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Decision

Matter of: Bilfinger Berger AG Sede Secondaria Italiana

File: B-402496

Date: May 13, 2010

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Joseph P. Hornyak, Esq., T. Wayne Gray, Esq., and Megan Mocho Jeschke, Esq., Holland & Knight, LLP, for Cooperativa Muratori Riuniti, an intervenor.

Katherine D. Denzel, Esq., U.S. Army Corps of Engineers, for the agency.

Frank Maguire, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging negative responsibility determination is denied where agency--relying on information that protester and debarred firm were related companies that previously had performed contracts using each other's resources and that protester would make use of debarred firm's resources in performing contract under Italian licensing system--reasonably determined that debarred firm would participate in contract performance.

DECISION

Bilfinger Berger AG Sede Secondaria Italiana (BBSSI), of Vincenza, Italy, protests the award of a contract to Cooperativa Muratori Riuniti (CMR), of Bologna, Italy, under request for proposals (RFP) No. W912GB-09-R-0032, issued by the U.S. Army Corps of Engineers for construction, repair, and facilities maintenance services in Italy. The protester challenges the agency's determination that it is not a responsible prospective contractor.

We deny the protest.

BACKGROUND

The RFP, issued on May 12, 2009, was for award, on a "best value" basis, of the Italy Job Order Contract (JOC), for construction, renovations, repair, and replacement of

building systems, maintenance and repair of facilities, and other maintenance services at military installations in Italy. Agency Report (AR) at 1. Under the RFP, offerors were required to submit a Societa Organismi D'Attestazione (SOA), a certification evidencing compliance with Italian law regarding the qualifications of companies competing for public works contracts. RFP at 31-32; AR at 2. An SOA certifies a company to be qualified in particular categories and classifications of work. *Id.* at 3. BBSSI's proposal included an SOA in the name of a related company, Bilfinger Berger Hochbau GmbH (BBH), a debarred contractor. Contracting Officer's (CO) Statement at 11-12. Submission of an SOA in the name of another contractor is permissible in certain circumstances under a system called *avalimento*, authorized by Italian law. Protest at 6; AR at 4.

Following review of initial proposals, a competitive range was established, discussions were held, and final proposal revisions were received. CO's Statement at 17. After evaluation of final proposals, the contracting officer determined that BBSSI's proposal was the best value. CO's Statement at 20; AR exh. 19, Source Selection Decision Document (SSDD), at 001132.

In considering BBSSI's responsibility, however, the contracting officer found that BBSSI and BBH had an extremely close business relationship, based on their corporate relationship, government dealings with both firms on prior contracts in which their resources and assets had been used interchangeably, and BBSSI's listing of contracts performed by BBH as experience and past performance in its proposal. SSDD at 001113-14; CO's Statement at 22; AR at 7-11. The contracting officer concluded that BBSSI had provided "several indications that it is affiliated with [BBH]," and may have been "a mechanism for [BBH] to submit proposals and to continue to contract with the U.S. Government," and that it therefore was necessary to review the "whole record ... based on various evidence and documents that have been received from the contractor which indicate this relationship." SSDD at 001133. The contracting officer found substantial information in this regard. He notes, for example, that "8 out of the 10 projects submitted as Experience and Past Performance in [BBSSI's] original proposal were performed by [BBH]," and that "discussions with field personnel administering current BBH and BBSSI contracts in Italy [indicated] that the same people and resources were performing work under both company names." CO's Statement at 22.

The agency also obtained an opinion from an Italian legal expert to determine the effect of BBSSI's use of BBH's SOA. AR exh. 19, Opinion of Giorgio Cosmelli, Jan. 8, 2010. The contracting officer's interpretation of this opinion was that the SOA system is intended to provide assurance to contracting parties that they are dealing with qualified companies and that, although a contractor's submission of an SOA in the name of another contractor is permissible, the system contemplates that the awardee will have full disposal of the resources of the firm holding the SOA. SSDD at 001134. The contracting officer concluded that, because of BBSSI's use of BBH's SOA, BBSSI would have "full disposal of [BBH's] assets and resource[s]—technical,

financial, employees, machinery, know-how, organization, economic and financial standing,” and would likely avail itself of those assets. SSDD at 001134.

Based on these circumstances showing both a close relationship between BBSSI and BBH, and the appearance that BBH would participate in performance of the contract, the contracting officer determined that BBH was indirectly offering on the solicitation through BBSSI. The contracting officer also concluded that BBSSI was not a responsible offeror and was not eligible to receive the award. See Federal Acquisition Regulation (FAR) § 9.104-1; SSDD at 001134; CO’s Statement at 22. Award was made to CMR on January 28, 2010. This protest followed.

DISCUSSION

BBSSI generally challenges the contracting officer’s negative responsibility determination. It specifically asserts that the determination was unreasonable, since it advised the agency that it would perform the contract without any involvement of BBH. Protest at 11-12. Further, the protester asserts that the Cosmelli opinion, as interpreted by the contracting officer, could not form the basis for a reasonable nonresponsibility determination. Supp. Protest, Mar. 12, 2010. BBSSI also asserts that the SOA requirement was a definitive responsibility criterion, which it satisfied. Protest at 9-13. Finally, the protester asserts that the contracting officer’s determination constituted a wrongful de facto debarment. Protest at 19-20.

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. 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. Miklin Corp., B-236746.2, Jan. 19, 1990, 90-1 CPD ¶ 72 at 1-2, recon. den., B-236746.3, June 8, 1990, 90-1 CPD ¶ 540; see, e.g., Blocacor, LDA, B-282122.3, Aug. 2, 1999, 99-2 CPD ¶ 25. Our review is based on the information available to the contracting officer at the time the determination was made. Acquest Dev. LLC, B-287439, June 6, 2001, 2001 CPD ¶ 101 at 3.

Here, as indicated above, based on the information available to him, the contracting officer concluded that BBSSI had provided indications that it may have been “a mechanism for [BBH] to submit proposals and to continue to contract with the U.S. Government.” SSDD at 001133. In support of this conclusion, the agency supplies a statement by the head of its contract administration office, who states that “the same personnel have simultaneously represented [BBSSI and BBH] on the contracts we have administered there both prior to and during the period in which BBH has been debarred,” and that there has been “no differentiation between the operations, insofar as the same key personnel have been identified and have signed documents

for contracts with both companies.” AR exh. 15a, Declaration of William Thievon, Mar. 4, 2010; see AR exh. 15d (organizational chart showing identical Bilfinger representatives on BBSSI and BBH contracts). The agency asserts that the two firms utilized common facilities and equipment, common and shared employees, including key personnel and management, and common bank accounts and that this resulted in the lack of a practical differentiation between either company in their daily work. AR at 7, 18.

The protester generally does not dispute the information on which the agency based its determination. Rather, it asserts that the information is irrelevant, since it does not “invalidate the very clear and explicit representation in BBSSI’s discussion response, whereby it was unequivocally represented that BBSSI would perform on this [contract] without any involvement of BBH.” Comments at 25 (emphasis in original).

We find that the extensive information on which the contracting officer relied fully supported the view that BBSSI and BBH were closely related, and the resultant appearance that BBH, a debarred contractor, would be involved in performing the contract, as it had been under prior contracts. Debarred contractors generally may not receive contracts from the government or subcontracts from government contractors, and “are also excluded from conducting business with the Government as agents or representatives of other contractors.” FAR § 9.405. Further, the FAR prohibits debarred firms from submitting offers for government contracts either directly or “indirectly (e.g., through an affiliate).” FAR § 9.403 (definition of “contractor”) and § 9.405(a) (“contractors” debarred, suspended, or proposed for debarment are excluded from receiving contracts); Detek, Inc., B-261678, Oct. 16, 1995, 95-2 CPD ¶ 177 (firm not eligible for award where circumstances indicated that debarred affiliate was attempting to submit offer through affiliated offeror). While BBSSI represented that BBH would not participate in performance, the contracting officer was not required to take BBSSI’s representations at face value; he reasonably could rely on the historical and other information evidencing a close working relationship between BBSSI and BBH in concluding that BBH essentially was proposing through BBSSI, and that BBSSI therefore was nonresponsible.

We also find that the contracting officer’s concerns about BBSSI’s reliance on BBH’s SOA was reasonable. SSDD at 001133-34. Based on the Cosmelli opinion, the contracting officer found that BBSSI’s use of BBH’s SOA further supported the conclusion that BBH would be involved in contract performance and was essentially offering on the solicitation through BBSSI. Id. The protester asserts that its use of BBH’s SOA was “simply for the sake of satisfying the ministerial requirement of having a SOA certificate,” Protest at 11-12; AR at 3, and reiterates that it intended to perform the contract wholly by itself, without participation by BBH. Again, however, the agency was not bound to accept BBSSI’s representations and disregard its SOA arrangement with BBH, together with the other substantial information bearing on the firms’ relationship.

The protester asserts that the legal opinion reviewed by the agency could not form the basis for a reasonable nonresponsibility determination due to deficiencies in the agency's acquisition of the opinion, the opinion itself, and the contracting officer's interpretation of the opinion. Comments at 4-21; Supp. Protest, Mar. 12, 2010. In this regard, the protester asserts that the Request for Quotations seeking the legal opinion did not provide sufficient background material, including information setting forth BBSSI's views regarding the legal effect of the SOA. Comments at 4-9, 18-21. We do not agree with BBSSI, however, that the absence of its views from the RFQ diminished the reliability of the opinion.¹ The RFQ adequately described the subject matter the opinion was to address, and there was no requirement that the agency turn the opinion into a vehicle for debate by setting forth BBSSI's views on the matter. Contracting officers generally are entitled to rely on information available to them at the time of a responsibility determination, absent any indication that the information is defective, unsupported, or suspect. M. Matt Durand, LLC, B-401793, Nov. 23, 2009, 2009 CPD ¶ 241 at 7.

BBSSI also asserts that the agency misinterpreted the legal opinion and that the opinion does not support the contracting officer's conclusions. Comments at 9-11, 15-19. However, BBSSI has not established that the agency's interpretation of the opinion was incorrect or unreasonable. The opinion comments on the law surrounding an SOA, rather than the precise question of one firm's use of another firm's SOA. However, the opinion does indicate that, under the SOA system, a contractor may "prove to have the technical capabilities and the economic and financial standing necessary" to compete for the award of a public contract "by relying on the resources ... of other entities, provided that, in such case, the bidder can prove to the contracting authority that it will have in its disposal the resources of such other entities to carry out the works." *Cosmelli Opinion* at 3-4. The opinion also indicates that "the bidder who intends to avail itself of the third party's resources shall produce ... a declaration certifying that it intends to avail itself of the third party's resources in order to meet the necessary requirements" *Id.* at 5. These statements are all reasonably supportive of the contracting officer's conclusion that BBSSI's reliance on BBH's SOA was indicative of an intent to "have at its disposal the resources of [BBH] to carry out the [contract]." *SSDD* at 001134. The protester has provided no definitive information, other than its own legal opinion, establishing that the law permits it to use another firm's SOA without involving that other firm in performance of the contract.²

¹ We note, however, that the RFQ did include substantial text excerpted from a BBSSI attorney's e-mail to agency counsel, setting forth BBSSI's position regarding the effect of the SOA. RFQ at 3-4. We also note that some of the documentation BBSSI asserts the agency failed to include in the RFQ actually postdates the issuance of the RFQ. Comments at 6-9, 19-20.

² The contracting officer further concluded, based on the legal opinion, that because of BBSSI's use of BBH's SOA, BBSSI actually would be required to make use of
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BBSSI also asserts that the SOA requirement was a definitive responsibility criterion, which it satisfied when it submitted BBH's SOA, and that further examination of the SOA is unwarranted and an improper application of an unstated evaluation factor. Protest at 9-13. This argument is without merit. BBSSI was not found nonresponsible due to failure to meet the solicitation requirement for submission of an SOA; rather, it was found nonresponsible based on the circumstances discussed above and its submission of BBH's SOA. FAR part 9.4.

Finally, the protester asserts that the contracting officer's negative responsibility determination constituted a wrongful de facto debarment, without affording BBSSI the procedural protections of FAR § 9.406-1(b). This argument is without merit. A de facto debarment occurs when the government uses nonresponsibility determinations as a means of excluding a firm from government contracting or subcontracting, rather than following the debarment regulations and procedures set forth at FAR subpart 9.4. Firm Erich Bernion GmbH, B-233106, Dec. 28, 1988, 88-2 CPD ¶ 632 at 4. A necessary element of a de facto debarment is that an agency intends not to do business with the firm in the future. Id.; Lida Credit Agency, B-239270, Aug. 6, 1990, 90-2 CPD ¶ 112 at 3 n.2. The nonresponsibility determination here was based on current information regarding BBSSI and BBH's close business relationship, and BBSSI's use of BBH's SOA. The record does not show that the agency intends to exclude the firm from other procurements based on its specific determination here.

The protest is denied.

Lynn H. Gibson
Acting General Counsel

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BBH's assets as a matter of law. SSDD at 1134. While BBSSI again disputes the contracting officer's interpretation, Comments at 4-21, it has not established that this interpretation is incorrect. In any case, in light of our findings above, this conclusion is not essential to a finding that the agency acted reasonably.