In the United States Court of Federal Claims

No. 19-1796C

(E-filed: March 6, 2020)[1]

AMAZON WEB SERVICES, INC., Plaintiff, v. THE UNITED STATES, Defendant, and MICROSOFT CORP., Intervenor-defendant.	Bid-Protest; Temporary Restraining Order; Preliminary Injunction; Requirement of Security; RCFC 65.

Kevin P. Mullen, Washington, DC, for plaintiff. J. Alex Ward, Daniel E. Chudd, Sandeep N. Nandivada, Caitlin A. Crujido, Alissandra D. Young, Andrew S. Tulumello, Daniel P. Chung, Theodore J. Boutrous, Jr., Richard J. Doren, and Eric D. Vandevelde, of counsel.

Anthony F. Schiavetti, Trial Attorney, with whom appeared Joseph H. Hunt, Assistant Attorney General, Robert E. Kirschman, Jr., Director, and Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant. Michael G. Anderson and Benjamin M. Diliberto, Washington Headquarters Service & Pentagon Force Protection Agency; and Tyler J. Mullen, Defense Information Systems Agency; of counsel.

[1] This opinion was issued under seal on February 13, 2020. Pursuant to ¶ 4 of the ordering language, the parties were invited to identify source selection, proprietary or confidential material subject to deletion on the basis that the material was protected/privileged. The proposed redactions were acceptable to the court. All redactions are indicated by brackets ([ ]).

Robert S. Metzger, Washington, DC, for intervenor-defendant. Jeffery M. Chiow, Neil H. O'Donnell, Lucas T. Hanback, Stephen L. Bacon, Deborah N. Rodin, Cassidy Kim, Eleanor M. Ross, Kathryn H. Ruemmler, Abid R. Qureshi, Roman Martinez, Anne W. Robinson, Dean W. Baxtresser, Genevieve Hoffman, Riley Keenan, Margaret Upshaw, of counsel.

OPINION AND ORDER

CAMPBELL-SMITH, Judge.

On January 22, 2020, plaintiff filed a motion for temporary restraining order (TRO) and preliminary injunction (PI), pursuant to Rule 65 of the Rules of the United States Court of Federal Claims (RCFC).[2] See ECF No. 130. In ruling on the motion, the court has also considered: (1) the administrative record (AR), ECF No. 107 (notice of filing the AR);[3] (2) intervenor-defendant's response in opposition to plaintiff's motion, ECF No. 137; (3) defendant's response in opposition to plaintiff's motion, ECF No. 139; and (4) plaintiff's reply in support of its motion, ECF No. 144. The motion is ripe for ruling, and the court deems oral argument unnecessary. For the following reasons, plaintiff's motion for a preliminary injunction is **GRANTED**.

I. Background

This protest action was filed on November 22, 2019. See ECF No. 1. The case involves considerable detail, but for purposes of deciding this motion, the court will relate only those details that are necessary to the instant analysis.

Plaintiff filed this action to protest the United States Department of Defense's (DOD) decision to award the Joint Enterprise Defense Infrastructure (JEDI) contract to

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[2] The court notes that RCFC 65 differentiates between preliminary injunctions (PI) and temporary restraining orders (TRO) primarily on the basis of notice to the opposing parties. Specifically, when the opposing party has notice, the relief requested is a PI. See RCFC 65(a). When no notice is given, the relief requested is a TRO with a duration limited to fourteen days, absent an extension. See RCFC 65(b). Although plaintiff has nominally requested both a PI and a TRO, the court considers its motion as a request for a PI because defendant and intervenor-defendant have each been afforded an opportunity to respond to plaintiff's arguments. As such, any separate request for a TRO is moot.

[3] The administrative record (AR) in this case is comprised of an unusually large number of files in a variety of formats, some of which were incompatible with filing through the court's case management/electronic case filing (CM/ECF) system. The court, therefore, departed from its usual practice of requiring defendant to file the AR through CM/ECF, and ordered defendant to file the AR on encrypted external hard drives. See ECF No. 98 (order).

intervenor-defendant, under Solicitation No. HQ0034-18-R-0077 (solicitation). See id. at 1; ECF No. 130 at 1 (identifying the resulting contract as Contract No. HQ0034-20-D-0001). As alleged by plaintiff in the complaint, the JEDI program is DOD's "plan to upgrade and consolidate its cloud computing infrastructure across [DOD], which would enable [DOD] to employ 'emerging technologies to meet warfighter needs' and maintain 'our military's technological advantage.'"[4] Id. at 17 (citation omitted).

DOD issued the JEDI solicitation on July 26, 2018. Id. at 18. After reviewing proposals, the source selection authority was to make an award determination on a best-value basis. The source selection plan stated: "The objective of this source selection is, through a competitive solicitation process, to select the Offeror whose proposed solution for JEDI Cloud represents the best value to the Government." See AR at 64340. Following the evaluation process, DOD publicly announced, on October 25, 2019, that it had awarded the JEDI contract to intervenor-defendant. See ECF No. 1 at 90.

In both its complaint and its motion for injunctive relief, plaintiff describes the solicitation's evaluation factors and alleges a host of errors in their application. See generally, ECF No. 1, ECF No. 130-1. The factor most critical to the court's present analysis, however, is Factor 5, which addresses "the Offeror's proposed approach to application and data hosting." AR at 151496, 151506. As part of the technical proposals under Factor 5, the offerors were instructed to submit price proposals based on various factual scenarios. See id. at 151496. The agency was then to evaluate the proposals for each Price Scenario to determine whether the proposal was a "technically feasible approach when considering the application and data hosting requirements in Section L for this Factor and the specific scenario requirements in Attachment L-2." Id. at 151506. See also id. at 151496 (Section L requirements); id. at 198-217 (Attachment L-2 Price Scenarios requirements).

Plaintiff's allegations of improper evaluation analyzed in this opinion relate specifically to Price Scenario 6, in which each offeror is instructed to propose prices on facts related to its "Containerized Data Analysis Framework." See ECF No. 130-1 at 16-20; AR at 215. The Price Scenarios were revised through Amendment 005, which

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[4] Plaintiff offers the following definition of the term cloud computing:

> "Cloud Computing" refers to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction. Cloud computing is an alternative to traditional "on-premises" information technology resources, which require users to plan, procure, manage, and maintain physical computing resources (i.e., servers).

ECF No. 1 at 17.

instructed offerors to "[a]ssume that all data in these price scenarios is highly accessible unless otherwise stated." AR at 64310. The amended version of Price Scenario 6 did not expressly state that the "highly accessible" assumption did not apply. See id. at 64327-29. It did, however, use the similar term "highly available" in several instances. Id.

After DOD issued Amendment 005, an offeror sought the following clarification:

> The Government has introduced a new term "highly accessible" without definition. Could the government confirm that the term "highly accessible" is defined as either "Online Storage" or "Nearline Storage" as defined in Attachment J-8?

Id. at 64332. In response, DOD stated: "The term 'Highly Accessible' is meant to be understood as online and replicated storage." Id. (emphasis added).

The solicitation defines online storage as "[s]torage that is immediately accessible to applications without human intervention." Id. at 650. And it defines nearline storage to mean "[s]torage not immediately available, but can be brought online quickly without human intervention." Id. The solicitation does not define the term "replicated storage," but plaintiff reads this to be a separate characteristic of the required storage from its designation as online, based on its understanding of the term as a reference to "the practice of storing data more than once so that there are multiple copies of the data." ECF No. 130-1 at 17. Neither defendant nor intervenor-defendant offers an alternative definition for "replicated storage" in their responses. See ECF No. 137, ECF No. 139.

Plaintiff alleges that intervenor-defendant's proposal under Factor 5, Price Scenario 6 proposed [ ] storage rather than online storage, in contravention of the solicitation requirement reflected in Amendment 005 and the subsequent DOD clarification. See ECF No. 130-1 at 18. Intervenor-defendant's proposal for Price Scenario 6 proposes [ ] storage, see AR at 174754-57. And as defined in intervenor-defendant's proposal, [ ] storage is [ ] storage, [ ]. Id. at 173315.

In its source selection report, the Price Evaluation Board (PEB) stated that plaintiff proposed online storage for Price Scenario 6, and that intervenor-defendant proposed [ ] storage for Price Scenario 6. The PEB attributed the price difference between the two proposals, in part, to this difference.

> 5.5.6.1. [Plaintiff] proposed a total price of $[ ] for Price Scenario 06. Approximately [ ]% of [plaintiff's] price before adjustments was in the Storage category with a value of $[ ]. [Plaintiff's] proposed discounting strategy resulted in an adjustment of $[ ], or a [ ]% decrease in price. The significant variance in price from [intervenor-defendant] was attributed to a technical approach where [plaintiff] proposed their [ ] **online storage**

> in so [sic] they could [ ]. A separate MFR was completed to document their rationale and was identified in the IPR Memo.
>
> 5.5.6.2. [Intervenor-defendant] proposed a total price of $[ ] for Price Scenario 06. Approximately [ ]% of [intervenor-defendant's] price before adjustments was in the Storage category with a value of $[ ]. [Intervenor-defendant's] proposed discounting strategy resulted in an adjustment of $[ ], or a [ ]% decrease in price. The significant variance in price from [plaintiff] was attributed to the technical approach where [intervenor-defendant] proposed their [ ] **storage** solution which meets the technical feasibility requirements and offers a [ ] unit price.

Id. at 176363 (emphasis added). The crux of plaintiff's argument on this point is that the PEB erred in concluding that intervenor-defendant's [ ] storage met "the technical feasibility requirements," because, pursuant to Amendment 005 and DOD's clarification thereof, offerors were required to propose online storage. ECF No. 130-1 at 17-18. Plaintiff contends that as a result of intervenor-defendant's "noncompliant storage solution," DOD "should have found [intervenor-defendant's] technical approach unfeasible, assigned a deficiency, and eliminated Microsoft from the competition." Id. at 19.

For this reason, among others, plaintiff asks the court to issue a preliminary injunction, "to prevent Defendant United States from proceeding under Contract No. HQ0034-20-D-0001, which was awarded under Solicitation No. HQ0034-18-R-0077-0002 to [intervenor-defendant], until [plaintiff's] protest is resolved." ECF No. 130 at 1.

II. Legal Standards

A. Bid Protests

In its complaint, plaintiff invokes this court's bid protest jurisdiction. See ECF No. 1 at 15-16. This court's bid protest jurisdiction is based on the Tucker Act, which gives the court authority:

> to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. . . . without regard to whether suit is instituted before or after the contract is awarded.

28 U.S.C. § 1491(b)(1) (2012). The Tucker Act also states that the court may grant "any relief the court considers proper . . . including injunctive relief." 28 U.S.C. § 1491(b)(2).

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