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Decision

Matter of: Sallyport Global Holdings

File: B-417223.2; B-417223.4

Date: April 3, 2019

Kara L. Daniels, Esq., and Sonia Tabriz, Esq., Arnold & Porter Kaye Scholer, LLP, for the protester.

Bradley D. Wine, Esq., Sandeep N. Nandivada, Esq., and Caitlin A. Crujido, Esq., Morrison & Foerster LLP, for SOS International, LLC, an intervenor.

Wade L. Brown, Esq., Department of the Army, for the agency.

Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's decision to meet its requirements through the award of a sole-source contract is denied where record shows that the requirement at issue is to be performed by a firm that has an exclusive land use agreement with the government of Iraq to occupy the premises where contract performance is to take place, such that it is the only firm capable of meeting the agency's requirements.

DECISION

Sallyport Global Holdings, of Reston, Virginia, protests the award of a sole-source contract to SOS International, LLC, of Reston, Virginia, under request for proposals (RFP) No. W52P1J-18-R-TajiBLS, issued by the Department of the Army for base life support (BLS) services at Camp Taji, Iraq. Sallyport maintains that the agency's sole-source acquisition strategy is unreasonable, and that the requirement should be subject to full and open competition.

We deny the protest.

The facts in this case largely are undisputed. On July 12, 2018, the agency published a sources-sought notice on the Federal Business Opportunities website soliciting expressions of interest in connection with the acquisition. That notice advised interested parties that the agency intended to issue a sole-source contract to SOS based on the agency's understanding that SOS has an exclusive land use agreement (LUA) with the government of Iraq (GOI). Agency Report (AR) exh. 4, Sources-Sought

Notice. The agency's announcement specified that the agency intended to make award to SOS under the authority of 10 U.S.C. § 2304(c)(1), which contemplates the award of a sole-source contract where only one responsible source is available to provide the solicited goods or services.

In response to that sources-sought notice, the agency received a number of expressions of interest and capability statements, including a submission from the protester. Notwithstanding those expressions of interest, the agency executed a sole-source justification and approval (J&A) to award a contract to SOS on November 27, 2018, and published a pre-solicitation notice, along with a redacted copy of the J&A, on December 20. Shortly thereafter, the agency executed a sole-source contract for an estimated value of approximately \$1 billion with SOS for a base year and four 1-year options on December 26, and published notice of its award decision the next day.¹ After learning of the award, Sallyport filed the instant protest.

PROTEST

Sallyport argues that the agency unreasonably awarded SOS a sole-source contract because, according to the protester, it also can obtain a LUA with the Iraqi government that will enable it to perform the requirement. Sallyport therefore maintains that the agency erred in executing a sole-source contract with SOS under the "only one responsible source" exception to the overarching competition requirements of the Competition in Contracting Act.

Our review of an agency's decision to conduct a sole-source acquisition focuses on the adequacy of the rationale and conclusions set forth in the agency's J&A; when the J&A sets forth a reasonable justification for the agency's actions our Office will not object to the award. MFVega & Associates, LLC, B-291605.3, Mar, 25, 2003, 2003 CPD ¶ 65 at 4. On this record, we have no basis to object to the agency's actions.

¹ The agency states that it executed an undefinitized contract action with SOS with a ceiling amount of approximately \$191 million because, although SOS had provided the agency a proposal for the requirement on December 13, the agency had not yet had an opportunity to evaluate the proposal, and the agency needed a contract vehicle in place by December 31 in order to avoid a lapse in services. The J&A included a ceiling amount of approximately \$979 million, while the SOS proposal included a cost estimate of just over \$1 billion. Compare; AR, exh. 17, Contract Between SOS and the Army, at 2; AR, exh. 15j, J&A, at 2; AR, exh. 34c SOS Proposal, Cost Volume, at 1.

The agency also notes that there is a difference between the possible duration of the contract--potentially five years--and the duration of SOS's LUA, which currently is for a period of only three years. However, exercise of the options under the awarded contract is specifically contingent upon SOS having a valid LUA in effect for the period of performance in question. See AR, exh. 17, Contract Between SOS and the Army, at 2.

The agency's J&A here explains that, prior to the invasion of Iraq, Camp Taji, Iraq, was a military installation built and operated by the Iraqi government. AR, exh. 15j, J&A, at 3. The complex includes an area referred to as the "green zone," along with an adjacent airfield.² After the invasion of Iraq, from 2003-2011, coalition forces operated the Camp Taji green zone. Id. Thereafter, the Iraqi government regained sovereign control over the Camp Taji green zone in connection with the draw-down of coalition forces. Id. At that point, the Iraqi government contracted with western firms to continue to provide BLS services at the Camp Taji green zone, and in that connection, executed an exclusive LUA with SOS to ensure continuity of those services. Id.

The J&A goes on to explain that SOS entered into an exclusive LUA with the Iraqi government through the execution of a memorandum signed on April 22, 2013 (and reaffirmed by a memorandum dated March 14, 2018), and that the current LUA is effective for a period of three years. AR, exh. 15j, J&A at 5-6. The J&A further states that the LUA prevents other firms from using the facilities and infrastructure at the Camp Taji green zone. Id.

The record includes several exhibits that, collectively, comprise the correspondence establishing SOS's exclusive LUA. AR, exhs. 6-12. The latest of these, dated March 14, 2018, provides as follows:

The Prime Minister, the Commander-in-Chief of the Armed Forces, approved to assign the area occupied by SOS International LLC (SOSi) in the Camp Taji exclusively in accordance with the contract drawn up between the company, the Joint-Task Forces, and the contractors of the FMS [foreign military sales] Program for three years pursuant to the applicable Iraqi laws.

AR, exh. 12, Exclusive Work Authorization, Mar. 14, 2018.

Sallyport initially raised questions about whether these agency exhibits demonstrate that SOS has an exclusive LUA for the Camp Taji green zone. During the course of the protest, however, the agency submitted a letter from the American Embassy in Baghdad confirming that, in mid-2013, after the Camp Taji green zone was transferred back to the Iraqi government, SOS was awarded an exclusive license by the Prime Minister of Iraq's Office to operate the facilities. AR, exh. 31, Letter from the American Embassy in Baghdad to Counsel for the Army, Feb. 24, 2019, at 1. The letter goes on to note that the process employed by the Prime Minister's Office and the justification for the license

² The green zone refers to a specific area within Camp Taji that includes most of the "hard stand" buildings and the primary personnel and logistics hub. AR, exh. 15j, J&A at 3. The adjacent airfield is the subject of a separate LUA executed between the Iraqi government and the government of the United States. AR, exh. 14, LUA between the GOI and the United States, July 10, 2016.

awarded to SOS were never publicized or made transparent either to the Embassy, or the Office of Security Cooperation--Iraq.

The letter goes on to represent as follows:

Embassy Baghdad has continuously and on all occasions declared its support of the Department of Defense request that the exclusive license agreement currently held by SOSi at Camp Taji be rescinded and that the GOI permit and support a new life support services package solicitation, open to fair competition under the stewardship of U.S. Department of Defense. To date, all such efforts have met with resistance from senior GOI leaders and no action has been taken to rescind the existing SOSi exclusive license agreement.

Id. The record therefore demonstrates that, in fact, SOS has an exclusive arrangement with the Iraqi government to provide base life support services at the Camp Taji green zone.

In addition, the letter goes on to clarify the respective responsibilities of the Department of State on the one hand, and the Department of Defense on the other, in connection with operations in Iraq. The letter provides as follows:

The Department of State reiterates that the Department of Defense is not authorized to separately negotiate or enter into agreements with any Government of Iraq entity or representative, other than the Iraq Ministry of Defense. Operation Inherent Resolve commenced in 2014, there is no separate Status of Forces Agreement (SOFA) and so U.S. forces remain and operate in Iraq only in an advisory capacity under the authority of the Department of State and the Chief of Mission (the Ambassador).

AR, exh. 31, Letter from the American Embassy in Baghdad to Counsel for the Army, Feb. 24, 2019, at 2.

In response to the Army's submission of the letter from the Embassy, Sallyport argues that the letter should not be part of the record in this protest because the letter was prepared after the agency's J&A was executed, and also, according to Sallyport, because the letter was prepared "in the heat of litigation."

Our Office considers the entire record produced in connection with a protest, including explanations and arguments presented during the protest process. See Kollsman, Inc., B-413485, et al., Nov. 8, 2016, 2016 CPD ¶ 326 at 8. Here, while the protester is correct that the letter was prepared after the agency's J&A, it was tendered by the agency to support the veracity of the assumption underlying the J&A, namely, that SOS has an exclusive LUA that precludes the Army from holding a competition for this requirement. In addition, as noted, the letter was prepared by Department of State

officials that are not a party to the litigation; it follows that the letter was not “prepared in the heat of litigation” as that notion is discussed in our cases.³ See e.g. Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15.

In the final analysis, Sallyport has produced no evidence to contradict the Army’s position, as corroborated by the Department of State, that SOS has an exclusive LUA for the Camp Taji green zone that precludes the agency from competing its requirements. Sallyport also has made no showing that the Army has any authority to disregard the agreement between SOS and the Iraqi government, or to engage in negotiations that could enable the agency ultimately to compete its requirements. Finally, Sallyport has produced no evidence (beyond a statement from one of its company officials that is not supported by any objective evidence) that the firm can secure a LUA of its own from the Iraqi government. On this record, we have no basis to object to the agency’s decision to obtain its requirements on a sole-source basis.

As a final matter, Sallyport raises what essentially are several procedural challenges to the agency’s J&A. For example, Sallyport argues that the J&A relied on a government estimate that was less than the amount of the proposal submitted by SOS for the requirement. However, we conclude that, even if Sallyport were correct in these assertions, the firm was not prejudiced by any such possible procedural infirmities. Prejudice is an essential element of every viable protest, and where none is shown or otherwise evident from the record, we will not sustain a protest, even where the protester arguably may be correct. Olympus America, Inc., B-414944, Oct. 19, 2017, 2018 CPD ¶ 151 at 3-4.

Here, as noted, the record establishes that SOS has an exclusive LUA that precludes the agency from holding a competition for its requirements. Even if Sallyport were correct with respect to its remaining arguments, the essential impediment to the agency conducting a competition would remain. Simply stated, regardless of which firm may win such a competition, only SOS is in a position to perform the contract. We therefore conclude that any procedural infirmity that may exist in the agency’s J&A would not change our disposition of the protest. We therefore need not consider these remaining allegations in detail.

The protest is denied.

Thomas H. Armstrong
General Counsel

³ We point out as well that there was a second protest filed in connection with this acquisition by Kellogg Brown & Root Services, Inc. (KBR). Upon receiving and reviewing the letter from the Embassy, KBR withdrew its protest.