



United States Government Accountability Office
Washington, DC 20548

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Decision

Matter of: Rotech Healthcare, Inc.

File: B-409020; B-409020.2

Date: January 10, 2014

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John E. McCarthy Jr., Esq., and Derek R. Mullins, Esq., Crowell & Moring LLP, for Apria Healthcare, Inc., the intervenor.

David G. Fagan, Esq., Department of Veterans Affairs, for the agency.

Heather Weiner, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the agency improperly found the protester nonresponsible because the contracting officer failed to consider recent relevant information in assessing whether the protester had inadequate financial resources to perform the contract is denied where the record shows that the agency reasonably considered the available information concerning the protester.

DECISION

Rotech Healthcare Inc., of Orlando, Florida, protests the award of three contracts (to Norco Inc., of Boise, Idaho; Care Medical Equipment, Inc., of Portland, Oregon; and Apria Healthcare, Inc., of Lake Forest, California), under request for proposals (RFP) No. VA260-13-R-0020, issued by the Department of Veterans Affairs (VA), for the provision of home oxygen services. Rotech argues that the agency unreasonably found Rotech to be nonresponsible, and therefore ineligible for award.

We deny the protest.

BACKGROUND

On March 8, 2013, the VA issued the RFP to provide ongoing home respiratory supplies and services to veterans and beneficiaries in the Veterans Integrated Service Network geographical service area No. 20. RFP at 1, 5. The RFP

permitted offerors to submit proposals for any or all of the 8 geographic areas listed in the solicitation. RFP at 1; id., attach. 1.¹ The RFP stated that the contractor shall provide “all supplies, materials, equipment, transportation of equipment, equipment services, labor, supervision, patient education, safety management, infection control, as necessary for patients on home oxygen therapy,” as specified under the statement of work (SOW). RFP at 1. The RFP anticipated the award of “at least four,” but “up to eight” fixed-price, multiple-award indefinite-delivery, indefinite-quantity contracts for one base year and four option years. Id. at 1, 4.

The RFP stated that proposals would be evaluated based on four evaluation factors: (1) technical capability, (2) past performance, (3) service-disabled veteran-owned small business (SDVOSB)/veteran-owned small business (VOSB) status, and (4) price. Id. at 61. For purposes of award, the technical and past performance factors were considered of equal importance, and when combined, were considered significantly more important than the SDVOSB/VOSB status and price factors. Id. at 61-62.

Rotech submitted a timely proposal in response to the RFP by the April 30 closing date. As the contracting officer explains, Rotech’s proposal advised the agency that, on April 8, the protester voluntarily entered into Chapter 11 bankruptcy. Contracting Officer (CO) Statement at 2. In addition, Rotech’s proposal included a letter from Rotech’s chief operating officer addressing Rotech’s bankruptcy, which stated, as relevant here: “There are no plans to sell the company or transition management at both Corporate and field levels.” Agency Report (AR), Tab 7, Rotech Letter (Apr. 2, 2013), at 2; CO Statement at 7.

Notwithstanding the letter in Rotech’s proposal stating that Rotech had no plans to sell the company, on May 21, Rotech’s CEO was quoted in a news article, stating that, as part of Rotech’s bankruptcy filing, “simultaneous with its pursuit of confirmation of its joint plan of reorganization by August, the Company will continue its prepetition marketing efforts to identify a buyer for its business.” AR, Tab 5, Responsibility Determination, at 1 (quoting AnitaMarie Laurie, “Rotech Healthcare Inc.: Rotech Announces Dual Strategy to Maximize Value” (May 21, 2013, 6:35 PM ET), available at: <http://www.4-traders.com/ROTECH-HEALTHCARE-INC-3513448/news/Rotech-Healthcare-Inc-Rotech-Announces-Dual-Strategy-to-Maximize-Value-16900222/>).

On August 29, the United States Bankruptcy Court for the District of Delaware approved Rotech’s bankruptcy plan, which included Rotech’s strategy to emerge from bankruptcy. Protest, exh. 12, Order Confirming Bankruptcy Plan. In approving Rotech’s bankruptcy plan, the protester states that the court relied upon documents

¹ This solicitation covers facilities in Alaska, Idaho, Oregon, and Washington. RFP, attach. 1.

about Rotech, including projected financials, a valuation analysis, and some financing commitments. Protest at 18.

The VA evaluated the proposals, and on September 18, the contracting officer found that Rotech was nonresponsible. AR, Tab 5, Responsibility Determination at 1, 6. In conducting the responsibility determination of Rotech, the contracting officer primarily relied on information provided in a Dun & Bradstreet (D&B) Report,² ordered on June 7, 2013. CO Statement ¶ 5; AR, Tab 5, Responsibility Determination, at 2; AR, Tab 2, Debrief Letter, at 2-3. Based on the information in the D&B Report, as well as the announcement about Rotech's plan to continue its prepetition marketing efforts to identify a buyer for its business, the contracting officer found Rotech to be nonresponsible, concluding that the firm "does not have adequate financial resources to perform the contract, or the ability to obtain them." AR, Tab 5, Responsibility Determination, at 1. Specifically, the contracting officer explained its concerns about Rotech as follows:

First, Rotech does not yet have an approved reorganization plan and does not expect one until August 2013. Secondly, Rotech admits it is and has been pursuing the sale of the company. It cannot be known who would purchase the assets and whether or not a new company can or would want to keep and maintain the contract.

Id. at 2.

In addition, the contracting officer provided further detail about the decision in a written debriefing. Specifically, the debriefing letter to Rotech stated the following:

- Rotech identified in [its] proposal that it voluntarily entered into Chapter 11 Bankruptcy on 4/8/2013.
- D&B (SAR 06/07/2013) reports a negative net worth [for Rotech] of \$297,189,000.00 as of 9/30/2012.
- D&B reports a 21.1% probability of supplier ceased operations or of becoming inactive over next 12 months. The average for US business is 5.6%.

² Dun and Bradstreet is an independent reporting service that makes its reports available to the public for evaluating the financial positions of companies. Such reports may be used by contracting agencies in evaluating contractor responsibility. See Federal Acquisition Regulation (FAR) § 9.105-1(c)(5); Int'l Shipbuilding, Inc., B-257071, Dec. 16, 1994, 94-2 CPD ¶ 245 at 4-5 n.2.

- D&B reports a supplier evaluation risk rating of 9, the highest risk rating on the scale.
- D&B reports 9 for both viability and portfolio comparison. (*Note, based on information in D&B's data files, for this business is 9. This means the company has been placed in a Special Category of bankruptcy or high risk of business deterioration).
- D&B reports a data depth indicator rating of "J" which means the business has filed for Chapter 11 bankruptcy and the plan of reorganization is not yet confirmed.
- D&B reports Rotech's financial condition as "Unbalanced."
- D&B does not report a rating for credit capacity for Rotech.

AR, Tab 2, Debrief Letter, at 2-3.

The contracting officer further explained that:

The uncertainty of Rotech's financial condition and the lack of an approved reorganization plan appropriately supports a determination of inadequate financial resources or the ability to obtain them at this time[. However, the final piece of information that solidified the determination comes from a Rotech announcement[.] [O]n May 21, 2013, [Rotech] informed the U.S. Bankruptcy Court that . . . the Company will continue its prepetition marketing efforts to identify a buyer for its business [simultaneous with its pursuit of confirmation of its joint plan of reorganization by August.]

Id. at 2.

In light of the information about Rotech's marketing efforts to identify a buyer for its business, the contracting officer stated the following:

The Contracting Officer's determination not to award to Rotech is the only prudent business decision that will eliminate the risk of possible disruptions in service and cost associated with re-procuring in the future should Rotech cease operations or sell to a buyer. It is not possible to know if a successor would have capability, capacity or desire to assume the contract or be eligible to hold a Government contract.

Id.

On September 24, the VA advised Rotech that it awarded contracts to: (1) Norco, for Boise and Spokane, for an estimated contract value of \$13,027,263; (2) Care Medical, for Portland and Puget Sound, for an estimated contract value of \$18,835,873; and (3) Apria Healthcare, Inc., for Roseburg and Southern Oregon Rehabilitation Center & Clinics (SORCC), for an estimated contract value of \$10,232,176.³ Protest, exh. 1, Notice to Unsuccessful Offeror Letter (Sept. 24, 2013), at 1-2. This protest followed Rotech's debriefing.

DISCUSSION

Rotech argues that the VA unreasonably determined that it was nonresponsible because the contracting officer failed to consider recent relevant information in assessing whether Rotech had adequate financial resources to perform the contract, or the ability to obtain these resources. In this regard, the protester asserts that the contracting officer failed to fulfill his obligation to make the responsibility determination "on as current a basis as is feasible up to the date of award," as required by FAR § 9.105-1(b)(3).⁴ The protester also challenges the VA's evaluation and selection decision. For the reasons discussed below, we conclude that the agency reasonably found Rotech nonresponsible,⁵ and therefore find that Rotech is not an interested party with respect to its remaining protest grounds. See Trailblazer Health Enters., LLC, B-407486.2, B-407486.3, Apr. 16, 2013, 2013 CPD ¶ 103 at 13-14 (a protester is not an interested party to protest an agency's evaluation of proposals where the contracting officer reasonably determined the firm to be nonresponsible).

Contracts may only be awarded to responsible prospective contractors. FAR § 9.103(a). In making a responsibility determination, the contracting officer must find, among other things, that the contractor has "adequate financial resources to perform the contract, or the ability to obtain them." FAR § 9.104-1(a). In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer is to make a determination of nonresponsibility. FAR § 9.103(b).

³ On September 27, Rotech emerged from bankruptcy. Protest, exh. 13, Bankruptcy Court Notice of Effective Date.

⁴ FAR § 9.105-1(b)(3) states that "[i]nformation on financial resources and performance capability shall be obtained or updated on as current a basis as is feasible up to the date of award."

⁵ Although our decision does not specifically address all of Rotech's arguments concerning responsibility, we have fully considered each of them and find that none provides a basis to sustain the protest.

The determination of a prospective contractor's responsibility rests within the broad discretion of the contracting officer who, in making that decision, must necessarily rely on his or her business judgment. We therefore will not question a negative determination of responsibility unless the determination lacks a reasonable basis. KMS Solutions, LLC, B-405323.2, B-405323.3, Oct. 6, 2011, 2011 CPD ¶ 209 at 12; Colonial Press Int'l, Inc., B-403632, Oct. 18, 2010, 2010 CPD ¶ 247 at 2. An offeror's responsibility is to be evaluated based on any information received by the agency up to the time award is proposed to be made. FAR § 9.105-1(b)(3); Sygnetics, Inc., B-404535.5, Aug. 25, 2011, 2011 CPD ¶ 164 at 4. In addition, contracting officers are generally given wide discretion in determining the amount of information that is required to assess an offeror's responsibility. See Trailblazer Health Enters., LLC, *supra*, at 11 (citing Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1334-35 (Fed. Cir. 2001)). While the contracting officer may elect to open a dialogue with an offeror to address responsibility concerns, such a dialogue is not required where an agency has an otherwise reasonable basis for assessing the firm's responsibility. KMS Solutions, LLC, *supra*, at 12-13.

D&B Reports

First, Rotech argues that the VA improperly relied on the D&B Reports in finding the protester nonresponsible, because the reports were outdated and did not reflect information from Rotech's bankruptcy proceedings. As discussed above, the contracting officer found that Rotech had neither adequate financial resources to perform the contract, nor the ability to obtain them. In making this determination, the contracting officer relied on information contained in a June 7 D&B Report, as well as information in the May 21 article concerning the protester's plans to seek a buyer for the company (which we discuss separately, below). AR, Tab 5, Responsibility Determination, at 2. The determination also referenced Rotech's filing for bankruptcy on April 11, and stated that Rotech's reorganization plan had not yet been approved. *Id.*

Rotech contends that FAR § 9.105-1(b)(3) obligated the contracting officer also to consider the bankruptcy court's approval of Rotech's bankruptcy plan on August 29--more than a month prior to the contract award date--along with other information, such as statements made in the bankruptcy court's order approving the plan, and documents relied upon by the bankruptcy court in approving the plan. Protest at 15. Further, the protester notes that the nonresponsibility determination incorrectly stated that "Rotech does not yet have an approved reorganization plan and does not expect one until August 2013," even though Rotech was found nonresponsible in mid-September. AR, Tab 5, Responsibility Determination, at 2. Rotech argues that the information upon which the contracting officer based the nonresponsibility determination was stale and irrelevant, and was overtaken by more positive developments. As a result, Rotech argues that the determination was unreasonable. Protest at 18.

In support of this argument, the protester quotes the U.S. Court of Federal Claims' decision in CRAssociates, Inc. v. United States, 95 Fed. Cl. 357, 338 (2010), which stated that “[t]he regulation [FAR § 9.105-1(b)(3)] undeniably requires an agency to rely on current information in making its responsibility determination.” This case, however, does not support the protester’s interpretation that FAR § 9.105-1(b)(3) imposes a strict mandate on contracting officers to seek additional information up to the date of award. As the Court further explained, “[while] FAR § 9.105-1(b)(3) provides that ‘[i]nformation . . . shall be obtained or updated on as current a basis as is feasible up to the date of award[,]’ . . . [t]his language does not prohibit an agency, in exercising its judgment, from relying upon information that was accumulated prior to the award decision” CRAssociates, 95 Fed. Cl. at 338 (“Thus, it is hardly the case that an agency’s reliance upon information that has not been updated to the time of a new responsibility decision is a per se violation of FAR § 9.105.”) In fact, as the Court noted, the Federal Circuit essentially rejected the same argument in United States v. John C. Grimberg Co., Inc., 185 F.3d 1297, 1303 (Fed.Cir. 1999), in which the Court held that a contracting officer did not violate the responsibility provisions in failing to request new information from an offeror found to be nonresponsible. Id. Specifically, the Federal Circuit stated:

Although FAR 9.105-1(a) does require the contracting officer to have, or to obtain, enough information to make a responsibility determination, the contracting officer is the arbiter of what, and how much, information he needs. Because responsibility decisions are largely a matter of judgment, contracting officers are generally given wide discretion to make this decision. Thus, although the contracting officer is given the discretion to seek additional or clarifying responsibility information from a contractor, he is not obligated to do so.

John C. Grimberg Co., Inc., 185 F.3d at 1303 (internal citations omitted).

The VA does not dispute that it did not consider the Bankruptcy Court’s approval of Rotech’s bankruptcy plan in its nonresponsibility determination, but responds that the contracting officer was not obligated to seek additional information from Rotech. AR at 10-11. The agency contends that the contracting officer’s reliance on the information in the June 7 D&B Report and May 21 article was reasonable because the information remained relevant and material to Rotech’s financial position up to, and beyond, the award date. Id. at 8-11. We agree with the agency.

The June 7 D&B Report⁶ assessed Rotech with the highest risk rating of “9” in the following categories:

Supplier Evaluation Risk--predicts the likelihood that a company will obtain legal relief from creditors or cease operations without paying creditors in full.

Viability Rating--assesses the risk that a company will no longer be in business in the next 12 months

Portfolio Comparison Score--compares the viability of a company with that of similar businesses, including available financial data, trade payments, and business activity, to predict the likelihood of going out of business or becoming inactive.

AR, Tab 1, June 7 D&B Report, at 1. In addition, the report gave Rotech a Data Depth Indicator rating of “J”, which signified that Rotech was in bankruptcy. The report also stated that the probability of Rotech ceasing operations and/or becoming inactive was 21.1% (while the average for US business is 5.6%). Id. at 2. The report also stated that Rotech had a negative net worth of \$297,189,000, and an “unbalanced” financial condition. Id. at 1.

Based upon a review of the D&B reports, the CO concluded that “[i]t is unclear whether Rotech would be able to comply with the required or proposed delivery or performance schedule, taking into consideration its current financial position” and that, “[g]iven Rotech’s current financial position, it is unclear whether they have the necessary organization, experience, accounting and operational controls to effectively manage the company and recover from bankruptcy.” AR, Tab 5, Responsibility Determination, at 2. The contracting officer further explains that, “[t]hroughout [his] review of the D&B Report it became very apparent that D&B was rating Rotech as a very high risk business,” and that, “[i]n fact, the D&B Report [gave] Rotech not just a high risk rating but the very highest risk rating offered on the D&B Report in all the rating categories where a rating scale was available.” CO Statement at 6.

We conclude that the record supports the reasonableness of the contracting officer’s reliance on information in the June 7 D&B report in finding Rotech

⁶ With regard to reliance on the D&B Report, the VA contracting officer explains that it relies upon D&B Reports in evaluating for responsibility because these reports offer a comprehensive measure of risk, and “deliver a highly reliable business rating which analyzes the current and future health of a business such as Rotech.” CO Statement at 5.

nonresponsible.⁷ For example, in response to the protest, the contracting officer ordered a new D&B report on October 4, “to see what, if any, risk factors had changed [from those listed in the June 7 D&B Report] and whether [the] responsibility determination should be revisited.” CO Statement at 6. This new report, obtained more than a month after the Bankruptcy Court approved Rotech’s bankruptcy plan and after Rotech emerged from bankruptcy, advised that Rotech’s bankruptcy plan had been approved, stating:

BANKRUPTCY UPDATE: According to published reports, Rotech Healthcare, Inc. announced that the U.S. Bankruptcy Court has approved the Second Amended Joint Plan of Reorganization of Rotech Healthcare, Inc. . . .

AR, Tab 4, Oct. 4 D&B Report, at 5. The October report also changed Rotech’s status from “J”--filed for Chapter 11 bankruptcy, to “M”--severe risk of business deterioration. Id. In addition, despite the approval of Rotech’s bankruptcy plan, the report continued to assign Rotech the highest risk possible in all rating categories. Id. at 3; CO Statement at 6-7.

The protester responds to the agency report by arguing that, “the October D&B Report was based almost entirely on the same outdated information as the June D&B Report.” Protester’s Comments (Nov. 14, 2013), at 5. This argument, however, is not supported by the record, which shows that the October D&B report, as quoted above, clearly takes into account Rotech’s updated bankruptcy status. AR, Tab 4, Oct. 4 D&B Report, at 5. The report also changed Rotech’s rating from “J” to “M,” indicating a change in status from “Chapter 11 bankruptcy” to “Business Deterioration (Severe Risk).” Id. at 3. Accordingly, although the protester contends that the nonresponsibility determination erroneously relies, in part, on Rotech not having an approved reorganization plan prior to award, the record demonstrates that the same high risk ratings remained for Rotech even after its plan was approved.

Thus, while the contracting officer did not have the October 4 report when making his nonresponsibility determination, this report demonstrates that the information in the June 7 report--upon which the contracting officer relied--was not stale, irrelevant or altered by the bankruptcy proceedings, the approval of Rotech’s bankruptcy plan, or Rotech’s emergency from bankruptcy. For this reason, we find that the information was not so outdated that the contracting officer’s reliance upon it was unreasonable.

⁷ In light of our finding reasonable the contracting officer’s reliance on this information, we find no basis to the protester’s argument that the agency’s responsibility determination was premature because it was prepared in July, but not signed until September. Supp. Protest (Nov. 14, 2013), at 6.

Rotech's Statement Concerning Its Intent to Sell

The protester also challenges the reasonableness of the contracting officer's reliance on the May 21 statement of Rotech's CEO announcing an interest in selling the company. In this regard, Rotech argues that the contracting officer should not have considered this information because Rotech "had only considered selling its business in the past as a method to protect the interests of its then current shareholders" and that "[s]ince at least the confirmation of the Bankruptcy Plan, Rotech was no longer considering selling the business." Protest at 8. The protester, however, fails to point to any evidence that would have notified the contracting officer about any changes to Rotech's strategy regarding selling the company. Protester's Comments (Oct. 30, 2013), at 19.⁸ As stated above, the agency had no obligation to seek clarifying or additional information. See John C. Grimberg Co., Inc., 185 F.3d at 1303. Accordingly, there is nothing to indicate that the contracting officer's reliance on the facts and statements made in the May 21 article was unreasonable.

Rotech's Filing for Bankruptcy

Rotech also asserts that its filing for bankruptcy does not, in itself, mean that it lacks adequate financial resources, and contends that it was unreasonable for the contracting officer to find that Rotech lacked adequate financial resources without considering the purpose for Rotech's bankruptcy. In this regard, the protester states that Rotech sought to discharge onerous debts and make Rotech a more financially viable company, and that the bankruptcy was not a plan to sell the company's assets and liquidate. Protest at 21. While a filing for Chapter 11 bankruptcy does not automatically require a finding of nonresponsibility, a contracting officer may nonetheless reasonably view bankruptcy as a factor in finding a contractor nonresponsible. See XO Commc'ns, Inc., B-290981, Oct. 22, 2002, 2002 CPD ¶ 179 at 6. Here, the record indicates that although the contracting officer considered Rotech's bankruptcy status, he did not find Rotech nonresponsible based solely on Rotech's filing for bankruptcy. The nonresponsibility determination was based on the high risk ratings for Rotech identified in the D&B Report, as well as the company's announcement regarding its

⁸ The protester also contends that the VA "imposed a nonexistent secret obligation on Rotech to update its financial information as part of the VA's responsibility determination," and faulted Rotech for not complying with this obligation. Supp. Protest (Nov. 14, 2013), at 4-5. Although Rotech points to statements in the contracting officer's response to the protest grounds as support for this assertion, we find that there is nothing in the record to indicate that the agency placed such an obligation on Rotech, or that the agency in any way penalized Rotech for not doing so.

intent to sell the company. As previously discussed, we find the agency's reliance on this information reasonable.

Confirmation of Rotech's Bankruptcy Plan

Next, Rotech argues that the contracting officer's nonresponsibility determination was unreasonable because, during the same timeframe, the VA assented to Rotech's bankruptcy plan, which in the protester's view, means that the VA effectively made a responsibility determination regarding Rotech's other contracts with the VA. Protest at 19; Protester's Comments (Oct. 30, 2013), at 14-15. We find no merit to this argument.

Responsibility determinations are based upon the circumstances of each procurement; these determinations are inherently judgmental and the fact that different conclusions may be reached as to a firm's responsibility does not demonstrate unreasonableness or bad faith. Harvard Interiors Mfg. Co., B-247400, May 1, 1992, 92-1 CPD ¶ 413 at 9. Here, as the agency notes, while the Department of Justice, on behalf of the VA, confirmed Rotech's bankruptcy plan, this approval concerned only contracts already existing at the time Rotech filed for bankruptcy. AR at 12-13. The contract at issue here had not been awarded at that time. Moreover, there is nothing in the record to support the protester's assertion that the VA's confirmation of the bankruptcy plan included a new affirmative responsibility determination for Rotech. Based on this record, we find no basis to sustain the protest.

Comparison of Offerors' Proposals

Finally, Rotech contends that the nonresponsibility determination was unreasonable because it was improperly based on a comparison of the offerors' proposals. Supp. Protest (Nov. 14, 2013), at 2. The record, however, does not evidence that the agency concluded that the protester was nonresponsible based on a comparison with any of the other offerors. Instead, the contracting officer made the responsibility determination separately and independently from the agency's comparative analysis of proposals, and the responsibility determination was based on information about Rotech in the D&B Report and May 21 article. AR, Tab 5, Responsibility Determination at 1-2; CO Statement (Nov. 20, 2013), at 2-3. Even though the responsibility determination included a concluding paragraph in which the agency compared Rotech with another offeror in the context of a tradeoff analysis, the fact remains that Rotech was found nonresponsible independent of the comparison. The record does not show that the contracting officer evaluated the

protester's responsibility based on a comparative assessment of the awardee or its proposal. Based on this record, we find no basis upon which to sustain the protest.

The protest is denied.

Susan A. Poling
General Counsel