

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

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Engility Corporation

File: B-413202; B-413202.2

Date: September 2, 2016

Kara M. Sacilotto, Esq., Rand L. Allen, Esq., Brian G. Walsh, Esq., and Gary S. Ward, Esq., Wiley Rein LLP, for the protester.
Kristina S. Wiercinski, Esq., Department of the Army, for the agency.
Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging an agency's negative responsibility determination is sustained where record shows that the agency's determination was based on incomplete information and unsubstantiated conclusions.

DECISION

Engility Corporation, of Andover, Massachusetts, protests its elimination from competition under request for proposals (RFP) No. SSESr-2055, issued by the Department of the Army to acquire software and engineering support services. Engility maintains that the agency unreasonably found it nonresponsible.

We sustain the protest.

BACKGROUND

The RFP contemplates the issuance of a task order to perform software engineering support services for a base year and two 1-year options on a cost-plus-fixed-fee basis. RFP Performance Work Statement at 5. Competition for the requirement was confined to firms that previously had been awarded indefinite-delivery, indefinite-quantity (IDIQ) contracts under the agency's systems and software engineering support next generation contract program.¹

¹ The record shows that the estimated value of the task order being competed is between \$200 and \$275 million. Agency Report (AR) exh. G, Pre-Solicitation

(continued...)

As is relevant to the protest, the RFP provided that the agency would perform a review to ensure that the offerors had the required facility security clearance. The RFP stated:

The Offeror shall submit the requested information in Boxes 6, 7, and 8 of DD Form 254 for the Prime and all subcontractors.²

Upon submission of proposals, in accordance with FAR [Federal Acquisition Regulation] 9.104-2, the Contracting Officer will screen the information submitted by Offerors in Boxes 6, 7, and 8 of DD Form 254 for the Prime and all subcontractors to determine if minimum security requirements are met. At a minimum, the Contracting Officer will determine if the submission reflects facility clearances as follows: the Prime - Top Secret; sub-contractor(s) – Secret. If the Contracting Officer determines that the Offeror or any of its sub-contractors fails to meet minimum security requirements, the Contracting Officer may deem the Offeror to be not responsible and thus not eligible for contract award. The Offeror's proposal will not be forwarded to any team for any evaluation but instead will be returned to the contractor without further action.

The successful Offeror must confirm that they meet all requirements of the DD 254 and all provisions of the PWS [performance work statement] security requirements at time of award because the awardee must meet the appropriate security clearance requirements in order to immediately begin transition and performance at time of contract award. The Government will not sponsor prime contractors nor can the Government wait for prospective contractors to obtain appropriate clearances.

(...continued)

Conference Slides, at 5. Because the value of the task order here exceeds \$10 million, this procurement is within our jurisdiction to hear protests related to the issuance of task orders under multiple-award IDIQ contracts. 10 U.S.C. § 2304c(e)(1)(B).

² Form DD 254 is the Department of Defense Contract Security Classification Specification. See <http://www.dtic.mil/whs/directives/forms/eforms/dd0254.pdf> (last visited September 2, 2016). As is pertinent here, box 6 of that form requires the offeror to provide the name, address and zip code of the prime contractor, the prime contractor's commercial and government entity (CAGE) code, and the name, address and zip code of the prime contractor's cognizant security office. Id.

RFP at section 2.4.1.

The record shows that Engility submitted a timely proposal on March 24, 2016, that included information concerning its name, address, CAGE code and cognizant security office. AR, exh. J, Engility Proposal, Volume III, Administrative Documents, at 4. In this connection, Engility identified itself as “Engility Corporation,” identified a facility in Chantilly, Virginia as the place of performance, provided the CAGE code 4A457, and identified the Defense Security Service field office in Chantilly, Virginia as the cognizant security office. Id.

The agency explains that it submitted a verification request to the Defense Security Service’s (DSS) Industrial Security Facilities Database (ISFD) on April 5. In response to that inquiry, the agency received an ISFD report that identified the facility affiliated with the CAGE code submitted by Engility as “TASC, Inc.” at an address in Andover, Massachusetts AR, exh. K, ISFD Report.

The agency explains that it then requested assistance from a security specialist at the Command Industrial Security Office, CECOM (the U.S. Army Communications-Electronic Command), to help determine whether or not Engility possessed the required top secret facility clearance. Contracting Officer’s Statement of Facts/Agency Legal Memorandum at 7-8. The agency also contacted the Defense Contract Management Agency (DCMA) administrative contracting officer for Engility’s underlying IDIQ contract to find out whether there had been any modifications to Engility’s contract, or whether there were novation agreements that were “in process.” Id.

On April 15, in response to the agency’s query, the security specialist advised that the results she obtained from the ISFD database were the same as the results obtained by the agency in its search. AR, exh. L, E-Mail Exchange between the Contract Specialist and the Security Specialist, at 5. She advised that she had performed a “mass search” of the ISFD database and found no information for an Engility facility in Chantilly, Virginia. Id. She also stated that she was attempting to contact the DSS representative in Massachusetts, but had not contacted anyone at that office. Id.

On April 28, the security specialist sent another e-mail to the agency advising that the CAGE code identified in the Engility proposal was “still” for a TASC facility. AR, exh. L, E-Mail Exchange between the Contract Specialist and the Security Specialist, at 3. She also advised that she had spoken to an unidentified DSS official in Chantilly, Virginia, who advised that he was aware of a “buyout” between Engility and TASC; that he was unsure when Engility and TASC would complete the transaction; and that there would be “a lot of paperwork that is required by DSS to process the change.” Id.

The record shows that there was yet another exchange of e-mail between the agency and the security specialist on May 3 and 4. During that exchange, the security specialist advised that there was no change in the ISFD database for the CAGE code identified in the Engility proposal, and that she ran another search for Engility in the ISFD database and identified approximately 5 entries, but that these entries appeared to have been under different company names. AR, exh. L, E-Mail Exchange between the Contract Specialist and the Security Specialist, at 2. The contract specialist wrote back to the security specialist advising as follows:

Per our discussion, the relevant information at this point remains unchanged. The cage code listed in Engility's DD254 corresponds to a company (TASC) who at this point is not the same entity as Engility when researched in ISFD. Furthermore, the address listed for Engility in the DD254 corresponds to a few Engility entities in ISFD, however none match the cage code listed in the DD254. Therefore, given the requirement to have a Top Secret Facility clearance per the DD254, and the stipulation that "the Government will not sponsor prime contractors nor can the Government wait for prospective contractors to obtain appropriate clearances" per the TOR [solicitation], Engility cannot be considered to be eligible for award based upon their submission and their proposal must be returned to them.

Id. The security specialist agreed with the conclusions stated by the contract specialist. Id. at 1.

The record shows that the agency made a determination that Engility was not responsible on May 10. AR, exh. N, Nonresponsibility Determination. By letter dated May 12, the contracting officer advised Engility of the agency's determination that the firm was not responsible. AR, exh. O, Letter to Engility from the Agency.

In response to the agency's letter, Engility wrote to the agency on May 19, advising that the CAGE code identified in its proposal was "active" in the System for Award Management (SAM) database for Engility; that the CAGE code identified in its proposal was its primary address since its merger with TASC, Inc.; that Engility's Chantilly, Virginia facility appeared in the SAM database under CAGE code 9G924; and that Engility's DSS primary point of contact at the Chantilly, Virginia field office could clarify any confusion. AR, exh. P, Letter from Engility to the Contracting Officer. Engility also asked the agency to substitute the CAGE code for its Chantilly, Virginia facility for the one originally provided in its proposal. Id.

The record shows that the agency ran a search in the ISFD database on May 25 using the second CAGE code provided by Engility, and this search identified a TASC facility at the address identified in the Engility proposal as the place of performance. AR, exh. Q, ISFD Database Report. The agency then sent a letter to Engility on May 25, advising the firm that its original determination that Engility was

nonresponsible remained unchanged. After receipt of that letter, Engility filed the instant protest.

DISCUSSION

Engility argues that the agency unreasonably found it nonresponsible. The protester maintains that it engaged in a merger transaction between Engility Corporation and TASC, Inc. The protester explains that in February 2015, Engility Corporation acquired TASC, Inc., and that, on January 1, 2016, Engility consolidated contracts from a number of legal entities to one entity by asset transfers. The protester further explains that, as part of the January 1, 2016 transaction, a number of contracts were novated to TASC, Inc. and TASC, Inc. changed its name to Engility Corporation. The protester states that, contemporaneously with these changes, Engility submitted a name change and novation agreement to DCMA, and also advised the DSS of the changes. The protester therefore maintains that the facility it identified in its proposal in Chantilly, Virginia, is now, and at all relevant times has been, an Engility Corporation facility approved as a top secret facility that meets the requirements of the solicitation.

The agency essentially takes the position that the solicitation required Engility to have the required clearance in order even to submit a proposal. According to the agency, Engility did not have the required top secret facility clearance for its Chantilly, Virginia facility at the time it submitted its proposal, and it was therefore reasonable to find the firm nonresponsible.

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 judgment in exercising that discretion. Torres Int'l, LLC, B-404940, May 31, 2011, 2011 CPD ¶ 114 at 4. 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. 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, while the record submitted by the agency appears facially to support its determination that Engility did not possess the required top secret facility clearance, Engility has tendered evidence that draws the agency's conclusion into question. In addition, the record shows that the agency was aware of the merger transaction between TASC and Engility, and also was aware of inconsistencies between the information in the ISFD data base and other contractor databases (such as the SAM database). Despite the agency's knowledge and these evident inconsistencies, the agency made no effort to obtain accurate, up-to-date information from either the protester, or directly from the DSS office identified in the protester's proposal,

regarding either the status of that transaction or its possible effect on the top secret facility clearance for its proposed place of performance in Chantilly, Virginia.

On the question of the agency's knowledge of the merger between Engility and TASC, along with its knowledge of the inconsistencies between the ISFD database and other contractor databases, the record shows that the agency was aware of this transaction, as well as inconsistencies between the ISFD database and other contractor databases. In his initial e-mail to the security specialist the contract specialist stated as follows:

We know Engility purchased TASC Inc. last year in a stock buyout, but the ISFD does not reflect this change. However, the System for Award Management (attached) does show Engility Doing Business as TASC under the subject cage code and the MA [Massachusetts] address. Given the difference between the submitted information and ISFD, we are trying to conclude whether the Gov't can definitively determine the Offeror (Engility) does indeed hold the appropriate security clearance.

AR, exh. L, E-Mail Exchange between the Contract Specialist and the Security Specialist, at 8. The record includes subsequent references to the Engility-TASC merger transaction, but these references amount to unsupported conjecture on the part of either the security specialist or the unidentified DSS representative in the Chantilly, Virginia field office with whom the security specialist spoke. In this connection, the security specialist stated to the agency's contracting officer as follows: "My guess is that the buyout has not gone through novation." Id. at 5. She subsequently spoke with the unidentified DSS representative in Chantilly, Virginia, about the Engility-TASC merger transaction and characterized that discussion as follows:

He was not sure when Engility and TASC will complete the buyout. He thinks they are close, he really could not [say] when they will finalize the [sale]. And he would probably know more in a couple of weeks. However, there will be a lot of paperwork that is required by DSS to process the change. It depends on what is in the final agreement.

Id. at 3.

Of significance, this unsupported conjecture attributed to the unidentified DSS representative in Chantilly, Virginia was expressly relied on by the contracting officer in his determination finding Engility nonresponsible. That determination states as follows:

The Security Specialist also contacted the DSS Industrial Security Representative for Chantilly, VA. The DSS Representative in VA confirmed that he was not aware of a finalized buyout between Engility and TASC, Inc. The DSS Representative for VA stated that once a buyout is actually finalized, there is a significant amount of paperwork that must be processed, and therefore a significant amount of time and effort that must be expended in order for DSS to process changes to facilities clearances as the result of the buyout.

AR, exh. N, Nonresponsibility Determination at 2-3.

Against this backdrop, Engility has proffered evidence that appears to show that the firm does, in fact, have the required facility security clearance in the name of Engility Corporation at the Chantilly, Virginia location where it offered to perform the task order. First, the record includes evidence showing that TASC, Inc. changed its name from TASC, Inc. to Engility Corporation. In this connection, the record includes a document provided to the DCMA administrative contracting officer at the time of the January 1, 2016 name change and asset consolidation transaction. That document represents that TASC, Inc. amended its certificate of incorporation on January 1, 2016 to change its name to Engility Corporation and provided documentary evidence to the government in support of that representation. Supplemental Protest Exhibit, Change of Name and Novation Agreement, at 2.

The record also includes a Department of Defense Security Agreement executed between Engility Corporation and a representative of the DSS on January 21, 2016. Protest, exh. 5, Department of Defense Security Agreement. That document memorialized the name change from TASC, Inc. to Engility Corporation for the facility security clearance at the Chantilly, Virginia facility location identified by Engility as the place of performance for the subject task order. Id. Moreover, the protester also has submitted an e-mail from a Chantilly, Virginia DSS representative dated March 9, 2016. That e-mail acknowledges that the TASC CAGE code 9G924 (the CAGE code for the Chantilly, Virginia facility) is now an Engility Corporation CAGE code, and advised Engility to report the name change in the electronic facility clearance system: "Yes, since TASC – CAGE: 9G924 is now Engility Corporation you will also need to report the name change in e-FCL." Protester's Comments, exh. 6, E-mail from the Chantilly, Virginia DSS Representative to Engility Corporation's Director of Security, March 9, 2016.

The record also includes an e-mail from the DCMA administrative contracting officer for Engility acknowledging the name change from TASC, Inc. to Engility Corporation and identifying the reassignment of the headquarters CAGE code originally included in Engility's proposal (4A457) to Engility Corporation. That e-mail provides: "As the result of company restructuring, TASC, using CAGE Code 4A457, became Engility, dba TASC, using CAGE Code 4A457 on Jan 1, 2016." Protester's Comments, exh.

7, E-mail from Engility's DCMA Administrative Contracting Officer to Various Parties.

In sum, the record includes evidence that appears to show that, as of no later than January 21, 2016--prior to the submission of proposals--Engility Corporation had a facility with the required security clearance in Chantilly, Virginia, and this is the facility where Engility proposed to perform the task order. While we offer no dispositive opinion about the sufficiency of Engility's security clearance for the proposed facility, the evidence presented by the protester draws into question the agency's nonresponsibility finding.

The agency suggests that firms were advised by the RFP that this was a Federal Acquisition Regulation (FAR) part 16 acquisition and that the FAR part 15 evaluation and discussion procedures did not apply. Contracting Officer's Statement of Facts/Agency Legal Memorandum at 19. However, the rules relating to clarifications and discussions have no application to possible inquiries regarding matters of responsibility. Simply stated, an agency's exchanges with an offeror regarding matters of responsibility do not constitute discussions. McKissack+Delcan JV II, B-401973.2, B-401973.4, Jan. 13, 2010, 2010 CPD ¶ 28 at 6-8. Here, any information furnished by Engility concerning its Chantilly, Virginia facility would not have related to the technical acceptability of its proposal, but rather would only have related to the firm's responsibility. In view of the foregoing considerations, we sustain the protest.³

RECOMMENDATION

We recommend that the agency reconsider its nonresponsibility determination in light of the discussion above. Should the agency find Engility responsible, we recommend that its proposal be evaluated on the merits, and that the firm be

³ As a final matter, we point out that the agency properly could not have found Engility nonresponsible before even evaluating its proposal. Notwithstanding the terms of the RFP, both the FAR and our cases require that an offeror's responsibility be evaluated based on information received by the agency at any time up to the time award is proposed to be made. FAR § 9.105-1(b)(3); Sygnetics, Inc., B-404535.5, Aug. 25, 2011, 2011 CPD ¶ 164 at 4. The agency states that, during previous task order solicitations, it treated the security requirements as a matter of technical acceptability rather than a matter of responsibility; for this acquisition, it decided to make the security requirements a matter of responsibility. Contracting Officer's Statement of Facts/Agency Legal Memorandum at 3-4. Having made that election, the agency was required to assess the question of an offeror's responsibility in accordance with the FAR and our cases which, as noted, require agencies to consider information relating to responsibility that is provided at any time up to the time of award.

afforded an opportunity to compete for the task order at issue. In addition, we recommend that the protester be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. The protester should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Susan A. Poling
General Counsel