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Decision

Matter of: Draeger, Inc.

File: B-414938

Date: September 21, 2017

Hilary S. Cairnie, Esq., Pepper Hamilton LLP, for the protester.
Jared P. Weissberger, Esq., Defense Logistics Agency, for the agency.
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DIGEST

Protest that a purchase order for medical equipment exceeds the scope of the awardee's underlying indefinite-delivery, indefinite-quantity (IDIQ) contract is dismissed as untimely where the record shows that the protester knew, prior to submitting its proposal, that the agency considered such medical equipment to be within the scope of the solicitation and the protester has received orders for the same type of equipment under its own IDIQ contract.

DECISION

Draeger, Inc., of Telford, Pennsylvania, protests purchase order No. SPM2D1-09-D-8348, issued by the Department of Defense, Defense Logistics Agency (DLA), to Datex-Ohmeda Inc. dba GE Healthcare (GE), of Madison, Wisconsin, for anesthesia machines. Draeger contends that the order exceeds the scope of GE's underlying indefinite-delivery, indefinite-quantity (IDIQ) contract and that GE's anesthesia machines do not meet the required technical specifications.

We dismiss the protest.

BACKGROUND

On March 15, 2007, DLA issued request for proposals (RFP) No. SP0200-06-R-8014 to award multiple IDIQ contracts for various categories of patient monitoring systems, including "anesthesia monitoring systems." Req. for Dismissal (RFD) at 1; Tab 2, RFP, at 1, 7. The RFP's statement of work (SOW) also stated that the medical equipment to be purchased "includes, but is not limited to . . . anesthesia apparatus[.]" among 21 other types of listed equipment. RFP, SOW, at 171-72. The RFP provided for an "open season" before the end of each contract term during which DLA would consider

additional proposals from new suppliers only.¹ RFP at 11. The agency has issued numerous amendments to the RFP, including amendment 14, issued on October 29, 2013, to open the 2013 open season, and amendment 15, issued on November 19, 2013, to extend the deadline for submission of proposals for the 2013 open season until January 6, 2014. RFP amends. 14 & 15; see generally www.fbo.gov/spg/DLA/J3/DSCP-M/SP0200-06-R-8014/listing.html (last visited Sept. 21, 2017). DLA has awarded over 40 IDIQ contracts, including to GE and Draeger. RFD, Tabs 3-4, GE & Draeger IDIQ Contracts; Tab 7, Modality Matrix. Draeger was awarded its IDIQ contract in August 2014 after submitting a proposal during the December 2013 open season. RFD, Tab 4, Draeger IDIQ Contract, at 1 (offer & award dates).

On July 12, 2016, the agency issued a request for offers (RFO) to IDIQ contractors, including GE and Draeger, soliciting “anesthesia machines.”² RFD at 1; Tab 6, RFO § 1.³ DLA received quotations from both GE and Draeger in response to the RFO, and on June 20, 2017, the agency issued a purchase order for 12 anesthesia machines to GE for \$383,924. RFD at 2; Tab 1, Order. This protest followed.

DISCUSSION

Draeger argues that the purchase order exceeds the scope of the IDIQ solicitation and resulting contracts because, according to the protester, an anesthesia monitor is not the same as an anesthesia machine, and the IDIQ contracts provide for delivery of the former, but do not expressly provide for delivery of the latter.⁴ Protest at 3, 5, 12; attach., Decl. ¶¶ 6, 8. Draeger claims that “IDIQ offerors could not reasonably have anticipated that the [IDIQ contracts] should be understood to provide for inclusion of anesthesia machines under the CLINs [contract line item numbers] specifying delivery

¹ The performance period was for a base year and 9 option-years and the RFP stated that any contract awarded during an open season would run for the period of time remaining on the initial contract awards. RFP at 7, 11.

² Draeger did not protest the terms of the RFO.

³ The RFO was not assigned a solicitation number. See DLA Email to Parties, Aug. 18, 2017. To be clear, references to RFP and SOW are to the 2007 solicitation for award of IDIQ contracts; references to RFO are to the 2016 solicitation for the purchase of anesthesia machines.

⁴ Draeger concedes that GE offers anesthesia machines under its IDIQ contract. See Protest at 15 (asserting that among the three IDIQ contractors offering anesthesia machines, only Draeger offered the most advanced anesthesia machine on the market). In fact, the protester does not dispute DLA’s assertion that Draeger has known since at least 2015 that GE’s IDIQ contract offers anesthesia machines. Compare RFD at 3 with Response at 1-7. At issue here is whether anesthesia machines generally are outside the scope of the RFP and the resulting IDIQ contracts, and whether GE’s machines in particular met the RFO’s technical requirements.

of anesthesia monitors.” Protest at 12. Draeger asserts that the agency has unreasonably restricted competition, materially compromised the integrity of the procurement process, and deprived IDIQ contractors of a fair opportunity to compete for future purchase orders, because not all offerors could make an informed decision about whether to offer anesthesia machines (at the IDIQ contract level). See id. at 9, 15. The protester maintains that the “prejudice to Draeger could not be more obvious nor more egregious.”⁵ Id. at 16.

We dismiss the protest as untimely. Significantly, Draeger concedes that it views the IDIQ contract as patently ambiguous with respect to whether contractors can provide anesthesia machines.⁶ Draeger states that prior to submitting its 2013 proposal, it “questioned whether it could even offer anesthesia machines” under the terms of the IDIQ RFP. Protest at 9. In this respect, the record shows that prior to submitting its proposal during the 2013 open season, Draeger knew that DLA considered the IDIQ RFP to provide for the purchase of anesthesia machines. Draeger’s protest includes a copy of a November 15, 2013, email from the firm to DLA inquiring “as to the allowance of our anesthesia machines” and other types of equipment. Id., attach. 5, Draeger Email to DLA, Nov. 15, 2013, at 29. DLA responded that all of the “produc[t] lines” of which Draeger inquired “would be acceptable under the” RFP. Id., DLA Email to Draeger, Nov. 18, 2013, at 29; cf. SOW at 171 (“In order to support the majority of our customers’ requirements we are encouraging offerors to submit their entire product lines.”).⁷ As stated above, proposals for the 2013 open season were due January 6, 2014. RFP amend. 15, at 1.

⁵ Although we do not address all of Draeger’s arguments, we have considered all of the protester’s contentions and find that none provides a basis to sustain the protest.

⁶ Because we dismiss the protest, we need not, and do not, resolve whether anesthesia machines actually exceed the scope of the RFP and resulting IDIQ contracts.

⁷ Notably, Draeger does not explain the supposed difference between an anesthesia monitor and an anesthesia machine, nor does the protester address the terms “anesthesia apparatus,” “anesthesia ventilator,” or “anesthesia delivery system” as those terms are also used in the IDIQ SOW or RFO. Protest at 5, 8-13; Decl. of Draeger’s Dir. of Mktg. (Decl.) ¶¶ 1-12; Response to RFD (Response), at 1-7; see SOW at 172; RFO amend. 2 §§ 4(b)(i)-(ii). Moreover, Draeger neglects to address the following provisions from the IDIQ RFP, SOW, and resulting contracts: (1) encouraging offerors to submit their entire product lines; (2) stating that the purpose of the contract “is to provide complete functional systems . . . and certain selected items to be procured as ‘add on’ or ‘upgrade’ equipment into an existing system”; and (3) listing medical equipment that was excluded from the solicitation. See Protest; Decl.; Response; RFP at 5, 147-48; SOW at 171-72. Draeger’s failure to address these terms and provisions is inconsistent with our requirement that protesters set forth a detailed statement of the legal and factual grounds of protest. See 4 C.F.R. §§ 21.1(c)(4), 21.5(f).

Because Draeger's allegations concern the terms of the IDIQ solicitation and the fundamental ground rules of the procurement--issues that were known to the protester before it submitted its proposal nearly 4 years ago--these allegations implicate our timeliness rules regarding solicitation improprieties, in this case, whether the IDIQ RFP contains a patent ambiguity.⁸ See, e.g., Armorworks Enters., LLC, B-400394, B-400394.2, Sept. 23, 2008, 2008 CPD ¶ 176 at 7. Our Bid Protest Regulations contain strict rules for the timely submission of protests. They specifically require that a protest based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1). This rule includes challenges to alleged improprieties that do not exist in the initial solicitation but which are subsequently incorporated into it; in such cases, the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation. Id.; see Verizon Wireless, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4.

Where, as here, an agency issues a solicitation amendment inviting new offerors to compete for multiple-award contracts during an open season, a protest based upon alleged improprieties apparent on the face of the solicitation must be filed no later than the time set for receipt of proposals under the amendment. United Commcn's. Sys., Inc., B-279383, June 2, 1998, 98-1 CPD ¶ 148 at 3; see Digital Sys. Grp., Inc., B-256422, B-256521, June 3, 1994, 94-1 CPD ¶ 344 at 5-6, recon. denied, B-256422.2, B-256521.2, Oct. 28, 1994, 94-2 CPD ¶ 169 at 2 (denying a protest challenging an agency's decision not to set aside a procurement for multiple-award schedule contracts where the protester failed to challenge that decision prior to the deadline for submission of proposals set in the amended solicitation issued for the open season); Komatsu Dresser Co., B-246121, Feb. 19, 1992, 92-1 CPD ¶ 202 at 3-4 (stating that a supply schedule open season is tantamount to a new supply schedule solicitation making the terms of the amended solicitation subject to protest prior to the closing date for receipt of proposals).

Remarkably, the record shows that--not only did Draeger know, prior to submitting its proposal for the 2013 open season, of the alleged ambiguity in the IDIQ RFP regarding the scope of the anesthesia equipment contemplated by the solicitation--Draeger itself has received more than 30 purchase orders for anesthesia machines under its own IDIQ contract. RFD at 3; see, e.g., Tab 5, Purchase Orders Issued to Draeger & GE, at 1-2, 161, 760; see Protest at 9. Indeed, Draeger acknowledges that its 2013 proposal included "a selection of anesthesia machines." Protest at 9.

In the context of an open season for the submission of new proposals for multiple-award contracts, it is inconsistent with our timeliness rules to permit a protester to challenge the terms of a solicitation after the firm has submitted a proposal, accepted award, and

⁸ A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, while a latent ambiguity is more subtle. See FFLPro, LLC, B-411427.2, Sept. 22, 2015, 2015 CPD ¶ 289 at 10.

even received orders under the resulting contract. United Commcn's. Sys., Inc., supra. Underlying our timeliness rules regarding solicitation improprieties is the principle that challenges which go to the heart of the underlying ground rules by which a competition is conducted, should be resolved as early as practicable during the solicitation process, but certainly in advance of an award decision if possible, not afterwards. Caddell Construction, Co., Inc., B-401281, June 23, 2009, 2009 CPD ¶ 130 at 3. Such a rule promotes fundamental fairness in the competitive process by preventing an offeror from taking advantage of the government as well as other offerors, by waiting silently only to spring forward with an alleged defect in an effort to restart the procurement process, potentially armed with increased knowledge of its competitors' position or information. Blue & Gold, Fleet, L.P. v. United States, 492 F.3d 1308, 1313-14 (Fed. Cir. 2007). It also promotes efficiency by ensuring that concerns regarding a solicitation are raised before contractor and government resources are expended in pursuing and awarding the contract, thus avoiding costly and unproductive litigation after the fact. Id.

Here, Draeger should have protested any apparent ambiguity regarding the type of anesthesia equipment contemplated under the IDIQ RFP, prior to the January 6, 2014, deadline specified in amendment 15 for submission of proposals for the 2013 open season. United Commcn's. Sys., Inc., supra; see 4 C.F.R. § 21.2(a)(1). Draeger's arguments at this point--raised years after it questioned (but did not protest) the scope of the RFP, was awarded an IDIQ contract, and has received numerous orders for the allegedly out-of-scope medical equipment--are untimely, at best.⁹ United Commcn's. Sys., Inc., supra; see Digital Sys. Grp., Inc., supra; Rexnord Corp., B-244573, Oct. 2, 1991, 91-2 CPD ¶ 284 at 2-3 (dismissing as untimely a protest against the listing of a competitor's item as an approved product where the product has been repeatedly included in solicitations and the protester first protested the method of approval approximately 7 years after the approval was granted).¹⁰

⁹ As DLA states,

Draeger had no problem submitting an offer in response to the RFO . . . for anesthesia machines. Not until Draeger realized that it did not receive the award did it raise this issue. In fact, Draeger's arguments, if taken seriously would seem to require a finding that [Draeger's] offer is also out of scope.

RFD at 3.

¹⁰ Even if the protest were timely, Draeger cannot show that it was competitively prejudiced by the allegedly out-of-scope purchase order. Competitive prejudice is an essential element of a viable protest, and where the protester fails to demonstrate prejudice, our Office will not sustain a protest. See Emergent BioSolutions Inc., B-402576, June 8, 2010, 2010 CPD ¶ 136 at 14. Given that Draeger has included anesthesia machines in its own IDIQ contract since it was awarded and has received numerous orders for anesthesia machines, the protester can hardly claim, as it does, that the prejudice to Draeger is obvious and egregious.

Because we dismiss the protester's out-of-scope challenge, we must further dismiss, for lack of jurisdiction, Draeger's assertion that the awardee's anesthesia machines do not meet the RFO's salient characteristics. Protests filed with our Office in connection with the issuance or proposed issuance of a task or purchase order are not authorized except where the order is valued over \$25 million, or where the protester can show that the order increases the scope, period, or maximum value of the contract under which the order is issued. 10 U.S.C. § 2304c(e); Colette, Inc.--Recon., B-407561.2, Jan. 3, 2013, 2013 CPD ¶ 19 at 2. For the reasons discussed above, Draeger fails to properly challenge whether the purchase order increases the scope of the IDIQ contract, and the value of the order here is otherwise (considerably) less than the \$25 million threshold for GAO's jurisdiction to hear protests of the issuance of orders under multiple-award IDIQ contracts.¹¹

The protest is dismissed.

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General Counsel

¹¹ As stated above, the value of the order is \$383,924. RFD, Tab 1, Order, at 1.