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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Chase Supply, Inc.
File: B-411528.2; B-411529.2
Date: December 7, 2015

Fred Fielding, for the protester.
Gail Booth, Esq., Defense Logistics Agency, for the agency.
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participated in the preparation of the decision.

DIGEST

Protest arguing that an agency's decision to waive first article test requirements under two previously-awarded purchase orders constitutes a modification to those orders that is outside their previous scope is denied where the decision to waive testing did not modify the substantive requirements for the product.

DECISION

Chase Supply, Inc., a small business of Hampton, Virginia, protests the modification of purchase order Nos. SPE7M4-15-M-1464 (PO-1464) and SPE7M4-15-M-1620 (PO-1620), issued to Flexfab LLC, of Hastings, Michigan, by the Defense Logistics Agency (DLA) for the supply of air duct hose assemblies.¹ Chase contends that the modifications, which waive certain first article tests (FAT), are improper because they are outside the scope of the original purchase orders. The protester also argues that the awardee's air duct hose assembly was not eligible for a waiver of the FAT requirement. Finally, Chase argues that its two prior protests challenging the award of these orders to Flexfab, which Chase withdrew after settlement negotiations with the agency, should be reinstated because Chase never anticipated that the agency would waive the FAT requirement for Flexfab.

We deny the protests in part and dismiss them in part.

¹ All references to air duct hose assemblies are to those identified by national stock number (NSN) 4720-00-930-5974.

BACKGROUND

This protest involves challenges to two orders placed by the DLA with Flexfab. Prior to the protests at issue here, Chase raised two challenges, one for each order, that the agency, in essence, made improper sole-source awards. The two earlier challenges were subsequently withdrawn by the protester after it and the agency engaged in settlement negotiations. The current two protests challenge the agency's decision to modify those orders during performance.

On December 18, 2014, the DLA issued request for quotations (RFQ) No. SPE7M4-15-T-1058 (RFQ-1058) for the supply of 447 air duct hose assemblies, and posted the solicitation to its DLA internet bid board system (DIBBS). RFQ-1058 at 1, 6. The RFQ was issued as a small business set-aside pursuant to the simplified acquisition procedures of Federal Acquisition Regulation (FAR) part 13. Id. at 1-2. As relevant here, the solicitation notified potential vendors that pursuant to FAR clause 52.209-3, first article approval-contractor testing would be required under the resulting purchase order. Id. at 3, 5.

Flexfab submitted a quotation in response to the solicitation on December 23.² In its quotation, Flexfab requested an exception to a wire specification for the air duct hose assembly and waiver of the solicitation's FAT requirements. Agency Report (AR) (B-411528), Tab 8, Flexfab Exception Request, at 1. The agency approved Flexfab's request to take exception to the specification because the type of wire required in the specification was no longer available from U.S. sources. AR (B-411529.2), Tab 12, Response to Exception Request, at 1.³ However, the agency determined that FAT approval was necessary due to the change in the type of wire. Id.

² The day before the due date for receipt of quotations, the agency removed the RFQ from DIBBS because a DLA acquisition supervisor determined that the requirement was urgently needed. Contracting Officer (CO) Statement (B-411528) at 2. Because Flexfab was the only source to successfully supply the item in prior acquisitions, the DLA contacted Flexfab and requested a quotation. Id.

³ Our Office docketed each of Flexfab's protests separately. In response, the DLA filed two separate ARs. For administrative purposes our Office is issuing a consolidated decision. Where appropriate, this decision contains references to each of the agency reports that were filed by the DLA; the reports are distinguished by the relevant file number (or B-number). Where necessary, this decision also refers to the agency reports filed by the DLA in response to the protests that were previously withdrawn by Chase.

On February 26, 2015, the agency issued Flexfab PO-1464 for the supply of 406 air duct hose assemblies. AR (B-411529.2), Tab 10, PO-1464, at 1. Shortly thereafter, on March 19, the DLA issued Flexfab PO-1620 for an additional 406 air duct hose assemblies. AR (B-411529), Tab 7, PO-1620, at 1. Notices announcing the issuance of both purchase orders were posted to the DLA's DIBBS website. CO Statement (B-411528) at 2; Supp. CO Statement (B-411529) at 2.

On May 12, Chase filed protests with our Office challenging the agency's decision to issue Flexfab PO-1464 and PO-1620.⁴ Protest (B-411528), at 1-3; Protest (B-411529), at 1-3. On August 4, Chase withdrew its protests after negotiating a settlement agreement with the DLA. AR (B-411528.2), Tab 18, Withdrawal E-mail at 1; AR (B-411529.2), Tab 16, Withdrawal E-mail at 1.

On August 27, Chase filed the current protests after discovering that the DLA had issued modifications on both PO-1464 and PO-1620.⁵ PO-1464 was modified to waive eight FAT requirements⁶; PO-1620, which was issued after Flexfab had passed FAT under the PO-1464 order, was modified to waive FAT in its entirety. AR (B-411528.2), Tab 13, Modification P00001, at 1-2; AR (B-411529.2), Tab 17, Modification P00002, at 1-2.

DISCUSSION

Chase challenges the modifications the DLA made to PO-1464 and PO-1620, which waived some or all FAT requirements. The protester primarily argues that the modifications were unreasonable because they changed the fundamental nature of

⁴ The protester alleged that it was not aware that both purchase orders had been issued to Flexfab until May 7, 2015. We declined to dismiss Chase's May 12 protests as untimely since the agency only posted its notice of issuance on DIBBS and not FedBizOpps, which has been designated as the government-wide point of entry (GPE). See Federal Acquisition Regulation (FAR) §§ 5.101, 5.101(a)(1), 5.102; See e.g., Latvian Connection, LLC, B-411489, Aug. 11, 2015, 2015 CPD ¶ 251 at 5; DBI Waste Sys., Inc., B-400687, B-400687.2, Jan. 12, 2009, 2009 CPD ¶ 15 at 2 (Publication of information to an agency specific website does not always trigger the same type of constructive notice of procurement actions that offerors are generally charged with when such information is published on the GPE.).

⁵ PO-1464 was modified on July 14; PO-1620 was modified on August 17. Chase alleges that it did not discover the modifications, which were posted only to DIBBS, until August 20. Protest (B-411528.2) at 3; Protest (B-411529.2) at 3.

⁶ The following eight tests were waived: fungus, sunshine, fire resistance, abrasion test, absorption test, tensile strength, fabric flex life, and reparability test. AR (B-411528.2), Tab 13, Modification P00001, at 1-2.

the purchase orders.⁷ As a result, Chase contends that the modification was outside the scope of the orders, and should have required a new competition. Chase also contends that the agency's decision to waive FAT was improper because Flexfab does not qualify for the waivers. The protester additionally asserts that the modifications violate the agency's settlement agreement with Chase.⁸

With respect to the scope argument, the Competition in Contract Act generally requires "full and open competition" in government procurements as obtained through the use of competitive procedures. 41 U.S.C. § 3301. Our Office generally will not review modifications to contracts, because such matters are related to contract administration and are beyond the scope of GAO's bid protest function. 4 C.F.R. § 21.5(a); MCI Telecomms. Corp., B-276659.2, Sept. 29, 1997, 97-2 CPD ¶ 90 at 7. An exception to our rule about reviewing modifications to a contract is where it is alleged that the modification is outside the scope of the contract originally awarded. Id. This is because the work covered by the modification would otherwise be subject to the statutory requirement for competition, absent a valid determination that the work is appropriate for procurement on a sole-source basis. Id.

In determining whether a modification is beyond the scope of an underlying contract (or in this case a purchase order), our Office considers whether there is a material difference between the modification and the contract. DynCorp Int'l LLC, B-402349, Mar. 15, 2010, 2010 CPD ¶ 59 at 6; MCI Telecomms. Corp., supra. Evidence of a material difference is found by reviewing the circumstances attending the procurement that originally was conducted, examining any changes in the type of work, performance period, or costs between the contract as awarded and as modified, and considering whether the original solicitation adequately advised offerors of the potential for the type of work contemplated by the modification. See Anteon Corp., B-293523, B-293523.2, Mar. 29, 2004, 2004 CPD ¶ 51 at 5. The overall inquiry is whether the modification is of a nature that potential offerors reasonably would have anticipated competing for the goods or services being acquired through issuance of the modification. Id.

In its protest, Chase argues that the agency's waiver of FAT will result in fundamentally different products from those that pass FAT without waivers. In this regard, the protester contends that the FAT requirements will influence decisions

⁷ Specifically, Chase argues that the modifications "render[] the products originally contracted for very different from what would be supplied under these waivers." AR (B-411528.2), Tab 11, Protest at 1; AR (B-411529.2), Tab 8, Protest at 1.

⁸ Chase and the DLA appear to have a different understanding of the terms of the negotiated settlement agreement. As explained below, we need not resolve this dispute because this protest ground is dismissed.

about the materials, construction, and design of the products. In addition, Chase contends that even if the agency could waive FAT, Flexfab is not eligible for the waiver.

Contrary to Chase's arguments, we find that decision to waive FAT under PO-1464 and PO-1620 did not materially change the orders because the waiver of test requirements does not modify the underlying substantive requirements for the air duct hose assemblies. AR (B-411528.2), Tab 13, Modification P00001, at 2; AR (B-411529.2), Tab 17, Modification P00002, at 2. In this regard, every air duct hose assembly supplied by Flexfab must still meet the product requirements imposed under the original purchase orders, irrespective of the FAT waivers.⁹ AR (B-411528), Tab 3, PO-1464, at 3; AR (B-411529), Tab 7, PO-1620, at 3. As the DLA explains, "waiver of FAT does not change any of the requirements under th[e] specification" since "FAT is used to ensure that the contractor has the ability to make an item that meets the contractual requirements" and even "[i]f FAT is waived, the contractual requirements still have to be met." AR (B-411528.2), Tab 13, Quality Assurance Specialist Memorandum, at 1; AR (B-411529.2), Tab 14, Quality Assurance Specialist Memorandum, at 1.

Since we conclude that waiving the testing requirement does not mean that the agency will be ordering a fundamentally different product, Chase's assertions fail to demonstrate that the modification was beyond the scope of the order.

We also find misplaced the protester's assertion that Flexfab was not eligible to obtain a waiver. Chase asserts that the agency's waiver of FAT was improper because Flexfab's air duct has never passed FAT. As previously discussed, PO-1464 and PO-1620 each contain FAR clause 52.209-3. FAR clause 52.209-3 does not make the agency's decision to waive FAT contingent on whether a vendor previously passed the FAT being waived, but rather contemplates that an agency may waive FAT where supplies identical or similar to those called for have been previously furnished by the vendor and have been accepted by the government. See FAR clause 52.209-3(h).

Here, the agency based its waiver under PO-1464 on Flexfab previously furnishing these air duct hose assemblies under prior government contracts, which were accepted by the government within three years of when PO-1464 was issued, and because the tests that were waived were not impacted by the exception to the wire specification. AR (B-411528.2), Tab 23, Engineer's Affidavit, at 1. The record also demonstrates that the DLA waived all FAT requirements under PO-1620 because

⁹ The air duct hose assemblies supplied under PO-1464 and PO-1620 must still meet all the other non-test specifications of Aerospace Standard (AS) 7365A that were not waived. AR (B-411528), Tab 3, PO-1464, at 3; AR (B-411529), Tab 7, PO-1620, at 3.

Flexfab received FAT approval under PO-1464. AR (B-411529.2), Tab 17, Modification P00002, at 2. Based on this record, we have no basis to find that Flexfab's air duct hose assemblies were not eligible for FAT waiver.¹⁰

In sum, since we conclude that the modifications to waive FAT were not outside the scope of the underlying purchase orders,¹¹ we view the modifications at issue as purely a matter of contract administration within the discretion of the agency.

Finally, Chase's allegation that the DLA breached its settlement agreement leading to Chase's decision to withdraw its prior challenge does not raise a valid basis of protest. Accordingly, we dismiss this protest ground. In its prior protests of these orders, Chase argued that the agency, in essence, made improper and unjustified sole-source awards to Flexfab. In negotiating a settlement agreement with Chase, the agency agreed, in part, to also consider issuing an order for these products to Chase. Chase now contends that it would not have withdrawn its prior protests if it had known that the DLA would waive FAT requirements for Flexfab because Chase "had serious doubts as to [Flexfab's] ability to pass FAT" and because "[i]f [Flexfab] failed FAT, all those costs would be borne by Flexfab." Protest (B-411528.2), at 2; Protest (B-411529.2), at 2. As a result, Chase asks that it be allowed to reinstate the protests it previously withdrew.

As a preliminary matter, we do not reinstate protests. A protest that was withdrawn cannot be "revived" by subsequent agency action. Instead, the subsequent action gives rise to a new basis for protest. Lackland 21st Century Servs. Consolidated--Protest and Costs, B-285938.6, Jul. 13, 2001, 2001 CPD ¶ 124 at 4.

In essence, we see no role for our Office in this dispute over how Flexfab's purchase orders are administered. Chase's complaint on this front, even if were accurate--and the record suggests it is not--raises a matter not for review by our Office. Our bid protest jurisdiction is limited to deciding protests "concerning an alleged violation of a procurement statute or regulation." 31 U.S.C. § 3552. Thus, in cases such as this, we will not consider an argument concerning compliance with a settlement agreement except to the extent the protester asserts that an alleged breach resulted in a prejudicial violation of procurement laws or regulations. See U-Tech Servs. Corp.; K-Mar Indus., Inc., B-284183.3, B-284183.4, Oct. 6, 2000, 2002 CPD ¶ 78 at 3-4; American Marketing Assocs., Inc--Recon., B-274454.4,

¹⁰ We also have no basis to find unreasonable the agency's decision to waive Flexfab's FAT. Vision Blocks, Inc., B-281246, Jan. 14, 1999, 99-1 CPD ¶ 20 at 2 (an agency's decision to waive FAT is largely discretionary since the requirement is for the protection and benefit of the government).

¹¹ The protester does not allege, and the record does not demonstrate, that the agency issued the purchase orders with the intent to modify them.

May 14, 1997, 97-1 CPD ¶ 183 at 2-3. The protester here has not shown that the agency's alleged breach of the settlement agreement resulted in a violation of procurement laws or regulations.

The protests are denied in part and dismissed in part.

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General Counsel