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Decision

Matter of: Cooper/Ports America, LLC

File: B-419000.2

Date: January 15, 2021

Brian Johnson, Esq., Barron Avery, Esq., and Laura Gronauer, Esq., Baker & Hostetler LLP, for the protester.

Nicole Giles, Esq., Lindy Bathurst, Esq., Tracye W. Howard, Esq., and Brian Walsh, Esq., Wiley Rein LLP, for James J. Flanagan Shipping Corporation, the intervenor.

Alexis J. Bernstein, Esq., Captain Seiji Ohashi, and Josephine Farinelli, Esq., Department of the Air Force, for the agency.

Christopher Alwood, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging an agency's proposed corrective action as inadequate for failing to make a new technical evaluation is dismissed as premature where the protester merely anticipates improper, prejudicial agency action.
 2. Protest objecting to an agency's failure to replace the contracting officer for the remainder of the procurement is denied where the protester has failed to present convincing evidence that agency officials acted in bad faith.
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DECISION

Cooper/Ports America, LLC (Cooper/Ports) of Houston, Texas, protests the corrective action taken by the United States Transportation Command under request for proposals (RFP) No. HTC711-20-R-R002, for stevedoring and related terminal services at the Port of Beaumont, Port Arthur, and the Port of Corpus Christi in Texas. Cooper/Ports contends that the corrective action is unreasonable because it fails to provide a meaningful remedy to concerns raised in the protester's prior protest.

We deny the protest.

BACKGROUND

The agency issued the RFP on January 9, 2020, pursuant to the procedures of Federal Acquisition Regulation (FAR) subpart 12.6 and part 15. Protest, exh. D, RFP at 29. The solicitation contemplated the award of an indefinite-delivery, indefinite-quantity contract under which task orders for stevedoring and related terminal services would be placed over a 5-year period. *Id.* at 3; Protest, exh. E, Performance Work Statement at 2. The RFP established that award would be made on a lowest-priced technically acceptable basis, considering a single technical evaluation factor and price. RFP at 30.

The agency received proposals from two offerors, James J. Flanagan Shipping Corporation (Flanagan) and Cooper/Ports. Protest, exh. B, Notice of Award. On July 28, 2020, the agency notified Cooper/Ports that it had selected Flanagan for award. *Id.* On August 10, Cooper/Ports filed a protest with our Office challenging the award to Flanagan.

On September 9, the agency produced its report in response to that protest. In its report, the agency revealed that, as part of its consideration of Flanagan's responsibility, it had made email inquiries regarding Flanagan with the president of International Longshoremen's Association (ILA) Local 1924. Memorandum for Record on Responsibility Determination, B-419000, Agency Report, Tab 181 at 1. The memorandum did not specify whether the agency had received any replies from ILA Local 1924. *Id.* On September 11, Cooper/Ports filed a request that the agency produce additional documents, including "[a]ll documents produced and received by the Government in connection with its inquiry 'into specific allegations regarding [Flanagan's] responsibility,' to include its 'email inquiries with the Port Director at the Port of Beaumont and President of ILA Local 1924' and any replies received." Cooper/Ports Request for Additional Documents, B-419100, Sept. 11, 2020, at 1-2. In response to Cooper/Ports's request, and despite citing to such documents in its own memorandum for the record, the agency stated that it did not have any documents relevant to the specific request regarding inquiries with ILA Local 1924. See Response to Request for Additional Documents, B-419000, Sept. 14, 2020 at 1-2.

On September 21, Cooper/Ports filed its comments on the agency report for the initial protest, which included attached copies of the agency communications with ILA Local 1924 regarding Flanagan that the agency had previously stated it did not have. See Cooper/Ports Comments & Supp. Protest, B-419000.1, Sept. 21, 2020. After withdrawing multiple grounds of protest, Cooper/Ports's remaining protest allegations were that the agency improperly withheld material documents from its agency report; misrepresented in the agency report the results of the agency's inquiries into the status of Flanagan's collective bargaining agreements; failed to recognize that the awardee had misrepresented the status of its collective bargaining agreements in its proposal; and performed an unreasonable responsibility determination. *Id.*; Protest at 7-8.

On September 29, the agency notified our Office that it intended to take corrective action. Protest, exh. G, Notice of Corrective Action at 1-2. Specifically, the agency

stated it would perform a new responsibility determination to ensure that the determination was based on the complete record and make a new award decision in accordance with the solicitation. *Id.* The agency also stated it might take other corrective action that it deemed appropriate. *Id.* On October 1, Cooper/Ports objected to the agency's intended corrective action on the basis that it failed to address or provide a remedy for multiple protest grounds Cooper/Ports had raised. Protest, exh. H, Cooper/Ports Response to Agency Notice of Corrective Action at 1. Notwithstanding Cooper/Ports's objection, we dismissed the protest based on our conclusion that the agency's intended action of making a new responsibility determination, and a new selection decision, together with the possibility of taking such other steps it deems appropriate, rendered the protest academic. *Cooper/Ports America*, B-419000, Oct. 27, 2020 (unpublished decision).

On October 9, Cooper/Ports filed this protest regarding the adequacy of the proposed corrective action.

DISCUSSION

Cooper/Ports contends that the planned corrective action is insufficient to address all aspects of, and provide a meaningful remedy to, the prior protest it filed with our Office. Protest at 9-12. The agency requests that we dismiss the protest as premature and for failure to demonstrate prejudice, given that no new award decision has been made and the protest merely anticipates prejudicial agency action.¹ Request for Dismissal at 3-5. For the reasons set forth below, we find no basis to sustain the protest.

Cooper/Ports first argues that the corrective action is inadequate because it does not address its allegation that the agency overlooked a material misrepresentation in the awardee's proposal. See Protest at 11. The protester contends that, to address its protest ground, the agency must conduct a new technical evaluation and disqualify Flanagan from the competition. *Id.*

Our prior decisions have considered the timing of protests challenging the propriety of an agency's proposed corrective action. See, e.g., *Quotient, Inc.*, B-416473.4, B-416473.5, Mar. 12, 2019, 2019 CPD ¶ 106 at 4. In instances where the agency's proposed corrective action alters the ground rules for a competition--or where the agency clearly indicates its intention not to alter ground rules that the protester contends must be changed to ensure a proper competition--we have considered a protester's challenge of those ground rules to be analogous to a challenge to the terms of a

¹ In the present protest, the agency filed a request for dismissal prior to the deadline for the agency report, and the protester filed its response to that request. Our Office suspended the requirement for the agency to file its report pending resolution of the agency's request. The entire protest was not appropriate for summary dismissal; however, we found that the agency's request for dismissal sufficiently addressed the protest on the merits. As a result, no formal agency report was filed for this protest.

solicitation, thus requiring the basis for protest to be raised prior to award. *Domain Name Alliance Registry*, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 7-8; *Northrop Grumman Info. Tech., Inc.*, B-400134.10, Aug. 18, 2009, 2009 CPD ¶ 167 at 9-10; see 4 C.F.R. § 21.2(a)(1). However, in those instances where the agency's proposed corrective action does not alter the ground rules, and the protester essentially argues that the results of the upcoming evaluation and selection decision will prove to be flawed, we have considered a protester's preaward challenge to the outcome of the evaluation to be premature. *360 IT Integrated Solutions; VariQ Corp.*, B-414650.19 *et al.*, Oct. 15, 2018, 2018 CPD ¶ 359 at 10; *SOS Int'l, Ltd.*, B-407778.2, Jan. 9, 2013, 2013 CPD ¶ 28 at 2.

As an initial matter, the protester's argument assumes that the agency has stated definitely that it will not undertake additional reviews during this period of corrective action. This assumption is refuted by the agency's statement reserving the right to take such other corrective action as it deems appropriate. Protest, exh. G, Notice of Corrective Action at 1-2. Since the agency still could elect to take these additional steps, the assertion that the agency is acting improperly is premature at this juncture.

Similarly, the protester's argument that the agency will again overlook an alleged material misrepresentation in Flanagan's proposal is premature. In this regard, the protester incorrectly infers from the absence of any explicit statement by the agency that it will conduct a new technical evaluation that the agency will again overlook a material misrepresentation in Flanagan's proposal. Protest at 7.

Given the posture of this procurement, regardless of whether there has been a final decision by the agency about whether Flanagan's proposal contains a material misrepresentation, we view Cooper/Ports's assertions as premature, given that an award decision has not yet been made. See *360 IT Integrated Solutions; VariQ Corp.*, *supra*, at 11. Consequently, there is no basis for us to consider the protester's claims at this time. If, in the future, the agency takes concrete action that may properly form the basis for a valid bid protest, the protester may file with our Office at that time, consistent with our Bid Protest Regulations.

The protester also argues that the agency's corrective action fails to address its allegations regarding the integrity of the procurement. Protest at 10-11. As set forth above, the protester argued in its initial protest that the agency misrepresented the results of its responsibility determination and failed to produce relevant documents that were relied upon by the agency in making its responsibility determination in response to the initial protest.² See Cooper/Ports Comments & Supp. Protest, B-419000, Sept. 21, 2020. Here, the protester contends that these prior agency actions require the agency

² As noted above, in its memorandum determining that Flanagan was responsible, the agency stated only that it made inquiries with ILA Local 1924 and did not specify whether it had received any responses that it relied upon. Memorandum for Record on Responsibility Determination, B-419000, Agency Report, Tab 181 at 1.

to replace the contracting officer. Protest at 10-11; Response to Request for Dismissal at 7.

Our Office has, in rare instances, made recommendations against agency personnel's continued involvement in procurements based on misrepresentations made in evaluation documents and failure to produce relevant documents in response to a protest. See, e.g., *Univ. Research Co., LLC*, B-294358 *et al.*, October 28, 2004, 2004 CPD ¶ 217 at 10-11. Here, however, the protester's bare assertions regarding the integrity of the procurement, without more, are insufficient to meet the high bar necessary to establish bad faith or bias on the part of government personnel. Government officials are presumed to act in good faith, and to establish bad faith, a protester must present convincing evidence that agency officials had a specific and malicious intent to harm the firm. See *Trailboss Enters., Inc.*, B-415812.2 *et al.*, May 7, 2018, 2018 CPD ¶ 171 at 12. Our Office will not conclude that an agency's actions are motivated by bad faith merely because they are adverse to the protester's interests. *Id.*

Here, Cooper/Ports submits no convincing evidence supporting its allegations that the agency acted in bad faith. The agency acknowledges that it had not considered the relevant documents cited by the protester as part of the responsibility determination, and further explains that it had not produced the documents in question because the contract specialist who created the documents had failed to properly file them in the contract file before being assigned to a different program. Request for Dismissal at 3. The agency's position in this regard is reflected in its September 29 notice of corrective action, proposing to make a new responsibility determination to ensure that the determination was based on the complete record. Protest, exh. G, Notice of Corrective Action at 1-2. On this record, we find no basis to sustain the protest.

The protest is denied.

Thomas H. Armstrong
General Counsel