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Decision

Matter of: Triple Canopy, Inc.

File: B-310566.4

Date: October 30, 2008

Kelley P. Doran, Esq., G. Matthew Koehl, Esq., Sean P. Bamford, Esq., Victor G. Vogel, Esq., and Michael F. Scanlon, Esq., K&L Gates LLP, for the protester.
Timothy B. Mills, Esq., Maggs & McDermott LLC, for Sabre International Security, an intervenor.
Maj. William J. Nelson, Department of the Army, for the agency.
Glenn G. Wolcott, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Pursuant to the National Defense Authorization Act of 2008, which authorizes protests of task orders valued in excess of \$10 million, this Office's consideration of such protests will include an assessment of whether a procuring agency's source selection decision was reasonably consistent with the terms of the underlying solicitation and applicable procurement laws and regulations.
2. Where, prior to the submission of proposals, the agency expressly advised offerors that it would not require contractors to obtain facilities security clearances to perform task order requirements, protest that awardee was ineligible for task order award on the basis that it does not hold a facilities clearance is essentially an untimely challenge to the terms of the solicitation.
3. Protest that agency failed to reasonably evaluate the past performance of protester and awardee is denied where agency's past performance evaluation record is consistent with solicitation's definition of relevant past performance, contains adequate contemporaneous documentation supporting the agency's assessments, and the opinions of protester's personnel regarding the awardee's prior performance provide no credible basis to question the reasonableness of the agency's assessments.

DECISION

Triple Canopy, Inc. of Herndon, Virginia, protests the award of a task order by the Department of the Army, Joint Contracting Command – Iraq/Afghanistan, to Sabre International Security of Baghdad, Iraq, for security services at forward operating base (FOB)¹ Q-West in Iraq.² The task order was issued pursuant to a multiple award indefinite-delivery/indefinite-quantity (ID/IQ) contract known as the Theater-Wide Internal Security Services (TWISS) contract. Triple Canopy asserts that Sabre is ineligible for the task order award because it does not hold a U.S. facilities security clearance, and that the agency erred in evaluating Sabre's and Triple Canopy's past performance.³

We dismiss the protest in part and deny it in part.

BACKGROUND

In April 2007, the agency issued a solicitation for the TWISS ID/IQ contract, which is the underlying contract for the task order protested here; the TWISS solicitation sought proposals to provide security services at U.S. military installations throughout Iraq.⁴ The TWISS solicitation contemplated multiple awards of ID/IQ contracts under which ID/IQ awardees would subsequently compete for specific task orders.

¹ The protest record indicates that the terms “forward operating base” and “contingency operating base” were used interchangeably by the agency; our decision uses the term “forward operating base” or “FOB” throughout.

² Q-West is the name commonly used to refer to Qayyarah Airfield West, located in northern Iraq approximately 30 miles south of Mosul.

³ Based on information provided by the agency in response to the initial protest, Triple Canopy filed a supplemental protest on August 28, 2008 (docketed as B-310566.7), asserting that Sabre's proposal failed to comply with certain solicitation requirements regarding proposed manning levels and that this had an impact on Sabre's proposed price. We are currently developing the record in this matter and have advised counsel for the parties that we intend to address those issues in a separate decision.

⁴ The scope of services sought was described as “all labor, weapons, equipment, and other essential requirements to supplement and augment security operations at various sites throughout the Iraqi theater.” TWISS Performance Work Statement (PWS), May 8, 2007, ¶ 1.

Prior to submission of final proposals under the TWISS solicitation, the agency published responses to various questions posed by offerors. Among other things, in May 2007, the agency published the following question and response:

QUESTION/COMMENT: Does the offeror need a facilities clearance? If so, will the customer consider sponsoring an offeror for a Limited Facilities Clearance? Does UK [United Kingdom] Secret suffice for the “cleared” positions? Does the offeror require a facilities clearance as defined in NISPOM [National Industrial Security Program Operating Manual]? Does a UK Secret or NATO [North Atlantic Treaty Organization] secret clearance suffice for coalition secret?

DISCUSSION: None.

ANSWER: There is no requirement for a facility requirement for this contract as there is no requirement for contractors to store or process classified information. A UK Secret clearance would be considered as meeting the coalition secret requirements. Any access to classified information would be in a government facility at an FOB.

Agency Motion to Dismiss, Aug. 18, 2008, encl. 4, at 8-9.

In short, prior to submission of final proposals for the TWISS ID/IQ contract, the agency was specifically asked whether a facilities clearance would be required for contract performance. The agency clearly responded that it was not, explaining that contractor personnel would have access to classified information only at a government facility and, thus, the contractor would not be responsible for storing or processing classified information at its own facility. Triple Canopy did not protest the terms of the solicitation.

In September 2007, TWISS ID/IQ contracts were awarded to five offerors, including Triple Canopy and Sabre. By letter dated September 27, 2007, Triple Canopy was notified that it had been awarded a TWISS contract and was also notified as to the identity of the other four awardees.⁵

On July 3, 2008, the agency issued a task order request (TOR) to provide security services at FOB Q-West. The TOR identified certain minimum requirements that proposals were required to meet, and stated that, following a determination of

⁵ The other four awardees were Aegis Defence Services, Ltd. of London, England; EOD Technology, Inc. of Lenoir City, Tennessee; SOC-SMG, Inc. of Minden, Nevada; and Sabre International Security of Baghdad, Iraq. Letter from Army to Triple Canopy (Sept. 27, 2007).

minimum acceptability, the agency would perform a “best value tradeoff” on the basis of two equally weighted factors: price and past performance.⁶ TOR at 12.

With regard to price, the TOR: (1) contained a manning table that listed types of posts, various labor categories, and required manning levels; (2) referred offerors to the labor categories/CLINs (contract line item numbers) that were contained in their TWISS contracts; and (3) directed offerors to “furnish completed pricing for all CLINs based on attached CLIN structure.” Id. at 13. The TOR also stated that “[p]rice will be determined by adding all CLINs and subCLINs in the Pricing Schedule.” Id. With regard to past performance, the TOR stated: “Only Past Performance associated with previously awarded TWISS task orders will be considered relevant.” Id. at 12.

Triple Canopy and Sabre each submitted a proposal prior to the applicable July 8 deadline; thereafter, their proposals were evaluated.⁷ With regard to past performance, the contracting officer concluded that Triple Canopy and Sabre were essentially equal;⁸ accordingly, price became the determinative factor. Agency Report, Tab 7, Source Selection Decision (SSD) at 4. Sabre’s evaluated price was \$10,140,863; Triple Canopy’s evaluated price was [deleted]. SSD, attach. 1, at 5. Thus, a task order to provide security services at FOB Q-West was awarded to Sabre. This protest followed.

DISCUSSION

Triple Canopy protests that Sabre was ineligible for award because it does not hold a facilities security clearance, which Triple Canopy asserts is a requirement for contract performance, and that the agency failed to reasonably evaluate Sabre and Triple Canopy with regard to past performance. As discussed below, we dismiss the protest with regard to the alleged requirement for a facilities security clearance and we deny the protest with regard to the agency’s past performance evaluations.

⁶ The Q-West TOR did not state that, in order to perform the particular requirements of this task order, a contractor was required to obtain a facilities clearance, and Triple Canopy did not protest the terms of the Q-West TOR.

⁷ A third offeror’s proposal was also submitted and evaluated. That third proposal, and its evaluation, is not relevant to resolution of this protest; accordingly it is not further discussed.

⁸ The contracting officer describes both Sabre’s and Triple Canopy’s past performance as “excellent.” Contracting Officer’s Statement, Aug. 28, 2008, at 4.

Scope of Review

As a preliminary matter, the agency asserts that this Office is not authorized to consider the issues raised in Triple Canopy's protest due to the protest limitations previously imposed by the Federal Acquisition Streamlining Act of 1994 (FASA), 10 U.S.C. § 2304(c)(2000).⁹ As discussed below, this Office's consideration of the various issues raised by Triple Canopy is authorized by section 843 of the National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. 110-181, 122 Stat. 3, 236-39 (2008), which modified the prior FASA limitations regarding permissible protests. Specifically, the NDAA provides that, in addition to previously permitted task order protests, a protest is authorized with regard to "an order valued in excess of \$10,000,000." 122 Stat. 237.

The agency acknowledges that the NDAA not only modifies FASA's prior limitations on protests, but further, in order to meet the "fair opportunity to be considered" requirements, the NDAA requires that, for orders in excess of \$5,000,000, procuring agencies must provide ID/IQ contract holders with specific information regarding the bases for pending task order competitions.¹⁰ The agency further acknowledges that the NDAA authorizes protests challenging an agency's failure to comply with these "fair opportunity to be considered" requirements. Agency Legal Memorandum, Sept. 2, 2008, at 12.

Nonetheless, the agency maintains that, while task order contractors are "entitled to receive the information [regarding the bases for competitions]," and may protest the agency's failure to provide such information, contractors are "not entitle[d] . . . to challenge the merits of the award determination."¹¹ Id. at 14. That is, the agency

⁹ More specifically, although FASA provided that, generally, when placing task orders pursuant to multiple award ID/IQ contracts, all ID/IQ contract holders "shall be provided a fair opportunity to be considered," FASA also limited protests of task order awards to assertions that the order increased the scope, period, or maximum value of the contract under which the order was issued. 10 U.S.C. § 2304c(b),(d) (2000).

¹⁰ For example, the NDAA requires that an agency provide potential task order competitors with: a clear statement of the agency's requirements; disclosure of the significant evaluation factors and subfactors, and their relative importance; and where, as here, award is to be made on a "best value" basis, a written statement documenting the basis for the task order award. 122 Stat. 237.

¹¹ More specifically, the agency asserts that "IDIQ holders essentially have a right to file a 'pre-award' protest to challenge the sufficiency of the task order solicitation, but they do not have a right to a 'post-award' protest to challenge the rationale of the award decision itself," id. at 12, and similarly that "[o]fferors are only entitled to receive sufficient information to prepare their best proposal in response to the
(continued...)

asserts that while the NDAA's provisions permit a protester to challenge an agency's failure to inform offerors regarding the ground rules under which a task order competition will be conducted—it does not authorize a protest that challenges the agency's failure to actually follow those rules.

We reject the agency's arguments. Initially, as noted above, the NDAA authorizes "a protest of an order valued in excess of \$10,000,000." 122 Stat. 237. The Competition in Contracting Act of 1984 (CICA), as modified by FASA, specifically defines the term "protest," stating:

The term "protest" means a written objection by an interested party to any of the following:

- (A) A solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services.
- (B) The cancellation of such a solicitation or other request.
- (C) An award or proposed award of such a contract.
- (D) A termination or cancellation of an award of such a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

31 U.S.C. § 3551(1)(2000).

In the context of CICA and FASA, along with this Office's well-established practices and procedures employed to implement the protest jurisdiction conferred by those statutes, we view the NDAA's authorization to consider "a protest of an order valued in excess of \$10,000,000" as providing the same substantive protest jurisdiction conferred by those statutes. In this regard, we find no basis to conclude that, in enacting the NDAA and authorizing certain task order protests, Congress intended to establish a system that requires agencies to advise offerors of the bases for task order competitions, and enforces that requirement through authorization of bid protests—but provides no similar enforcement authority to ensure that agencies actually act in accordance with the guidance they are required to provide to offerors. Rather, consistent with this Office's past practice, and CICA's provisions that define a protest as an "objection . . . to . . . an award or proposed award," we view the NDAA's authorization to consider protests of task orders in excess of \$10 million as extending to protests asserting that an agency's award decision failed to reasonably

(...continued)

solicitation, and to have the award determination memorialized in writing. Those elements are present here, and Protester is entitled to nothing further." Id. at 15.

reflect the ground rules established for the task order competition.¹² Accordingly, our review of Triple Canopy's protest includes consideration of whether the agency's source selection decision was reasonably consistent with the terms of the underlying solicitation and applicable procurement laws and regulations.

Facilities Clearance

As noted above, Triple Canopy first challenges the task order award to Sabre on the basis that Sabre does not hold a facilities security clearance, asserting that a facilities clearance is a requirement for performance of this task order.

As discussed above, prior to competing for the TWISS ID/IQ contract, the agency was specifically asked whether a facilities clearance was required for performance of this contract. The agency unambiguously advised offerors that it was not, explaining that, in performing subsequent task order requirements, contractor personnel would have access to classified information only at a government facility and, thus, the contractor would not be responsible for storing or processing classified information at its own facility. Triple Canopy did not protest the terms of the TWISS solicitation. Further, as noted above, the Q-West TOR did not state that, to perform the particular requirements of the Q-West task order, a contractor was required to obtain a facilities clearance, and Triple Canopy did not protest the terms of the Q-West TOR prior to submitting its proposal.

Our Bid Protest Regulations require that protests challenging alleged defects or improprieties that are apparent from the face of the solicitation must be filed prior to the time established for submission of proposals. 4 C.F.R. 21.2(a)(1) (2008). Here, there is no credible argument that the agency's position regarding facilities clearances was ambiguous. As discussed above, the agency was expressly asked whether a facilities clearance was required, and the agency specifically responded that it was not. Accordingly, Triple Canopy's assertion that Sabre was ineligible for award of this task order because it does not hold a facilities clearance is, in essence, an untimely challenge to the terms of the solicitation and will not be considered; this portion of Triple Canopy's protest is dismissed.

¹² The agency expresses concern that our Office's consideration of the bases for agencies' source selection decisions in task order procurements will "effectively graft FAR [Federal Acquisition Regulation] Part 15 [requirements]" onto the task order process. Agency Legal Memorandum, Sept. 2, 2008, at 13. This Office recognizes that the ground rules established for various task order competitions may properly differ from the ground rules established under other procurements, including, for example, procurements conducted pursuant to FAR Part 15.

Past Performance

Triple Canopy next protests that the agency failed to reasonably evaluate Sabre's and Triple Canopy's respective past performance. More specifically, Triple Canopy's protest states, "on information and belief, [the agency] either ignored or did not properly weight Sabre's poor record of performance on prior TWISS task orders, thus improperly rating Sabre's past performance." Protest at 13-14. The protest elaborates that, "[f]or example, on information and belief, Sabre has failed to meet mobilization timelines, has a poor record of customer satisfaction, and has had personnel shortfalls." Id.

As a general matter, the evaluation of an offeror's past performance is within the discretion of the contracting agency, and we will not substitute our judgment for reasonably based past performance ratings. In determining whether a particular evaluation conclusion is reasonable, we examine the record to determine whether the judgment was reasonable, adequately documented, and in accord with the solicitation's stated evaluation criteria. See, e.g., Abt Assocs., Inc., B-237060.2, Feb. 6, 1990, 90-1 CPD ¶ 223 at 4.

Here, consistent with the TOR provision that, "[o]nly Past Performance associated with previously awarded TWISS task orders will be considered relevant," TOR at 12, the record indicates that the agency considered only Sabre's and Triple Canopy's previous performance of TWISS task orders in performing its past performance evaluations. More specifically, the contemporaneous record shows that the agency considered Triple Canopy's performance under three prior TWISS task orders: "FOB Delta," "MNC-I C2," and "FOB Endeavor." SSD at 2-3. Similarly, the agency considered Sabre's performance under five prior TWISS task orders: "FOB Hammer," "FOB Husaniyh," "Camp Paliwoda," "IZ working dogs," and "FOB Kalsu." Id. The agency record indicates that the contracting officer discussed each offeror's prior performance of the task orders listed above with the applicable contracting officer's representative, and the contemporaneous evaluation documentation lists specific information regarding each task order, summarizing the offerors' past performance as follows:

Because the TWISS program is relatively new the current task orders have only been active for 2-4 months on average. As such there is little past performance information available. To date however, all the contractors are performing services as required on their respective contracts. None of the three TWISS Contractors evaluated have any negative reports to date. All three contractors mobilized as required by the task order and are performing the services as required under the contract. There are no known performance deficiencies for any of the contractors.

SSD at 4.

The SSD referenced additional past performance evaluation documentation showing that Sabre and Triple Canopy had each been criticized for errors in completing certain required forms, but specifically noted with regard to each contractor that the agency was “seeing good improvement.” SSD, attach. 2, at 7, 8. The additional evaluation document also noted that Sabre has “[m]issed quarterly census reporting requirement.” *Id.* at 7. However, the contracting officer states: “In the overall evaluation of past performance, this was considered extremely minor and was not considered a significant element in [Sabre’s] principal performance of security services.” Contracting Officer’s Statement, Aug. 28, 2008, at 3.

Further, the agency’s past performance documentation noted: “[Sabre] is eager to address issues that arise. No significant quality performance faults or failures noted in COR assessments.” SSD, attach. 2, at 7. Similarly, the documentation noted: “[Triple Canopy] cultivates a professional relationship with customer. No significant quality performance faults or failures noted in COR assessments.” *Id.* at 8. Finally, the contracting officer summarized the evaluation of Sabre’s and Triple Canopy’s past performance stating: “Overall, both companies had excellent ratings with respect to their past performance of TWISS task orders, and I evaluated Sabre and Triple Canopy as effectively having equal past performance.” Contracting Officer’s Statement, Aug. 28, 2008, at 4.

Triple Canopy’s protest and subsequent submissions essentially offers its own evaluation of Sabre’s and its own past performance, concluding that its own past performance should have been considered superior to Sabre’s. In that context, Triple Canopy submitted a declaration from its vice president of protective services containing various allegations regarding Sabre’s prior performance.¹³

Consistent with the principle, stated above, that the relative merits of offerors’ past performance is properly within the discretion of the contracting agency, and that our Office will not substitute our judgment for that of the agency, it is similarly well-settled that a protester’s mere disagreement with the agency’s judgment is insufficient to establish that an evaluation was improper. *See, e.g., Clean Harbors Env’tl. Servs., Inc.*, B-296176.2, Dec. 9, 2005, 2005 CPD ¶ 222 at 3. Further, while an agency is obligated to consider reasonably available, relevant past performance

¹³ In response, Sabre submitted its own declaration from its TWISS program manager addressing each of Triple Canopy’s criticisms and stating that “**Each such allegation is categorically false and is unsupported by any evidence.**” Declaration of Sabre Program Manager, Sept. 22, 2008, at 1 (bold in original). Thereafter, Triple Canopy submitted additional declarations from Triple Canopy employees; these declarations consist, in large part, of allegations and criticisms of Sabre, allegedly made by third parties. Throughout the protest, Sabre has maintained that Triple Canopy’s allegations and criticisms are without basis.

information, a procuring agency is not required to identify each and every piece of past performance information that may potentially exist. See, e.g., Pemco Aeroplex, Inc., B-310372, Dec. 27, 2007, 2008 CPD ¶ 2 at 7-8.

Here, we have reviewed the agency's evaluation record and conclude that the agency's consideration of Triple Canopy's performance regarding three prior TWISS task orders, and Sabre's performance regarding five prior TWISS task orders, was adequately documented, consistent with the TOR's definition of relevant past performance, and provided a reasonable basis for the agency's conclusion that the offerors' past performance was essentially equal. Further, the declarations of Triple Canopy's employees containing various criticisms and allegations regarding the prior performance of Sabre, their competitor, fall woefully short of establishing a basis for this Office to sustain the protest.

Among other things, Triple Canopy's declarations consist primarily of what the declarants themselves acknowledge is second- and third-hand hearsay from unidentified sources. (For example Triple Canopy's vice president asserts that other unnamed Triple Canopy personnel "received information" from unidentified former Sabre employees and that "former [unidentified] Sabre third country national employees" told similarly unidentified Triple Canopy personnel about various alleged deficiencies in Sabre's performance regarding generally unidentified contracts. Protester's Comments, Sept. 12, 2008, attach. D.) Many of Triple Canopy's criticisms are vague and reflect little more than the declarants' judgments. (For example, one of the declarants identifies an Army representative with whom the declarant allegedly "had conversations" during which the representative allegedly "expressed concerns" about Sabre's performance; with this foundation, the declarant asserts "it is my belief" that the Army representative "may be aware" of what the declarant characterizes as "poor Sabre performance." Protester's Reply, Oct. 1, 2008, attach. 3.) Finally, a substantial portion of Triple Canopy's declarations appear to relate to information that the TOR expressly precluded from consideration when it established that only past performance of prior TWISS task orders would be considered in performing the past performance evaluation.

Even if this Office viewed Triple Canopy's vague and unsupported allegations as constituting objective, credible evidence regarding Sabre's prior performance on relevant contracts--which we do not--Triple Canopy has not shown that any of the purported information was reasonably available to the contracting officer when he performed his past performance evaluation. On the record here, there is no merit in Triple Canopy's protest challenging the agency's past performance evaluation, and

we find no basis to question the agency's determination that the past performance of Triple Canopy and Sabre were reasonably considered to be essentially equal.

The protest is denied.¹⁴

Gary L. Kepplinger
General Counsel

¹⁴ Triple Canopy also asserts that the agency failed to perform a best value tradeoff. As discussed above, the agency reasonably concluded that the offerors' past performance was essentially equal, and the TOR provided that, following a determination of minimum acceptability, price was the only other evaluation factor. Accordingly, price properly became the determinative factor.