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Decision

Matter of: Adams and Associates, Inc.

File: B-417534

Date: June 4, 2019

Lindsay Simmons, Esq., Hopewell Darnielle, Esq., Jackson Kelly PLLC, for the protester.
Jose Otero, Esq., Virginia Ackerman, Esq., Department of Labor, for the agency.
Michael Willems, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

GAO lacks jurisdiction to hear protest of task order solicitation where task order's value, exclusive of the value of an option to extend services, is below \$10 million and solicitation does not provide for the pricing or evaluation of the option to extend services.

DECISION

Adams and Associates, Inc. (Adams), of Reno, Nevada, protests its exclusion from competition under a task order request for quotations (TORFQ) issued under the Department of Labor's (DOL) "Contingency" multiple-award, indefinite-delivery, indefinite-quantity (IDIQ) contract for the interim operation of the agency's Atterbury Job Corps Center (JCC) in Edinburg, Indiana. The protester argues that the agency has misconstrued the terms of a provision excluding certain incumbent contractors from competing for task orders under the Contingency IDIQ, or, in the alternative, that the relevant contract provision is contrary to law and regulation.

We dismiss the protest because it is not within our jurisdiction.

BACKGROUND

On November 13, 2017, the agency issued a solicitation for the operation of the Atterbury JCC, and on April 11, 2019, awarded a contract to Management and Training Corporation. Agency Request for Dismissal at 3-4. Adams is the incumbent contractor at the Atterbury JCC, and filed a protest of that award with our Office, which is currently docketed as protest No. B-417120.2. Id. To provide for continued operations during the

pendency of the protest filed by Adams, the agency sought a six-month task order for services at the Atterbury JCC under the Contingency IDIQ. Id.

The TORFQ contemplates the placement of a single task order for a six-month period of performance. Agency Request to Dismiss at 4. The TORFQ provided that price would be evaluated in accordance with a provided pricing schedule, and the pricing schedule directed vendors to price the six-month base period. TORFQ at 3-7. While the TORFQ does not specify any option periods, the Contingency IDIQ contract provides that task orders issued under it will be subject to the contract extension provision at Federal Acquisition Regulation (FAR) clause 52.217-8. Id. at 5,7; Contingency IDIQ Contract at 41. This clause provides an option to extend services for up to six months at the rates specified in the contract, subject to certain exceptions. FAR clause 52.217-8.

The Contingency IDIQ contract also contains a clause providing that, where the operation of a JCC is “being changed (e.g. contract terminations or DOL determination not to exercise a contract option period), the incumbent [contractor] is ineligible for award” of a contingency task order for the relevant JCC. Agency Request for Dismissal at 5; Contingency IDIQ Contract at 50. The agency concluded that, pursuant to this clause, Adams was ineligible to compete under the TORFQ. Agency Request for Dismissal at 5. Adams filed a protest of its exclusion from the competition on May 2, prior to the closing date for receipt of quotations. Id.

As relevant to this decision, the record reflects that the agency prepared an independent government estimate for this procurement, which concluded that the likely value of the task order is approximately [DELETED] million. Id. at 6. The record also reflects that the agency received quotations from eight vendors, including the protester, notwithstanding the fact that the agency did not invite Adams to submit a quote. Id. at 5. Specifically, the protester quoted a price of approximately [DELETED] million, and six of the seven other quotations the agency received were below \$10 million. Id. at 6-7

DISCUSSION

The protester argues that the agency erred in excluding it from the competition because the agency’s reading of the incumbent exclusion clause is unreasonable, and otherwise inconsistent with law and regulation. Protest at 6-9. In response, the agency asks that we dismiss the protest, because, among other reasons, the task order is valued at less than \$10 million, and therefore we have no jurisdiction to consider the protest. Agency Request to Dismiss at 6-8. Protests filed with our Office in connection with the issuance or proposed issuance of a task or delivery order under a multiple-award contract issued by a civilian agency are not authorized except where the order is valued over \$10 million, or where the protester can show that the order increases the scope, period, or maximum value of the contract under which the order is issued. 41 U.S.C. § 4106(f).

Responding to the agency’s request for dismissal, the protester argues that the task order’s value, for purposes of our jurisdiction, should include the value of the six-month option to extend services under FAR clause 52.217-8. Protester’s Comments on

Request to Dismiss at 7-10. Specifically, the protester notes that, while the agency contends the task order should be valued between [DELETED] million and [DELETED] million, the exercise of the six-month option would, by its terms, double the period of performance at the same labor rates. Id. at 1, 7-10. This would effectively double the value of the task order such that it would have a value well in excess of \$10 million. Id. The protester contends that our decisions have previously concluded that where an option's price can be determined, the option should be included in the task order's value for jurisdictional purposes, regardless of whether the solicitation calls for the pricing and evaluation of the option. Id. at 8-9 (citing Serco Inc., B-406061, B-406061.2, Feb. 1, 2012, 2012 CPD ¶ 61 at 6-7)

The protester mischaracterizes our decisions. While our decision in Serco, Inc., concluded that, where a solicitation called for the FAR clause 52.217-8 option to be priced and evaluated, the value of that option was part of the task order's value for jurisdictional purposes, our decision in Edmond Scientific Co. later concluded that, where, as here, a solicitation does not call for such an option to be priced or evaluated, the option's value should not be considered part of the task order's value. Compare Serco Inc., supra, with Edmond Scientific Co., B-410187.2, Dec. 1, 2014, 2014 CPD ¶ 358 at 2-3. Specifically, in Edmond Scientific Co., the protester challenged the terms of a task order solicitation prior to the receipt of proposals, and the agency estimated the value of the task order to be below \$10 million. Edmond Scientific Co., supra, at 3 n.3. As in this case, the protester argued that the agency erred by not including the value of the FAR clause 52.217-8 option in the estimate, and, if that option were included, the value of the task order would have exceeded \$10 million. Id. at 2. We concluded that, because the solicitation did not provide for the pricing or evaluation of the FAR clause 52.217-8 option, it should not be included in the value of the task order. Id. at 2-3.

The protester argues that Edmond Scientific Co. is inapposite, because in the instant case, unlike in Edmond, the agency has already received quotations. Protester's Comments on Request to Dismiss at 10. The protester contends this is significant because the quotation prices for the base period effectively determine the pricing of the FAR clause 52.217-8 option, so the value of the option in this case is not unknown or indefinite. Id. However, Edmond Scientific Co. did not primarily rely on the fact that the value of the FAR clause 52.217-8 option could not be determined.¹ Instead, as noted above, the decision turned on the fact that the solicitation did not provide for the pricing

¹ While our decision in Edmond Scientific Co. does note that the agency had not yet received proposals, and therefore we could not rely on the value of submitted proposals to assess the value of the task order, this fact was relevant to the protester's claim that it expected its own price for the base period of the task order to exceed \$10 million, not in reference to our consideration of the value of the FAR clause 52.217-8 option. See Edmond Scientific Co., supra, at 3 n.3. Here, the protester has already submitted a quotation well below the \$10 million dollar threshold. Agency Request for Dismissal at 6 (citing Att. D, Adams Quotation, at 5).

and evaluation of the option. See Edmond Scientific Co., *supra*, at 2 n.2 (citing Major Contracting Servs., Inc., B-401472, Sept. 14, 2009, 2009 CPD ¶ 170 at 6). This is because we have previously concluded that, where an agency does not evaluate a FAR clause 52.217-8 option's price, the exercise of that option is, in effect, a new procurement that must independently satisfy the requirements for full and open competition. See Major Contracting Servs., Inc., *supra*, at 5-6 (citing FAR § 17.207(f), which requires that, to meet the requirements of full and open competition, an option must have been evaluated as part of the initial competition and be exercisable at an amount specified in or reasonably determinable from the terms of the basic contract).

As noted above, in this case, the solicitation did not call for vendors to price the FAR clause 52.217-8 option, and also did not provide for the evaluation of that option. Agency Request to Dismiss at 5,7; TORFQ at 3-7. Accordingly, the agency would be unable to exercise the FAR clause 52.217-8 option without invoking an exception to full and open competition or conducting an entirely new procurement. For that reason, the potential value of the FAR clause 52.217-8 option is not appropriately considered as part of the value of this task order for jurisdictional purposes. Because the task order's base period of performance is valued below \$10 million,² we lack jurisdiction to hear this protest.

The protest is dismissed.

Thomas H. Armstrong
General Counsel

² We note that the independent government estimate for the base period of performance for this task order is [DELETED] million, and seven of the eight quotations received (including the protester's quotation) were below \$10 million. Agency Request for Dismissal at 5-7. These factors support our conclusion that the value of the task order is below \$10 million. See ICI Servs., Inc., B-409231.2, Apr. 23, 2014, 2014 CPD ¶ 132 at 3 n.3 (considering value of submitted proposals for purposes of determining GAO jurisdiction). Of note, the protester has not argued that the task order base period of performance is appropriately valued in excess of \$10 million, and the protester's own quotation valued the task order at [DELETED] million. Agency Request for Dismissal at 6 (citing Att. D, Adams Quotation, at 5).