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Decision

Matter of: United Valve Company

File: B-416277.3; B-416277.4; B-416277.5

Date: January 17, 2019

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DIGEST

1. Protest challenging agency's determination to qualify an offeror as an approved source is denied where the record shows that the agency's determination was reasonably based.
 2. Protest of corrective action, which includes termination of a contract and resolicitation of the government's requirements, is denied where the agency's corrective action is appropriate to remedy flaws identified with the underlying procurement.
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DECISION

United Valve Company (United), of El Segundo, California, protests the corrective action taken by the Defense Logistics Agency (DLA), in response to our recommendation for corrective action in United Valve Co., B-416277, B-416277.2, July 27, 2018, 2018 CPD ¶ 268 (Decision). In that decision, we sustained United's protest against award of a contract to Logistical Support LLC (LSL), of Chatsworth, California, under request for proposals (RFP) No. SPE4A7-17-R-1321, issued by DLA for stability damper assemblies (damper assemblies) for use on the UH-1 helicopter. The protester asserts that the agency's announced corrective action is flawed and fails to reasonably implement GAO's recommendation.

We deny the protest in part, and dismiss the protest in part.

BACKGROUND

Issued on September 18, 2017, the RFP sought to procure damper assemblies, which were identified as a source control item and a critical application item, from approved sources that were identified in the solicitation by commercial and government entity (CAGE) code and part number. Decision at 1. The RFP identified four approved sources, including United and Logistical Support, LLC (hereinafter the approved source). Id. at 2. The RFP identified the approved source's CAGE code as 55064.¹ Id.

By the closing date, the agency received five proposals, including United's and a proposal from an entity that identified itself as Logistical Support, LLC (LSL) and its CAGE code as 1HFE7. Id. at 3. Only United's and LSL's proposals were considered for award.² AR, Tab 2, Final Price Negotiation Memorandum, at 2-3. The agency recognized and inquired as to why LSL's and the approved source's CAGE codes were different, and determined that both CAGE codes were associated with the same facility. Decision at 3-4. DLA subsequently made award to LSL. Id. at 4.

After receiving notice of award and filing an agency-level protest, United protested to our Office, arguing that LSL was not an approved source and was ineligible for award. Id. at 5.

On July 27, 2018, we sustained this protest and concluded that the record did not clearly establish that LSL was the same legal entity as the approved source identified in the solicitation or that LSL was qualified to offer the damper assemblies. We recommended that DLA determine and document whether LSL is qualified and thereby eligible for award. Our decision stated that if the firm is not eligible, the agency should terminate the firm's contract for the convenience of the government and make award to United, if otherwise appropriate.

On August 1, DLA sent a request for engineering support to the Air Force Engineering Support Activity (AF ESA) special program office that is responsible for approving and removing from the approved list sources of supply for DLA and Air Force procurements

¹ The RFP also incorporated the standard qualification requirements clause, Federal Acquisition Regulation (FAR) clause 52.209-1 (Qualification Clause). RFP at 19. That clause requires an offeror to have demonstrated that it or its product meets the standards prescribed for qualification prior to award of the contract and provides a space for the offeror to indicate whether it or its product has already met the qualification standards specified. Id.

² The other offerors were removed from consideration because the agency either declined to accept an alternate offer for a source control item or because the proposal did not offer approved parts. Agency Report (AR), Tab 2, Final Price Negotiation Memorandum, at 2-3.

of spare parts for the UH-1 helicopter. Tab 6, Declaration of AF ESA Engineer, at 2.³ DLA requested that the AF ESA validate and screen the technical data package associated with the damper assemblies to determine whether LSL is an approved source and whether LSL and the approved source are the same entity, “[considering] that they have the same name, address, [part number], and [point of contact] information when it comes to being an approved source.” Tab 3, Form 339, at 1, 4.

In response, the AF ESA determined that LSL was an approved source. In this regard, the AF ESA reviewed DLA’s request, the drawing for the damper assembly, and the national stock number procurement history. AR, Tab 6, Declaration of AF ESA Engineer, at 1. The AF ESA also referred the case to obtain a screening analysis worksheet report (SAW), which would, among other things, provide the status of the engineering support data and list the approved sources of supply. Id. The engineer also contacted the point of contact provided by LSL, to query whether the approved source and LSL were the same entity. Id. The point of contact indicated that the companies were the same and provided LSL’s System for Award Management registration. Id. The AF ESA viewed this documentation as confirming LSL’s CAGE code for supplying damper assemblies under the part number identified in the solicitation. Id. at 2. Additionally, the AF ESA concluded that a more thorough qualification review of LSL was not necessary because LSL had no known quality deficiency reports or other issues, of either a quality or engineering nature. Id. Based on this information, the AF ESA approved an engineering change order to grant source approval to LSL under CAGE code 1HFE7 and updated the technical data package and SAW with LSL’s new CAGE code, 1HFE7. AR, Tab 4, Engineering Change Order, at 1; Tab 5, SAW, at 1.

On September 27, DLA notified our Office that it had taken action to comply with our recommendation. In this regard, the agency explained that DLA submitted an inquiry to the AF ESA with cognizance over engineering support for this item, and as a result of the inquiry, the AF ESA identified LSL as an approved source. Electronic Protest Docketing System (EPDS) B-416277.1, B-416277.2, Docket Entry No. 32, Letter from DLA Acquisition Executive. DLA further explained that it was terminating for convenience the original award under the RFP because it had improperly identified the approved source, rather than LSL, as the manufacturing source. Id. Additionally, the agency stated that a directed award to United was not appropriate now, given that LSL had been validated as an approved source of supply and United’s proposal would require paying a price premium of nearly \$1 million. Id. DLA advised that it would

³ The agency provided a declaration from the Senior Mechanical Engineer with project management, execution, and operational responsibility in the UH-1/TH-1 Helicopter Special Operations Forces/Personnel Recovery Division at the Air Force Life Cycle Management Center at Warner Robins, Georgia. Tab 6, Declaration of AF ESA Engineer. The engineer explains that Warner Robins is the special program office with engineering management control over spare parts for the UH-1/TH-1 helicopter. Id. at 2.

update the approved sources list and competitively resolicit the requirement after validating the required quantities based on current demand forecasts. Id.

These protests timely followed.⁴

DISCUSSION

United advances two primary challenges to the corrective action the agency took in response to our decision sustaining the protest. In this regard, United contends that DLA erroneously concluded that LSL was an approved source and that the agency's decision not to direct award to United failed to follow GAO's recommendation.⁵

We first address United's challenge to the agency's approval process. United contends that the agency erred in finding LSL to be an approved source because DLA did not determine whether the approved source listed in the RFP and LSL are the same entity--which, according to the protester, DLA was required to do in order to establish whether LSL was qualified and eligible for award--and DLA did not satisfy the qualification source approval requirements. Protest, Oct. 9, 2018, at 11, 18. In this regard, United contends that DLA represented in the prior protest (B-416277.1 and B-416277.2) that a source could be approved only through the qualification process conducted by Bell

⁴ On November 5, during the development of the B-416277.3 protest, the agency issued a delivery order under the RFP to LSL. On November 15, the protester challenged the issuance of this delivery order. We docketed this protest as B-416277.5. On November 27, prior to the due date for the agency report for the B-416277.5 protest, the agency notified our Office that the order had been issued in error by a contracting officer who was unaware that the agency was in the process of terminating the award under contract SPE4A7-18-D-0162. Joint Contracting Officer's Statement and Memorandum of Law (COS/MOL), Nov. 27, 2018, at 2. The agency explained that it has taken corrective action by terminating the delivery order, which rendered the protest academic. We do not consider academic protests because to do so would serve no useful public policy purpose. Dyna-Air Eng'g Corp., B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132. Accordingly, the protest docketed as B-416277.5 is dismissed.

⁵ United 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, the protester argues in its October 9 protest that the agency's approval process was not "in accord" with Air Force Material Command Instruction 23-113. Protest, Oct. 9, 2018, at 20. We find the protester's arguments unavailing in this regard because they fail to elaborate on or explain with any specificity which provisions of the instruction the agency allegedly violated. Moreover, United effectively abandoned this argument by failing to address it again until its December 4 filing. Supp. Comments, Dec. 4, 2018, at 17.

Helicopter, the manufacturer of the UH-1 damper assembly at issue here.⁶ Id. at 19. Accordingly, United contends that since LSL did not become approved through Bell Helicopter's qualification process, and was not added to Bell Helicopter's source-controlled drawing as an approved supplier, LSL is not an approved source. Id.

The agency disputes this assertion, stating that the AF ESA has the authority to review and make changes to the approved sources list without intervention of Bell Helicopter and that it reasonably found LSL to be an approved source of supply. COS/MOL, (Nov. 7, 2018), at 5.

A contracting agency has the primary responsibility for determining its minimum needs and for determining whether a previously unapproved source will satisfy those needs, since it must bear the burden of difficulties incurred by reason of a defective evaluation. Chromalloy Gas Turbine Corp., B-234272, May 17, 1989, 89-1 CPD 474 at 2. Whether an offeror seeking source approval has submitted sufficient information to convince the agency that it will meet the agency's minimum needs is essentially a technical judgment committed to the agency's discretion, which we will not disturb unless it is unreasonable. Charleston Marine Containers Inc., B-299862, Aug. 30, 2007, 2007 CPD ¶ 152 at 3. A protester's disagreement with an agency's technical judgment does not render the judgment unreasonable and does not provide a legal basis for sustaining a protest. Astrosystems, Inc., B-261673.2, Dec. 7, 1995, 95-2 CPD ¶ 267 at 4.

The record shows that DLA referred the question of whether LSL was an approved source to the AF ESA responsible for approving and removing sources of supply for procurements of UH-1 damper assemblies. In response, the AF ESA reviewed the technical data package, damper assembly drawing, the procurement history, representations from LSL, and deficiency reports, and concluded that LSL should be granted source approval. On this record, United's criticisms of the AF ESA's conclusions concerning the adequacy of LSL's source approval process fall short of establishing that the AF ESA's determination, or DLA's reliance thereon, was unreasonable. The protester's challenges to the agency's process constitute technical disagreements that, without more, do not provide a basis to sustain the protest.

We next address the protester's various arguments asserting that DLA's corrective action does not reasonably implement our recommendation. In negotiated procurements, agencies have broad discretion to take corrective action where they

⁶ In the prior protest, the agency represented that Bell Helicopter owns and controls the technical data and "conducts all qualification testing that a source seeking approval must complete and pass in order for Bell to approve that source." EPDS, B-416277.1, B-416277.2, Docket Entry No. 25, Response to GAO Questions, at 1-2. The agency also stated that the military engineering support activity has management authority over the engineering and technical data aspects of this item for government procurement and is responsible for any interaction with Bell; DLA is not involved in the qualification process. Id.

determine that such action is necessary to ensure fair and impartial competition. McKean Def. Grp.--Info. Tech., B-401702.2, Jan. 11, 2010, 2010 CPD ¶ 257 at 3. As a general matter, the details of implementing our recommendations for corrective action are within the sound discretion and judgment of the contracting agency. IDEAL Indus., Inc., B-416416, July 26, 2018, 2018 CPD ¶ at 4. Such discretion must be exercised reasonably and in a fashion that remedies the procurement impropriety that was the basis for our protest recommendation. See AXIS Mgmt. Grp. LLC, B-408575.2, May 9, 2014, 2014 CPD ¶ 150 at 4. We will not object to the specific proposed corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. Strand Hunt Constr., Inc., B-292415, Sept. 9, 2003, 2003 CPD ¶ 167 at 4. An agency's discretion generally extends to determining whether it is necessary to terminate a contract, amend the solicitation, and reopen the competition. Id.

In our view, the corrective action here is well within the broad discretion afforded to contracting agencies in these circumstances and we will not substitute our views for DLA's on how the agency should proceed, absent a showing that this discretion is being abused. We see no such showing here.

The protest is denied in part and dismissed in part.

Thomas H. Armstrong
General Counsel