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Decision

Matter of: Unissant, Inc.

File: B-418193.2

Date: January 31, 2020

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DIGEST

Protest of an agency's corrective action, which included terminating a task order and reviewing its requirement and acquisition process, is denied where the agency's corrective action was reasonable in light of its failure to adequately document its earlier evaluation and award decision.

DECISION

Unissant, Inc., of Herndon, Virginia, protests the corrective action taken by the Department of Health and Human Services, National Institutes of Health (NIH), in response to an earlier protest from another offeror challenging the issuance of a task order to Unissant under request for proposals (RFP) No. C57839 for information security services. The protester contends that the agency's corrective action--which included terminating Unissant's task order and reviewing its requirement and acquisition process--is unreasonable.

We deny the protest.

BACKGROUND

On March 11, 2019, the agency issued the RFP, pursuant to Federal Acquisition Regulation part 16, to holders of NIH information technology acquisition and assessment center Chief Information Officer-Solutions and Partners 3 governmentwide multiple-award, indefinite-delivery, indefinite-quantity (IDIQ) contracts. Contracting Officer's Statement (COS) at 1. The RFP sought a contractor to provide information security support services for the agency's chief information officer. Id.

After the agency received initial proposals, engaged in exchanges with offerors, and requested several rounds of revised proposals, the agency selected Unissant for award. COS at 1. On September 30, the agency issued a task order to Unissant for a base year and four 1-year option periods with an anticipated total award value of \$131,818,899. Id.; see also Protest, exh. 2, Award Document, Sept. 30, 2019.¹

Another offeror filed a protest with our Office, challenging various aspects of the agency's evaluation of proposals and award decision. Prior to the due date for filing its report, the agency informed our Office that it would take corrective action consisting of the following:

- (1) The Agency will terminate the task order; [and]
- (2) The Agency will review the requirement and the acquisition process with the intention of breaking up the requirement into two separate procurements, as opposed to continuing with the single solicitation at issue.

Protest, exh. 1, Notice of Corrective Action, Oct. 29, 2019, at 1. We then dismissed the protest as academic. Customer Value Partners, Inc., B-418193, Oct. 30, 2019, at 1 (unpublished decision). On November 7, this protest followed.²

DISCUSSION

Unissant raises various complaints about the agency's corrective action. Unissant primarily argues that the agency's corrective action is unreasonable because "there [was] no flaw in the original evaluation and award." Protest at 11; see also Comments, Dec. 19, 2019, at 1. In response, the agency asserts that its corrective action was reasonable and within its discretion because its earlier procurement actions were flawed--that is, the agency lacked documentation to support its evaluation and award decision. Memorandum of Law (MOL), Dec. 9, 2019, at 5, 7.

We have considered all of the parties' arguments, including those that are in addition to or variations of those specifically discussed below, and find no basis to sustain Unissant's protest.

Agencies have broad discretion to take corrective action where the agency determines that such action is necessary to ensure a fair and impartial competition. See American

¹ This document refers to the issuance of a "delivery order" and "task[s.]" For consistency with the parties' filings, we refer to the awarded contract vehicle here as a "task order."

² This protest is within our jurisdiction to hear protests related to task and delivery orders placed under civilian agency multiple-award IDIQ contracts valued in excess of \$10 million. 41 U.S.C. § 4106(f)(1)(B).

Warehouse Sys., LLC, B-412543, Mar. 1, 2016, 2016 CPD ¶ 66 at 3; Domain Name Alliance Registry, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 8. The details of implementing corrective action are within the sound discretion and judgment of the contracting agency, and we will not object to any particular corrective action, so long as it is appropriate to remedy the challenged action. See Government Contracting Servs., LLC, B-416696.2, May 6, 2019, 2019 CPD ¶ 170 at 5; DGC Int'l, B-410364.2, Nov. 26, 2014, 2014 CPD ¶ 343 at 3; Northrop Grumman Info. Tech., Inc., B-404263.6, Mar. 1, 2011, 2011 CPD ¶ 65 at 3.

Here, the protester's allegation that "there [was] no flaw in the original evaluation and award[.]" Protest at 11, is unsupported by the record. The record shows that the contracting officer made her source selection decision despite what she now acknowledges was "a lack of supporting documentation." COS at 2; see also MOL at 2-3; Agency Report (AR), exh. 1, Email Communications, Aug. 2019 (noting that the contracting officer first became involved in the procurement during the selection phase). Specifically, the contracting officer explains the following:

In making my source selection decision, I relied on a high-level technical evaluation document which contained technical conclusions regarding final revised proposals. I also had access to the original proposals. I made efforts to gain access to underlying documentation to support the evaluation. However, I was unable to obtain documentation regarding the negotiation and evaluation process, including the evaluation of revisions and updates. I was unable to obtain documentation of discussions and exchanges. Some of the documents were missing, and some were contained in secured zip files to which I could not gain access.

COS at 1; see also AR, exh. 1, Email Communications, Aug. 2019 (discussing plans to revise some documents because "the trade-off analysis is not sufficient to award this requirement"); AR, exh. 3, Email Communications, Aug. 2019 (discussing access to "some of the attached documents"). The contracting officer then asserts that, "[b]ased on the information available, I determined that the task order should be awarded to Unissant." COS at 1.

The record also shows that the agency took corrective action when another offeror protested its evaluation and award decision. Protest, exh. 1, Notice of Corrective Action, Oct. 29, 2019, at 1. The contracting officer now explains that, upon receipt of that protest:

I began work to identify and assemble the necessary documentation to defend NIH against the [earlier] protest. As was the case prior to award, documentation regarding the exchanges/discussions that occurred between NIH and the offerors was unavailable or inadequate. Documentation to support the technical evaluation process was inadequate, including a lack of underlying support for conclusions made regarding the rating of offerors' final proposal revisions.

* * * * *

Due to lack of supporting documentation, I made the decision that NIH could not defend itself against [the] protest, nor could the agency support the task order award to Unissant.

COS at 2.

In other words, as the agency explains, the contracting officer “has conceded that she relied on conclusory technical findings in making her source selection decision, and when these conclusions were contested in the [earlier] protest, she was unable to respond to the [earlier] protest or defend her decision due to lack of supporting documentation.” MOL at 5-6.³

Under these circumstances, we find no basis to object to the agency’s decision to take corrective action. Where, as here, the agency has represented that its earlier procurement actions were flawed and inadequately documented, we find it reasonable for the agency to take corrective action to address its errors, such as terminating an unsupported task order. Moreover, the protester has not established--nor do we find--that the agency abused its discretion when it decided that it needed to review its requirement and acquisition process. In this regard, we note that, as a general rule, an agency has the discretion to determine its needs and the best way to meet them. See Platinum Servs., Inc.; WIT Assocs., Inc., B-409288.3 et al., Aug. 21, 2014, 2014 CPD ¶ 261 at 5, citing USA Fabrics, Inc., B-295737, B-295737.2, Apr. 19, 2005, 2005 CPD ¶ 82 at 4.

Nonetheless, the protester maintains its view that “GAO should recommend that the agency cancel the corrective action and proceed with performance of the awarded contract.” Comments at 20. The protester is, in essence, asking our Office to uphold a procurement that the agency believes was not made in accordance with applicable procurement law and regulation. We decline to do so.

³ While Unissant complains that the contracting officer’s representations should be discounted because they are, in the protester’s view, “thoroughly contradicted by the contemporaneous record,” Comments at 16, 18-20, we do not think that they are inconsistent. See, e.g., Computer World Servs. Corp., B-416042, May 22, 2018, 2018 CPD ¶ 191 at 5 (finding agency’s post-protest explanations which provided details explaining agency’s rationale for its decision to cancel solicitation to be reasonable). Our Office generally considers post-protest explanations where the explanations merely provide a detailed rationale for contemporaneous conclusions and fill in previously unrecorded details, so long as the explanations are credible and consistent with the contemporaneous record. Lynxnet, LLC, B-409791, B-409791.2, Aug. 4, 2014, 2014 CPD ¶ 233 at 6.

As a final matter, while the agency suggested in its notice of corrective action that it has “the intention of breaking up the requirement into two separate procurements,” the agency now represents that “a final decision on what strategy the agency will use to meet this requirement has not yet been made.” Protest, exh. 1, Notice of Corrective Action, Oct. 29, 2019, at 1; COS at 2. Therefore, to the extent the protester is challenging any specific changes that the agency may make to the solicitation, we note that such contentions are, at this time, premature. Dayton-Granger, Inc.--Recon., B-246226.2, Feb. 28, 1992, 92-1 CPD ¶ 240 at 2 (protests that merely anticipate improper agency action are speculative and premature).⁴

In sum, Unissant’s disagreement with the agency’s decision to take corrective action does not provide a basis to sustain the protest. The agency has conceded that it failed to adequately document, and therefore could not properly support, its evaluation and award decision. Under these circumstances, we cannot object to its decision to start over, terminate the task order, and review its requirement and acquisition process.

The protest is denied.

Thomas H. Armstrong
General Counsel

⁴ During the development of the record, Unissant attempted to reframe its protest by belatedly claiming that the agency’s corrective action was a “pretext.” Response to Request for Dismissal, Nov. 27, 2019, at 3; see also Comments at 22. Unissant’s revised claim is based solely on various inferences drawn by two of its employees and its counsel, accusing a named agency official of improperly influencing the procurement. We note that Unissant’s initial protest mentioned these inferences, but did not specifically allege that the agency’s actions were pretextual. Accordingly, since our Bid Protest Regulations do not contemplate the unwarranted piecemeal presentation or development of protest issues, Unissant’s revised claims regarding this matter are not timely filed and will not be considered further. 4 C.F.R. § 21.2(a)(2); see, e.g., International Code Council, B-409146, Jan. 8, 2014, 2014 CPD ¶ 26 at 3 n.3. In any event, we note that government officials are presumed to act in good faith, and a protester’s contention that officials are 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. See Veterans Healthcare Supply Sols., Inc., B-411904, Nov. 12, 2015, 2015 CPD ¶ 354 at 8. Moreover, we note that the agency has represented that this agency official was not involved in the decision to take corrective action. See MOL at 7-8; AR, exh. 5, Statement by NIH Official, Dec. 9, 2019, at 1-2.