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Decision

Matter of: Intellectix Corporation

File: B-420552; B-420552.2; B-420552.3

Date: May 27, 2022

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Michael P. Grogan, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester is not an interested party to challenge agency's issuance of a noncompetitive task order under a Federal Supply Schedule contract where the protester does not hold the schedule contract under which the order was issued.

DECISION

Intellectix Corporation, a small business of Rockville, Maryland, protests the Department of Justice's (DOJ) issuance of task order 15JPSS22F00000263, on a sole-source basis, to NTT Data Federal Services, Inc., for information technology (IT) support services for DOJ's executive office for immigration review (EOIR). The protester contends the agency's decision to issue the order, on a noncompetitive basis, was contrary to law and regulation, and was rooted in bias and bad faith.

We dismiss the protest.

BACKGROUND

On December 22, 2015, DOJ issued a request for quotations (RFQ) seeking contractor support for the provision of IT support services for EOIR's eWorld requirement, which was a collection of IT systems related to management of EOIR's immigration court hearings and cases. The agency conducted the acquisition under the General Service Administration's (GSA) Federal Supply Schedule (FSS) program, pursuant to Federal

Acquisition Regulation (FAR) subpart 8.4, and limited the competition to vendors holding contracts under FSS schedule 70. The RFQ anticipated the issuance of a single task order, on a time-and-material basis, with a 1-year base period and four 1-year options. See *generally*, *Camber Corp.*, B-413505, Nov. 10, 2016, 2016 CPD ¶ 350 at 1.

On August 1, 2016, DOJ issued the eWorld support task order (number DJJ16-F-2683) to NTT. Agency Report (AR), Tab E, Limited Sources Justification (LSJ) for Bridge Order 0263 at 1. Intellectix performed as a subcontractor to NTT for nearly the entire period of performance of the contract (from December 2016 to July 2021), primarily providing “services for the design, implementation, and sustainment of the EOIR Data Coordinator.” Protest at 6. The protester states that its subcontractor agreement with NTT ended on July 31, 2021, and Intellectix advised NTT that it did not intend to enter into a teaming agreement with the firm for the expected “follow-on” DOJ eWorld requirement. Protest at 7-8. Instead, Intellectix entered into a teaming agreement with another firm, whereby the protester would serve as the prime contractor. Protest at 7.

On July 29, days before NTT’s order was to expire, DOJ exercised an option to extend services through August 31. AR, Tab A.33, Modification 32 to Order 2683. On August 27, DOJ then issued a call order to NTT under a Drug Enforcement Agency (DEA) single-award blanket purchase agreement (BPA) for DOJ’s follow-on eWorld requirements. AR, Tab E, LSJ for Bridge Order 0263 at 1. Intellectix filed a protest with our Office the same day, arguing DOJ improperly failed to compete its follow-on requirement, and that NTT had misrepresented to DOJ Intellectix’s intention to perform as part of NTT’s team. Our Office dismissed Intellectix’s protest as academic on October 1, in response to the agency’s representation that it planned to take corrective action, which included canceling the call order and issuing an additional extension of NTT’s FSS order. *Intellectix Corp.*, B-420105 et al., Oct. 1, 2021 (unpublished decision). DOJ exercised an option to extend services with NTT, under its FSS order, ultimately through January 31, 2022. See AR, Tab A.35, Modification 34 to Order 2683; Tab A.37, Modification 36 to Order 2683.

The agency indicates that after “internal discussion about multiple different procurement vehicles” to provide a long-term solution for its eWorld requirements, on January 5, DOJ issued a request for information (RFI) to holders of DOJ’s Information Technology Support Services-5 (ITSS-5) Service-Disabled Veteran-Owned Small Business (SDVOSB) multiple-award indefinite-delivery, indefinite quantity (IDIQ) contract. Memorandum of Law (MOL) at 3; see *also* AR, Tab E, LSJ for Bridge Order 0263 at 3. DOJ explained that because it had not completed its review of RFI responses, on January 31, the agency again modified NTT’s original FSS order to extend performance through July 31. MOL at 3; AR, Tab E, LSJ for Bridge Order 0263 at 1.

On February 8, Intellectix again filed a protest with our Office, alleging the agency’s modification of NTT’s order was contrary to law and regulation, and that DOJ’s actions were motivated by bias and bad faith. In response to the protest, DOJ again represented it planned to take corrective action. DOJ explained that it intended to stop

work on the extension of NTT's task order (because it was improperly executed against a task order for which the underlying FSS contract had expired), issue a narrowly-tailored interim or "bridge" contract to NTT for six months under a different FSS contract held by NTT (contract No. GS-35F-518GA), and compete its follow-on eWorld requirement under the ITSS-5 SDVOSB IDIQ contract. During the pendency of the protest, Intellectix raised supplemental allegations, challenging the proposed bridge contract to NTT and DOJ's decision to compete the follow-on eWorld requirement under the ITSS-5 IDIQ contract. In light of the agency's proposed corrective action, which our Office concluded rendered the entire protest academic, we dismissed Intellectix's protest on February 17. We also explained that to the extent the protester wished to challenge future agency action, the scope of the agency's proposed corrective action, or the award of other contracts, "it may submit a protest (or multiple protests) to our Office in accordance with our Bid Protest Regulations." *Intellectix Corp.*, B-420511.1, B-420511.2, Feb. 17, 2022 at 3 (unpublished decision).

On February 11, DOJ issued the order at issue in this protest to NTT under the firm's GSA FSS contract No. GS-35F-518GA. AR, Tab J.2, Bridge Order 0263 at 1. In support of the order to NTT, DOJ prepared a limited sources justification memorandum, pursuant to FAR section 8.405-6 (Limiting sources), explaining that the task order was being issued to NTT "on a logical follow-on" basis to "ensure continuity of mission critical services until a follow-on procurement, which is expected to be conducted under the [SDVOSB] track of the [ITSS-5] contracts, is awarded." AR, Tab E, LSJ for Bridge Order 0263 at 1. The memorandum stated "[t]he six-month extension is necessary to allow time for the Department to re-procure the services using competitive procedures and to transition services to the new contract." *Id.* at 2. The total estimated value of the interim order was \$10.2 million, with performance to run through August 11. AR, Tab J.2, Bridge Order 0263 at 1. On February 22, Intellectix filed the instant protest challenging the award of the interim order to NTT under NTT's FSS contract.¹

DISCUSSION

Intellectix raises two principal challenges to the agency's decision to issue an interim order to NTT. First, the protester argues the agency's issuance of a noncompetitive order runs contrary to regulation because the agency cannot satisfy the FAR's requirements for limiting sources under FAR subpart 8.4 (Federal Supply Schedules). Protest at 21-34; Comments at 6-31. Second, Intellectix argues the agency's decision

¹ Intellectix filed a second protest with our Office on February 22, challenging the agency's intention to issue a solicitation for the agency's follow-on eWorld requirements under the ITSS-5 SDVOSB IDIQ contract. The protester argued the agency's intention to compete its requirement under that contract vehicle would impermissibly restrict competition, and that DOJ's procurement strategy was biased against Intellectix and motivated by bad faith. Our Office dismissed the protest as premature, concluding that absent the actual issuance of a solicitation or the award of a contract, we had no basis to consider Intellectix's allegations. *Intellectix Corp.*, B-420554, Mar. 3, 2022 (unpublished decision).

to issue the order was motivated by bad faith and bias in favor of NTT. Protest at 34-42; Comments at 31-45. We do not reach the merits of either of Intellectix's arguments because we conclude the protester is not an interested party to challenge the agency's issuance of the task order to NTT.

Under the bid protest provisions of the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-3557, only an interested party may protest a federal procurement. That is, a protester must be 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. 31 U.S.C. § 3551(2); 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. *RELM Wireless Corp.*, B-405358, Oct. 7, 2011, 2011 CPD ¶ 211 at 2. Whether a protester is an interested party is determined by the nature of the issues raised and the direct or indirect benefit or relief sought. *Id.*

The agency and the intervenor contend Intellectix is not an interested party to challenge DOJ's issuance of a task order to NTT. In this regard, DOJ argues because it has decided to meet its requirement through the FSS program, Intellectix, who does not hold the requisite FSS contract (or any FSS contract), lacks sufficient economic interest to challenge the agency's procurement actions. MOL at 7-10; Intervenor's Comments at 6-11. In response, the protester contends that it has a sufficient economic interest to challenge the agency's conduct because the firm was denied an opportunity to compete for an award. That is, had DOJ competed the requirement, rather than issue a noncompetitive award to NTT, Intellectix "could and would have submitted a highly competitive proposal." Comments at 53. The protester further argues, "[w]ere the Agency to compete even a portion of the Bridge Task Order, then Intellectix could perform that work, making it an interested party." Resp. to Req. for Dismissal at 6.²

Subpart 8.4 of the FAR governs an agency's use of the FSS program. Orders placed against the schedule are considered issued under full and open competition, and agencies need not seek competition outside of the FSS when placing an order. FAR 8.404(a). Orders placed against the FSS that exceed the simplified acquisition threshold should be competed among schedule holders, in accordance with the procedures identified in FAR section 8.405, unless the ordering agency waives those requirements on the basis of a justification that is prepared and approved in accordance with FAR section 8.405-6. See FAR 8.405-1(d)(1); FAR 8.405-2(c)(3)(i). In turn, FAR

² Prior to the production of the agency's report, DOJ asked that we dismiss Intellectix's protest, where one of the agency's arguments challenged whether Intellectix was an interested party. Req. for Dismissal at 4-6. We explained that while we intended to partially grant the agency's request for dismissal, we declined to dismiss the entirety of Intellectix's protest on interested party grounds "[a]t this time". GAO Resp. to Req. for Dismissal at 2. Following more substantive briefing on this issue in the MOL and through the parties' comments on the agency report, we conclude Intellectix lacks the necessary economic interest to challenge the agency's award decision.

section 8.405-6 (Limiting sources) provides three circumstances where an agency may properly justify limiting sources when placing an order against a FSS contract: (a) an urgent and compelling need exists; (b) only one source is capable of providing the service or supply; and (c) in the interest of economy and efficiency, the work is a logical follow-on to an original FSS order. FAR 8.405-6(a)(1)(A)-(C).

Here, the record demonstrates two salient facts that are dispositive of Intellectix's interested party status. First, DOJ made the decision to procure its required services through the FSS. See AR, Tab J.2, Bridge Order 0263 at 1. In issuing a task order on a noncompetitive basis to NTT, DOJ relied on the limiting sources exceptions provided for in FAR section 8.405-6. That is, the agency believed the bridge contract to NTT satisfied the requirements of FAR subsection 8.405-6(a)(1)(C).³ Second, the record reflects that Intellectix is not an FSS contract holder. See MOL at 9 (noting that Intellectix does not hold any FSS contracts per Intellectix's website and the GSA FSS website, and that the protester has not asserted that it is an FSS holder across multiple rounds of briefing).

Together, these facts demonstrate that the protester lacks the necessary economic interest to pursue its protest allegations challenging the agency's FSS order.⁴ While

³ Subsection 8.405-6(a)(1)(C) of the FAR provides that an agency may limit sources when "[i]n the interest of economy and efficiency, the new work is a logical follow-on to an original [FSS] order provided that the original order was placed in accordance with the applicable [FSS] ordering procedures. The original order or BPA must not have been previously issued under sole-source or limited-sources procedures."

⁴ In any event, the record does not support the protester's allegations that the agency issued the challenged FSS order to NTT based on bias or bad faith as part of an effort to improperly steer work to NTT. Government officials are presumed to act in good faith, and allegations of bias or bad faith must be supported by convincing proof, beyond mere inference and innuendo. *Peraton Inc.*, B-416916.5; B-416916.7, Apr. 13, 2020, 2020 CPD ¶ 144 at 9. Here, Intellectix's bias allegations stem from inferences it has drawn from procurement actions taken by DOJ prior to issuance of the order, and decisions it has made in connection with the upcoming procurement for the agency's long-term requirements.

The evidence in the record, however, reflects little more than the agency's desire to find a contract vehicle under which NTT, the incumbent contractor, could compete for the follow-on eWorld requirement. See AR, Tab C, Memorandum Regarding Contracting Officer's (CO) Phone Call with NTT (explaining that DOJ had chosen a contracting vehicle for the follow-on eWorld work for which NTT is not a holder, but that the firm could perform as a subcontractor, [DELETED]); AR, Tab K, Declaration from DOJ Director of Procurement Services Staff; AR, Tab N, Procurement Integrity Act Memorandum; MOL, exh. 1, Declaration of CO; DOJ Freedom of Information Act Document Production, Apr. 18, 2022, exh. 1-7. In addition, with regard to the anticipated procurement for the agency's long-term requirement, based on the

DOJ is relying on an exception to the competition requirements applicable to FSS acquisitions (namely, that the bridge order to NTT is a “logical follow-on” from a prior order) the agency’s actions under challenge necessarily concern the placement of an order under the FSS program. See FAR 8.405-1(d)(1) (explaining that an order (not requiring a statement of work) should be competed amongst the appropriate schedule holders, unless an agency can justify limiting competition in accordance with FAR section 8.405-6); FAR 8.405-2(c)(3)(i) (outlining the similar procedures where the underlying services do require a statement of work).

Accordingly, if the agency’s decision to limit sources for the placement of the order were to be deemed improper, the requirement for the order would not fall outside the FSS program, but, to the contrary, would follow the FSS competition rules outlined in FAR section 8.405-1(d)(1), which require competition among applicable schedule contract holders. Thus, the presumptive beneficiaries of such a challenge are the FSS contractors that would be eligible to compete for such an order. Intellectix, however, has not demonstrated, or otherwise argued, that it holds the requisite FSS contract, or any FSS contract. Therefore, its economic interest is too remote for the firm to be considered an interested party to challenge the agency’s task order award. See *CareFusion Solutions, LLC*, B-418736.2, Oct. 22, 2020, 2020 CPD ¶ 330 at 3 (“[g]iven that the Army decided to procure its requirement through the FSS contract, and it is undisputed that CareFusion is not an FSS contract-holder, CareFusion is not an interested party to protest” the issuance of a delivery order); see also *Sales Resource Consultants, Inc.*, B-284943, B-284943.2, Jun. 9, 2000, 2000 CPD ¶ 102 at 4 (concluding protester is not an interested party to challenge agency’s decision to procure name-brand software from specific FSS vendors where the agency chose the FSS program to satisfy its requirement and where protester does not have an FSS contract).

Indeed, the protester does not challenge the agency’s ability to obtain its requirements through the supply schedule, as it has done since 2015, nor does Intellectix argue that the underlying tasks to be completed under the order are outside of NTT’s schedule contract. Instead, the protester argues that it has a sufficient economic interest because it would have prepared a proposal had the “Agency properly competed the subject requirement.” Comments at 53. However, as noted above, the FSS ordering procedures satisfy the requirements for full and open competition. See FAR 8.404(a); FAR 6.102(d)(3). Thus, DOJ’s decision to limit the pool of competition to vendors holding FSS contracts is legally permissible and otherwise satisfies the competition requirements, even where an individual protester (like Intellectix) may be unable to compete because it does not hold an FSS contract. See *FitNet Purchasing Alliance*, B-310031, Sept. 21, 2007, 2007 CPD ¶ 181 at 3. The mere fact that Intellectix would submit a proposal if DOJ decided to conduct an unrestricted competition is of no moment because DOJ chose to obtain its requirement under the FSS program.

information in the record, DOJ has selected a contracting vehicle that does not allow NTT to submit an offer to the government. On its face, this action is inconsistent with an alleged effort to steer the agency’s requirements to NTT.

Accordingly, because the record does not support a finding that Intellectix holds the requisite FSS contract, it is not an interested party to challenge the agency's issuance of an order to NTT.

The protest is dismissed.

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