U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: FEI.Com

File: B-420815.2

Date: June 21, 2023

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Anthony E. Marrone, Esq., and Jennifer Yang, Esq., Department of Health and Human Services, for the agency.
Michael P. Price, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the establishment of a blanket purchase agreement under a solicitation set aside for small businesses is dismissed because the protester is not an interested party where the protester is not a small business concern and did not submit a quotation in response to the solicitation. Rather, the protester was a prospective subcontractor to an unsuccessful vendor that chose not to protest the agency's selection decision.

DECISION

FEI.com, Inc. (FEI), of Columbia, Maryland, protests the agency's actions in relation to the establishment of a blanket purchase agreement (BPA) with Ellumen, Inc., of Silver Spring, Maryland, under request for quotations (RFQ) No. 75A50222Q00001. The Department of Health and Human Services (HHS) issued the RFQ for technical services involving the software capabilities of the National Disaster Medical System. The protester contends that the agency unreasonably modified the scope of an already-existing BPA by allowing Ellumen to quote open market labor categories that were not included in the awardee's underlying General Services Administration (GSA) multiple award schedule (MAS) contract, and by increasing the maximum BPA price ceiling established by the RFQ by over $1 million.

We dismiss the protest.

BACKGROUND

On May 4, 2022, HHS issued the RFQ under the procedures of Federal Acquisition Regulation (FAR) subpart 8.4 to holders of GSA MAS contracts with special item number 54151HEAL. Req. for Dismissal, exh. 2, RFQ amend. 2 at 1.[1] The agency sought quotations from vendors to provide maintenance, enhancement, and modernization of core software capabilities and related capabilities of the National Disaster Medical System. *Id*. at 2. The RFQ was set aside for small businesses and contemplated the establishment of a single award BPA. *Id*. at 1-2. The RFQ advised that the maximum value of orders to be placed under the BPA "may be $12,000,000.00 over the duration of sixty (60) months/five (5) years[]." *Id*. at 3.

The RFQ further provided that vendors were to submit a pricing schedule that included proposed fixed hourly rates and discounts for the labor categories required by the RFQ. *Id*. at 54. The RFQ required vendors to propose labor categories from their GSA MAS contracts, and, to the extent their MAS labor categories contained different position titles than those required by the RFQ, permitted vendors to substitute their MAS labor categories as appropriate. *Id*. at 53. The RFQ also expressly advised that the agency would "not evaluate an open market item or service that is not available on the [vendor's MAS contract]." *Id*.

The RFQ informed vendors that HHS intended to select the vendor for the BPA on a best-value tradeoff basis, considering price and certain non-price factors.[2] *Id*. at 56.

HHS received quotations from two vendors, Index Analytics, LLC, and Ellumen. Because it was not a small business, and therefore not eligible to compete under the set-aside solicitation, FEI teamed with Index Analytics as a proposed subcontractor.[3] Protest at 4. After evaluating quotations, the agency established the BPA with Ellumen on or around June 3, 2022. *Id*.

On June 13, Index Analytics filed a protest with our Office. In the protest, Index Analytics alleged that Ellumen's quotation should have been found ineligible for award because Ellumen had either proposed labor categories that failed to meet the

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[1] The RFQ was amended and reissued on June 2. Req. for Dismissal, exh. 2, RFQ amend. 2 at 1. All references to the RFQ in this decision refer to the RFQ as amended and reissued on June 2, unless otherwise noted.

[2] While not relevant to the protest, the non-price evaluation factors included, in decreasing order of importance: (1) technical capability and approach; (2) management approach and capabilities; (3) staffing and recruitment capabilities; and (4) past performance. RFQ at 57. When combined, the non-price factors were significantly more important than the price factor. *Id*.

[3] FEI also represents that it is the incumbent contractor providing similar services to HHS, and further states that it has been the incumbent for the past 10 years. Protest at 3.

requirements of the RFQ, or proposed open market labor categories outside the scope of Ellumen's underlying GSA MAS contract. *Id*. On June 29, HHS informed our Office it was taking corrective action in response to the protest. *See Index Analytics, LLC*, B-420815, July 1, 2022 (unpublished decision). Specifically, the agency stated it intended to "re-evaluate all quotations to ensure compliance with the terms of the [s]olicitation" and "issue a new source selection award decision." *Id*. at 1. The agency also stated that it "shall maintain the current stay of performance and will not issue any orders/calls during the [a]gency's implementation of the aforementioned corrective action." *Id.* Our Office subsequently dismissed the protest as academic on July 1. *Id*. at 2.

On March 2, 2023, HHS provided to Index Analytics a "notice of award" to Ellumen. Protest at 5; Protest, exh. B at 1. After Index Analytics communicated this information to FEI, the protester filed the instant protest with our Office on March 13.

DISCUSSION

FEI contends that its protest is a challenge to HHS's unreasonable modification of the terms of Ellumen's previously established BPA. Protest at 5-6. In this regard, the protester argues that the agency's corrective action resulted in an improper modification of the BPA previously established with Ellumen after the initial evaluation to allow for the agency to order open market items under Ellumen's BPA. The protester maintains that by making this modification, the agency improperly waived the RFQ's prohibition on the inclusion of open market items in the BPA. FEI's sole basis for support of its allegation is the protester's speculation that Ellumen must have quoted open market labor categories to meet the requirements of the RFQ.[4] Protest at 8. The protester also argues that the agency waived the BPA maximum value of $12 million set in the RFQ because the modification indicated that the value of the BPA was now over $13 million. Protest at 8-9; *see* Protest exh. A, USAspending.gov Excerpt.

HHS requests dismissal of the protest, arguing that FEI is not an interested party to raise its objections for multiple reasons. Req. for Dismissal at 2. First, the agency argues that the protester is in fact challenging the establishment of a new BPA after the agency's corrective action, and not a modification to the terms of the existing BPA. *Id*. at 3. The agency contends that the protester's framing of the protest as a challenge to the modification of the BPA is merely an attempt to "bypass" our Office's regulations concerning interested party status. *Id*. Using this characterization of the protest, the agency argues that the protester is not an interested party to challenge the evaluation of quotations and establishment of the BPA with Ellumen because the protester is not a small business, and additionally because the protester did not submit a quotation in

[4] FEI's challenge essentially restates the argument raised by Index Analytics in the first protest that Ellumen's quotation should have been found ineligible for award because Ellumen had either proposed labor categories that failed to meet the requirements of the RFQ, or proposed open market labor categories outside the scope of Ellumen's underlying GSA MAS contract.

response to the solicitation, but was instead merely a prospective subcontractor. *Id*. In this regard, the agency notes that the RFQ was set aside for small businesses, and maintains that Index Analytics, FEI's small business prime contractor for this procurement, would have needed to file the protest because Index Analytics, and not FEI, would be in line for award if the protest challenges against Ellumen proved to be meritorious. *Id*. at 3, 5.

FEI argues that it is an interested party because it is protesting that HHS unreasonably modified the terms of Ellumen's existing BPA. Protest at 1; Resp. to Req. for Dismissal at 3. The protester maintains that it is not protesting the agency's establishment of a BPA--as the BPA at issue here was already established in June 2022 and was not terminated during the pendency of the agency's corrective action--but rather, that it is protesting an unreasonable modification that expanded the scope of the initial BPA or otherwise relaxed the initial BPA's requirements. Resp. to Req. for Dismissal at 3; *see* Protest at 5-6. In this regard, the protester asserts that the agency must have modified the existing BPA to waive the prohibition on proposing labor categories outside the scope of Ellumen's existing MAS contract, and to raise the maximum price ceiling from $12 million to over $13 million. Resp. to Req. for Dismissal at 2. In support of this argument, the protester partly relies on data obtained from USAspending.gov,[5] which shows a modification to the initially established BPA was made on March 1, 2023, that increased the value of the BPA to over $13 million. Protest, exh. A, USAspending.gov Excerpt. FEI thus maintains that the agency's arguments for dismissal are flawed, and should therefore be denied, because they are premised on the incorrect argument that the protester is challenging the evaluation of quotations or establishment of the BPA. Resp. to Req. for Dismissal at 3-4.

For the reasons explained below, we find FEI is not an interested party to pursue the protest. We conclude that FEI's protest amounts to a challenge that the agency's decision after corrective action to again select Ellumen for the BPA was inconsistent with the terms of the solicitation relating to the required labor categories and maximum price ceiling. As a proposed subcontractor and non-small business, the protester does not have the direct economic interest in the procurement required by our Bid Protest Regulations.

Under the bid protest provisions of the Competition in Contracting Act (CICA) of 1984, 31 U.S.C. § 3551-3557, only an "interested party" may protest a federal procurement. *Island Pyrochemical Industries*, B-418994, Sept. 29, 2020, 2020 CPD ¶ 308 at 6. 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. 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 issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. *RELM Wireless Corp.*,

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[5] USAspending.gov is "the official source for spending data for the U.S. Government," and as relevant here, provides information about the award of contracts over $25,000. USAspending website, www.usaspending.gov/about (last visited June 14, 2023).

B-405358, Oct. 7, 2011, 2011 CPD ¶ 211 at 2. Our Office has generally found that a prospective subcontractor or supplier lacks a "direct" economic interest in the award of a contract, because it is not a prospective or actual offeror. *Allied Tube & Conduit*, B-252371, Apr. 27, 1993, 93-1 CPD ¶ 345 at 2; *Team Wendy, LLC*, B-417700.2, Oct. 16, 2019, 2019 CPD ¶ 361 at 7. Further, our Office has also generally found that a large business is not an interested party to challenge an award under a solicitation set aside for small businesses. *Synchrogenix Information Strategies, LLC*, B-414068.6, Dec. 22, 2017, 2018 CPD ¶ 8 at 3.

Based on our review of the record, we disagree with the protester's characterization of this protest as a challenge to an unreasonable modification of the terms of the underlying BPA, and instead find the protester's arguments amount to a challenge to the reevaluation and the agency's decision to again select Ellumen for the BPA. As explained above, HHS's notice of corrective action from the initial June 2022 protest unequivocally stated its intent to "re-evaluate all quotations to ensure compliance with the terms of the [s]olicitation" and to "issue a new source selection award decision." *Index Analytics*, *supra* at 1. The agency also indicated it would "maintain the current stay of performance and [] not issue any orders/calls" during its implementation of the corrective action. *Id*. The agency did not cancel the initial BPA established with Ellumen following the filing of the initial protest.[6] *See* 31 U.S.C. § 3553(d)(3).

Following its implementation of corrective action, HHS advised that its reevaluation of quotations and "best value analysis" resulted in selecting Ellumen again for the BPA. Protest, exh. B, Award Notice at 1. In a letter to Index Analytics sent on March 2, 2023, the agency stated that "[t]he award was made" to Ellumen and identified the amount of the BPA as $13,342,320. *Id*. This BPA amount matches the amount identified on the USAspending.gov website listing the March 1 modification to Ellumen's BPA. The form of the agency's decision to select Ellumen again--lifting the stay of performance on the previously established BPA and increasing the BPA's maximum value--does not alter the fact that the agency's action here constitutes the establishment of a BPA after corrective action. The protest is thus properly viewed as challenging the establishment of a BPA with Ellumen in a manner that was inconsistent with the ground rules for the competition. The protest is based on the assertion that Ellumen's labor categories are outside the scope of its existing MAS contract, the very same predicate for the evaluation argument in the initial protest filed by Index Analytics, and that Ellumen's BPA exceeded the maximum price ceiling price established by the terms of the solicitation. Both of these issues present straightforward challenges to the agency's evaluation and source selection decision under the terms of the solicitation.

Because FEI is protesting HHS's establishment of a BPA with Ellumen after corrective action, we find that FEI is not an interested party to pursue the protest. As stated above, the RFQ was set aside for small businesses. RFQ at 1. The protester does not

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[6] To the extent the protester believes the agency was required to cancel or terminate the BPA established with Ellumen following the decision to take corrective action in response to the initial protest in June 2022, this is not required by CICA.

contest the fact that it is not a small business, and concedes that it was precluded from submitting a quotation as a prime contractor in response to the solicitation for this reason. Resp. to Req. for Dismissal at 2. We therefore find no basis to depart from our general rule that a large business is not an interested party to challenge an award under a solicitation set aside for small businesses. *Synchrogenix Information Strategies*, *supra* at 3.

In a similar vein, the protester was a prospective subcontractor of Index Analytics for this procurement. Protest at 2. Therefore, because the protester was not an actual offeror or vendor, the protester is also not an interested party to pursue this protest. *See Allied Tube & Conduit*, *supra*. The protester cannot demonstrate it meets the definition of "interested party" under our regulations, that is, demonstrate that it was an actual or prospective offeror or vendor with the requisite direct economic interest in the procurement to pursue its challenges with our Office to the evaluation of quotations and establishment of the BPA.[7]

Further, to the extent FEI asserts it is an interested party based on the nature of the relief it has requested, that is, that HHS must reissue the solicitation on the open market and without any set-aside restrictions, we disagree. The protester has not demonstrated why the agency would be required to reissue the solicitation in this manner. The agency chose to conduct this procurement pursuant to the procedures of FAR subpart 8.4 and to set aside the solicitation for small business concerns. The FAR provides that an agency may, in its discretion, set aside orders or BPAs under this subpart for any of the small business concerns identified at FAR 19.000(a)(3). FAR 8.405-5(a)(1); *InfoReliance Corp.*, B-413298, Sept. 19, 2016, 2016 CPD ¶ 263 at 3. The protester, who as previously mentioned was not a small business concern and did not submit a quotation as a prime contractor, bases its request for relief and claim that the agency would have to reissue the solicitation on the open market on speculation that Ellumen was ineligible for award and that Index Analytics would be the

[7] Our Office notes that nothing prevented Index Analytics, a small business vendor who actually submitted a quotation as a prime contractor, from filing a protest with our Office challenging the agency's reevaluation of quotations and establishment of a BPA with Ellumen.

only other vendor that would compete for the BPA if the solicitation were to be set aside again. Because FEI cannot show that the agency would be unable to again set aside the solicitation, the nature of its request for relief does not make it an interested party.[8]

The protest is dismissed.

Edda Emmanuelli Perez
General Counsel

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[8] Even if FEI is correct that Ellumen utilized open market labor categories that required an increase in the maximum BPA value, FEI has not shown that the agency would be prohibited from reissuing the solicitation as a set-aside with an increased maximum value and an allowance for open market labor categories.