



Decision

Matter of: Technology Advancement Group, Inc.

File: B-417609

Date: August 8, 2019

Jacqueline M. McEwan, for the protester.

Wade L. Brown, Esq., Department of the Army, for the agency.

Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the terms of a solicitation for sole-source contract is denied where agency reasonably determined that only the original equipment manufacturer could provide the services and products required.

DECISION

Technology Advancement Group, Inc. (TAG), of Dulles, Virginia, a small business, protests the terms of request for proposals (RFP) No. W56HZV-19-R-0034, and the proposed award of a sole-source contract to Trimble, Inc., of Dayton, Ohio, by the Department of the Army, Army Materiel Command, to install Trimble's grade control capability system equipment and to supply and install additional devices. The protester argues that the Army unreasonably rejected its capability statement and that the agency lacks a valid legal basis to issue the RFP and award the contract to Trimble on a sole-source basis.

We deny the protest.

BACKGROUND

Two earlier procurements are relevant to this protest. First, the Army purchased engineer rapid airfield construction capability (ERACC) type II devices from Trimble through an order issued under a Marine Corps indefinite-delivery, indefinite-quantity

contract.¹ Second, in July 2018, the Army posted a notice on fbo.gov (the Federal Business Opportunities website) of a proposed sole-source requirements contract award to Trimble for ERACC type II devices² and associated services for a 5-year base period and a 1-year option.

TAG challenged the proposed sole-source award to Trimble by filing a protest at our Office. In response, the Army proposed to take corrective action, which it described as having two parts. The Army would issue a new sources sought notice, consider any capability statements it received, and decide how to proceed for the long-term requirement. In addition, the agency stated that it would pursue the award of “a more limited sole-source procurement from Trimble for a reduced quantity of hardware and service[s] to cover a year’s worth of requirements” of particular devices and services. Letter from Counsel for Army to GAO, Oct. 17, 2018, at 1. The Army stated that the limited sole-source procurement would be “supported by a new J&A [justification and approval document] and issued in accordance with the requirements of FAR [Federal Acquisition Regulation] Part 6.” *Id.* As a result of the agency’s proposed corrective action, our Office dismissed TAG’s protest as academic. Technology Advancement Group, Inc., B-416699, Oct. 24, 2018, at 2 (unpublished decision).

On December 3, the Army posted a sources sought/market survey notice on fbo.gov, which the agency subsequently modified several times. On January 11, 2019, TAG submitted a capabilities statement to the contracting officer, which described the firm and its partner, Leica Geosystems Inc. The statement explained that TAG could supply Leica’s commercial laser and Global Positioning System machine control system. Dismissal Request exh. 8, TAG Sources Sought Response, at 1. The statement also explained TAG’s ability to provide equipment and services to meet the Army’s requirement, and answered a series of specific questions posed by the Army about the firm’s technical and logistical capabilities, cost estimates, and administrative information. *Id.* at 1-13.

¹ The Army explains that the performance period under that contract ended in December 2018 and the ordering period ended in April 2018. Agency Report (AR), Legal Memorandum at 2. TAG argues that the contract was for commercial off-the-shelf equipment and that the order caused the contract to reach its maximum value.

² The ERACC type II system components are installed on Army earthmoving equipment so that the system’s global positioning system and laser-leveling technologies can facilitate rapid airfield construction work. The system has three basic elements: an “A-kit,” which consists of hardware, wiring harnesses, and brackets that are installed on a specific prime mover to allow it to interface with a B-kit; a “B-kit” (consisting of laser leveling and global positioning system elements), that is easily transferred between prime movers that have A-kits installed; and frequency-gap radios, which allow the system to communicate. Dismissal Request exh. 7, Sources Sought/Market Survey Postings, at 12-13 (“Distribution Statement A” at 1-2).

On February 7, the Army prepared a report assessing the results of the sources sought/market research effort, which noted that two sources had been identified: Trimble and TAG. Trimble was identified as the original equipment manufacturer and supplier of the hardware, logistics products, and technical manuals that were the “ERACC type II program of record.” The report noted that Trimble had the advantages of owning the installation instructions for 609 A-kits that the Army had already purchased, owning the technical data package (TDP) for the ERACC type II system, and having qualified personnel. Additionally, technical manuals had been developed for Trimble’s devices and the Army had completed the testing of Trimble’s equipment for air-drop and helicopter sling load requirements. AR, Tab 10, J&A, at 3; Tab 11, Market Research/Sources Sought Report, at 1-2. The report also noted two disadvantages of contracting with Trimble, including that its response to the market research was vague. Id. at 2.

TAG was identified as a competing source of commercial equipment, and its advantages included its ability to meet military requirements, its current production of an interoperable ERACC type II B-kit, its production of a surveying tool kit for the Army, and its production of other machine control systems for earthmoving and civil engineering. Id. The report noted as disadvantages that TAG did not have “direct knowledge” of the Trimble system and would encounter a learning curve, its equipment would need to be tested, it had no access to Trimble’s installation instructions, it had not obtained certification for air-drop requirements, it did not describe the elements of its A-kit, and it generally did “not demonstrate how or why” it could meet the agency’s requirements. Id. at 3.

The Army then prepared a J&A document to authorize the sole-source procurement at issue in this protest, citing 10 U.S.C. § 2304(c)(1) and FAR § 6.302-1. AR, Tab 10, J&A, at 2, 11. The J&A noted that the Trimble ERACC type II was proprietary hardware, the Army did not have a TDP and had no right to obtain the TDP from Trimble, and Trimble had clearly stated in May 2018 that it would never sell the TDP to any government agency. Id. at 3. The J&A then noted that the Army had tested the Trimble ERACC type II against military-unique requirements with support from Trimble, and had “fully provisioned data elements of the hardware, which supports the ERACC [t]ype II system technical manuals.” Id.

After reviewing that background, the J&A proceeded to explain the factual and legal justification for a sole-source contract with Trimble. First, the J&A concluded that, with respect to the agency’s requirement for additional ERACC type II devices (or “hardware”), a competition would result in a duplication of costs³ already incurred for the

³ Our explanation of this point (and several others) is necessarily limited because the Army has asserted that portions of the record, including the cost estimates here, involve “OPSEC” [operational security] information that cannot be made public. Additionally, the Army designated certain information in the purchase description as being for official use only, while other information in the record is either nonpublic commercial proprietary
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Trimble system that “ha[d] met all major acquisition milestones including material release approval.”⁴ Id. at 3-4. Second, with respect to the required installation services,⁵ a competitive acquisition would result in an unacceptable delay due to three issues: the installation of the existing inventory of Trimble ERACC type II units by any source other than Trimble would void the warranty; a new contractor would require time to familiarize itself with installation of existing units and to develop installation instructions; and it would take “approximately 24.5 months” for the Army to conduct a competitive acquisition, for the contractor to become familiar with installation procedures, and for it to develop installation instructions. Id. at 6.

The J&A went on to explain that “unforeseen events” had prevented the agency from awarding a follow-on contract at the expiration of the Marine Corps contract, and that day-for-day delays would continue until a new contract was awarded. Id. at 7. The J&A concluded by explaining that award to any firm other than Trimble would result in an unacceptable delay of 24.5 months, which would pose significant risk to the Army by “depriv[ing] Engineer commands with this capability across multiple engineering systems,” whereas following the award of a contract to Trimble (which the J&A separately estimated would take 7 months), installation of units could resume within 30 days. Id. at 6-7. The J&A acknowledged that the Army would not obtain competition and that it had decided not to take action to increase competition because of its lack of a TDP, Trimble’s refusal to sell a TDP, and the cost and delay of considering any alternative system. Id. On March 27, the Army’s competition advocate approved the J&A under the authority of 10 U.S.C. § 2304(c)(1). AR, Tab 10, J&A, at 11.

The RFP, issued on April 25 as a combined synopsis/solicitation for commercial items, provided for the award of a sole-source contract with Trimble. The Army describes the contract as being for the installation of approximately 650 A-kits. The 650 A-kits include 609 units previously purchased under the Marine Corps contract, plus approximately

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information, or inter-/intra-agency communications. See AR, Tab 11, Market Research Report, at 2-3. Where the Army has designated certain information as public in one filing, but withheld it in another filing in the record before our Office, our discussion is based on the information in the Army’s public submission.

⁴ The J&A lists those costs as including engineering, testing, development, provisioning of parts, logistics events, technical manual development, and instructor and personnel training, which the statement implies were incurred during orders under the Marine Corps contract. Id.

⁵ The RFP lists the Army prime mover earthmoving equipment on which the units are to be installed as including graders, D6K dozer types I and II, Deployable Universal Combat Earthmover (DEUCE), and self-propelled scrapers. RFP at 60. The agency lists the prime mover host machines as the “Caterpillar 613C Scraper, T5 Dozer, DEUCE, 120M Motorized Road Grader, and 120M1A Motorized Road Grader-Airborne.” Legal Memorandum at 1.

41 additional A-kit units that are to be purchased and installed under the contract resulting from this RFP.⁶ Dismissal Request at 3 n.2. The quantities are identified as estimates because the RFP will result in a requirements contract for a 1-year ordering period. RFP at 130 (RFP amend. 2 at 19⁷); see also RFP at 21 (“The anticipated period of performance will include a base period of one year.”)

As noted above, since the Army concluded its market research and issued a J&A to authorize a sole-source procurement, the RFP stated that the agency was not seeking competitive proposals. Nevertheless, the RFP also stated that the agency would consider responses from responsible sources (i.e., other than Trimble), which had to “be supported with clear and convincing evidence to clearly be able to provide” the required hardware and services. The RFP further explained that these responses would only be reviewed to assess whether to conduct a competitive procurement “in lieu of the sole-source” RFP. RFP at 2. Responses to the RFP were due by May 28. On May 25, TAG submitted this protest, arguing that the sole-source justification was invalid.

DISCUSSION

As an initial matter, the Army argues that the protest should be dismissed both because it is untimely and because TAG is not an interested party. We disagree on both fronts.

Timeliness

The Army argues that in taking corrective action in response to TAG’s earlier protest, it expressly stated on October 17, 2018, that the Army would pursue a sole-source procurement from Trimble. The Army argues this protest, filed in May 2019, is untimely because it was filed more than 10 days after the Army stated its intentions. Dismissal Request at 5-7. TAG argues that its protest challenges the agency’s J&A on the basis that it does not comply with FAR part 6, in contrast to the Army’s statement in October 2018 that the procurement would be supported by a J&A that complied with FAR part 6. Opposition to Dismissal at 3. TAG argues that its protest was filed within 10 days of a May 23, 2019, email from the contracting officer which explained that the services and equipment could only be obtained from Trimble because “[t]he equipment is not determined to be a commercially available off-the-shelf (COTS) item. The equipment is commercial with minor modifications as defined in FAR 2.101.” Id. (quoting Protest attach. 2, Email from contracting officer to TAG (May 23, 2019), at 1).

⁶ It also appears that the Army anticipates purchasing 15 B-kits and 56 frequency-gap radios. Dismissal Request ex. 7, Sources Sought/Market Survey Postings, at 12 (“Distribution Statement A” at 1).

⁷ The record combines the initial RFP and subsequent amendments into a single document. In this decision, when citing to an amendment, we note both the combined pagination and the pagination of the amendment, to increase clarity.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, a protest based on other than alleged improprieties in a solicitation must be filed not later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Under the circumstances here, TAG's knowledge in October 2018 that the Army desired to conduct a sole-source procurement consistent with FAR part 6 did not provide a basis for TAG to protest. It was only on May 23, when TAG obtained information that TAG believed could show that the Army's sole-source justification⁸ was based on a flawed factual assertions, that TAG had a basis to protest. See AT&T Info. Servs., Inc., B-223914, Oct. 23, 1986, 86-2 CPD ¶ 447 at 3 (protest filed within 10 days after protester received agency's sole-source justification is timely). As a result, we decline to dismiss the protest as untimely.

Interested Party

With respect to TAG's status as an interested party, the Army argues that TAG did not submit a proposal or capability statement in response to the RFP, and it has not adequately shown that it could install the Trimble A-kits on Army prime movers. The Army argues that, in order to be considered an interested party, TAG had to submit a response to the RFP. Additionally, the Army argues that TAG's January 11, 2019, response to the Army's sources sought/market survey expressly stated that TAG could not install ERACC type II A-kits that the Army previously purchased from Trimble. Specifically, the Army pointed to the following exchange:

Does your company currently have Field Service Representatives (FSRs) who are capable of installing the Army's current inventory of A-Kits onto the host vehicles?

Response: Yes, TAG/Leica FSRs can install the current inventory of A-Kits onto any existing host vehicles. We have an existing global team of certified, highly trained, and experienced Regional Support Engineers who are capable of installation, on-call maintenance, repair, survey, troubleshooting, training, and scheduled and unscheduled maintenance on all aspects of the systems we are offering.

Dismissal Request at 12 (quoting Dismissal exhs. 7 & 8).

The Army argues that the response--the words "of the systems we are offering" in particular--shows that TAG never made a claim to be able to install the Trimble A-kit;

⁸ The Army refused TAG's request for a copy of the J&A until it was provided to TAG (in redacted form) in the record submitted to our Office. At the time, the Army stated that the document would only be released after award of a contract to Trimble, and then within 14 days as required by FAR § 6.305(a). Protest exh. 2, Email from Contract Specialist to TAG (May 23, 2019), at 2.

only that it could install the commercial system that is manufactured by TAG's partner, Leica. Id. at 12. TAG argues that its response directly informed the Army that it could install the Army's current inventory (i.e., Trimble A-kits) onto the required vehicles, and that the Army's argument is a willful misreading of the response.

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557, only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. Bid Protest Regulations, 4 C.F.R. § 21.0(a)(1). Determining whether a party is interested involves consideration of a variety of factors, including the nature of issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. Four Winds Servs., Inc., B-280714, Aug. 28, 1998, 98-2 CPD ¶ 57. A protester is not an interested party where it would not be in line for contract award even if its protest were to be sustained. Id.

We require a protester to submit a timely expression of interest responding to an agency's notification that it is considering a sole-source contract, and to receive a negative agency response as a prerequisite to filing a protest challenging an agency's sole-source decision. Integrated Sys. Group, Inc., B-246446, Feb. 21, 1992, 92-1 CPD ¶ 213 at 2. A potential source can protest the sole-source and related issues within 10 days of when it knows or should have known that its expression of interest was rejected and that the sole-source procurement is proceeding. Forensic Quality Servs.--Int'l, B-299723, May 23, 2007, 2007 CPD ¶ 97 at 2.

Here, TAG's response shows that it provided information to show that it had personnel capable of installing the Trimble A-kits that the Army previously purchased. TAG responded with a timely capability statement and answers to each of the Army's questions during the sources sought/market survey conducted for this requirement. When the Army then issued the RFP anticipating the award of a sole-source contract, TAG properly understood that the Army was proceeding with a sole-source procurement, and in effect, had rejected TAG's response. We think TAG's responses to the Army's sources sought/market survey are adequate to show that TAG is an interested party for purposes of challenging the issuance of the RFP on a sole-source basis.

Sole-Source Justification

TAG argues that the Army lacks a valid basis for awarding a sole-source contract to Trimble. In contrast to the Army's conclusion that only Trimble can meet the agency's requirement, TAG contends that its personnel can install the equipment on the Army's prime movers, and that TAG can provide its partner's equipment that will meet the agency's specifications, and will be interoperable with Trimble's equipment. Protest at 3. TAG disputes the Army's claim that possession of a TDP is required to perform the contract, and argues that in actuality, its partner, Leica, is very familiar with the

ERACC equipment and has replaced Trimble devices with Leica devices on many occasions, including on Caterpillar prime movers. Protester's Comments at 2.

The Army argues that its J&A provides a reasonable basis for its decision to award a sole-source contract. Legal Memorandum at 7. In particular, the J&A explains that "[t]he ERACC [t]ype II incorporates a version of Trimble's commercial products with slight modifications to meet unique military mission requirements to design and construct roads, airfields, and storage areas/lots in an accelerated timeframe." AR, Tab 10, J&A, at 3. To install the Trimble devices purchased previously, the Army concluded that a contractor would have to either have access to Trimble's TDP, or expend significant time to identify and document the method to install Trimble's devices. After concluding that neither of these approaches would yield a suitable result, the Army determined that only Trimble could provide the services and devices that the agency requires. Id. at 4-7.

The Competition in Contracting Act of 1984 provides that agencies must award contracts on the basis of full and open competition, absent a specific exception authorizing the use of noncompetitive procedures. 10 U.S.C. § 2304. When an agency uses noncompetitive procedures, it is required to execute a written J&A with sufficient facts and rationale to support the use of the specific authority. See 10 U.S.C. § 2304(f)(1)(A), (B); FAR §§ 6.302-1(d)(1), 6.303, 6.304. Our review of an agency's decision to conduct a sole-source acquisition focuses on the adequacy of the rationale and conclusions set forth in the agency's J&A; when the J&A sets forth a reasonable justification for the agency's actions our Office will not object to the award. Sallyport Glob. Holdings, B-417223.2, B-417223.4, Apr. 3, 2019, 2019 CPD ¶ 133 at 2. A sole-source award is justified where the agency reasonably concludes that only one known source can meet its needs within the required time, except where the noncompetitive situation arises from a lack of advance procurement planning. Metric Sys. Corp., B-279622, July 2, 1998, 98-2 CPD ¶ 4 at 6.

The record reasonably supports the Army's conclusion that the need for a contract with Trimble arises both from unforeseen events, and from its previous decisions to incur the cost of testing Trimble's ERACC type II devices and to purchase 609 units from Trimble without obtaining the associated installation services. TAG has not shown that the need for this sole-source contract was created by the Army failing to plan reasonably.

TAG also argues that the scope of the Marine Corps contract under which the Army purchased Trimble's equipment was only for commercial off-the-shelf equipment, and that the Army's position that the equipment was modified in ways that make it proprietary is inconsistent with that contract. Protester's Comments at 2-3. Even if true, the Army's contracting actions under the Marine Corps contract are not at issue in this protest; rather, this protest presents a challenge to the terms of the sole-source RFP issued by the Army. The question before our Office is whether, in the current circumstances, the Army reasonably concluded that only Trimble could perform the current requirement for the installation services and additional equipment.

We conclude that the record here reasonably supports the agency's decision to conduct a sole-source procurement. TAG's protest arguments do not meaningfully refute the Army's conclusions that only Trimble can provide the services to install the previously-purchased Trimble A-kits without undue risk or delay. In addition only Trimble can supply the Army's requirements for the additional A-kits, B-kits, and frequency gap radios needed to make the system functional, its elements interchangeable, and avoid delays and additional costs associated with determining whether the Leica equipment supplied by TAG would meet the agency's requirements.

The protest is denied.

Thomas H. Armstrong
General Counsel