).

The evaluation notice established a one page limit for Finkl's response, but clarified that there were no page limits for substantiating documentation. Id. Finkl timely responded to the evaluation notice. The protester confirmed that the information for its immediate owner in SAM was correct, but that its SAM representation neglected to reflect that the immediate owner was owned or controlled by Schmolz + Bickenbach Group, a Swiss company. AR, Tab 22, Finkl Evaluation Notice Response, at 2. Finkl represented that it would update its SAM registration accordingly. Id.; see also Tab 24, Finkl SAM Report for August 27, 2018 through August 27, 2019, at 3-4 (reflecting change to highest-level owner information).

In response to the agency's inquiry regarding the ownership and control arrangements that would mitigate a potential FOCI concern under RFP ¶ L-1.2, the protester represented only that it could not be subject to FOCI because, as outlined in the NISPOM, FOCI concerns only apply to firms subject to a facility security clearance (FCL). Specifically, Finkl submitted that:

U.S. companies not subject to a [FCL] are not subject to FOCI. Finkl is not subject to FOCI, as Finkl does not perform classified contracts, receive or maintain classified information pursuant to any U.S. federal contract or subcontract, does not possess a FCL, and is not in the process for applying for a FCL.

AR, Tab 22, Finkl Evaluation Notice Response, at 2; see also id., exh. No. 2, Decl. of Finkl Director-New Business & Special Programs, at ¶¶ 3-6 (attesting to same).⁴

On August 29, the contracting officer prepared a decision finding Finkl to be non-responsible. Specifically, she determined that "[t]he solicitation clearly stated offerors under foreign ownership were not eligible to participate in the acquisition," and therefore Finkl was ineligible for award. AR, Tab 25, Non-responsibility Determination, ¶ 5. Additionally, the contracting officer found that Finkl "misrepresented its foreign ownership status throughout the source selection evaluation process." Id. On August 30, the Air Force notified Finkl that its contract was being terminated for the government's convenience because Finkl "was not eligible to participate in this acquisition as participation by foreign-owned companies, or US companies subject to substantial foreign ownership or control, was not authorized." AR, Tab 26, Termination Notice, at 1. On September 7, Finkl filed this protest with our Office.

⁴ In addition to the brief declaration noted above, the only other substantiating documentation provided was a heavily redacted organizational chart reflecting the relationship between Finkl and its ultimate Swiss parent. AR, Tab 22, Finkl Evaluation Notice Response, exh. No. 1, Organizational Chart, at 3.

DISCUSSION

Finkl challenges the agency's determination that Finkl was under FOCI, and therefore was non-responsible pursuant to the RFP's FOCI-related provision. Finkl argues that the FOCI provisions only apply in cases where a firm is seeking FCL eligibility and access to classified material. Because the resulting contract will not require access to classified material, the protester asserts that it was inappropriate for the agency to evaluate whether Finkl is under FOCI. Additionally, the protester alleges that even if the FOCI provision applied, the agency unreasonably interpreted the solicitation to automatically preclude award to any U.S. company with a foreign owner. Finkl maintains that the agency should have instead conducted the requisite analysis to determine whether the company was under FOCI in accordance with applicable NISPOM standards.⁵

The Air Force primarily argues that the RFP's plain text supports its determination that Finkl's foreign ownership rendered the company ineligible for award. Alternatively, the agency defends its non-responsibility determination on the basis that Finkl failed to adequately address the agency's concerns during clarifications with respect to the impact of its foreign ownership on the question of whether the protester was under FOCI. For the reasons that follow, we find that the agency's non-responsibility determination was reasonable where it afforded the protester the opportunity to address any mitigating ownership and control considerations, but Finkl did not adequately respond to the agency's concerns.

As an initial matter, our Office has reservations with both parties' proffered interpretations of the RFP. Where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. Magellan Fed., B-416254, B-416254.2, June 7, 2018, 2018 CPD ¶ 206 at 4.

⁵ Finkl raises other collateral arguments. While our decision does not specifically address every argument, we have considered all of the protester's arguments and find that they do not provide a basis on which to sustain the protest. For example, Finkl alleges that the Air Force violated the exclusive delegation of authority to the Defense Security Service pursuant to 32 C.F.R. § 117.56 to conduct FOCI determinations. The delegation relied on by the protester, however, is inapposite, because that delegation is only in connection with the determination of the initial or continued FCL eligibility of U.S. companies and U.S. contractors with foreign involvement. See 32 C.F.R. § 117.56(a). Here, the Air Force reviewed FOCI concerns not in connection with a FCL eligibility determination, but, rather, pursuant to its obligation to conduct a responsibility determination pursuant to FAR subpart 9.1.

First, we find unpersuasive Finkl's argument that the agency could not review and consider potential FOCI concerns because no classified information will be disclosed under the resulting contract. The RFP notified offerors that no classified information would be disclosed in connection with the contract, but did require that offerors protect the RFP's technical data package, drawings, and data pertaining to warhead production as "For Official Use Only" in accordance with the NISPOM. RFP, SOW, ¶ 8. In this regard, the agency explained that it included the RFP's FOCI provision because, even if no classified information will be disclosed, the agency nevertheless had an important security-related interest in protecting the sensitive weapons-related technological information that was disclosed to the offerors in the RFP and that will be disclosed to the contractor. See COSF at 13-15.⁶ In contrast, Finkl's argument effectively would render superfluous the provision indicating that U.S. companies found to be under FOCI were ineligible for award, as the RFP unequivocally put offerors on notice that no classified information would be disclosed under the contract. If the RFP's FOCI clause was limited only to a case where the resulting contract would require the disclosure of classified information, the provision would be devoid of any meaning where, as Finkl argues, the solicitation does not require the disclosure of classified information. Such a selective reading of the RFP is unreasonable.⁷

On the other hand, we do not find that the RFP supports the Air Force's interpretation that any U.S. firm that is owned by a foreign entity was ineligible for award. Rather, the

⁶ On August 30, the contracting officer notified the Joint Certification Program (JCP) Office that Finkl had made an omission or misstatement of a material fact regarding its foreign ownership when it requested certification from the JCP Office. AR, Tab 34, Email from Contracting Officer to JCP Office, Aug. 30, 2018 (2:08 PM), at 1. The JCP Office implements a memorandum of understanding between the Department of Defense (DOD) and Canada's Department of National Defense under which contractors are certified to access unclassified technical data disclosing critical military technology. Id., Email from JCP Office to Contracting Officer, Aug. 9, 2018 (3:07 PM), at 1. Certified contractors can request access to unclassified military critical technical data, such as the RFP's technical data package and drawings, and work sites where such data can be accessed on the condition that they must agree not to distribute covered information to unauthorized individuals. Id.

⁷ At worst, Finkl's interpretation that the RFP's FOCI clause is effectively inapplicable due to the absence of any classified information as set forth in the performance work statement raises a patent ambiguity in the terms of the solicitation. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error. Where, as here, a patent ambiguity is not challenged prior to submission of solicitation responses, we will not consider subsequent untimely arguments asserting the protester's own interpretation of the ambiguous provisions. FFLPro, LLC, B-411427.2, Sept. 22, 2015, 2015 CPD ¶ 289 at 11. An offeror that competes under a patently ambiguous solicitation does so at its own peril, and cannot later complain when the agency proceeds in a manner inconsistent with one of the possible interpretations. Sheritech Pharmacy Piedmont, LLC, B-413945, Nov. 7, 2016, 2016 CPD ¶ 325 at 4 n.2.

RFP provides that only those U.S. companies determined to be under FOCl in accordance with the applicable standards of the NISPOM are ineligible for award. RFP, ¶ L-1.2. Under the NISPOM, a U.S. company is considered under FOCl:

[W]henever a foreign interest has the power, direct or indirect, whether or not exercised, and whether or not exercisable through the ownership of the U.S. company's securities, by contractual arrangements or other means, to direct or decide matters affecting the management or operations of that company in a manner which may result in unauthorized access to classified information or may adversely affect the performance of classified contracts.

DOD 5220.22-M, National Industrial Security Program Operating Manual (Feb. 2006) (hereinafter, NISPOM), Chap. 2, Sect. 3, ¶ 2-300(a).

In determining whether a firm is under FOCl, the NISPOM identifies a number of factors that the government shall consider with respect to the company, the foreign interest, and the government of the foreign interest, as appropriate. The factors include: record of economic and government espionage against U.S. targets; record of enforcement and/or engagement in unauthorized technology transfer; the type and sensitivity of the information that shall be accessed; and the source, nature, and extent of FOCl. *Id.*, ¶ 2-301. Additionally, the government is to review the type of actions, if any, that would be necessary to negate the effects of FOCl to a level deemed acceptable to the government. *Id.*, ¶ 2-302(a)(3). The NISPOM sets forth various methods for negating or mitigating the risk of foreign ownership or control, including board resolutions, voting trust and proxy agreements, and special security and control agreements. *Id.*, ¶ 2-303. Thus, we find that neither the RFP nor the incorporated NISPOM standards reasonably support the Air Force's position that Finkl was automatically excluded from the possibility of award based solely on its foreign ownership, without consideration of other factors, including potential mitigation approaches presented by Finkl.⁸

In our view, the only reasonable interpretation of the RFP is that U.S. offerors found to be subject to immitigable FOCl consistent with the required analysis of risks and

⁸ The Air Force argues that our Office should not consider whether the agency complied with the NISPOM, as it is internal agency guidance, not applicable procurement law or regulation. The agency is correct that our Office generally does not review whether an agency's actions comply with internal agency guidance because our Office is only authorized to decide protests concerning an alleged violation of a procurement statute or regulation. *See, e.g., Nationwide Pharm. LLC--Recon.*, B-413489.2 *et al.*, Nov. 25, 2016, 2016 CPD ¶ 339 at 4; *Triad Logistics Servs. Corp.*, B-403726, Nov. 24, 2010, 2010 CPD ¶ 279 at 2-3. Here, however, the RFP required the Air Force to analyze FOCl matters in accordance with applicable NISPOM provisions. Accordingly, it is appropriate for us to review the NISPOM's provisions to the extent they constituted the terms of the solicitation.

mitigation factors set forth in the NISPOM were precluded from award. Thus, we must address whether the agency's non-responsibility determination was reasonable. For the reasons that follow, we find that the Air Force's reasonably found that Finkl is owned by a foreign entity, and afforded the protester the opportunity to address any potential mitigation factors, but Finkl failed to rebut the presumption of FOCI arising from its foreign parent's ownership.

The determination of a prospective contractor's responsibility rests within the broad discretion of the contracting officer who, in making that decision, must necessarily rely on his or her business judgment. We therefore will not question a negative determination of responsibility unless the determination lacks a reasonable basis. Rotech Healthcare, Inc., B-409020, B-409020.2, Jan. 10, 2014, 2014 CPD ¶ 28 at 6; KMS Solutions, LLC, B-405323.2, B-405323.3, Oct. 6, 2011, 2011 CPD ¶ 209 at 12; 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. FAR § 9.105-1(b)(3); Sygnetics, Inc., B-404535.5, Aug. 25, 2011, 2011 CPD ¶ 164 at 4. In addition, contracting officers are generally given wide discretion in determining the amount of information that is required to assess an offeror's responsibility. See Rotech Healthcare, Inc., *supra*. Here, we find no basis to question the Air Force's non-responsibility determination because Finkl elected to contest the applicability of the solicitation's provision, rather than respond to the agency's reasonable request for clarification necessary to conduct the very analysis Finkl complains the agency failed to perform.

Specifically, it is unquestionable that the agency's review of Finkl's foreign ownership considered the NISPOM's enumerated factor of "[t]he source, nature, and extent of FOCI, including whether foreign interests hold a majority or substantial minority position in the company, taking into consideration the immediate, intermediate, and ultimate parent companies." NISPOM, Chap. 2, Sect. 3, ¶ 2-301(d). Although it is not apparent that the Air Force considered the NISPOM's other enumerated risk factors, the question of Finkl's foreign ownership appears to be a reasonable and credible basis for the agency's concern with Finkl's compliance with the RFP's special responsibility provision. Furthermore, the agency's concerns also reasonably extended to the accuracy of Finkl's certified disclosures, which failed to reflect its foreign ownership. Based on credible allegations of Finkl's foreign ownership raised during Ellwood's post-award protest and its own independent research, the Air Force elected to issue clarification questions to Finkl to ascertain the accuracy of its SAM disclosures, and whether Finkl was under FOCI, including explicitly asking Finkl to address what mitigating ownership and control arrangements it had in place. See, e.g., AR, Tab 19, Evaluation Notice to Finkl, at 3.

While Finkl complains that the agency failed to conduct the requisite analysis under the NISPOM to determine whether Finkl's foreign ownership presented material security risks or could be mitigated, Finkl failed to rebut the agency's reasonable presumption that Finkl's foreign ownership presented FOCI concerns, or address the agency's request for any mitigation-related information. Rather, Finkl argued, as it did before our

Office, that FOCI concerns were inapplicable because no classified material was at issue. Therefore, Finkl's failure to address the agency's valid concerns presented during clarifications effectively precluded the agency from conducting the analysis that Finkl claims was required. In analogous cases, we have found that an offeror that does not adequately respond to an agency's request for additional information during discussions risks having its proposal rejected. Knoll, Inc.; Steelcase, Inc., B-294986.3, B-294986.4, Mar. 18, 2005, 2005 CPD ¶ 63 at 7; Poly-Pacific Techs., Inc., B-293925.2, Dec. 20, 2004, 2004 CPD ¶ 250 at 4. Thus, in the absence of any mitigating information from Finkl to demonstrate why its foreign ownership did not pose FOCI concerns, we cannot conclude that the agency's resulting non-responsibility determination was unreasonable.

The protest is denied.

Thomas H. Armstrong
General Counsel