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Decision

Matter of: Wyle Laboratories, Inc.

File: B-416528

Date: September 7, 2018

Alexander J. Brittin, Esq., Brittin Law Group, PLLC, for the protester.
Carl J. Vernetti, Esq., and Sarah Park, Esq., Department of Homeland Security, for the agency.
Heather Weiner, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester fails to demonstrate a direct economic interest in the procurement and thus is not an interested party under our Bid Protest Regulations eligible to challenge the terms of the request for quotations where the protester acknowledges that it does not intend to perform any of the work required under the solicitation, and where the record reflects that the protester submitted a quotation and a protest on behalf of another company solely to satisfy its contractual obligations to that company under a third-party agreement.

DECISION

Wyle Laboratories, Inc., of Huntsville, Alabama, challenges the terms of request for quotations (RFQ) No. 01C18Q0106, issued by the Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP), for professional, technical, and operational support services, in support of DHS's Office of Facilities and Asset Management. The protester alleges that the solicitation is unduly restrictive of competition because it limits the submission of past performance information to information submitted for the prime contractor.

We dismiss the protest because the protester is not an interested party.

BACKGROUND

The CBP issued the RFQ on June 4, 2018. The competition is limited to firms holding one of the General Services Administration's (GSA) One Acquisition Solution for Integrated Services (OASIS) unrestricted pool 1, multiple-award indefinite-delivery,

indefinite-quantity contracts for professional, scientific, and technical services. The RFQ anticipates the issuance of a time-and-materials task order for a period of performance of five years.¹

As relevant here, on June 5, 2018, Wyle entered into an asset purchase agreement (APA) with [DELETED] whereby Wyle transferred all of the “assets and liabilities used in or relating to the performance” of Wyle’s OASIS contract to [DELETED]. Protest at 5. In addition, the APA requires that Wyle “cooperate and provide commercially reasonable efforts to assist [DELETED] with submission of proposals in response to requests for task order proposals,” like the task order that is the subject of this protest, “during the interim period and before a full novation is granted.” Id. Wyle further explains that, as part of the APA, “[DELETED] [is] responsible for all services required by a task order issued under the above referenced Solicitation,” and that “Wyle has made clear to [DELETED] that . . . it will not be performing any work under the above referenced [s]olicitation.” Id.

With regard to the novation, on June 14, 2018, Wyle submitted documentation to GSA detailing its transaction with [DELETED] and asking GSA to recognize [DELETED] as the successor-in-interest to Wyle’s OASIS pool 1 contract, pursuant to Federal Acquisition Regulation (FAR) 42.1204. Protest at 5. The agency has advised our Office that GSA has not yet recognized the novation agreement. Agency Request for Dismissal at 1.

The protest states that [DELETED] has been the incumbent contractor for the same work being procured by the solicitation for the past eight years. Protest at 7. As noted above, however, the instant RFQ is limited to firms holding an OASIS contract.

Wyle and its prospective successor-in-interest, [DELETED], timely submitted a quotation in response to the solicitation prior to the RFQ’s June 29 deadline. Specifically, Wyle states that the quotation explains the following:

Wyle will serve as the prime contractor until novation of its OASIS Pool 1 Unrestricted contract assets, and will be performing requisite prime contract administration responsibilities only during the novation period. At the time of novation, [DELETED], as successor-in-interest to Wyle, will become the prime contractor and assume these responsibilities.

Response to Dismissal Request at 3 (quoting from Technical Quotation).²

Prior to submission of its quotation, Wyle filed the instant protest with our Office challenging the solicitation’s terms as unduly restrictive of competition.

¹ The estimated value of the task order at issue exceeds \$10 million, and therefore exceeds the threshold for GAO bid protest jurisdiction. 41 U.S.C. § 4106(f)(2).

² Wyle did not provide a copy of its quotation to our Office.

DISCUSSION

The protester argues that the solicitation is unduly restrictive of competition because it deprives both Wyle and Wyle's successor in interest, [DELETED], a fair opportunity to submit a quotation and have that quotation fairly considered. Protest at 5. Specifically, the protester asserts that the RFQ provision limiting past performance information to only the prime contractor "unreasonably places Wyle and [DELETED] at a competitive disadvantage," and maintains that the solicitation should also allow for the submission of subcontractor past performance information. In response, the agency requests dismissal of the protest, arguing that Wyle is not an interested party.

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556, only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 31 U.S.C. § 3551(2)(A); 4 C.F.R. §§ 21.0(a)(1), 21.1(a). Our regulations require a protester to affirmatively demonstrate that it is an interested party; a protester's failure to meet its obligation requires dismissal of the protest. 4 C.F.R. § 21.1(c)(5), 21.1(i); InSpace 21 LLC, B-410852, B-410852.3, Dec. 8, 2014, 2014 CPD ¶ 363 at 4.

Our Regulations require that a protest set forth all information establishing that the protester is an interested party for the purposes of filing a protest. 4 C.F.R. § 21.1(c)(5). Determining whether a party is interested involves consideration of a variety of factors, including the nature of the issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. Integral Sys., Inc., B-405303, Aug. 16, 2011, 2011 CPD ¶ 161 at 3.

Here, there is no dispute that the quotation submitted in response to the solicitation was tendered by Wyle and its prospective successor-in-interest, [DELETED]. As such, Wyle appears to qualify as an "actual" bidder or offeror under our regulations. 4 C.F.R. § 21.0(a)(1).

In dispute, however, is whether Wyle has a direct economic interest in the procurement that would be affected by the award of a contract or the failure to award a contract. In considering whether a protester has a direct economic interest in a procurement, our Office has considered whether an entity has the capability and intent to compete under the solicitation. See Total Procurement Servs., Inc., B-272343.2 et al., Aug. 29, 1996, 96-2 CPD ¶ 92 at 4.

Wyle argues that it has a direct economic interest in the procurement because the solicitation does not prohibit the prime/subcontractor teaming arrangement proposed by it and [DELETED]--that is, Wyle acting as the prime contractor, with [DELETED] performing all of the work as its subcontractor, until novation is approved, and thereafter [DELETED] taking over as the prime contractor. Specifically, the protester argues that, because this proposed teaming arrangement is not precluded by the solicitation and because the agency has not yet evaluated quotations or come to a conclusion regarding Wyle's ability to perform in light of [DELETED] acting as a subcontractor, GAO should

afford little weight to any “hypothetical evaluation” performed by the agency regarding Wyle’s capability to perform due to the teaming arrangement. Response to Dismissal Request at 5.

Based on our review of the record, we conclude that, despite the proposed teaming arrangement proposed by Wyle and [DELETED], Wyle has failed to demonstrate that it has a direct economic interest in the procurement. Accordingly, we conclude that Wyle does not qualify as an interested party under our Bid Protest Regulations, and therefore, that the protest should be dismissed.³

As discussed above, Wyle’s protest acknowledges that it submitted the quotation on behalf of its successor-in-interest, [DELETED], solely to comply with Wyle’s contractual obligations to [DELETED] under the asset purchase agreement. In this regard, Wyle’s protest explains that the APA requires that Wyle “cooperate and provide commercially reasonable efforts to assist [DELETED] with submission of proposals in response to requests for task order proposals . . . during the interim period and before novation is granted.” Protest at 5. In addition, as Wyle’s protest states, the quotation was “prepared by . . . [DELETED]” and all of the work under the solicitation will be performed solely by [DELETED]. Id. at 6. In this regard, Wyle’s protest further notes that “Wyle will not be performing any of the work for the task order, but rather, [DELETED] and its subcontractors will be performing all of the work under the task order.” Id.

In the unique circumstances presented here, even if Wyle is correct and the solicitation does not prohibit the type of prime/subcontractor teaming arrangement proposed, Wyle has not demonstrated how the limited “prime contract administration responsibilities” it indicates that it will provide as the “prime contractor” reflect that Wyle has a direct economic interest in the procurement. Significantly, as noted above, Wyle’s protest makes clear that it does not have any intention in its role as the “prime contractor” or otherwise to perform any of the work under the task order. Rather, as Wyle acknowledges, [DELETED] and its subcontractors will perform all of the work under the task order. Where, as here, Wyle’s purpose as the “prime contractor” is a legal requirement of its third-party asset purchase agreement with [DELETED] and Wyle’s only duties as the prime contractor are the administrative responsibilities required to allow [DELETED] and its subcontractors to perform under the task order until the novation is finalized, and where Wyle acknowledges that it does not intend to perform

³ Although we do not address each of the protester’s arguments, we have considered all of the protester’s contentions and find that none provide a basis to sustain the protest.

any of the work required under the solicitation, we do not believe that the protester has demonstrated sufficient direct economic interest in the procurement to qualify as an interested party.

The protest is dismissed.

Thomas H. Armstrong
General Counsel