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Decision

Matter of: EOD Technology, Inc.

File: B-406978.2; B-406978.3

Date: August 20, 2012

DECISION

EOD Technology, Inc., of Lenoir, Tennessee, protests the corrective action taken by the Department of the Army under request for proposals (RFP) No. W91B4L-12-R-0189 for security services in Afghanistan. EOD argues that the Army improperly determined that EOD was nonresponsible, and permitted the awardee, Olive Group, of Dubai, United Arab Emirates, to begin performing the contract.

We dismiss the protest.

The RFP, issued on June 7, 2012, provided for award of a fixed-price contract for security services at Forward Operating Base Lindsey, Afghanistan, for a 7-month base period and two 3-month option periods. Protest at 5. Offerors were informed that award would be made to the offeror providing the lowest-priced, technically acceptable offer. Proposals were evaluated on a pass-fail basis for technical capability, pricing, eligibility requirements, and past performance. Id. at 6-7. As relevant here, under the eligibility requirements evaluation factor, offerors were required to be affirmatively determined to be responsible in accordance with the standards of Federal Acquisition Regulation (FAR) Part 9 and the solicitation.

The Army received seven proposals, and in June awarded the contract to Olive Group. EOD received a written debriefing that informed the firm that, although EOD's proposal was otherwise technically acceptable and offered the lowest price, it was determined to be not responsible. Id. at 10.

On July 5, EOD protested to our Office challenging the award to Olive Group and requesting that the Army suspend contract performance in accordance with the

Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(c) (2006).¹ On July 13, the Army advised our Office that it would reevaluate EOD's responsibility and eligibility for award, and that, if the reevaluation results in a determination that EOD is eligible for award, the Army would "proceed accordingly." In light of the Army's proposed corrective action, we dismissed EOD's protest as academic on July 16.

On July 25, EOD learned that the Army had authorized Olive Group to begin transitioning activities for contract performance, and was informed that EOD should have received official notice that it had again been found nonresponsible. Protest at 11. On July 31, EOD again protested to our Office objecting to the nonresponsibility determination, as well as the Army's implementation of the corrective action and authorization for Olive Group to perform the contract. On August 4, the Army requested that EOD respond to specific concerns raised about EOD's responsibility. On August 14, EOD filed a supplemental protest, arguing that the agency improperly re-awarded the contract to Olive Group and/or authorized contract performance before completing its reevaluation of OED's responsibility.

The Army requests that we dismiss EOD's protest as premature, stating that the agency has not yet completed its reevaluation of EOD's responsibility. With respect to Olive Group's performance of the contract, the Army contends that the agency was not required to continue to suspend contract performance because the CICA stay expired when GAO dismissed its protest. The Army also explains that it began to transition the contract to Olive Group in order to avoid a lapse of services.

We agree with the Army that where, as here, the agency has not yet made a new finding concerning EOD's responsibility, EOD's protest of the agency's nonresponsibility determination is premature.² See e.g., Del-Jen Educ. & Training Group, B-401787.3, May 4, 2010, 2010 CPD ¶ 110 at 3 n.2; PRC Inc., B-233561.8,

¹ CICA provides, subject to certain exceptions, that performance of a contract must be suspended if the agency receives notice of a protest within 10 days of contract award or within 5 days of a required debriefing, and while the protest is pending. 31 U.S.C. §§ 3553(d)(3), (4).

² We expect the agency to act with reasonable efficiency in determining whether EOD is responsible. An agency's mere promise of corrective action, without reasonably prompt implementation, circumvents the goal of the bid protest system established by CICA--that is, the economic and expeditious resolution of bid protests. Commercial Energies, Inc.--Recon. & Costs, B-243718.2, Dec. 3, 1991, 91-2 CPD ¶ 499 at 6. In this regard, a protest is not resolved where the agency does not timely implement the promised corrective action that caused us to dismiss the protest. Pemco Aeroplex, Inc.--Recon. & Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 7.

B-233561.9, Sept. 29, 1992, 92-2 CPD ¶ 215 at 4-5. In the event that the Army concludes that EOD is nonresponsible, the protester may re-file its protest, subject to our timeliness rules.

With respect to EOD's argument that FAR § 9.105-2(a) requires the Army to complete its determination of EOD's responsibility before awarding the contract to Olive Group or authorizing performance, this section indeed requires that "[w]hen an offer on which an award would otherwise be made is rejected because the prospective contractor is found to be nonresponsible, the contracting officer shall make . . . a determination of responsibility, which shall state the basis for the determination." Here, the contracting officer in fact found EOD to be nonresponsible prior to awarding the contract to Olive Group. Although the Army's corrective action involves a reevaluation of EOD's responsibility, this does not implicate the agency's compliance with FAR § 9.105-2(a) prior to awarding the contract to Olive Group.

The protest is dismissed.

Lynn H. Gibson
General Counsel