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Decision

Matter of: NCI Information Systems, Inc.; NCI Information Systems, Inc.

File: B-416407.2; B-416407.3; B-416408.2; B-416408.3

Date: September 13, 2018

Daniel P. Graham, Esq., Tyler E. Robinson, Esq., and Caroline E. Colpoys, Esq., Vinson & Elkins LLP, for the protester.

J. Alex Ward, Esq., Lauren J. Horneffer, Esq., Charles L. Capito, Esq., Morrison & Foerster LLP, for, IAP Worldwide Services, Inc., the intervenor.

Debra Talley, Esq., and David A. Balaban, Esq., Department of the Army, for the agency.

Lois Hanshaw, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests challenging the agency's negative responsibility determination are denied where the record shows that the protester proposed a subcontractor to perform approximately 99 percent of the direct labor for two task orders to be performed in Afghanistan, and where the agency learned after the award of the task orders that the protester's proposed major subcontractor had been debarred by the Afghan government, leading the contracting officer to reasonably conclude that neither the protester, nor its subcontractor, could perform the work.

DECISION

NCI Information Systems, Inc. (NCI), of Reston, Virginia, protests the Department of the Army's determination that NCI was not responsible to perform the services under request for proposals (RFP) Nos. RS3-17-0016 (RFP 0016) and RS3-18-0001 (RFP 0001), issued by the Department of the Army for information technology (IT) governance and sustainment of Afghanistan's National Police Network Operations Center and National Army Network Operations Center.

We deny the protests.

BACKGROUND

The agency sought to issue two separate, but very similar task orders under the agency's Responsive Strategic Sourcing for Services (RS3) multiple-award indefinite-delivery, indefinite-quantity (IDIQ) contract on a lowest-priced, technically acceptable basis considering a technical factor and cost/price. Agency Report (AR), Tab 4, RFP 0016 at 1, 11; Tab 28, RFP 0001 at 1, 11. The task orders would require a contractor to, among other things, operate and maintain the existing network infrastructure, provide improved cybersecurity capabilities, and assist with the ongoing site expansions for the Afghan National Police (RFP 0016) and for the Afghan National Army (RFP 0001). AR, Tab 6, RFP 0016 Performance Work Statement (PWS), at 1; Tab 30, RFP 0001 PWS, at 1. The task orders were to be performed in Afghanistan for a 30-day phase-in period, one 12-month base period, and four 12-month option periods. Id. at 3; Id. at 7.

NCI submitted a proposal for each of the RFPs. Joint Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 7. In both proposals, NCI offered, as a major subcontractor, an Afghan-owned company named Global Technology Ltd. (G-Tech) that would serve as a value-added partner. AR, Tab 14, NCI Proposal for RFP 0016, at 2; Tab 39, NCI Proposal for RFP 0001, at 5.¹ G-Tech would provide 99% (RFP 0016) and 98.99% (RFP 0001) of the direct labor for the two task orders. AR, Tab 27, RFP 0016 Task Order Decision Document (TDD), at 53; Tab 52, RFP 0001 TDD, at 47.

After reviewing proposals, the agency determined that NCI's proposals were technically acceptable, and that its adjusted prices of \$28,120,924 (RFP 0016) and \$36,733,355 (RFP 0001) were the lowest prices received.² COS/MOL at 2. The agency determined that NCI was responsible and issued the two task orders to NCI.³ AR, Tab 27, RFP 0016 TDD, at 57; Tab 52, RFP 0001 TDD, at 51.

After award, the agency discovered and confirmed that NCI's subcontractor G-Tech was not in good standing with the Afghan government. AR, Tab 57, NCI Negative Responsibility Determination, at 2. The agency issued a determination, applicable to each task order, rescinding its prior determinations of responsibility and finding NCI not

¹ Our Office added consecutive numbers to the pages of these documents.

² The awarded value of each task order is above \$25 million. Accordingly, these procurements are within our jurisdiction, to hear protests related to the issuance of task orders under multiple-award indefinite-delivery, indefinite-quantity contracts established under Title 10. See 10 U.S.C. § 2304c(e)(1)(B).

³ In making the responsibility determination, the agency searched the System for Award Management and found no information to indicate that NCI was not responsible, and NCI did not appear on the List of Parties Excluded from Federal Procurements. AR, Tab 27, RFP 0016 TDD, at 57; Tab 52, RFP 0001 TDD, at 51.

responsible to perform the work for these task orders.⁴ Id. at 5-7. In this regard, the agency explained that G-Tech had been debarred, from August 21, 2016 to August 22, 2018, by the Islamic Republic of Afghanistan National Procurement Authority (Afghan NPA)⁵ for violating host country laws by submitting fake authorization letters. Id. at 1. Based on this information, and various provisions of the RS3 IDIQ contract and RFPs 0016 and 0001, the agency concluded that NCI lacked a satisfactory record of integrity because: (1) neither NCI nor G-Tech disclosed the debarment during the procurement process and (2) G-Tech's "[d]ebarment goes to the integrity of the procurement process."⁶ Id. at 2-5.

The agency outlined specific concerns regarding the debarment, such as whether G-Tech could perform the solicited work while debarred. Id. The CO asserted that G-Tech's successful performance on past contracts did not require the Army to "blindly assume" that G-Tech's debarment is a non-issue since neither NCI nor G-Tech have confirmed that the Afghan government will consent to allowing G-Tech to perform the work required by the task orders, which would require access to Afghan facilities and IT networks and the ability to obtain Afghan Security clearances.⁷ Id. The CO asserted that, absent any indication that NCI and G-Tech have resolved this serious concern with

⁴ This determination explains the agency's previous actions with regard to NCI's responsibility. In short, NCI was twice found responsible: once after award, and a second time after a disappointed offeror, IAP Worldwide Services, Inc. (IAP), brought to the agency's attention that G-Tech was debarred by the Afghan government. AR, Tab 57, NCI Negative Responsibility Determination, at 1-2. After the issuance of the second responsibility determination, IAP protested to our Office and challenged the task order awards to NCI. Id. at 2. IAP's protests alleged that the agency's evaluation and determination that NCI was responsible were unreasonable. Id. In response to the protests, the agency decided to take corrective action by rescinding its determination that NCI was responsible and canceling the award of the two task orders to NCI. AR, Tab 56, Notice of Corrective Action, at 1. Based on the proposed corrective action, we dismissed the protests as academic. IAP Worldwide Services, Inc., B-416407, June 18, 2018 (unpublished decision); IAP Worldwide Services, Inc., B-416408, June 18, 2018 (unpublished decision).

⁵ NCI states that the Afghan NPA has the authority to debar a bidder or contractor from participation in an Afghan procurement. Protest at 6.

⁶ With regard to the agency finding NCI responsible in the second responsibility determination, the contracting officer (CO) stated, "[g]iven the urgency of the requirements and the short notice of the debarment, I had not had time to fully research the debarment before making my determination." AR, Tab 57, NCI Negative Responsibility Determination, at 2.

⁷ The determination explains that the agency's initial research showed that G-Tech had been awarded various contracts, before and after debarment, as the prime contractor. Id. at 1; see AR, Tab 62, Second Responsibility Determination, at 1.

the Afghan government, he had no basis to believe that the solicited work could be performed. Id. Accordingly, the CO determined that NCI was not responsible to perform the work under the two task orders.⁸ Id. at 5-6. On June 25, NCI timely protested to our Office.

DISCUSSION

NCI protests the agency's negative responsibility determination for the task order awards.⁹ NCI contends that G-Tech's debarment does not, and has not, prevented G-Tech from doing business with the U.S. or Afghan government during its debarment, and that it is unreasonable to assume that the debarment will affect G-Tech's current ability to perform these task orders. Protest at 7. NCI also contends that it was improper for the agency to reverse its previous findings that NCI was responsible. Id. at 8-9.

The Army offers various bases upon which it determined that NCI and G-Tech are not responsible. COS/MOL at 13. For example, the agency asserts that G-Tech's debarment, which was in place at the time NCI received award, for providing fake authorization letters is a very serious issue that directly impacts the integrity of the procurement process. Id. at 16-17. The agency also states that NCI has offered no evidence that even remotely brings into question the validity of the Afghan NPA's debarment decision. Id. at 17. Moreover, the agency explains that regardless of whether G-Tech has successfully performed other contracts and received a business license from the Afghan government during its debarment, neither vendor has shown that it has obtained assurances from the Afghan government that G-Tech, the subcontractor responsible for nearly 99% of the direct labor on both task orders, will be able to perform the task orders at issue here while it is debarred. Id. at 16, 27-28. Accordingly, the agency contends that because it had no reason to believe that NCI or G-Tech could perform the work, it reasonably concluded that NCI was not responsible. Id. at 28.

In response, NCI concedes that G-Tech was debarred by the Afghan NPA and that the Army did not act in bad faith in making the responsibility determination. Comments at 2, 4.

In making a negative responsibility determination, a contracting officer is vested with a wide degree of discretion and, of necessity, must rely upon his or her business

⁸ The agency states that NCI is not responsible in accordance with Federal Acquisition Regulation (FAR) § 9.104-1(b), (c), (d), and (g). AR, Tab 57, NCI Negative Responsibility Determination, at 1, 7.

⁹ NCI raises various challenges to the Army's responsibility determination. Although we do not address all of NCI's argument here, we have considered these arguments and conclude that none provides a basis to sustain the protests.

judgment in exercising that discretion. Torres Int'l, LLC, B-404940, May 31, 2011, 2011 CPD ¶ 114 at 4. In our review of negative responsibility determinations, we consider only whether the determination was reasonably based on the information available to the contracting officer at the time it was made. See Acquest Dev. LLC, B-287439, June 6, 2001, 2001 CPD ¶ 101 at 3. Contracting officers are generally given wide discretion in determining the amount of information that is required to assess an offeror's responsibility. Cargo Transport Sys. Co., B-411646.6, B-411646.7, Oct. 17, 2016, 2016 CPD ¶ 294 at 7. Although the determination must be factually supported and made in good faith, the ultimate decision appropriately is left to the agency, since it must bear the effects of any difficulties experienced in obtaining the required performance. Id. at 5. For these reasons, we generally will not question a negative determination of responsibility unless the protester can demonstrate bad faith on the part of the agency or a lack of any reasonable basis for the determination. Colonial Press Int'l, Inc., B-403632, Oct. 18, 2010, 2010 CPD ¶ 247 at 2.

Here, the agency found NCI not responsible based on the following facts: NCI's major subcontractor was debarred by the Afghan NPA; the agency interpreted the debarment as raising concerns regarding the firms' record of integrity and ability to perform the work; and these concerns were not substantively resolved. To the extent NCI's various arguments disagree with the agency's interpretation of the facts upon which the responsibility determination was based, and contend that the agency should have accorded different weight or significance to said facts, this disagreement, without more, does not show that the agency's conclusions were unreasonable.¹⁰ Accordingly, the information described above, in our view, reasonably supports the contracting officer's final determination that NCI could not be deemed responsible. Simply put, a non-responsibility determination is a matter where the contracting officer is vested with broad discretion in exercising his or her business judgment, and NCI has not shown that the contracting officer here abused that discretion or that his determination had no reasonable basis. See Kompania e Sigurimeve Eurosig Sh.a, B-414561.2, B-414561.4, Jan. 9, 2018, 2018 CPD ¶ 21 at 6.

The protests are denied.

Thomas H. Armstrong
General Counsel

¹⁰ We find unpersuasive NCI's various challenges to the reasonableness of the agency's responsibility determination, alleging, for example, that the agency should not have given full reciprocity to the Afghan debarment because FAR subpart 9.1 does not mention foreign debarments, and that the Army failed to adequately investigate G-Tech's debarment. Comments at 6, 9. The protester's arguments, or variations thereof, lack merit, and fail to overcome the obligation of prospective prime contractors, such as NCI, to determine the responsibility of its prospective subcontractor. See FAR § 9.104-4.