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Decision

Matter of: Black & Veatch Special Projects Corporation

File: B-417166

Date: March 5, 2019

Timothy E. Heffernan, Esq., and Sarah K. Bloom, Esq., Watt Tieder Hoffar & Fitzgerald, LLP, for the protester.

John B. Alumbaugh, Esq., United States Agency for International Development, for the agency.

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DIGEST

1. Protest that the agency violated the fair opportunity procedures in the Federal Acquisition Regulation and the protester's indefinite-delivery, indefinite-quantity contract by issuing a task order to a woman-owned small business without competition is dismissed as untimely where the contract unambiguously permits the agency to make a direct task order award to any category of small or small disadvantaged business as an exception to the fair opportunity process.
 2. Protest challenging a woman-owned small business awardee's capability to perform is dismissed where the protester, an other-than-small business, is ineligible for the task order awarded using a small business exception to the fair opportunity procedures set forth in the protester's indefinite-delivery, indefinite-quantity contract, and therefore is not an interested party.
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DECISION

Black & Veatch Special Projects Corporation (Black & Veatch), of Overland Park, Kansas, protests the issuance of a task order to Trigon Associates, LLC, a woman-owned small business of New Orleans, Louisiana, under solicitation No. 72044019R00002, issued by the United States Agency for International Development (USAID), for architectural and engineering (A&E) services to design and manage environmental remediation of dioxin contamination at the Bien Hoa Airbase in Vietnam. The protester contends that the agency violated the fair opportunity procedures in the Federal Acquisition Regulation (FAR) and its A&E indefinite-delivery indefinite-quantity

(IDIQ) contract by issuing the task order to Trigon, and that Trigon is incapable of performing the task order.

We dismiss the protest.

BACKGROUND

On July 28, 2015, USAID issued a solicitation to award multiple contracts for global A&E services. Request for Dismissal, Exh. 3, IDIQ Solicitation, at 3. On September 29, the agency awarded a total of nine IDIQ contracts, six to large businesses, including the protester, and three to small businesses, including Trigon. Request for Dismissal at 3.

As relevant to the protest, the IDIQ solicitation and awarded contracts require that the task order contracting officer provide each contractor with a fair opportunity to be considered for each task order exceeding \$3,500, unless an exception applies. Request for Dismissal, Exh. 3, IDIQ Solicitation, at 40; Exh. 6, Trigon IDIQ Contract, at 46. In addition to the exceptions provided in FAR § 16.505(b)(2), the IDIQ solicitation and the protester's IDIQ contract contain the following exception to the fair opportunity process:

(6) Small Business Reserves and Small Business Set-Asides.

Pursuant to [USAID Automated Directive System (ADS) Chapter] 302, Small Business exception in Section 534(f) of P.L. 107-115, for [task orders/delivery orders] only: Provides USAID with an exception to the fair opportunity process in FAR 16.505 to directly place task orders with any category of small or small disadvantaged business.

Small Business Reserve

All task orders issued under this IDIQ [contract] greater than \$3,500 but less than or equal to \$2,000,000 must be competed first with any category of small or small disadvantaged business contract holders. All contractors must be given a fair opportunity to be considered for Task Orders over \$2,000,000 unless the [task order contracting officer] determines that one of the above statutory exceptions applies.

Request for Dismissal, Exh. 3, IDIQ Solicitation, at 41; Exh. 6, Trigon IDIQ Contract, at 47. Further, the IDIQ solicitation and IDIQ contract explain that "USAID may directly place task orders with any category of small or small disadvantaged business that received a prime contract award from the same solicitation that resulted in the award of this contract." Id. In the same section, the IDIQ solicitation and IDIQ contract provide:

(i) Single small business award. USAID may directly place a task order with the small business prime under this exception.

Id.

On November 29, 2018, the agency awarded a task order to Trigon in the amount of \$33,404,577 for A&E services to remediate dioxin contamination at the Bien Hoa Airbase in Vietnam. Request for Dismissal, Exh. 9, FBO.gov Notice, Nov. 30, 2018. The agency made a direct award to Trigon using the exception set forth in the solicitation concerning task order awards to small businesses. Request for Dismissal, Exh. 7, Negotiation Memorandum (Unredacted), at 4. This protest followed.¹

DISCUSSION

The protester argues that the agency violated the fair opportunity procedures set forth in FAR § 16.505(b) and the IDIQ solicitation and IDIQ contract when it issued a task order directly to Trigon. Protest at 5-7. In this regard, the protester argues that the agency was not authorized under any law to directly issue the task order to Trigon, and was, in fact, required to provide all IDIQ contract holders a fair opportunity to be considered for the award of this task order, since its value exceeded \$2 million. Id. at 7-9.

The agency argues that the protest is untimely because it challenges a term of the solicitation that is now incorporated into all of the IDIQ contracts awarded, including the one awarded to Black & Veatch in 2015. Request for Dismissal at 4-7. The agency states that this language in the IDIQ solicitation and resulting IDIQ contracts stems from statutory authority specific to USAID, implemented due to concerns with the agency's small business contracting, and which allows the agency to directly place task orders with any category of small businesses. Id. at 4-5.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Verizon Wireless, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4. Our timeliness rules specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1); see AmaTerra Emtl. Inc., B-408290.2, Oct. 23, 2013, 2013 CPD ¶ 242 at 3.

Here, the protest was filed on December 7, 2018. As noted, the IDIQ solicitation and awarded contracts were issued over three years prior to that date and set forth specific language as to the award of task orders pursuant to the IDIQ contract. The protester argues that its protest challenging this language in the IDIQ solicitation and IDIQ contract is nonetheless timely because the language does not sufficiently notify contract

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).

holders how the agency would implement the small business exception to the fair opportunity process. Response to Request for Dismissal at 5.

Where a protester and agency disagree as to the meaning of solicitation or contract language, we will resolve the matter by reading the solicitation or contract as a whole and in a manner that gives effect to all of its provisions. Technica Corp., B-416542, B-416542.2, Oct. 5, 2018, 2018 CPD ¶ 348 at 11. Where a dispute exists as to a solicitation's or contract's terms, we will examine the plain language of the document. Id. A solicitation or contract term is not ambiguous unless it is susceptible to two or more reasonable interpretations. See WingGate Travel, Inc., B-412921, July 1, 2016, 2016 CPD ¶ 179 at 7. If the solicitation or contract language is unambiguous, our inquiry ceases. See id. Here, the protester's reading of the IDIQ solicitation and the resulting IDIQ contract is not reasonable and therefore the language is not ambiguous.

As noted, the IDIQ solicitation and IDIQ contracts specifically state that each contractor will be provided with a fair opportunity to be considered for each task order exceeding \$3,500, unless an exception applies. Request for Dismissal, Exh. 3, IDIQ Solicitation, at 40; Exh. 6, Trigon IDIQ Contract, at 46. The IDIQ solicitation and the IDIQ contracts also state that public law and USAID ADS chapter 302: "Provides USAID with an exception to the fair opportunity process in FAR 16.505 to directly place task orders with any category of small or small disadvantaged business." Request for Dismissal, Exh. 3, IDIQ Solicitation, at 41; Exh. 6, Trigon IDIQ Contract, at 47. Further, the solicitation states that "USAID may directly place task orders with any category of small or small disadvantaged business that received a prime contract award from the same solicitation that resulted in the award of this contract." Id. In the same section, the solicitation provides: "Single small business award. USAID may directly place a task order with the small business prime under this exception." Id. With respect to the specific procedures to be followed, the IDIQ solicitation and resulting IDIQ contracts state as follows:

The following is the process for using the small business exception:

- (a) If required, the [task order contracting officer representative (TOCOR)] submits the scope of work to the IDIQ COR for review to determine if their requirement falls within the IDIQ scope of work.
- (b) The IDIQ COR provides corporate capability information for the small businesses to the TOCOR.
- (c) The TOCOR reviews the corporate capability information and provide[s] a brief, written recommendation (not a justification) to the TOCO on which contractor he/she recommends for an award. No need to go to the next steps below.
- (d) If corporate capability is equal, the TOCOR will need to follow the appropriate [request for task order proposals] procedures below. The TOCO is responsible for final selection, negotiation, and Task Order award. The [\$2,000,000] threshold does not apply when using the small business exception and fair opportunity procedures.

Request for Dismissal, Exh. 3, IDIQ Solicitation, at 41-42; Exh. 6, Trigon IDIQ Contract, at 48. The agency followed these procedures when awarding the task order to Trigon. See Request for Dismissal, Exh. 7, Negotiation Memorandum (Unredacted), at 5.

Black & Veatch submitted a proposal and was awarded a contract that includes these unambiguous terms. The protester did not file a protest challenging this provision prior to the closing time for submission of proposals. Therefore, the protest is untimely.

Black and Veatch also argues that Trigon does not have the ability to perform any technically complex environmental compliance activity because it does not have experience in remediation of toxic substances. Protest at 7. USAID argues that the protester is not an interested party to challenge Trigon's ability to perform the task order because it is not a small or small disadvantaged business and therefore would be ineligible for award even if its protest were to be sustained. Request for Dismissal at 8-9. The protester argues that it is an interested party because the agency improperly applied the small business exception, and did not notify offerors of a set-aside decision or deviation from the fair opportunity procedures. Response to Request for Dismissal at 6.

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 have a direct economic interest which would be affected by the award of a contract or the failure to award a contract. Bid Protest Regulations, 4 C.F.R. § 21.0(a)(1). Determining whether a protester is interested involves consideration of a variety of factors, including the nature of issues raised, the benefit of relief sought by the protester, and the party's status in relation to the procurement. RELM Wireless Corp., B-405358, Oct. 7, 2011, 2011 CPD ¶ 211 at 2. A protester is not an interested party where it would not be in line for contract award were its protest to be sustained. Id.

Here, the agency has demonstrated that it expressly followed the process for using the small business exception included in the IDIQ solicitation and awarded contracts. Specifically, the agency reviewed the corporate capability information for the small business IDIQ contract holders, requested updated capability statements, and negotiated the task order with the recommended small business, Trigon. See Request for Dismissal, Exh. 7, Negotiation Memorandum (Unredacted), at 5. Since the protester, as an other-than-small business, is ineligible for award of a task order using the small business exception to the fair opportunity procedures set forth in the IDIQ contract, it is not an interested party for the purpose of maintaining this protest

allegation.² Creative Computing Sols., Inc., B-408704, B-408704.2, Nov. 6, 2013, 2013 CPD ¶ 262 at 4.

The protest is dismissed.

Thomas H. Armstrong
General Counsel

² In addition, the protester's argument is a challenge to the agency's affirmative responsibility determination. As a general matter, our Office does not review affirmative determinations of responsibility by a contracting officer. 4 C.F.R. § 21.5(c). One of the circumstances in which we will make an exception to the general rule is where a protest identifies evidence raising serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information. Verestar Gov't Servs. Grp., B-291854, B-291854.2, Apr. 3, 2003, 2003 CPD ¶ 68 at 4. In this regard, our Office's review of allegations in the context of affirmative determinations of responsibility generally pertain to very serious matters, such as potential criminal activity. FN Mfg., Inc., B-297172, B-297172.2, Dec. 1, 2005, 2005 CPD ¶ 212 at 7-8 (allegation that agency failed to consider an ongoing investigation into whether the awardee defrauded the government on a prior contract for the same requirement). An allegation that the performance of work under the task order is too technically complex for the awardee to perform does not rise to the level needed to trigger a review by our Office of a contracting officer's responsibility determination.