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Decision

Matter of: NTELX, Inc.

File: B-413837

Date: December 28, 2016

William M. Weisberg, Esq., Law Offices of William Weisberg, for the protester.
Pamela J. Mazza, Esq., Megan C. Connor, Esq., Patrick T. Rothwell, Esq., Piliero Mazza PLLC, for TTW Solutions, Inc., the intervenor.
Melissa Buford, Esq., Consumer Product Safety Commission, for the agency.
Charmaine A. Stevenson, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly awarded a sole-source contract through the Small Business Administration's 8(a) program is denied where the record does not show bad faith on the part of government officials.

DECISION

NTELX, Inc., a small business of Vienna, Virginia, protests the award of a sole-source contract to TTW Solutions Inc., an 8(a) small business of Potomac, Maryland, under request for quotations (RFQ) No. CPSC-Q-15-0060, which was issued by the Consumer Product Safety Commission (CPSC) for operation and maintenance of CPSC's international trade data system risk assessment methodology (RAM) software system. The protester contends that CPSC acted in bad faith when it improperly awarded the sole-source contract to TTW under the Small Business Administration's (SBA's) 8(a) program in violation of Federal Acquisition Regulation (FAR) part 6 requirements for full and open competition.

We deny the protest.

BACKGROUND

On August 19, 2010, CPSC issued an 8(a) sole-source award for development of a RAM 1.0 system. Memorandum of Law (MOL) at 1-2; Agency Request for Dismissal at 3. The purpose of the RAM system is to identify the potential risk of shipments of consumer products at U.S. ports of entry. *Id.* NTELX was a

subcontractor on the RAM 1.0 contract, and developed the system using NTELX's proprietary software for which CPSC was granted a license under the terms of the contract. Id. at 2.

CPSC subsequently determined that it would procure a system with the same functionality of RAM 1.0, but that used open source software instead, and with the capacity to add enhancements and upgrades. Agency Report (AR), Exh. 16, RAM 2.0 Development Contract Award, at 3 ("It is CPSC's plan to replace the proprietary components and upgrade the current system where CPSC can maximize insight of current functionality and future potential."). CPSC again utilized the 8(a) program, and awarded a sole-source contract for the development of the new system (RAM 2.0) to TTW. Id.; Contracting Officer Statement of Fact (COSF) at 2.

NTELX performed as a subcontractor to TTW on the RAM 2.0 development contract, and did not provide a license for its proprietary software as it had for RAM 1.0. Protest at 3; MOL at 12. Upon completion of the RAM 2.0 development contract, CPSC then awarded TTW another contract, on September 26, for the continued operation and maintenance of the RAM 2.0 system.¹ AR, Exh. 33, RAM 2.0 Operation and Maintenance Contract Award at 1-2 ("The Contractor shall provide all necessary personnel and services in the operation, maintenance, and development of [RAM 2.0] in accordance with the attached Statement of Work and the Contractor's final quote dated September 15, 2016."). NTELX has filed this protest challenging the 8(a) sole-source award of the RAM 2.0 operation and maintenance contract to TTW.

DISCUSSION

In its protest, NTELX argues that in making the 8(a) sole-source award to TTW, the agency acted in bad faith and violated FAR part 6 requirements for full and open competition.² Protest at 6-7. According to the protester, the RAM 2.0 system could

¹ The contract includes minor development work that is incidental to the operation and maintenance of the RAM 2.0 system. COSF at 4; AR, Exh. 33, RAM 2.0 Operation and Maintenance Contract Award at 3 (indicating that a task order for operation and maintenance will be issued at the time of contract award and funded monthly at a fixed price; however, fixed-price task orders for development work will be negotiated at the time of task order request and receipt of the contractor's proposal).

² The protester also argued that the agency violated the Misappropriation Act and the Antideficiency Act when it made the award to TTW. Protest at 5-6. NTELX alleges that CPSC is improperly procuring development work using appropriations intended for operation and maintenance work in violation of fiscal law, and thereby has violated the Competition in Contracting Act requirement that all contracts be awarded in accordance with law and regulation. Id. The agency responds that

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only be built using RAM 1.0, and TTW must have failed in its performance of the RAM 2.0 development contract because it did not have a RAM 1.0 license.³ Id. NTELX challenges the agency's decision to procure RAM 2.0 through the 8(a) program based upon its belief that it is the only contractor that could perform the requirement. NTELX also argues that the agency has mischaracterized the award as one for operation and maintenance when it is truly for allegedly incomplete development work. NTELX argues that because it is the only responsible source by which the agency could have procured RAM 2.0, CPSC's 8(a) sole-source award of the RAM 2.0 operation and maintenance contract to TTW was arbitrary and capricious, unreasonable, and in bad faith. Id. at 7.

The agency responds that the very purpose of the RAM 2.0 development contract was to avoid the use of any proprietary software so that the agency would own the system outright and avoid the continual payment of licensing fees. MOL at 12. The agency states that NTELX's proprietary software used for the RAM 1.0 system "was neither needed nor wanted," and that the RAM 2.0 system was in fact successfully developed without proprietary software. Id. The agency further explains that "the use of open source technology would ultimately save the Agency significant financial resources despite the initial up front investment because the Agency would no longer be saddled by unending license payments." Id. at 13.

Further, the agency explains that both the RAM 1.0 and RAM 2.0 contracts were issued under the SBA's 8(a) program. MOL 1-2; COSF at 2. CPSC has stated that it awarded TTW a sole-source contract under the 8(a) program for the continued operation and maintenance of the RAM 2.0 system because the contracting officer determined that keeping the requirement in the 8(a) program would comply with FAR part 19, and the value of the procurement was below the competition threshold

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CPSC receives a single appropriation for salaries and expenses, which would properly include the RAM 2.0 operation and maintenance contract, and that TTW has successfully completed the RAM 2.0 development contract. COSF at 4; MOL at 10-11. We dismiss these allegations because NTELX failed to comment on the agency report's response to these arguments (and also failed to respond to the agency's request for dismissal on these issues), which renders them abandoned. SRM Grp., Inc., B-410571, B-410571.2, Jan. 5, 2015, 2015 CPD ¶ 25 at 8 n.5. In addition, we dismiss these grounds because our bid protest jurisdiction is limited to alleged violations of procurement statutes and regulations. See 31 U.S.C. § 3552; Alliant Enterprise JV, LLC, B-410352.5, B-410352.6, July 1, 2015, 2015 CPD ¶ 209 at 5 n.8 (dismissing protest allegation of Antideficiency Act violation because the Antideficiency Act is not a procurement statute).

³ According to the protester, TTW failed to meet several deliverables and specification requirements in its RAM 2.0 development contract. Protest at 7; Comments at 3.

for 8(a) awards. COSF at 2 citing FAR § 19.203(c) (“[I]f a requirement has been accepted by the SBA under the 8(a) Program, it must remain in the 8(a) Program unless the SBA agrees to its release in accordance with 13 CFR parts 124, 125, and 126.”); see also 13 C.F.R. § 124.504(d).

Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes the SBA to enter into contracts with government agencies and to arrange for the performance of such contracts by awarding subcontracts to socially and economically disadvantaged small business concerns. The FAR provides that contracts may be awarded to the SBA for performance by eligible 8(a) firms on either a sole-source or competitive basis. FAR § 19.800(b); see also FAR § 6.204 (identifying section 8(a) competition as full and open competition after exclusion of sources). Because of the broad discretion afforded the SBA and the contracting agencies under the applicable statute and regulations, our review of actions under the 8(a) program generally is limited to determining whether government officials have violated regulations or engaged in fraud or bad faith. See 4 C.F.R. § 21.5(b)(3); B&D Consulting, Inc., B-413310 et al., Sept. 30, 2016, 2016 CPD ¶ 280 at 9 n.12. Government officials are presumed to act in good faith and a protester’s claim that contracting officials were motivated by bias or bad faith must be supported by convincing proof; our Office will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Azimuth, Inc., B-409711, B-409711.2, July 21, 2014, 2014 CPD ¶ 218 at 4.

The record does not support NTELX’s allegations that the agency’s 8(a) sole-source award to TTW was made in bad faith. NTELX has argued that it is the sole contractor that can perform the requirement and that the agency has purposely mischaracterized the award as operation and maintenance. The agency, however, has stated that TTW satisfactorily completed performance of the RAM 2.0 development contract and is therefore awarding this contract for operation and maintenance, with options for development work as needed.⁴ Specifically, the

⁴ To the extent that the protester is arguing TTW is not responsible, NTELX has failed to state a valid basis of protest. The agency has stated that it conducted a thorough review of TTW’s capabilities and determined the firm could perform. COSF at 4. We will review a challenge to an agency’s affirmative responsibility determination where the protester presents specific evidence that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. Verestar Gov’t Servs. Group, B-291854, B-291854.2, Apr. 3, 2003, 2003 CPD ¶ 68 at 4-5. The allegations that our Office has reviewed in the context of an affirmative determination of responsibility generally pertain to very serious matters such as potential criminal activity. See, e.g., FN Mfg., Inc., B-297172, B-297172.2, Dec. 1, 2005, 2005 CPD ¶ 212 at 7-8 (considering an allegation that the agency failed to consider an ongoing investigation into whether the awardee defrauded the

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agency has stated RAM 2.0 is fully functional, TTW adequately completed all tasks required under the RAM 2.0 development contract, and the agency has accepted the RAM 2.0 system, paid the final invoice, and properly awarded the contract for RAM 2.0 operation and maintenance to TTW. MOL at 10-11; COSF at 2. Therefore, although NTELX may disagree with the agency's business decisions to award TTW an 8(a) sole-source contract for RAM 2.0, it has failed to demonstrate that the agency has engaged in any fraud or bad faith.⁵ See Deval LLC, B-408519, Oct. 25, 2013, 2014 CPD ¶ 318 (where protester alleged that agency award under the 8(a) program was the result of animosity on the part of agency officials, our Office stated it will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition).

The protest is denied.

Susan A. Poling
General Counsel

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government on a prior contract for the same requirement). In contrast, NTELX's assertion that TTW may have failed to meet certain specification requirements in its prior contract, which the agency has disputed, does not support the necessary threshold to trigger our Office's review of a challenge to an affirmative responsibility determination. See Health Care Waste Services, B-266302, Jan. 19, 1996, 96-1 CPD ¶ 13. Further, whether TTW actually complies with the requirement of the current contract is a matter of contract administration, which we will not review. 4 C.F.R. § 21.5(a).

⁵ In its comments on the agency report, NTELX states that it was "ready, willing, and eager to execute a perpetual license with CPSC, at a price that would have resulted in a total lifecycle cost of RAM 2.0 being a fraction of what CPSC has paid to date, for something that, unlike RAM 2.0, met CPSC's requirements." Comments at 2. The protester has provided no proof for this statement, and we have no basis to question the veracity of the agency's representation of the functionality of the RAM 2.0 system or CPSC's conclusion that it will be more cost effective over time.