

Decision

Matter of: Innotion Enterprises, Inc.

File: B-419907

Date: September 14, 2021

Al Espinoza for the protester.

Julie K. Cannatti, Esq., Justin D. Haselden, Esq., and Audrey Roh, Esq., Department of Housing and Urban Development, for the agency.

Jacob M. Talcott, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's decision not to extend protester's current task orders and instead make award on a sole-source basis to another contractor is denied where agency's decision was reasonably justified.

DECISION

Innotion Enterprises, Inc. of Fairfax, Virginia, protests the decision of the Department of Housing and Urban Development (HUD) to procure on a sole-source basis property management services from DGG RE Investments, Inc. through contract No. DU204SA-17-D-01. The protester contends that the agency's decision to solicit the services on a sole-source basis was arbitrary and capricious. The protester also contends the agency's decision not to extend Innotion's task orders was made in bad faith.

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

BACKGROUND

HUD, through the Federal Housing Administration (FHA), insures lenders against the risk of loss on mortgages obtained with FHA financing. Contracting Officer's Statement (COS) at 1. In the event of a default on an FHA-insured loan, the lender acquires title to the property by foreclosure or other acquisition method, files a claim for insurance benefits, and conveys the property to HUD. *Id.* Due to these acquisitions, HUD has a need to manage the conveyed properties in a way to maximize the return of insurance funds. *Id.*

To achieve this end, HUD administers a real estate disposition service through homeownership centers (HOC) in Philadelphia, Pennsylvania; Atlanta, Georgia; Denver, Colorado; and Santa Ana, California. *Id.* Each HOC is responsible for real estate within a designated geographic area.¹ HUD contracts for three types of management and marketing (M&M) services in these areas: property management services (performed by field service manager (FSM) contractors), asset management services, and mortgagee compliance management services. *Id.* at 1-2. Contractors awarded FSM contracts perform tasks such as property inspection, property security, cosmetic enhancements, and ensuring the property is “ready to show.” *Id.*

Over the past several years, HUD has administered various iterations of M&M contracts for FSM services. *Id.* at 2. As relevant here, M&M 3.10 (FSM) contracts were awarded in 2017. *Id.* Awardees included, among others, Innotion and DGG. *Id.* The ordering period for the FSM contracts expired on May 31, 2020, and the final orders issued under those contracts expired on May 31, 2021. *Id.* at 2, 4.

Currently, HUD is evaluating proposals for M&M 3.12 (FSM). *Id.* Although the agency originally planned to issue this solicitation in October 2018, it was unable to do so until February 2021 due to a series of external events. *Id.* at 2-3. These events included an appeal by the Small Business Administration (SBA) of HUD’s decision to issue M&M 3.12 using full and open competition, and protests of the M&M 3.9 asset management solicitation concerning the effect of COVID-19 on estimated inventory quantities, which led the agency to reconsider the quantity estimates in the 3.12 (FSM) solicitation.²

In addition, when the agency sought to obtain interim services through a limited sources “bridge” or short-term contract competition, a protest was filed in May 2021 by Alpine Companies, Inc. (the *Alpine* protest) challenging the terms of the solicitation.³ *Id.* at 1-4. According to the agency, following the *Alpine* protest, it was left with insufficient time to make a competitive award and therefore decided, to avoid a lapse in service, to issue a

¹ These areas are designated by a number and a letter. COS at 1. For example, Area 4D encompasses Iowa, Nebraska, South Dakota, and Wisconsin; 5D encompasses Minnesota, Montana, North Dakota, and Wyoming. Agency Report (AR), Tab 19, DGG Master Contract Modification at 3-4.

² Our Office sustained these protests on the basis that the solicitation did not reflect the agency’s needs in light of the COVID-19 pandemic. See *Chronos Solutions, LLC et al.*, B-417870.2 *et al.*, Oct. 1, 2020, 2020 CPD ¶ 306. In response, the agency followed our Office’s recommendations, which included revisiting its estimates for future procurements, including M&M 3.12 (FSM). COS at 3-4.

³ In response to *Alpine*’s protest, the agency notified our Office that it would take corrective action by canceling the solicitation. *Alpine Companies, Inc.*, B-419849, June 2, 2021 (unpublished decision).

60-day sole-source extension to contract holders at the current option pricing pursuant to Federal Acquisition Regulation (FAR) section 6.302-2.⁴ COS at 4-5.

Upon receiving notice of the agency's intentions, several of the current contract holders agreed to extend their contracts at the same pricing. *Id.* at 5-6. On May 26, 2021, five days before the expiration of the final orders issued under the M&M 3.10 (FSM) contracts, HUD learned that Innotion had refused to extend its pricing for two areas, and that the contract holders for three other geographic areas had likewise refused to extend pricing on the expiring task orders.⁵ *Id.* at 6.

On May 30, 2021, HUD executed on a sole-source basis, DGG's existing task orders in accordance with FAR section 6.302-2, as HUD concluded DGG was the only firm capable of performing under the circumstances. *Id.*; AR, Tab 19, DGG Master Contract Modification at 1. Through this modification, the agency extended DGG's existing task orders and modified them to include the five additional geographical areas. *Id.*

This protest followed.

DISCUSSION

Innotion argues that HUD: (1) acted in bad faith by not extending Innotion's task orders for geographical areas 4D and 5D; and (2) improperly awarded these geographical areas to DCG in a manner that was arbitrary and capricious. Protest at 1. For reasons discussed below, we dismiss the protest in part, and deny it in part.

We dismiss Innotion's first protest ground for failure to state a valid basis of protest. Our Office considers bid protest challenges to the award or proposed award of contracts. 31 U.S.C. § 3552. Therefore, we generally do not review matters of contract administration, which are within the discretion of the contracting agency and for review by a cognizant board of contract appeals or court. Bid Protest Regulations, 4 C.F.R. § 21.5(a); *Colt Def., LLC*, B-406696.2, Nov. 16, 2012, 2012 CPD ¶ 319 at 5. We have repeatedly determined that protests challenging an agency's decision not to exercise an option concern matters of contract administration outside the scope of our bid protest function, and we will not consider the matter even where the protester argues that the agency's decision not to exercise an option was made in bad faith. *See, e.g., Jones, Russotto & Walker*, B-283288.2, Dec. 17, 1999, 99-2 CPD ¶ 111 at 4; *Fjellestad, Barrett and Short*, B-248391, Aug. 21, 1992, 92-2 CPD ¶ 118 at 3; *Walmac, Inc.*, B-244741, Oct. 22, 1991, 91-2 CPD ¶ 358 at 2.

⁴ Section 6.302-2 of the FAR, which we discuss in greater detail later in this decision, permits an agency to use other than full and open competition where urgent and compelling circumstances are present.

⁵ Although the protester refused to extend its prices for two areas, it agreed to extend its prices for two other areas. Req. for Dismissal at 2.

Here, Innotion's challenge to HUD's "bad faith non extension" of its task order is, in essence, akin to an allegation that the agency should have exercised the option to extend services found in Innotion's contract. Because Innotion's protest would necessarily require our Office to resolve a question of contract administration, the protest fails to state a valid basis of protest for our consideration, and therefore is dismissed.

Innotion's second protest ground challenges HUD's decision to award task orders for the five geographical areas to DGG on a sole-source basis. Protest at 1. According to Innotion, the decision to award on a sole-source basis was "arbitrary and capricious." *Id.*

As noted above, the agency's justification for both the sole-source extension of existing contracts (to which the protester does not object) and the sole-source award of additional areas to DGG was based on the authority described at FAR section 6.302-2. This section permits an agency to use other than full and open competition where the agency's requirement is of such unusual and compelling urgency that the government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits proposals. The FAR requires that when using this authority, the agency solicit offers from as many potential sources as is practicable under the circumstances, and that contracts awarded be supported by a written justification and approval (J&A) document. FAR 6.302-2(c)(2), 6.302-2(b).

Our review of an agency's decision to conduct a sole-source procurement focuses on the adequacy of the rationale and conclusions set forth in the J&A; where the J&A sets forth a reasonable justification for the agency's actions, we will not object to the award. *Chapman Law Firm Co., LPA*, B-296847, Sept. 28, 2005, 2005 CPD ¶ 175 at 3. A contracting officer may not properly use noncompetitive procedures if the procuring agency created the need to use such procedures through a lack of advance planning. *New Breed Leasing Corp.*, B-274201, B-274202, Nov. 26, 1996, 96-2 CPD ¶ 202 at 6. An agency's procurement planning, however, need not be error-free or successful, and the fact that an agency encounters delays or exigencies does not demonstrate that the agency failed to meet its obligation for advance planning. See *eAlliant, LLC*, B-407332.4, B-407332.7, Dec. 23, 2014, 2015 CPD ¶ 58 at 5.

As mentioned above, HUD originally planned to issue the solicitation for M&M 3.12 (FSM) in October 2018, but due to an SBA appeal and protests sustained by our Office, it was unable to post the solicitation until February 2021. AR, Tab 31, J&A at 6. To provide coverage until it was able to make awards under the new solicitation, HUD initially decided to conduct a limited sources competition for interim contracts to bridge the potential lapse in performance; the agency encountered difficulty implementing this strategy, however, as that solicitation was protested to our Office by Alpine. *Id.* In taking corrective action in response to Alpine's protest, HUD decided to issue 60-day sole-source extensions to current contract holders at the current option pricing. *Id.* HUD learned only five days (two business days) before the expiration of the task orders that not all firms would extend the pricing on their current contracts. As a result, the

agency concluded there was not sufficient time to solicit competition and evaluate proposals before a lapse in service in certain of the affected areas. At that point, HUD elected to obtain services from DGG on a sole-source basis for those areas where the services were about to lapse. We see no basis in the record to conclude that HUD's decision was arbitrary or capricious.

With respect to the awards to DGG, HUD contends it chose DGG as it was currently performing similar services at a satisfactory or higher level in other geographical areas and already had a presence in three of the HOCs where service was required. *Id.* at 4. Given the nature of the circumstances surrounding this procurement, including the novel COVID-19 pandemic, we have no basis to find the agency's action here unreasonable or contrary to the FAR.

The protest is denied in part and dismissed in part.

Edda Emmanuelli Perez
General Counsel