



Decision

Matter of: Government Contracting Services, LLC

File: B-416696.2

Date: May 6, 2019

Kevin Ingley, for the protester.

Brian C. Habib, Esq., Department of the Army, for the agency.

Glenn G. Wolcott, Esq., April Y. Shields, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is dismissed as academic where the agency takes corrective action to determine if a sole-source procurement is appropriate after the record shows that the agency knew, prior to the closing date for proposals, that only one source was qualified to meet the solicitation's certification requirements.

DECISION

Government Contracting Services, LLC (GCS), of Tacoma, Washington, protests the terms of request for proposals (RFP) No. W9115118R0038, issued by the Department of the Army for maintenance of electronic security systems at Fort Hood, Texas. Among other things, GCS protests that the solicitation is overly restrictive in that it requires use of an intrusion detection system manufactured by Monitor Dynamics (MD); that an offeror must be certified by MD; and that one of the potential offerors is an affiliate of MD.¹

We dismiss the protest based on the agency's pending corrective action.

¹ This protest is not subject to a GAO protective order because GCS opted to proceed *pro se*. Accordingly, our discussion of some aspects of the record is necessarily general in order to limit references to non-public information. Nonetheless, GAO reviewed the entire record *in camera* in preparing our decision.

BACKGROUND

The agency issued the RFP on July 27, 2018,² seeking to award a single contract for maintenance services for various electronic security systems at Fort Hood, Texas, including an intrusion detection system (known as the Integrated Commercial Intrusion Detection System [ICIDS-II]) that is manufactured by MD. The system protects various Fort Hood facilities, including “firearm warehouses, document storage buildings, ammunition bunkers . . . [and] Sensitive [C]ompartmented Information Facilities[.]” AR, Tab 3, RFP at 20. In this context, the RFP required that “[t]he contractor performing the required services shall be a Monitor Dynamics (MD) Certified ICIDS-II Service Provider.”³ Id. at 21 (emphasis added).

The RFP stated that award would be made on a lowest-price, technically acceptable basis considering the following three evaluation factors: mission capability (technical), past performance, and price. RFP at 97-98. In order to receive an acceptable technical rating, proposals had to be evaluated as acceptable under each of two subfactors: personnel qualifications and certifications. Id. at 98-99. For the certifications subfactor, the RFP stated:

Subfactor 2: Certification. The Government will evaluate written documentation to ensure the technicians and system administrators are certified as MD trained technicians or system administrators or system integrator depending on services provided for the ICIDS-II system

Id. at 98.

On August 16, the day before the initial closing date for proposals, GCS filed its first protest, challenging various aspects of the solicitation. Among other things, GCS asserted that MD was “affiliated with, in collaboration with, and has a conflict of interest with one of the competitors on this procurement, Evergreen Fire Alarms LLC, dba Evergreen Fire & Security (Evergreen)” and alleged that there were “anti-competitive and predatory acts underway that are designed to achieve monopolistic power on this

² Although the “solicitation issue date” reflected on the RFP is July 30, 2018, the agency advises that the RFP was issued on July 27, 2018, based on the issue date reflected in the Federal Business Opportunities (FBO) website. Agency Report (AR), Mar. 13, 2019, at 2 n.1; AR, Tab 10, FBO Posting Data for Solicitation No. W9115118R0038, Aug. 23, 2018, at 2.

³ The agency explained that MD, the system manufacturer, will provide maintenance warranties and technical engineering support only for work performed by certified service providers. FBO Posting at 2. Additionally, the certification requirement is consistent with Army Regulation 190-11 (Physical Security of Arms, Ammunition, and Explosives) which states: “Alarm maintenance personnel will be certified in the respective software appropriate to the system which they maintain.” AR, Tab 31, Army Regulation 190-11, at 16.

procurement.” Initial Protest, B-416696, Aug. 16, 2018, at 2. In response to that protest, the agency took corrective action, stating that it would conduct an organizational conflict of interest investigation regarding MD and its affiliates; assess the validity of the certification requirement; and conduct market research. Accordingly, we dismissed GCS’s initial protest as academic. Government Contracting Servs., B-416696, Sept. 21, 2018 (unpublished decision).

GCS’s first protest and the agency’s subsequent corrective action revealed the following undisputed facts: In 2010, Evergreen acquired MD; to date, those companies are affiliated on the basis of common ownership; and MD’s certification of GCS was terminated on August 23, 2018. See generally Protest at 2-3; AR at 9-12; Protest, Attachment 1, Oct. 29, 2010 (“Evergreen, a longtime dealer and installer of [MD’s] security systems, acquired most of [MD’s] assets for \$720,000 at a bankruptcy auction”); AR, Tab 37, Email from Agency to MD Regarding GCS Certification, Aug. 24, 2018; AR, Tab 19, Corrective Action Crosswalk, at 1 (“the three individual owners of [the MD affiliate] also are the owners of [MD]”).

As of December 7, 2018, the agency had concluded that “there is only one potential source [for this procurement] . . . since GCS’s certification has expired.” Corrective Action Crosswalk at 6. In this context, the agency documented its assessment of the situation, and path forward, as follows:

[A]s a result of the corrective action and the change in market, the [contracting officer] had two COAs [courses of action]: 1) proceed with the evaluation of the current solicitation finding the protester not responsible and/or technically unacceptable or 2) cancel the current solicitation and solicit as a sole source using the authority [in Federal Acquisition Regulation] FAR [§] 6.302-1.[⁴]

As we discussed, after consulting with Legal and meeting with [the Director of the Contracting Command] and the Division Chief, the [contracting officer] chose COA one.

AR, Tab 46, Corrective Action Crosswalk Email, Dec. 7, 2018, at 1.

The record provides no further insight as to why the agency chose to ignore “COA two”—that is, cancel the current solicitation and solicit as a sole-source—even though the agency had already determined that there was, in fact, only one qualified source.

Accordingly, the agency moved forward with the procurement as though there was competition and, on February 7, 2019, issued an RFP amendment that, among other

⁴ Section 6.302-1 of the FAR provides authority for a sole-source procurement where there is only one available source.

things, directed offerors to confirm their certification status and provide written documentation as proof of certification, and extended the closing date for proposals to February 11. AR, Tab 6, RFP Amendment 0003, Feb. 7, 2019.

On February 8, GCS filed this protest. On April 22, following submission of the agency's report, the protester's comments, and the parties' supplemental briefings, the GAO attorney assigned to the protest conducted a conference call with the parties. During that call, the GAO attorney highlighted the above facts; suggested that the procurement was being conducted on a *de facto* sole-source basis; and noted that the record did not contain any of the documentation required for a sole-source procurement.

By letter to our Office dated April 25, the agency stated that it would take corrective action; "determine if a sole source under this procurement is appropriate under FAR Subpart 6.3"; and, if so, "implement the necessary processes and procedures" to support a procurement conducted under other than full and open competitive procedures. Notice of Corrective Action, Apr. 25, 2019, at 1. The agency further advised that "no award will be made pending the agency's determination and actions discussed in its corrective action memo." Confirmation of GAO's Understanding Regarding Corrective Action, Apr. 26, 2019, at 1. While the agency argues that its corrective action moots, or renders academic, the pending protest, GCS disagrees.

DISCUSSION

GCS's protest, as initially filed, challenges the MD certification requirements in the RFP as unduly restrictive of competition, based on its assertion that MD is "affiliated with, in collaboration with, controlled by, and has a conflict of interest with one of the offerors." Protest at 2. In this regard, GCS argues that the agency's actions "effectively sole source the award in an anticompetitive environment,"⁵ and seeks disqualification of Evergreen. *Id.* at 5.

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557. Our role in resolving bid protests is to ensure that the statutory requirements for full and open competition are met. Honeywell Tech. Sols., Inc., B-407159.4, May 3, 2012, 2013 CPD ¶ 110 at 3. Where, as here, an agency undertakes corrective action that will supersede and potentially alter prior procurement actions, our Office will generally decline to rule on a

⁵ GCS also argues that the affiliation between MD and Evergreen creates organizational conflicts of interest and antitrust issues. Protest at 3-4. Based on the agency's pending commitment to act in a manner that is consistent with the requirements of FAR subpart 6.3, we view these allegations as academic. In the event the agency subsequently engages in actions that violate applicable procurement law or regulation, GCS may file a protest, provided such protest is otherwise consistent with our Bid Protest Regulations.

protest challenging the agency's prior actions on the basis that the protest is rendered academic. See Dyna-Air Eng'g Corp., B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132.

While GCS objects to the agency's corrective action on the grounds that it "does not grant" the relief sought by GCS, Response to Notice of Corrective Action, Apr. 25, 2019, at 1, that fact does not constitute a valid basis for challenging the corrective action. As noted above, our role in resolving bid protests is to ensure that a challenged procurement is conducted in a manner consistent with procurement statutes and regulations. Dyna-Air Eng'g Corp., *supra*. Whether an agency's compliance with such authorities coincides with a protester's desired relief is not generally a basis for challenging the agency's actions. Moreover, the details of implementing corrective action are within the sound discretion and judgment of the contracting agency, and we will not object to any particular corrective action, so long as it is appropriate to remedy the challenged action. See DGC Int'l, B-410364.2, Nov. 26, 2014, 2014 CPD ¶ 343 at 3; Northrop Grumman Info. Tech., Inc., B-404263.6, Mar. 1, 2011, 2011 CPD ¶ 65 at 3.

Here, the agency's corrective action, to "determine if a sole source under this procurement is appropriate" and, if so, to proceed in a manner consistent with that determination, may well result in cancellation of the challenged solicitation, rendering that challenge academic. Notice of Corrective Action at 1. Accordingly, the protest is dismissed.

Thomas H. Armstrong
General Counsel