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Decision

Matter of: BCMC, LLC; Blueprint Consulting Services, LLC

File: B-413988.2; B-413988.3; B-413988.4; B-413988.5

Date: February 23, 2017

Philip J. Davis, Esq., Brian G. Walsh, Esq., and Samantha S. Lee, Esq., Wiley Rein LLP, for BCMC, LLC, a protester.

Devon E. Hewitt, Esq., and Michael E. Stamp, Esq., Protora Law PLLC, for Blueprint Consulting Services, LLC, a protester.

Morgan L. Cosby, Esq., Department of State, for the agency.

Alexander O. Levine, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's elimination of two vendors from consideration for award based on application of a limitation on future contracting provision, found in two predecessor subcontracts, is not a matter of contract administration.
 2. Protest challenging an agency's exclusion of two vendors from consideration for award based on a limitation on future contracting provision is denied where the agency reasonably determined that the provision was applicable to the work sought under the solicitation.
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DECISION

BCMC, LLC, a small business located in Falls Church, Virginia, and Blueprint Consulting Services, LLC, a small business located in Washington, DC, protest the decision by the Department of State (DOS) to exclude their quotations from the competition conducted pursuant to request for quotations (RFQ) No. SAQMMA-16-Q-0137, which contemplates the issuance of a task order under a General Services Administration (GSA) Federal Supply Schedule contract for information technology (IT) governance support services for DOS's Bureau of Consular Affairs, Office of Consular Systems and Technology. Both protesters assert that the agency, in reaching its exclusion decision, unreasonably invoked and applied a limitation on future contracting provision found in the predecessor contract to the instant requirement.

We deny the protests.

BACKGROUND

The instant effort is a successor requirement to two task orders performed by ICF International. On June 9, 2009, DOS issued task order No. SAQMMA-09-L-0811 (the 0811 task order) to ICF under a blanket purchase agreement issued against ICF's GSA Schedule 70 contract. The performance work statement (PWS) for the 0811 task order contained, in two separate sections,¹ the following constraint applicable to the contractor performing the task order:

Restricts the contractor from providing any systems development or IT operations efforts within the Department while performing under this contract and for a period of three years after completion of this task order so that the contractor is not biased by virtue of its performance of this task order and does not obtain any unfair competitive advantage over other parties. IT services is defined under GSA Schedule 70 as including 'resources and facilities management, database planning and design, systems analysis and design, network services, programming, millennium conversion services, conversion and implementation support, network services project management, data/records management, subscriptions/publications (electronic media), and other services.'^[1]

[1] <http://www.gsa.gov/library>

Agency Report (AR), Tab 7, 0811 Task Order PWS, at 2, 15.

On February 9, 2015, DOS issued task order No. SAQMMA-15-F-0589 (the 0589 task order) under ICF's GSA Schedule 70 contract as a follow-on to the 0811 task order. The 0589 task order was issued with one six-month base period and two three-month options and covered IT governance services similar to those in the prior task order. The 0589 PWS contained limitation on future contracting provisions that were identical to the provisions found in the 0811 task order. See AR, Tab 4, 0589 PWS, at 2, 10.

On February 26, 2015, ICF executed a subcontract with BCMC for services in support of the 0589 task order. See AR, Tab 10, BCMC Subcontract. On March 2, ICF executed a similar subcontract with Blueprint for services in support of the 0589 task order. See AR, Tab 5, Blueprint Subcontract. Both subcontracts contained, in

¹ The provision appeared within a section titled "Constraints" and within a subsection titled "Organizational Conflict of Interest Certification and Disclosure." AR, Tab 7, 0811 Task Order PWS, at 2, 15.

bold font, limitation on future contracting provisions that were identical to the restriction found in the 0589 and 0811 task orders. See AR, Tab 5, Blueprint Subcontract, at 13; AR, Tab 10, BCMC Subcontract, at 13. For both subcontracts, these provisions were included in an appendix containing the statement of work applicable to the subcontract. Id. Additionally, both subcontracts contained a provision requiring the subcontractor to provide the services set forth in the statement of work. AR, Tab 5, Blueprint Subcontract, at 1; AR, Tab 10, BCMC Subcontract, at 1.

On May 13, 2016, the agency issued RFQ No. SAQMMA-16-Q-0137, seeking quotations to provide IT governance support services for DOS's Office of Consular Systems Technology. The RFQ was set aside for small business vendors holding current Federal Supply Schedule contracts under GSA Schedule 70, special item number 132-51, information technology professional services. The RFQ identified the applicable North American Industry Classification System code as 541512, computer systems design services.

The RFQ's scope of work envisioned the contractor assisting in the development, implementation, and maintenance of the Office of Consular Systems Technology's IT Governance Program by defining processes to ensure the effective and efficient use of IT in enabling the organization to achieve its organization goals. RFQ at 12. In support of this objective, the RFQ included task areas for numerous IT support service areas, including task areas for systems development lifecycle support, enterprise architecture support, knowledge management support, and Microsoft SharePoint support. See id. at 18-23.

Following the issuance of the RFQ, DOS answered several questions relating to the incumbent contract and the current scope of work. Specifically, the agency identified ICF as the incumbent prime contractor under the 0589 task order and stated that while "this effort is a total small business set-aside . . . the incumbent is not precluded from partnering with an offeror as a subcontractor to a prime that is a small business." AR, Tab 3, RFQ Q&A, Question 2. Additionally, in response to a question from a vendor about whether the agency would include a particular requirement in the RFQ, DOS stated it would not include the requirement "because the tasks in this RFQ do not require system development." Id. at Question 116.

Both BCMC and Blueprint timely submitted quotations in response to the solicitation. On October 3, the agency issued a task order under the RFQ to BCMC for \$40,329,300. On October 12, Blueprint filed a protest with our Office of the agency's award to BCMC.

On November 9, the agency notified our Office that it intended to take corrective action in response to Blueprint's protest. In his corrective action memorandum, the contracting officer explained that the agency's decision to take corrective action was not based upon an assessment that the protest grounds were clearly meritorious,

but instead was based on the agency's assessment that an "organization[al] conflict of interest matter" had been discovered. AR, Tab 6, Corrective Action Memorandum, 1. Referencing the limitation on future contracting provision found in the 0589 task order, DOS stated that the "clause had been breached when various firms supporting the previous incumbent contract SAQMMA15F0589 competed for this new award under SAQMMA16Q0137." Id. at 2. The agency explained that:

The subject solicitation is for IT Services categorized under GSA Schedule 70 as 'IT Implementation Support Services' and under the terms of [the 0589 task order], the following companies are ineligible for consideration of this award and other future work of this type until November 8, 2019: . . .

2. Subcontract Vendor--Blueprint Consulting Services LLC . . .

5. Subcontract Vendor -- Business Computers Management Consulting Group [BCMC]. . .

Id. Having excluded Blueprint and BCMC as ineligible vendors, DOS stated it would reevaluate the remaining quotations in the competitive range and then issue the task order to the vendor that provides the best value to the Government. Id.

On November 18, Blueprint and BCMC filed the instant protests of their exclusion from the competition.

DISCUSSION

BCMC and Blueprint argue that DOS's exclusion of their quotations was based on an unreasonable interpretation of the restriction on future contracting found in the 0589 task order.² The protesters argue that the provision was narrowly drafted to apply only to "systems development" or "IT operations" efforts, and that the current RFQ's statement of work does not call for any systems development or IT operations work. Additionally, Blueprint asserts that the agency cannot enforce the limitation on future contracting provision because DOS lacks privity of contract with Blueprint, a subcontractor on the 0589 task order. Finally, Blueprint argues that the limitation on contracting clause found in its subcontract does not apply to it and instead applies only to ICF. For the reasons discussed below, we deny the protests.

² BCMC also challenges the agency's cancellation of the task order issued to BCMC under the RFQ. We deny this protest ground for the same reasons detailed below with regard to the protesters' challenge to the agency's exclusion of BCMC's and Blueprint's quotations.

Jurisdiction and Timeliness

As a preliminary matter, the agency asserts that its decision to eliminate Blueprint and BCMC is a matter of contract administration that is beyond our Office's review function. In support of this point, DOS argues that its action is an enforcement of an existing government contract and that our review of this decision would require us to interpret that contract. Under our Bid Protest Regulations, the administration of an existing contract is within the discretion of the agency and is not a protest issue for our consideration. 4 C.F.R. § 21.5(a). Instead, disputes between a contractor and the agency are resolved pursuant to the disputes clause of the contract and the Contract Disputes Act of 1978. Id.

We do not consider the agency's decision to exclude BCMC's and Blueprint's quotations to be a matter of contract administration outside our jurisdiction. In this regard, we note that BCMC and Blueprint are not parties to the 0589 task order issued by DOS to ICF. While BCMC and Blueprint are subcontractors to ICF under the 0589 task order, this relationship does not create an enforceable contract relationship with the agency. See generally Nat'l Bank v. Grand Lodge, 98 U.S. 123, 124 (1878) (setting forth general rule that privity of contract is required to create a contractual obligation). And while there is an existing contract between DOS and ICF, the agency has not provided a contractual basis for enforcing the provisions of this contract against nonparties BCMC and Blueprint.³ Accordingly, the agency's decision to eliminate BCMC and Blueprint's quotations does not amount to a contract enforcement action and instead reflects a procurement action taken by the agency on the basis of its previous determination that performance of the 0589 task order should be subject to a bar on future contracting.⁴ As a result, we decline to dismiss the protests as matters of contract administration not subject to our review.⁵

³ We note that the agency has not argued that it has a contractual right to enforce BCMC's and Blueprint's subcontracts, e.g., by asserting it is an intended beneficiary.

⁴ Consistent with this conclusion, the agency's elimination decision would be unlikely to give rise to an action under the Contract Disputes Act (CDA) since such an action typically does not arise where there is no privity of contract between the agency and the subcontractor. See Astronautics Corp. of Am., ASBCA No. 49691, 99-1 BCA ¶ 30,390, at 150,213 (stating general rule that boards of contract appeals do not have jurisdiction under the CDA over subcontractor claims filed directly against the government or government claims filed directly against a subcontractor).

⁵ While our review necessarily requires us to interpret the limitation on future contracting provision in question, our decision does not address or decide the contractual rights or obligations of any parties to the 0589 task order.

DOS also asserts that BCMC's and Blueprint's protests are untimely because they amount to a challenge to the work included in the RFQ's statement of work. In this regard, our timeliness rules require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial quotations be filed before that time. 4 C.F.R. § 21.2(a)(1).

Here, we conclude that the protests do not challenge the description of work provided in the RFQ, but instead challenge the agency's decision to eliminate BCMC and Blueprint's quotations from the competitive range. Because the agency did not notify the protesters of this decision until November 9, BCMC's and Blueprint's protests, which were filed within ten days of that date, are timely.⁶

Application of the Restriction on Future Contracting

Our conclusion above that this is not a matter of contract administration does not end our inquiry -- we must still assess whether the agency's decision to apply the restriction found in the 0589 task order to exclude BCMC's and Blueprint's quotations was otherwise reasonable. In this regard, we review agency procurement actions excluding vendors or rejecting quotations to determine if the challenged action is unreasonable, inconsistent with the terms of the solicitation, or contrary to law or regulation. See, e.g., Akira Techs., Inc.; Team ASSIST, B-412017 et al., Dec. 7, 2015, 2015 CPD ¶ 383 at 4-5 (agency's rejection of a quotation must be reasonable and consistent with the terms of the solicitation).

Based on our review of the record here, we conclude that DOS's exclusion of BCMC and Blueprint was reasonable in light of the restriction on future contracting found in the 0589 task order and in both vendors' subcontracts under that task order. The language of that provision reflects that it was drafted to apply to contractors performing work under the 0589 task order "so that the contractor is not biased by virtue of its performance of this task order and does not obtain any unfair competitive advantage over other parties." AR, Tab 4, 0589 PWS, at 2, 10.⁷ The provision warned such contractors that they would be restricted from "providing any systems development or IT operations efforts within [DOS] while performing under

⁶ Additionally, we note that the record evidences that, prior to November 9, the agency did not interpret the restriction as applying to the RFQ. See AR, Tab 3, RFQ Q&A, Question 2 (indicating that the incumbent was not barred from teaming in order to compete for the instant requirement) and id. at 116 (indicating that the agency did not consider the RFQ tasks to involve system development). Accordingly, a protest filed before November 9 would have been premature.

⁷ The provision at issue is consistent with Federal Acquisition Regulation § 9.507-2, which permits the inclusion of a contract clause placing restraints on future contracting.

this contract and for a period of three years after completion of this task order.” Id.⁸ The restriction was also included, in bold font, in both BCMC’s and Blueprint’s subcontracts in an appendix containing the applicable statement of work. AR, Tab 5, Blueprint Subcontract, at 13; AR, Tab 10, BCMC Subcontract, at 13. In addition, both subcontracts contained a requirement for the subcontractor to provide the services set forth in the statement of work. AR, Tab 5, Blueprint Subcontract, at 1; AR, Tab 10, BCMC Subcontract, at 1.⁹ Accordingly, we find that the adoption of the restriction was reasonable and that both Blueprint and BCMC were reasonably on notice that the agency would apply the restriction to prevent them from competing on future DOS procurements involving the provision of systems development or IT operations services.

Both BCMC and Blueprint argue that, even if the restriction does bar them from competing for systems development and IT operations work, the RFQ here does not involve any systems development or IT operations efforts. Both protesters therefore assert that the limitation on future contracting provision is not applicable to the instant requirement, which involves the provision of IT governance services. As detailed below, we disagree and find that the instant requirement includes at least one area of work that is properly characterized as “IT operations,” i.e., SharePoint support services.

⁸ DOS argues that the second sentence in the restriction, which provides the definition of “IT Services” applicable to a GSA Schedule 70, is intended to broadly apply the restriction on future contracting to any procurements involving such “IT Services.” We disagree with the agency’s broad interpretation. While the provision contains the definition of “IT Services,” it does not contain any language restricting the contractor from competing for such IT Services. Instead, such restrictive language is entirely contained within the first sentence, and is limited to restricting the provision of “systems development or IT operations efforts.” In the absence of express language creating the broad restriction urged by the agency, we will not infer such a restriction.

⁹ Blueprint argues that the use of the word “contractor” in the subcontract’s restriction provision evidences that the limitation was intended to apply to ICF since the subcontract defined the term “Contractor” to mean ICF. We do not agree. As discussed above, Blueprint’s subcontract requires Blueprint to provide the services set forth in the subcontract’s statement of work, which is the section of the subcontract where the restriction on future contracting is provided. AR, Tab 5, Blueprint Subcontract, at 1. Additionally, the restriction provision uses the lower case word “contractor” in setting forth the operative limitation, thus differentiating it from the capitalized, defined term “Contractor,” which Blueprint’s subcontract uses to refer to ICF. Id. at 1, 13.

The restriction on future contracting does not contain any definition for the terms “systems development” or “IT operations.” The agency argues, however, that both terms are commonly understood IT industry terms. With regard to “IT operations,” DOS proffers that:

this is a categorical term used to describe all processes and services required to be performed in order to run the client’s business, in this case, all processes and services related to information technology required to run [the Bureau of Consular Affairs]. This includes administrative processes and support for hardware and software, as the collection of services and processes and how [the Office of Consular Systems and Technology] operates as a standardized procedure.

Contracting Officer’s Statement at 5. BCMC agrees with the agency that IT operations is an industry standard term, which BCMC contends “involves the management and user support for IT systems that have been deployed.” BCMC Comments at 6. Blueprint similarly defines IT operations as “involv[ing] maintaining, fixing and enhancing the systems developed under a ‘Systems Development’ contract.” Blueprint Protest at 5.

We find that the instant RFQ includes work that may properly be characterized as “IT operations.”¹⁰ In this regard, the RFQ seeks a contractor to provide day-to-day Microsoft SharePoint support including the following tasks:

- a) Maintain existing sites ensuring functionality. This may potentially include writing code and debugging;
- b) Maintain logical and physical infrastructure of SharePoint sites, including creating and modifying sites;
- c) Configuration management;
- d) Design, develop, implement, and maintain features / functionality for new business needs / solutions;

¹⁰ Because we conclude that the RFQ includes at least one IT operations effort, we need not determine if the RFQ also includes “systems development” since the limitation on future contracting provision applies to “any systems development or IT operations efforts.” AR, Tab 5, Blueprint Subcontract, at 13; AR, Tab 10, BCMC Subcontract, at 13 (emphasis added). We note, however, that the agency initially determined that the RFQ did not involve systems development work. See AR, Tab 3, RFQ Q&A, Question 116.

- e) Manage site usage;
- f) Routine clean up;
- g) Maintain user management and access requests;
- h) Routine back-up;
- i) Conduct user training;
- j) Document processes;
- k) Ad hoc reporting, as requested

RFQ at 23.

As this RFQ description reflects, the SharePoint support services relate to the care and maintenance of the agency's SharePoint hardware and software, and include normal IT operations tasks such as "configuration management," "clean up," "back-up," and "user management and access requests." These tasks, which involve the maintenance and support of computing resources, are consistent with the definitions provided by the agency and the parties of "IT operations" as encompassing the maintenance and support of existing IT systems. While SharePoint is a third party software product, in our view, this fact does not affect our conclusion that the contractor's duties under this task area involve the maintenance and support of existing hardware and software products. We therefore conclude that the RFQ's SharePoint support service task area does involve an IT operations effort.

Because the limitation on future contracting provision restricts the contractor from providing any IT operations efforts for the agency for a period of three years after completion of the 0589 task order, we conclude that the agency's exclusion of BCMC and Blueprint from the competition was reasonable.

The protests are denied.

Susan A. Poling
General Counsel