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Decision

Matter of: Aegis Defense Services, LLC

File: B-412755

Date: March 25, 2016

J. Scott Hommer, III, Esq., Keir X. Bancroft, Esq., Randall K. Miller, Esq., Nathaniel S. Canfield, Esq., and Michael T. Francel, Esq., Venable LLP, for the protester. Thomas G. Ward, Esq., C. Bryan Wilson, Esq., Lucas E. Beirne, Esq., and Shaun P. Mahaffy, Esq., Williams & Connolly, LLP; William K. Walker, Esq., Walker Reausaw; James H. Lister, Esq., Zacharia Olson, Esq., and Adam W. Cook, Esq., Birch Horton Bittner & Cherot; and Daniel S. Ward, Esq., Ward & Ward, PLLC, for the intervenor, Chenega-Patriot Group, LLC.

Kathleen D. Martin, Esq., Department of State, for the agency.

Elizabeth Witwer, Esq., and Jennifer Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging award under a multiple award indefinite-delivery, indefinite-quantity contract is dismissed where the protester is also an awardee and has not established that it is an interested party to protest.

DECISION

Aegis Defense Services, LLC (Aegis), of McLean, Virginia, protests the award of an indefinite-delivery, indefinite-quantity (IDIQ) contract to Chenega-Patriot Group, LLC (CPG), of Chantilly, Virginia, under request for proposals (RFP) No. SAQMMA-15-R-0282, which was issued by the United States Department of State for protective security services to support the agency's global protective and security mission. Aegis alleges that the agency unreasonably awarded the contract to CPG after inadequately or incompletely investigating alleged violations of the Procurement Integrity Act (PIA) on the part of CPG.

We dismiss the protest.

The RFP, issued on May 15, 2015, contemplated the award of multiple IDIQ contracts, referred to as the Worldwide Protective Services (WPS) 2 contracts. RFP § B.2. Both Aegis and CPG were among the seven offerors that received an

award of a WPS 2 IDIQ contract. Protest at 2; Contracting Officer's Statement, Feb. 24, 2016, at 4. In its protest, Aegis alleges that CPG improperly used Aegis's confidential, proprietary and trade secret information to secure an award. Protest at 2-3. Specifically, Aegis alleges that one of Aegis's former employees misappropriated Aegis's information and used that information to aid CPG in the development of its proposal in response to the WPS 2 RFP. Id.

On June 26, Aegis notified the contracting officer of CPG's potential violation of the PIA and requested that the agency investigate the matter and take necessary remedial action. Protest at 6; Contracting Officer's Statement at 5. The contracting officer represents that he conducted an investigation into Aegis's allegations and concluded that "there is no basis [to] determine a PIA violation has occurred." Contracting Officer's Statement at 6, 9. On February 18, 2016, Aegis filed the subject protest challenging the sufficiency of the agency's investigation.

On February 24, the agency requested dismissal of the protest, alleging that Aegis had failed to assert or demonstrate that it was competitively harmed, as required to support a challenge to an award based upon an allegation of a PIA violation. Agency Req. for Dismissal, Feb. 24, 2016. On February 25, our Office declined to dismiss the protest on the grounds asserted by the agency, but asked the protester to address whether, as an awardee under a multiple-award IDIQ contract, it possesses the requisite direct economic interest to pursue a protest against an award to another contractor.

Before Aegis could respond to our inquiry, however, CPG filed a request for dismissal based upon four independent grounds: (1) Aegis, as an awardee, is not an interested party; (2) Aegis's complaints are the subject of ongoing litigation in a court of competent jurisdiction; (3) Aegis's complaints have already been decided on the merits by a court of competent jurisdiction; and (4) Aegis's protest is untimely. CPG Req. for Dismissal, Feb. 29, 2016.

On March 4, Aegis filed a consolidated response to our inquiry and to CPG's request for dismissal. CPG filed a reply on March 7, and Aegis and the agency filed replies on March 8.¹ We have reviewed the parties' submissions and, for the reasons below, we dismiss the protest.

¹ In its reply, the agency indicated that it concurred with CPG's request for dismissal. Agency Reply, Mar. 8, 2016, at 1.

DISCUSSION

Aegis Lacks Standing to Challenge the WPS 2 IDIQ Contract

Aegis lacks standing to bring a bid protest because, as an awardee, it is not an interested party and any harm alleged is conjectural or hypothetical. Under the Competition in Contracting Act of 1984 (CICA), which governs the bid protest jurisdiction of our Office, only an “interested party” may protest a federal procurement. 31 U.S.C. § 3551(1); Banknote Corp. of Am., Inc. v. United States, 365 F.3d 1345, 1351-52 (Fed. Cir. 2004); Nat’l Air Cargo Grp., Inc., B-411830.2, Mar. 9, 2016, 2016 CPD ¶ __ at 4. CICA defines an interested party as “an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract[.]”² 31 U.S.C. § 3551(2)(A). Our Bid Protest Regulations employ the same definition. 4 C.F.R. § 21.0(a)(1). Accordingly, to meet the interested party standard under CICA and our Regulations, a protester must (a) be an actual or prospective bidder or offeror, and (b) demonstrate that it possesses a direct economic interest in the contract award. Aegis fails on both counts.

First, Aegis, as an awardee, by definition, is not an actual or prospective offeror. Although prior decisions of our Office have relied primarily on an awardee’s lack of direct economic interest to dismiss similar protests, see e.g., Nat’l Air Cargo Grp., Inc., supra; Recon Optical, Inc.; Lockheed-Martin Corp., Fairchild Sys., B-272239, B-272239.2, July 17, 1996, 96-2 CPD ¶ 21, a protester’s status as an awardee precludes its interested party status irrespective of any alleged economic interest.³

² Our decision here does not address the meaning of the term “interested party” as it pertains to protests of the conversion of functions performed by Federal employees to private sector performance. See 31 U.S.C. § 3551(1)(E), (2)(B); See also 4 C.F.R. § 21.0(a)(2).

³ Although our Office is not bound by decisions of the United States Court of Federal Claims, we note that the court has developed an extensive body of precedent reaching a similar conclusion when construing the term “interested party.” See e.g., Kellogg Brown & Root Servs. v. United States, 117 Fed. Cl. 764, 768 (2014) (citing “a lengthening line of mostly persuasive precedents holding that contract awardees may not challenge agency decisions regarding their contracts by bringing bid protests.”) (citations omitted); Trailboss Enters., Inc. v. United States, 111 Fed. Cl. 338, 340 (2013) (“Where the plaintiff is the awardee of the contract, however, it no longer has standing under [28 U.S.C. § 1491(b)(1)] as an interested party for the purpose of challenging the terms of the award.”); Outdoor Venture Corp. v. United States, 100 Fed. Cl. 146, 152 (2011) (“Once a bidder has received a contract, it is no longer an actual or prospective bidder or offeror with regard to the particular procurement. Instead, the bidder has become an awardee, who is not an interested party for purposes of 28 U.S.C. § 1491(b)(1) and therefore lacks standing (continued...)”).

Thus, contrary to Aegis's contentions that no blanket rule applies to bar an awardee from pursuing a bid protest, see Aegis Response, Mar. 4, 2016, at 5 (citing Recon Optical, Inc., supra),⁴ we find that the statutory definition of an interested party expressly bars protests where the protester is the awardee of the challenged contract.⁵ Accordingly, Aegis's status as an awardee is alone sufficient to bar its claims.

Second, Aegis fails to establish that it satisfies the second prong of the interested party standard, i.e., that it possesses a direct economic interest in the contract award. When a solicitation contemplates multiple awards, to constitute a

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to bring a bid protest to protect its award.”) (citations omitted); ABF Freight Sys., Inc. v. United States, 55 Fed. Cl. 392, 397 (2003) (“Because plaintiffs . . . received contract awards under the solicitation complained of, they are not disappointed bidders and do not have standing to assert this protest.”). Although these cases interpret the term “interested party” as it appears in the Administrative Dispute Resolution Act of 1996 (ADRA), Pub. L. No. 104-320, codified at 28 U.S.C. § 1491(b)(1), the United States Court of Appeals for the Federal Circuit has held that, because that statute does not define the term, the Court will “construe[] the term ‘interested party’ in accordance with the CICA definition[.]” Banknote Corp. of Am., Inc., supra, at 1351-52. The Court also held that, after reviewing the legislative history of ADRA, “we conclude that Congress intended standing under the ADRA to be limited to disappointed bidders.” Id. at 1351 (citing AFGE, AFL-CIO v. United States, 258 F.3d 1294, 1301-02 (Fed. Cir. 2001)).

⁴ In Recon Optical, Inc., we alluded to a situation in which an awardee of a multiple award contract might possess the requisite economic interest if (a) the RFP permitted alternative proposals and (b) the awardee's alternate proposal was passed over in favor of an award to another offeror. Recon Optical, Inc., supra, at 3. In this hypothetical situation, however, the protester would pursue its challenge as a disappointed offeror advocating on behalf of its non-successful alternate proposal, not as a contract awardee.

⁵ Our Office has permitted awardees to challenge corrective action that involves the termination or suspension of a contract and the subsequent re-competition of the requirements of that contract. See e.g., American Warehouse Sys., Inc., B-412543, Mar. 1, 2016, 2016 CPD ¶ ___. In these circumstances, however, an awardee satisfies the first prong of the interested party standard because the challenged corrective action essentially returns the procurement to a pre-award status, i.e., the awardee is now akin to a prospective offeror competing for the contract and is viewed as a former awardee. See Sys. Application & Techs., Inc. v. United States, 691 F.3d 1374, 1381-82 (Fed. Cir. 2012). That is not the case here. Aegis does not allege that the agency has terminated or suspended its contract, or that the agency has attempted to re-compete the requirements of that contract.

cognizable protest, an offeror must credibly allege direct economic harm. Nat'l Air Cargo Grp., Inc., *supra*, at 4-5 (citing Recon Optical, Inc., *supra*, at 3-4).⁶ Here, Aegis alleges that it possesses a direct economic interest in that it will be forced to “compete against Chenega-Patriot for task orders under the WPS 2 contract.” Protest at 1; Aegis Response at 3. Due to the nature of IDIQ contracts, however, an awardee has no legally cognizable expectation of receiving future task orders. Thus, such economic interest in the issuance of future task orders is too speculative.

Here, under the RFP’s terms, IDIQ contract holders are guaranteed a minimum quantity of orders valued at no less than \$10,000 and a fair opportunity to compete for future task orders issued under the IDIQ contract. RFP §§ B.3, G.5 (citing Federal Acquisition Regulation (FAR) § 16.505(b)). In other words, under the instant RFP, the agency is not legally obligated beyond the provision of the guaranteed minimum of \$10,000 and a fair opportunity to be considered for future task orders. Nat'l Air Cargo Grp., Inc., *supra*, at 4 (“IDIQ contract holders are guaranteed a minimum quantity of orders . . . and a fair opportunity to compete for future task orders[.]”). See also Automation Techs., Inc. v. United States, 73 Fed. Cl. 617, 624 (2006) (under an IDIQ contract, an agency is not legally obligated beyond the guaranteed minimum).

Aegis’s protest does not allege that the inclusion of CPG will result in Aegis receiving a volume of orders valued less than its guaranteed minimum. In any event, an agency’s failure to comply with the contractual requirement to provide the guaranteed minimum is a matter of contract administration, which our Office will not review. 4 C.F.R. § 21.5(a). Moreover, to the extent Aegis is alleging that by forcing it to compete with CPG for future task orders, it has been deprived of a fair opportunity to be considered for those task orders, *see* Aegis Response at 6,⁷ such a claim is premature for the reasons discussed in the subsequent section.

⁶ Our decision in Nat'l Air Cargo Grp., Inc., does not stand for the proposition that an awardee under an IDIQ contract meets the statutory definition of an interested party if that awardee can demonstrate direct economic interest. As noted above, a protester must demonstrate that it meets both elements of the statutory definition of interested party.

⁷ Aegis contends there is a “key fact that meaningfully distinguishes this matter” from other cases in which our Office or the Court of Federal Claims considered an awardee’s status as an interested party, namely that none of the other cases involved the misappropriation of an awardee’s trade secrets by another awardee under a multiple award IDIQ contract. Aegis Response at 6. Aegis explains that, even if the other cases stand for the proposition that an awardee under an IDIQ may not rely upon the potential diminution in the value or number of future task orders awarded to it in order to demonstrate interested party status, the situation is “qualitatively different” where an awardee is forced to compete against another

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In light of the fact that Aegis has been awarded a WPS 2 IDIQ contract, it cannot demonstrate a direct economic interest in the contract award to CPG. Indeed, hypothetically, if Aegis's protest were found to be meritorious; and if the agency were to reopen its investigation of the alleged PIA violations; and if CPG's award were terminated on the basis of such alleged violations, Aegis would be unable to obtain an additional stake in the procurement. Rather, it would remain an awardee with the same guaranteed minimum of \$10,000 in task orders and a fair opportunity to compete for future task orders. For this reason, Aegis is not an interested party. The METEC Grp., B-290073, B-290073.2, May 20, 2002, 2002 CPD ¶ 86 at 7 (“A protester is not an interested party to protest an award to another offeror where the protester would not be in line to receive that award were its protest sustained.”); Recon Optical, Inc., supra, at 3-4 (“Since each protester here is a successful offeror under the RFP each would be unable to obtain any additional stake in this procurement even if its protest of the other award were sustained.”).

Aegis's Challenge to Future Task Orders Is Premature

As noted above, Aegis alleges that it possesses an interest in competing for future task orders on a level playing field. Aegis Response at 6. We agree. However, to the extent Aegis contends that the award to CPG deprives it of such an interest or the interest in a fair opportunity to be considered for future task orders, any such contention amounts to a preemptory challenge to a future task order, which is premature at this time. See Automation Techs., Inc. v. United States, supra, at 622-23 (construing a complaint regarding the possibility of not being afforded a fair opportunity for future task orders as a protest to the prospective award of the task order itself). Any challenge to a future task order is not ripe for review until, at a minimum, the agency has issued a solicitation for the task order. Aegis cannot allege that it has been deprived of an interest in competing on a level playing field until an actual competition exists.

Moreover, apart from the issue of ripeness, other factors relevant to our review of a challenge to a future task order include, among other things: whether the expected value of the task order exceeds \$10 million, see 10 U.S.C. § 2304c(e)(1)(B);

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awardee that misappropriated its trade secrets. Id. Thus, Aegis clarifies that it possesses “not only the interest in preventing the diminution in value of its WPS 2 award, but more importantly [an] interest in not having a competitor use the fruits of Aegis's labor against it.” Id. Aegis argues that it has been deprived of an interest in competing on a “level playing field.” Id. Although Aegis does not frame its argument in such terms, we view Aegis to be contending, essentially, that the fair opportunity to compete for future task orders is rendered a “fiction” where a party is forced to compete against an awardee that misappropriated its trade secrets.

whether Aegis is an actual or prospective offeror in the task order competition; whether CPG intends to submit a proposal in response to a task order solicitation; and whether the agency still maintains that CPG is eligible to compete for task orders.⁸ We will not speculate as to such issues at this time. For these reasons, Aegis's challenge to a future, yet-to-be-determined task order competition is premature.

Because we find that Aegis is not an interested party to challenge the WPS 2 IDIQ contract and because we find that any challenge to future task orders is premature, we need not reach a decision with respect to the other grounds for dismissal raised by CPG in its request for dismissal.

We dismiss the protest.

Susan A. Poling
General Counsel

⁸ We also note that Aegis has filed a complaint in the Circuit Court for Fairfax County, Virginia, in which Aegis alleges, among other things, that CPG misappropriated Aegis's trade secrets in connection with the WPS 2 procurement. See Protest, Exh. 3, Aegis Complaint, No. FE-2015-09880, at 16-17. As part of its prayer for relief, Aegis seeks "a finding that Chenega-Patriot is disqualified from participating in the WPS 2 solicitation and [is] enjoined from participating in the WPS 2 solicitation." Id. ¶ E at 18. Both the court's factual findings and any relief granted could potentially affect the agency's conclusions with respect to its PIA investigation, CPG's responsibility, and/or CPG's participation in the WPS 2 procurement.