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Decision

Matter of: VSE Corporation

File: B-417908; B-417908.2

Date: November 27, 2019

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DIGEST

Protest challenging an agency's evaluation of the awardee's proposal for failing to reasonably consider whether the proposal presented unacceptable performance risks due to the awardee's divestiture from its corporate parent is denied. The challenges to the awardee's financial capacity to perform in fact pertain to the awardee's affirmative responsibility, and we have no basis to question the reasonableness of the agency's responsibility determination regarding the awardee. The non-price challenges also fail because the solicitation did not contemplate the evaluation of any factor other than price.

DECISION

VSE Corporation, of Alexandria, Virginia, protests the issuance of a task order to AECOM Management Services, Inc., of Germantown, Maryland, under task order request (TOR) No. W56HZV-19-X-JW02, which was issued by the Department of the Army, Army Materiel Command, for a supplemental labor force to support combat/tactical vehicle production, facilities maintenance, warehousing, and hazardous materials handling for disposal in support of the Department of Defense Industrial Base for Red River Army Depot, Sierra Army Depot, Anniston Army Depot, and Rock Island Arsenal. The TOR was issued against the Equipment Related Services (ERS) contract suite under the TACOM Strategic Service Solutions (TS3) multiple award, indefinite-delivery, indefinite-quantity (IDIQ) contracts. VSE argues that the Army unreasonably evaluated AECOM Management Services' proposal.

We deny the protest.

BACKGROUND

The Army's TS3 ERS suite of IDIQ contracts allows for the procurement of services primarily related to: tasks necessary to keep machines or systems functioning; or for maintenance, repair, and overhaul; equipment modification; equipment installation; and technical representative services. Contracting Officer Statement/Memorandum of Law (COS/MOL) at 3. VSE and AECOM Management Services (formerly URS Federal Services) are TS3 ERS suite contract holders. Id. The TOR, which was issued on May 22, 2019, and subsequently amended four times, sought proposals from TS3 ERS contract holders for a supplemental labor force to support combat/tactical vehicle production, facilities maintenance, warehousing, and hazardous materials handling for disposal in support of the Department of Defense Industrial Base for Red River Army Depot, Sierra Army Depot, Anniston Army Depot, and Rock Island Arsenal. TOR at 1.¹ The TOR contemplated the award of a time-and-materials task order, with a base year and two, 1-year option periods. Id. at 2, 18.

Award was to be made to the responsible offeror that submitted the proposal with the lowest total evaluated price (TEP). TOR at 30. Thus, the only evaluation factor was price. Id. at 29, 30; see also Agency Report (AR), TOR Questions & Answers (ver. 2), at 36 ("The Government will not be considering a Best Value evaluation, this will be based on price only."); TOR at 29 (instructing offerors to only submit one proposal volume, cost/price, which was to consist entirely of a price evaluation template, which was included as TOR attachment No. 2).

As to price, the Army was to evaluate for: affordability; price reasonableness; and completeness. Id. As to affordability, the TOR provided that an offeror could not receive an award if its proposal was unaffordable. Id. As to price reasonableness, the TOR provided that a price was reasonable if, in its nature and amount, it did not exceed that which would be incurred by a prudent person in the conduct of competitive business. Id. As to completeness, the TOR provided that offerors had to include all information required by the TOR for the base and option years. Id. at 30-31. The TOR also included a provision entitled, "order of evaluation," at § M.3. That provision set out the order in which proposals were to be evaluated, and provided that: "[e]ach proposal will be evaluated to determine the [TEP], to include an assessment of affordability, price reasonableness, completeness, and responsibility. The Government will identify the proposal with the lowest [TEP]." Id. at 31.

The Army received four proposals in response to the TOR. Following discussions, the agency received final proposal revisions from the offerors. Based on the final proposals, AECOM Management Services was found to offer the lowest TEP of

¹ References herein are to the TOR as amended.

\$520,255,848. COS/MOL at 7-8.² On August 2, 2019, the contracting officer signed a memorandum for the record documenting his responsibility determination for AECOM Management Services. The memorandum reflects that the contracting officer reviewed available information for AECOM Management Services in the System for Award Management (SAM), the Federal Awardee Past Performance and Integrity Information System (FAPIS), and the Contract Performance Assessment Reporting System. AR, Tab 8, Responsibility Determination (Aug. 2, 2019), at 1. On August 14, the contracting officer again checked the information in SAM and FAPIS, and then proceeded to issue the task order to AECOM Management Services. COS/MOL at 8; AR, Tab 9, SAM & FAPIS Records.

VSE timely requested a debriefing. During the debriefing, VSE asked the Army if it had considered the potential impacts of AECOM Management Service's proposed spinoff from its corporate parent, AECOM. COS/MOL at 9. In this regard, AECOM announced in a June 17 statement to shareholders that it intended to spinoff AECOM Management Services as a new public company. The statement represented that the new standalone AECOM Management Services would be "a top 20 government services provider, as ranked by Bloomberg", and that AECOM Management Services' fiscal year 2018 revenue was \$3.7 billion, its operating revenue was \$200 million, and its adjusted operating income was \$239 million. AR, Tab 14, AECOM Statement to Investors, at 1-2. The Army has represented that the contracting officer, contract specialist, price analyst, and legal advisor that evaluated proposals and made the applicable responsibility determination, as well as the Contract Review Board and other agency personnel who were involved in peer reviewing the solicitation and proposed contract award, were not aware of the proposed corporate reorganization until VSE raised the issue during the debriefing. See COS/MOL at 9; AR, Tab 16, Second Responsibility Determination (Aug. 26, 2019), at 1; Tab 20, Joint Declaration of Contracting Officer, Contract Specialist, and Cost/Price Analyst; Tabs 27-38 Emails from Agency Personnel to Agency Counsel.³

After VSE's debriefing, the Army investigated VSE's allegations, including reviewing the AECOM statement to investors, conducting a call with AECOM Management Services officials, reviewing AECOM's Securities and Exchange Commission (SEC) 2018 annual filing, and reviewing AECOM Management Services' written response regarding the potential impacts of the transaction. See, e.g., COS/MOL at 9-10; AR, Tab 41, Email exchange between Agency and AECOM Management Services Officials; Tab 42, Email exchange between Agency and AECOM Management Services Officials. With respect

² VSE proposed the second lowest TEP of \$536,124,691. COS/MOL at 8.

³ As addressed below, VSE challenges the thoroughness and accuracy of the agency's disclosures with respect to the agency personnel involved in this procurement and their knowledge of the proposed spinoff of AECOM Management Services. For the reasons addressed below, we find that VSE's arguments provide no basis on which to sustain the protest.

to AECOM Management Services' written response, the firm advised that there would be no material adverse change in the resources that would be relied upon for purposes of task order performance or the firm's proposed fixed rates. AECOM Management Services further confirmed that it would not seek any rate increases that were driven by the spinoff transaction, the task order would continue to be performed by the same people and assets, and there would not be any risk to meeting operational or contractual requirements. The firm also emphasized that the standalone AECOM Management Services entity would have adequate financial resources, pointing to the unit's fiscal year 2018 revenue, operating income, and adjusted operating income. AR, Tab 15, Letter from AECOM Management Services (Aug. 23, 2019), at 1.

On August 26, the contracting officer executed a second memorandum for the record concluding that AECOM Management Services would still be responsible following the proposed spinoff from AECOM. Relying on the representations in AECOM Management Services' written response and telephone conversation, the contracting officer concluded that: "With management and labor personnel staying in place, the nature of the work performed which creates easy cash flow from monthly billing, and the financial capability of the company not being put in jeopardy, the Government believes AECOM [Management Services] will be able to fulfill the performance requirements under this contract and meet the responsibility requirements under Federal Acquisition Regulation (FAR) 9.104." AR, Tab 16, Memo. for Record re: AECOM Management Services Potential Spin-off (Aug. 26, 2019), at 1. On the same date, VSE filed its initial protest with our Office.⁴

On October 14, which was a day before the submission of the parties' initial comments on the agency's report, AECOM announced that the proposed spinoff of AECOM Management Services would no longer occur. Rather, AECOM now plans to sell its equity interests in AECOM Management Services to two private equity firms. See, e.g., AECOM Management Services Comments (Oct. 15, 2019) at 11 (citation to AECOM Press Release omitted).

DISCUSSION

This is an unusual case in that many of the parties' asserted facts, assumptions, and arguments have rapidly been overtaken by changed circumstances. VSE initially alleged that the agency had failed to reasonably consider the potential consequences of AECOM Management Services' announced spinoff from its corporate parent. The agency's report in response to the protest, however, included a new responsibility determination to consider the potential impacts of the proposed corporate reorganization. By the time the protester and intervenor submitted their first respective

⁴ The task order at issue is valued in excess of \$25 million, and was placed under the TS3 IDIQ contracts established by the Army. Accordingly, our Office has jurisdiction to consider VSE's protest. 10 U.S.C. § 2304c(e)(1)(B).

set of comments on the agency report, the announced spinoff was cancelled; instead, a different corporate transaction was announced.

As an initial matter, because the transaction that gave rise to VSE's protest has been cancelled--the spinoff of AECOM Management Services as a standalone company--VSE's arguments regarding the cancelled transaction appear to be moot. In addition, the protester's arguments regarding the second prospective transaction--AECOM's sale of its ownership shares of AECOM Management Services to two private equity firms--are irrelevant to the evaluation of proposals, as well as the Army's contemporaneous responsibility determination for AECOM Management Services. Rather, the transaction, announced more than 2 months after the initial award here to AECOM Management Services, appears to raise matters of contract administration, which are not appropriate for consideration under our bid protest function. 4 C.F.R. § 21.5(a).

Even so, interpreting these arguments in the light most favorable to the protester, they do not advance any basis on which to sustain VSE's objections to the agency's actions.⁵ Specifically, VSE primarily asserts that the agency failed to reasonably consider the potential price and performance risks associated with AECOM Management Services no longer being affiliated with its corporate parent, AECOM. The protester also argues that the agency failed to reasonably consider whether AECOM Management Services' changed circumstances would impact its financial and technical capacity, and ability to perform, in accordance with its proposal and contractual commitments.

As to the protester's allegations that the Army failed to reasonably consider AECOM Management Services' potential financial incapability to perform the resulting task order following its divestiture from AECOM, we note that VSE casts its argument not as a challenge to AECOM Management Services' responsibility, but rather as a challenge to the agency's evaluation of the awardee's proposal under the TOR's evaluation criteria. See, e.g., VSE Supp. Comments at 5 ("VSE expressly and clearly went out of its way to

⁵ As noted above, VSE raises a number of collateral arguments. While our decision does not address all of the protester's arguments, we have carefully reviewed all of them and find that none provides a basis on which to sustain the protest. For example, VSE argues that the agency conducted unequal discussions when it effectively reopened discussions with AECOM Management Services following VSE's debriefing to discuss the prospective awardee's proposed spinoff from AECOM. This argument is without merit. The Army's communications with AECOM Management Services with respect to its corporate reorganization were in connection with the firm's responsibility, not with respect to the evaluation of the acceptability of its proposal. We have repeatedly recognized that an agency may request and receive information about an offeror's responsibility without conducting discussions that trigger the obligation to conduct non-responsibility discussions with other offerors. Chags Health Info. Tech., LLC, B-413104.30, B-413104.37, Apr. 11, 2019, 2019 CPD ¶ 145 at 6; Northrop Grumman Sys. Corp., B-412278.7, B-412278.8, Oct. 4, 2017, 2017 CPD ¶ 312 at 19.

emphasize that it challenges the Agency's evaluation under Section M.3 of the TOR, and is **not** challenging the Agency's affirmative responsibility determination.") (emphasis in original). Notwithstanding VSE's characterization of its argument, VSE is not challenging the evaluation of AECOM Management Services' proposal. In this price only competition, the protester does not allege any flaw with AECOM Management Services' proposed TEP, which was approximately 3 percent less than VSE's proposed TEP. Rather, VSE essentially challenges AECOM Management Services' financial capabilities following the divestiture from its corporate parent. See, e.g., VSE Comments & Supp. Protest at 16 (alleging that the agency failed to consider that the awardee has had "serious performance and profitability problems", and been accused of having "consistently overpromised and underdelivered") (internal citation omitted). These arguments raise quintessential matters of responsibility. See FAR § 9.104-1(a) (contracting officers are to consider as part of responsibility determination whether a prospective offeror has "adequate financial resources to perform the contract, or the ability to obtain them").

Our Office generally will not consider a protest challenging an agency's affirmative determination of an offeror's responsibility. 4 C.F.R. § 21.5(c). We will only hear a protest challenging 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. We have further explained that the information in question must concern very serious matters, for example, potential criminal activity or massive public scandal. IBM Corp., B-415798.2, Feb. 14, 2019, 2019 CPD ¶ 82 at 11; United Capital Investments Grp., B-410284, Nov. 18, 2014, 2014 CPD ¶ 342 at 2. Absent any such allegations here, we find no basis to disturb the agency's affirmative responsibility determination.

We similarly find no merit to VSE's arguments that the solicitation included non-price evaluation criteria and the agency should have considered the impact of the divestiture as part of its non-price evaluation. In support of its position, the protester points to a "reason for rejection" provision in section M.4b of the TOR. This provision provided that a proposal may be rejected if it reflects an inherent lack of technical competence or failure to comprehend the complexity and risks required to perform the TOR requirements if it is unachievable in terms of technical, labor mix, or schedule commitments. TOR at 31. Here, however, there were no technical submissions to evaluate for risk or a failure to comprehend the requirements.

In this regard, the TOR's instructions explained that proposals were to consist solely of one volume, cost/price. The cost/price volume consisted entirely of a price evaluation sheet, which was included as TOR attachment No. 2. TOR at 29. Similarly, both the instructions and the evaluation criteria explicitly stated that the only evaluation factor was price. Id. at 29, 30. Thus, contrary to VSE's arguments, there were no (and the nature of proposals submitted would not otherwise reasonably provide the agency with an ability to analyze any) technical, labor mix, or schedule commitments from the offerors.

Indeed, the agency's responses to offerors' questions on the TOR unequivocally provided that the only evaluation factor would be price:

85. Why is the acquisition strategy for this solicitation determined to be the "Lowest Price"?

RESPONSE: All contractors in the ERS Suite of the TS3 have already been determined as responsible sources when they were awarded contracts at the base level. Also, all previous awarded Task Orders for these Labor Services were solicited as [lowest priced, technically acceptable] and no offerors were kicked out for having technically unacceptable proposals, so it ultimately came down to price.

* * * *

93. Would the government consider an actual Best Value solicitation rather than just a Cost proposal from any TS3 ERS prime contractors and the lowest price wins?

RESPONSE: No. The Government will not be considering a Best Value evaluation, this will be based on price only.

AR, Tab 3, TOR Questions & Answers (ver. 2), at 35, 36.

Therefore, we find no basis to sustain VSE's argument that the agency unreasonably failed to evaluate any technical or performance risks with respect to AECOM Management Services' proposed separation from its corporate parent where the TOR cannot reasonably be construed as requiring such considerations.

Although we conclude the above discussion is dispositive of the protest issues raised, we also briefly address the protester's reliance on our decisions addressing imminent corporate transactions, and their potential impact on an agency's consideration of an offeror's proposal. These cases have arisen when an awardee divests some or all of its business, resulting in the contract being performed by a materially different contractor. See, e.g., Lockheed Martin Integrated Sys., Inc., B-410189.5, B-410189.6, Sept. 27, 2016, 2016 CPD ¶ 273 (denying protest that agency unreasonably considered a potential divestiture of one of the protester's business segments that was proposed to perform on the resulting contract where the agency was aware of the transaction and the potential impacts on the protester's indirect rates on the cost-reimbursable contract could be significant), recon. denied, Lockheed Martin Integrated Sys., Inc.--Recon., B-410189.7, Aug. 10, 2017, 2017 CPD ¶ 258; Wyle Labs., Inc., B-408112.2, Dec. 27, 2013, 2014 CPD ¶ 16 (sustaining protest where procuring agency prior to award of a cost-reimbursable contract was aware of, but declined to consider in its evaluation, the awardee's proposed division into two separate firms, the awardee's intent to assign the contract to the new corporate entity, and the potential material resulting changes to the technical approach and costs proposed by the awardee), recon. denied, National

Aeronautics & Space Admin.--Recon., B-408112.3, May 14, 2014, 2014 CPD ¶ 155. For the reasons that follow, we do not find that line of decisions applicable here.

First, as we have clarified with respect to this line of decisions, key in our analysis is both whether an agency is aware of a particular transaction, as well as its imminence and certainty. Lockheed Martin Integrated Sys., Inc.--Recon., *supra*, at 7. As addressed above, the transaction giving rise to VSE's initial protest cannot reasonably be considered imminent, or certain, since it was ultimately cancelled.⁶ Moreover, the agency could not have known of the revised corporate transaction plans because they were announced months after award. As a general matter, an agency's lack of knowledge of a proposed corporate transaction is generally not unreasonable, and an agency generally has no affirmative obligation to discover and consider such information. See, e.g., Target Media Mid Atlantic, Inc., B-412468.6, Dec. 6, 2016, 2016 CPD ¶ 358 at 7; Veterans Eval. Sys., Inc., et al., B-412940 *et al.*, Jul. 13, 2016, 2016 CPD ¶ 185 at 9-10; TrailBlazer Health Enters., LLC, B-406175, B-406175.2, Mar. 1, 2012, 2012 CPD ¶ 78 at 18-19.

Second, it is not apparent that AECOM Management Services' divestiture from AECOM, as currently planned, would meaningfully impact AECOM Management Services' performance of the task order. Our decisions regarding matters of corporate status and restructuring are highly fact-specific, and turn largely on the individual circumstances of the proposed transactions and timing. Lockheed Martin Integrated Sys., Inc.--Recon., *supra*, at 5. In this regard, we have found unreasonable an agency's failure to consider the impact of a known, imminent or completed transaction on the offeror's potential performance of a resulting contract. Where an offeror's proposal

⁶ As noted above, VSE challenges the Army's representations regarding relevant procurement officials' lack of knowledge about the subsequently cancelled transaction at the time of the initial award. The protester argues that the agency's representations have been "carefully characterized," fail to identify all individuals involved in the initial solicitation review (which predated AECOM's announcement), and "failed to support [the agency's] own careful choice of words." VSE Supp. Comments at 9-15. We find no merit to VSE's arguments for at least three reasons. First, as discussed above, the announced corporate transaction is essentially irrelevant since it has been cancelled. Second, even if we assumed agency personnel were aware of the transaction, as discussed herein, it is not apparent that the transaction had any impact on the award because the proposed transaction would have no impact on AECOM Management Services' proposed fixed rates, and the agency did not request or receive proposals as to any non-price factor. Finally, the agency has produced statements from the individuals directly involved in the evaluation of proposals and the affirmative responsibility determination for AECOM Management Services that they were unaware of the spinoff before VSE's debriefing. To the extent that VSE argues that others in the agency who were not directly involved in the evaluation or responsibility determination may have known of the transaction, we fail to see how such facts would impact the result here.

represents that it will perform the contract in a manner materially different from the offeror's actual intent, the award cannot stand, since both the offeror's representations, and the agency's reliance on such, have an adverse impact on the integrity of the procurement. See Wyle Labs., supra, at 8-9 (sustaining protest where procuring agency declined to consider impact of proposed reorganization of offeror where the offeror would not perform as the prime contractor, and assignment of the contract to a new legal entity that was smaller and with substantially fewer resources would likely have material effects on both the costs incurred and technical approach employed during contract performance). Those concerns are not present here.

First, this is not a case where the offeror is undergoing a corporate reorganization such that a different entity will perform the resulting contract or order. AECOM Management Services is the offeror, and, based on the disclosed details of the current proposed transaction, AECOM Management Services will perform the resulting order. In this regard, AECOM Management Services explains that the private equity firms are acquiring its stock, as opposed to acquiring its assets and merging them into a new company. See AECOM SEC Form 8-K (Oct. 17, 2019), exh. 2.1, Purchase & Sale Agreement, § 2.4(a)(i); see also VSE Comments & Supp. Protest, exh. No. 4, American Securities Press Release, at 2 (representing that AECOM Management Services' president and management team will continue to lead the company). Thus, since the transaction involves only a change in the ownership of AECOM Management Services' stock, there is no change between the offeror and the entity that will ultimately perform the requirements, and no change in the underlying assets that will be used to perform the work.

Second, the TOR here did not require a technical proposal from offerors and contemplates a time-and-materials task order. Any changes to AECOM Management Services' cost-reimbursable rates will have no impact on the fixed rates proposed here. As a result, there is no basis to conclude that AECOM Management Services' manner of performance following the anticipated transaction will change in any material way.

We deny the protest.

Thomas H. Armstrong
General Counsel