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**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Global Solutions Network, Inc.

File: B-298682

Date: November 27, 2006

Gerald H. Werfel, Esq., Pompan, Murray & Werfel, PLC, for the protester.
Peter F. Pontzer, Esq., and Lt. Col. Brian J. Godard, Department of the Army, for the agency.
Paul N. Wengert, Esq., and Glenn Wolcott, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency is improperly conducting procurement under commercial item procedures is denied where protester has not shown that use of those procedures will cause it competitive prejudice.

DECISION

Global Solutions Network, Inc. (GSN), a small business, protests the conduct of a procurement by the Department of the Army under request for proposals (RFP) No. W91QV1-06-R-0033 for task order management and financial support for the “HRsolutions” program office.¹ The protest contends that a named Army official in the [deleted] office is biased against the protester, that the procurement is being conducted under commercial item procedures, and that the government estimate and workload data in the solicitation are incorrect and misleading.

We deny the protest.

¹ According to the Army’s HRsolutions website, “HRsolutions was created . . . to streamline the acquisition of human resource (HR) services and support for the Army HR community, including family members. HRsolutions offers a dedicated staff of contract specialists to facilitate the use of contracting services to meet agency needs quickly using competitively-awarded contracts under its management.” About Army HRsolutions, <https://www.hrsolutions.army.mil/abou.asp> (last visited November 21, 2006).

The Army issued the RFP on July 29, 2006, as a set-aside for historically underutilized business zone (HUBZone) small businesses, seeking firm fixed-price proposals to provide services for a 1-year base period and four 1-year option periods. The RFP also provides “reimbursement at cost” of both other direct costs (described as including “supplies not otherwise provided”), and travel (described as covering “long distance travel for approved business meetings, conference support, and marketing calls”), up to specified annual ceiling amounts. RFP at 5-6.

The RFP was issued as a commercial item procurement under the procedures in Part 12 of the Federal Acquisition Regulation (FAR). The RFP specified that proposals will be evaluated on the basis of technical approach, personnel resumes, past performance information, and a price proposal. RFP at 26. The technical approach, personnel, and past performance factors are to be equal to each other in importance, and when combined, are to be significantly more important than price in selecting an awardee. RFP at 27.

First, GSN objects that a named Army official who may be involved in the procurement process is biased against GSN. According to GSN, if the official participates in the procurement, she will irreparably taint the selection process. Our Bid Protest Regulations, 4 C.F.R. §§ 21.1(c)(4) and (f) (2006), require that a protest include a detailed statement of the legal and factual grounds for protest, and that the grounds stated be legally sufficient. Here, the protester’s claims that the named official might be involved in the procurement, and thus might taint the procurement, merely anticipate improper agency action, and thus, are speculative and premature. We will not question agency action on the basis of such speculation.² See Ervin & Assocs., Inc., B-279161 et al., Apr. 20, 1998, 98-1 CPD ¶ 115 at 5; VSE Corp.–Recon. & Entitlement to Costs, B-258204.3, B-258204.4, Dec. 28, 1994, 94-2 CPD ¶ 260 at 2.

Next, GSN argues that the use of commercial item procedures in the procurement is improper because the tasks to be performed under the contract do not require the type of services that are or could be “sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices,” and therefore, the services do not qualify as a commercial item under the “commercial item” definition in FAR § 2.101.³ Protest at 8-9.

² In any event, it is our understanding, based on representations made by the Army, that the person of whom GSN complains will not be involved in this procurement.

³ GSN argues that the required services involve preparing government cost estimates, guiding the government’s use of its Military Interdepartmental Purchase Request (MIPR) procedures, tracking MIPRs, and supporting government source selection panels, all using knowledge of Army or government-wide regulations and procedures. GSN argues that the services thus have no commercial analog with established catalog or market pricing, making use of a commercial item solicitation improper. Id.

While asserting that it properly determined the services met the definition of a commercial item,⁴ the Army also argues that GSN has failed to show how it is competitively prejudiced by the Army's allegedly improper use of commercial item procedures for the procurement.

GSN counters by arguing that, if it is not selected for award, the Army allegedly will not be required to provide GSN with a debriefing, to which GSN maintains it would otherwise be entitled, pursuant to 10 U.S.C. § 2305(b)(5)(A), if the procurement were conducted under FAR Part 15 competitive negotiation procedures. GSN further maintains that, absent the statutory requirement for a debriefing, its ability to trigger a statutory stay of award or performance will apply only if it can file a protest within 10 days after award. GSN concludes that either of these results provides sufficient competitive prejudice for our Office to sustain this ground of protest.

Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). In the context of a protest challenging the terms of a solicitation, competitive prejudice occurs where the challenged terms place the protester at a competitive disadvantage or otherwise affect the protester's ability to compete. Crane & Co., B-297398, Jan. 18, 2005, 2006 CPD ¶ 22 at 9; Carr's Wild Horse Ctr., B-285833, Oct. 3, 2000, 2000 CPD ¶ 210 at 5. However, with respect to procurement of services that allegedly did not meet the definition of a commercial item, our Office denied a protest where the protester did not claim that any of the provisions or procedures unique to commercial item procurements put it at a competitive disadvantage, and did not show that the use of commercial item procedures otherwise prejudiced the protester's competitive position. Johnson Controls World Servs., Inc., B-285144, July 6, 2000, 2000 CPD ¶ 108 at 3. Here, according to GSN, the only competitive prejudice it faces will occur after conclusion of the competition. On this record, GSN has not shown how the challenged approach will affect GSN's ability to

⁴ The contracting officer describes the work to be performed as following up on marketing leads and inquiries to the interactive web site, assisting users with development of performance work statements and independent government cost estimates, facilitating the preparation of government funding documents, other administrative details of processing contracting work, conducting task order competitions, recommending awards to the contracting officer's representative, and performing routing business planning, financial management, and related business support for the program office. Contracting Officer's Statement at 2. The contracting officer further maintains that responses to a sources sought notice identified multiple firms that provide similar financial management services in the commercial marketplace. Id. at 3.

compete, and thus, has not shown that GSN will be competitively prejudiced by the allegedly improper use of commercial item procedures.

Finally, GSN argues that certain workload data in the RFP are inaccurate because they reflect the same level of effort for each year of the contract, rather than reflecting an increasing workload, which the solicitation elsewhere contemplates.

The agency responds that, although the estimated workload data to which GSN refers shows a static level of effort throughout the contract performance period, offerors were clearly advised in amendment 1 to the RFP that proposals for increasing levels of effort were both permitted and contemplated. Specifically, the following exchange was incorporated into the RFP:

Question: [P]age 64, Technical Exhibit 3, establishes a uniform level of effort of 15,360 hrs, which is then unchanged for all option years. This is inconsistent with statement at PWS [Performance Work Statement] 1.2 (RFP, page 47) that “both the level and the mix of HR solutions support staff are expected to change from time to time to reflect changing goals and the customer base” and the statement (PWS 5.1) that “the program is entering a period of rapid growth” and the 10% minimum growth required as a performance standard under Technical Exhibit 2. Offerors should have opportunity to propose a different level of effort for option years. Does the Government have a different estimated LOE for the option years?

Answer: Technical Exhibit 3 provides only an estimated level of effort to perform the work. Offerors are expected to propose an effective organizational structure to perform the work requirements and a work force appropriate to the proposed technical approach. There is no requirement to propose the same level of effort for all years of the contract. The Government does not have a different estimated LOE for the option years.

RFP amend. 1; Contracting Officer’s Statement at 4.

In this regard, the agency maintains that offerors were reasonably informed that the workload data was provided “for informational purposes only,” and reflected historical information that was currently in the government’s possession. The agency further maintains that the solicitation’s incorporation of a performance-based work statement made each contractor responsible for determining the degree of effort required, based on its own approach. Contracting Officer’s Statement at 3-4.

In response, GSN does not meaningfully challenge the Army’s position, but argues that in spite of the Army’s express statements that the static workload estimates are not controlling with regard to proposed staffing levels, “GSN as well as its competitors will . . . no doubt place some reliance upon that information.”

Protester's Comments at 7. Since the Army has clearly warned offerors to develop their prices based on their own approach to the performance work statement, GSN's speculation that offerors will behave otherwise does not demonstrate a defect in the solicitation.

The protest is denied.

Gary L. Kepplinger
General Counsel