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Comptroller General
of the United States

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Decision

Matter of: JSR, Inc.

File: B-419110

Date: November 2, 2020

Todd J. Canni, Esq., Matt Carter, Esq., and Dinesh Dharmadasa, Esq., Pillsbury Winthrop Shaw Pittman LLP, for the protester. Captain Seiji Ohashi, and Alexis J. Bernstein, Esq., Department of the Air Force, for the agency. Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the suspension and debarment provisions of the Federal Acquisition Regulation (FAR) do not apply to the award of indefinite-delivery, indefinite-quantity (IDIQ) contracts is denied.
2. Protest that the provisions of FAR 9.405-1, which permit an agency to issue orders under an existing IDIQ contract that are below the minimum ordering guarantee to a suspended contractor, also permit an agency to award a new IDIQ contract to a suspended contractor, is denied where the protester’s interpretation is inconsistent with the plain language of the FAR.
3. Protest that a solicitation for an IDIQ contract is invalid because the minimum guarantee is insufficient to create a binding contract is dismissed as untimely and also dismissed because the protester, a suspended contractor, is not an interested party to challenge the solicitation.

DECISION

JSR, Inc., a small business, of Schertz, Texas, protests the decision by the Department of the Air Force to exclude its proposal from the competition conducted under (RFP) No. FA4661-20-R-0001, which was issued for construction and design-build services. JSR argues that the agency improperly excluded its proposal based on its suspension from federal contracting because, the protester contends, the suspension and debarment provisions of the Federal Acquisition Regulation (FAR) do not apply to the award of indefinite-delivery, indefinite-quantity (IDIQ) contracts; the FAR provisions

permit agencies to award new IDIQ contracts to suspended contractors; and the RFP's guaranteed minimum is insufficient to create a binding contract.

We deny in part and dismiss in part the protest.

The Air Force issued the RFP on April 8, 2020, seeking proposals to provide construction and design-build services at Dyess Air Force Base, Texas. Req. for Dismissal, attach. 2, RFP at 1. The RFP anticipates the award of multiple IDIQ contracts. *Id.*

JSR submitted a proposal before the RFP closing date of May 29. Protest at 6. The Air Force evaluated proposals and prepared a source selection decision document (SSDD). Req. for Dismissal, attach. 3, SSDD at 1. On August 27, the contracting officer consulted the System for Award Management (SAM) to determine each offeror's eligibility. *Id.* at 22; Req. for Dismissal at 2. The agency found that JSR had been suspended from federal contracting by the Small Business Administration (SBA) as of August 20, based on "pending criminal charges" against an individual.¹ Req. for Dismissal, attach. 1, JSR SAM Entry at 3.

The Air Force notified JSR on August 28 that its proposal was excluded from the competition based on its suspension. Protest, exh. A, Letter from Air Force to JSR, Aug. 28, 2020, at 1. On September 2, JSR requested the Agency reconsider the exclusion. *Id.*, exh. B, Letter from JSR to Air Force, Sept. 2, 2020, at 1. The contracting officer denied JSR's request on September 4. *Id.*, exh. C, Letter from Air Force to JSR, Sept. 4, 2020, at 1. The award decision was signed by the source selection authority on September 4. Req. for Dismissal, exh. 3, SSDD at 25. This protest followed.

DISCUSSION

JSR challenges the Air Force's exclusion of its proposal from the competition based on three primary arguments: (1) an IDIQ contract is not a contract for purposes of the FAR provisions that prohibit debarred or suspended firms from receiving federal contracts; (2) even if an IDIQ contract is subject to the FAR suspension and debarment provisions, FAR 9.405-1 permits agencies to award IDIQ contracts to debarred or suspended contractors; and (3) the RFP anticipates the award of a contract that lacks binding

¹ JSR states that the suspension was "based on the alleged actions of a *former* shareholder who the SBA mistakenly believed is still affiliated with JSR." Protest at 6. The protester states that it is currently contesting this matter with SBA. *Id.* Our Office does not review protests that an agency improperly debarred or suspended a contractor from receiving government contracts. *Shinwha Elecs., B-290603 et al.*, Sept. 3, 2002, 2002 CPD ¶ 154 at 4.

the post-award briefing.” RFP section L at 1, 9.⁵ JSR contends that this guarantee is “nominal” in terms of the value and task to be performed, and therefore does not satisfy the requirement for binding consideration under FAR 16.504(a)(2). Protest at 3, 8; Response to Req. for Dismissal at 5. In the absence of binding consideration, the protester argues that the RFP provides for the award of a contract that will be “void as a matter of law.” *Id.* at 5. The protester therefore argues that the agency should cancel the RFP and issue a new RFP that has an adequate minimum guarantee. Protest at 11.

The Air Force argues that this protest ground is an untimely challenge to the terms of the solicitation because it was not raised prior to the RFP’s May 29 closing date. Req. for Dismissal at 3. Our Bid Protest Regulations require that protests based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals must be filed before that time. 4 C.F.R. § 21.2(a)(1).

JSR did not file its challenge to the terms of the solicitation prior to the closing date, and does not dispute that this argument is untimely. See Response to Req. for Dismissal at 6-7. Instead, the protester requests that our Office consider its untimely protest under the significant issue exception to our timeliness rules. *Id.* Pursuant to 4 C.F.R. § 21.2(c), our Office may consider the merits of an untimely protest where good cause is shown or where the protest raises a significant issue of widespread interest to the procurement community. In order to prevent our timeliness rules from becoming meaningless, however, these exceptions are strictly construed and rarely used. *Vetterra, LLC, B-417991 et al.*, Dec. 29, 2019, 2019 CPD ¶ 15 at 3.

What constitutes a significant issue is decided on a case-by-case basis. *Cyberdata, Techs., Inc.*, B-406692, Aug. 8, 2012, 2012 CPD ¶ 230 at 3. We generally regard a significant issue as one of widespread interest to the procurement community that has not been considered on the merits in a prior decision. *Baldt Inc.*, B-402596.3, June 10, 2010, 2010 CPD ¶ 139 at 2-3.

JSR’s untimely challenge to the terms of the RFP here does not present a significant issue because our Office has already addressed in numerous decisions whether the minimum order guarantee in a solicitation provides adequate consideration under FAR 16.504(a). See *Information Ventures, Inc.*, B-299255, Mar. 19, 2007, 2007 CPD ¶ 80 at 6-7; *CW Gov. Travel, Inc.-Recon.*; *CW Gov. Travel, Inc., et al.*, B-295530.2, July 25, 2005, 2005 CPD ¶ 139 at 8-9; *CW Gov. Travel, Inc.*, B-295530, Mar. 7, 2005, 2005 CPD ¶ 59 at 2-4; *ABF Freight Sys., Inc., et al.*, B-291185, Nov. 8, 2002, 2002 CPD ¶ 201 at 4; *TRS Research*, B-290644, Sept. 13, 2002, 2002 CPD ¶ 159 at 9 n.9; *Carr’s Wild Horse Ctr.*, B-285833, Oct. 3, 2000, 2000 CPD ¶ 210 at 3-4; *Aalco Forwarding, Inc., et al.*, B-277241.15, Mar. 11, 1998, 98-1 CPD ¶ 87 at 6-8; *Sea-Land Serv., Inc.*, B-278404, B-278404.2, Feb. 9, 1998, 98-1 CPD ¶ 47 at 11-13. We therefore find that

⁵ Sections L and M of the RFP were provided at Tab 01b of the consolidated version of the solicitation filed by the agency. Electronic Protest Docketing System No. 15.

the protester's challenge does not present a significant issue for our review under 4 C.F.R. § 21.2(c).

In any event, we also find that JSR is not an interested party to challenge the terms of the solicitation because the protester is not eligible to receive the award. Only an "interested party" may file a protest with our Office, *i.e.*, an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a)(1). 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. *Advanced Concept Enters., Inc.*, B-410069.3, B-410069.4 Jan. 22, 2015, 2015 CPD ¶ 53 at 2.

JSR is not an interested party to challenge the terms of the solicitation because it is a suspended contractor and would not be eligible to receive the award of a contract, even if its protest were sustained. *See Triton Elec. Enters., Inc.*, B-294221 *et al.*, July 9, 2004, 2004 CPD ¶ 139 at 1; *Space Dynamics Corp.*, B-220168.2, Nov. 29, 1985, 85-2 CPD ¶ 620 at 1. We therefore dismiss the protester's challenge to the adequacy of the RFP's minimum guarantee.

The protest is denied in part and dismissed in part.

Thomas H. Armstrong
General Counsel