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Decision

Matter of: Team Wendy, LLC

File: B-417700.2

Date: October 16, 2019

Susan Warshaw Ebner, Esq., Eric Whytsell, Esq., and Christy Milliken, Esq., Stinson LLP, for the protester.

Lisa L. Baker, Esq., Major Will A. Schmitt, Graeme S. Henderson, Esq., and Ellen B. Clark, Esq., United States Marine Corps, 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 agency improperly requested the National Industries for the Blind add a competitor's product to the AbilityOne procurement list is dismissed because GAO does not review this matter.

2. Protest that the agency is improperly seeking to modify a contract for helmets, by replacing a component of the helmet supplied by the protester with a component supplied by a competing firm, is dismissed where the protester, as a supplier of the component, is not an interested party to allege an out of scope modification of the helmet contract.

DECISION

Team Wendy, LLC, a small business, of Cleveland, Ohio, challenges the actions of the U.S. Marine Corps in connection with contract No. M67854-17-D-1221, which was awarded to Gentex, Inc., of Simpson, Pennsylvania, to provide enhanced combat helmets (ECHs). The protester contends that the agency intends to award an improper sole-source contract to Gentex for a component of the ECH which the protester currently supplies.

We dismiss the protest.

BACKGROUND

Under the provisions of the Javits-Wagner-O'Day (JWOD) Act, the Committee for Purchase from People Who Are Blind or Severely Disabled, now operating as the AbilityOne Commission, has the exclusive authority to establish and maintain a procurement list of supplies and services provided by qualified non-profit agencies for the blind or significantly disabled under the AbilityOne program. 41 U.S.C. §§ 8502(a), 8503(a); 41 C.F.R. § 51-2.8. The JWOD Act states that the procurement list is the mandatory source for federal agencies for any good or service on that list:

An entity of the Federal Government intending to procure a product or service on the procurement list . . . shall procure the product or service from a qualified nonprofit agency for the blind or a qualified nonprofit agency for other severely disabled in accordance with regulations of the Committee and at the price the Committee establishes if the product or service is available within the period required by the entity.

41 U.S.C. § 8504(a). The JWOD Act provides governmentwide authority for noncompetitive acquisitions for specified supplies or services. See Federal Acquisition Regulation (FAR) 6.302-5(b)(2); subpart 8.7.

The National Industries for the Blind (NIB) is designated by the AbilityOne Commission as a central nonprofit agency (CNA) that is charged with performing various functions in furtherance of the JWOD Act. See 41 U.S.C. § 8503(c); see also 41 C.F.R. § 51-3.1(a). For example, NIB is responsible for obtaining information from contracting agencies regarding the suitability of products for the procurement list, recommending to the AbilityOne Commission whether to add a product to that list, and distributing orders from federal agencies for products on the procurement list among NIB's affiliated nonprofit agencies employing the blind. 41 C.F.R. § 51-3.2.

This protest concerns pad inserts, also known as helmet suspension systems, used in the Corps' enhanced combat helmet (ECH). Protest (B-417700.2) at 1. The pad inserts at issue here are on the AbilityOne procurement list. Id. at 4; Amended Decl. of Agency Assistant Portfolio Manager, Sept. 30, 2019, at 1. NIB is therefore the mandatory source of supply for the federal government for these items under the JWOD Act.

The Corps issued request for proposals (RFP) No. M67854-16-R-1122 on September 15, 2016, seeking proposals to provide ECHs. Protest (B-417770.2), Exh. 1, RFP, at 1. The solicitation stated that the ECHs were required to incorporate pad inserts that met the specifications of purchase description GL-PD-09-04N, which was attachment J.1 to the RFP. Id. at 9; id., Attach. J.1, Purchase Description GL-PD-09-04N, at 1. The solicitation also stated that, pursuant to the requirements of the JWOD Act, NIB was the mandatory source for the pad inserts. Id. at 11; id., Attach. J.1, Purchase Description GL-PD-09-04N, at 60. The agency awarded contract No. M67864-17-D-1221 for ECHs to Gentex on May 19, 2017; the contract has a 5-year ordering period. Protest (B-417770.2), Exh. 1, Encl. 4, ECH Award Notice, at 4.

Neither the RFP nor the purchase description identified a specific pad insert that must be provided under the ECH contract. The protester and agency, however, agree that the product provided by NIB on the AbilityOne procurement list that meets the requirements of the purchase description is National Stock Number (NSN) 8470-01-546-9420. See Protester's Response to GAO Questions, Sept. 27, at 1-8; Amended Decl. of Agency Assistant Portfolio Manager, Sept. 30, 2019, at 1. Team Wendy states that it was selected by the AbilityOne Commission in 2006 to provide pad inserts listed on the procurement list under NSN 8470-01-546-9420. Protest (B-417700.2) at 4. Team Wendy and the Corps state that the protester is the only source authorized by the AbilityOne commission to provide this NSN. Id.; Amended Decl. of Agency Assistant Portfolio Manager, Sept. 30, 2019, at 1.

On June 13, 2019, the Corps issued a notice of a proposed sole-source award to Gentex to "support [] an Engineering Change Proposal qualification test." Protest (B-417700), Encl. 1, Sole-Source Notice, June 13, 2019, at 1. The notice explained that the agency intended to award a contract for Gentex's "Lux Pucks" pad inserts, and stated that the agency would purchase 83 ECHs with Lux Pucks, and 12 additional Lux Pucks. Id. The notice stated that the proposed sole-source award was justified under FAR §§ 6.302-1 and 13.106-1(b) because Gentex "is deemed the only one responsible source and no other supplies or services will satisfy agency requirements," and further stated that a justification and approval would be posted to the FedBizOpps website "no later than 14 days after contract award." Id.

Nine days after the issuance of the notice, Team Wendy filed a protest with our Office (B-417700) challenging the proposed sole-source award. The protester argued that: (1) the proposed award was not justified under the one responsible source provisions of FAR parts 6 and 13; (2) the agency did not engage in adequate market research to support its proposed sole-source award; (3) the proposed award was "an improper attempt to circumvent applicable procurement laws and regulations to replace the mandated helmet suspension system pad and supplier"; and (4) the proposed award was "inconsistent with requirements for purchase through the Ability One program." Protest (B-417700) at 1-2.

On July 1, the Corps advised our Office that it had cancelled the notice of intent, and further stated that it had not awarded a contract "pursuant to the Notice of Intent involving the [Gentex pad inserts]." Agency Request for Dismissal (B-417770), July 1, 2019, at 1. Based on the agency's representations, we dismissed the protest as academic. Team Wendy, LLC, B-417700, July 2, 2019, at 1 (unpublished decision).

Team Wendy states that, based on "ongoing dialogue with representatives of the NIB" it learned on July 10 that the Corps had requested "NIB to work with Gentex to add the Lux Pucks [pad inserts] to the [procurement list]." Protest (B-417700.2) at 9. Team Wendy filed the current protest on July 18.

DISCUSSION

Team Wendy argues that, although the Corps took corrective action in response to the protester's prior challenge to the agency's proposed sole-source award for pad inserts to Gentex, the agency is still attempting to make an improper sole-source award to that firm. The protester raises three primary arguments concerning the Corps' actions: (1) the agency improperly requested that NIB recommend addition of the Gentex pad insert to the procurement list; (2) the agency is attempting to improperly modify the helmet contract's requirements for pad inserts; and (3) the agency's actions constitute a failure to implement the corrective action it committed to undertake in response to Team Wendy's initial protest (B-417700).¹ We conclude that the protester's challenges relating to the AbilityOne program are matters that our Office does not review, and that the protester is not an interested party to challenge alleged changes to the scope of Gentex's contract for ECHs. We also conclude that the protester's argument that the agency has failed to implement its proposed corrective action fails to state a valid basis of protest. For these reasons, we dismiss the protest.

Challenges Regarding the AbilityOne Procurement List

Team Wendy argues that the Corps engaged in improper exchanges with NIB by requesting the addition of Gentex's pad inserts to the procurement list. The protester contends that these exchanges are an improper attempt to procure pad inserts from Gentex on a sole-source basis. Protester's Response to Request for Dismissal, Aug. 6, 2019, at 8-10.

GAO will not consider protests challenging the AbilityOne Commission's determination regarding items to be included on the procurement list, as such determinations are within the exclusive authority vested in the Commission to establish and maintain the list in accordance with the overall purpose of the JWOD Act. See Goodwill Indus. of the Valleys; SourceAmerica, B-415137, Nov. 29, 2017, 2017 CPD ¶ 369 at 5 n.8; Microform Inc., B-246253, Nov. 13, 1991, 91-2 CPD ¶ 460 at 2; Abel Converting, Inc., B-229581, Mar. 4, 1988, 88-1 CPD ¶ 233 at 2-3. In contrast, our Office will address the merits of protests challenging a procuring agency's actions in the context of the JWOD Act and its implementing regulations. For example, we will review whether a procuring agency has met its obligation to procure products from the procurement list or is improperly procuring products that are not on the procurement list. See, e.g., Goodwill Indus. of the Valleys; SourceAmerica, supra; Integrity Nat'l Corp., B-411582, Sept. 1, 2015, 2015 CPD ¶ 278; National Indus. for the Blind, B-409528.20, July 2, 2014, 2014 CPD ¶ 204; Alternative Contracting Enters., LLC; Pierce First Med., B-406265 et al., Mar. 26, 2012, 2012 CPD ¶ 124; OSC Solutions, Inc., B-401498, Sept. 14, 2009, 2009 CPD ¶ 185.

¹ The protester also raises other collateral arguments. Although we do not address every argument, we have reviewed them all and find no basis to conclude that any set forth valid bases of protest or are matters that our Office reviews as part of our bid protest function.

The Corps acknowledges that “[p]rior to the sole-source notification” issued in June 2019, it engaged in “conversations with NIB about adding products to [NSN 8470-01-546-9420].” Agency Request for Dismissal, July 31, 2019, at 2. The agency explains that “[t]he conversation led to [consideration of] the Gentex Lux Pucks [pad inserts].” Id. The agency also states that “[f]ollowing the corrective action” in response to Team Wendy’s initial protest (B-417700), the Corps “continued the process it had already started and notified NIB that it [was] still interested in having the ability to procure the Gentex pads from [the procurement list].” Id. Despite these exchanges, the Corps states that it “took no other actions vis-à-vis these Gentex pads and does not currently have any procurement actions either in place or anticipated other than the existing ECH contract that contains the NIB [procurement list] pads.” Id. at 3.

Although the agency states that its exchanges with NIB concern NSN 8470-01-546-9420 and the agency’s request to add Gentex as an additional source on the procurement list, the protester contends that the agency is seeking to add the Gentex pad inserts as a source for a different NSN. The protester argues the Corps seeks to obtain Gentex pad inserts to “satisfy materially different requirements” than the pad inserts provided by Team Wendy under NSN 8470-01-546-9420.² Protest (B-417700.2) at 1. Although the protester does not specifically identify which features of the Gentex pad inserts would be “materially different,” the protester contends that the agency’s prior attempt to issue a sole-source award for those pad inserts supports the inference that the Gentex products do not meet the same specifications as Team Wendy’s pad inserts. See id. at 18.

A decision by NIB to propose a Gentex pad insert for addition to the procurement list under NSN 8470-01-546-9420, or to add the inserts to the list under a different NSN (e.g., one that meets different specifications than NSN 8470-01-546-9420), is not a matter our Office will review. See Goodwill Indus. of the Valleys; SourceAmerica, supra; Microform, Inc., supra; Abel Converting, Inc., supra. Similarly, a decision by the AbilityOne Commission to accept a recommendation by NIB regarding the addition of a product to the procurement list is not a matter our Office will review. See id. Thus, regardless of the Corps’ reason for requesting that NIB recommend the addition of Gentex’s pad inserts to the procurement list, and regardless of whether the Corps is requesting that NIB consider Gentex’s pad inserts for NSN 8470-01-546-9420 or a different NSN, these actions are not matters that our Office will review as they are matters committed to the discretion to the AbilityOne Commission and its designated CNAs.

² Team Wendy contends that the Corps’ motivation for seeking to purchase Gentex pad inserts is based on inaccurate or misplaced concerns about the quality and efficacy of Team Wendy’s pad inserts. Protest (B-417700) at 7; Decl. of Team Wendy Chief Executive Officer, June 21, 2019, at 9-11. For the reasons discussed, we need not address the protester’s characterization of this matter.

Team Wendy contends that our Office should review this matter because it does not challenge NIB's discretion to propose the addition of items to the procurement list. Protester's Response to Request for Dismissal, Aug. 6, 2019, at 10. Rather, the protester contends that its challenge concerns the agency's request to add the Gentex product to the procurement list, and argues that the Corps "ongoing procurement actions constitute an improper use of the AbilityOne program" to enable the agency to make a sole-source award to Gentex for pad inserts. Id. at 1. The protester further contends that the effect of the agency's request, and NIB's recommendation of the Gentex product, would be a reduction in the number of orders for Team Wendy's pad inserts. Protest (B-417700.2) at 20.

For purposes of determining whether our Office will review a challenge concerning the addition of a product to the AbilityOne procurement list, we see no difference between an agency's request to add a product and the AbilityOne Commission's review of that request. We conclude these matters are either specifically authorized for procuring agencies or committed to the discretion of the AbilityOne Commission under the JWOD Act and its implementing regulations.³ We therefore dismiss this argument.

Challenges to the Scope of the Gentex ECH Contract

Next, Team Wendy argues that the Corps' exchanges with NIB show that the agency intends to improperly modify Gentex's ECH contract with regard to the pad insert requirement. The protester contends that if NIB agrees to recommend the Gentex pad inserts for addition to the procurement list, and if the AbilityOne commission agrees to the addition, these actions will enable the Corps to direct Gentex to provide its own pad inserts for the ECH, rather than the Team Wendy pad inserts. Protest (B-417700.2) at 9. The protester argues that directing Gentex to use its own pad inserts in the ECH, rather than Team Wendy's pad inserts, would constitute an improper modification of the ECH contract because the Gentex pad inserts have different specifications than the protester's. Id. at 9-10.

The Competition in Contracting Act of 1984 requires "full and open" competition in government procurements as obtained through the use of competitive procedures. 10 U.S.C. § 2304(a). Once a contract is awarded our Office will generally not review modifications to that contract because such matters are related to contract administration and are beyond the scope of our bid protest function. Bid Protest Regulations, 4 C.F.R. § 21.5(a); Zodiac of North Am., Inc., B-414260, Mar. 28, 2017, 2017 CPD ¶ 107 at 4. An exception to this rule arises where a protester alleges that a contract modification changes the work from the scope of the original contract, since the

³ Agencies are authorized, and encouraged, to assist the AbilityOne Commission and its CNAs, such as NIB, in identifying products to add to the procurement list. See 41 C.F.R. § 51-5.1(a) ("For items which appear to be suitable to be furnished by nonprofit agencies, the contracting activity should refer the candidate commodities and services to the Committee or a central nonprofit agency.").

work covered by the modification would otherwise be subject to the statutory requirement for competition, absent a valid determination that the work is appropriate for procurement on a sole-source basis. Chase Supply, Inc., B-411528.2, B-411529.2, Dec. 7, 2015, 2015 ¶ 384 at 4. We also consider whether the solicitation for the original contract adequately advised offerors of the potential for the type of changes found in the modification, and thus whether the modification would have materially changed the field of competition. Atlantic Coast Contracting, Inc., B-288969.2, June 21, 2002, 2002 CPD ¶ 104 at 4.

We need not address Team Wendy's allegations regarding a modification of Gentex's contract to provide ECHs because the protester is not an interested party to challenge this matter. 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). A prospective subcontractor or supplier lacks a "direct" interest in the award of a contract, and is therefore not an interested party to file a protest concerning the terms of a solicitation. Allied Tube & Conduit, B-252371, Apr. 27, 1993, 93-1 CPD ¶ 345 at 2; PPG Indus., Inc., B-272126, June 24, 1996, 96-1 CPD ¶ 285 at 3. For these reasons, we conclude that a supplier or subcontractor for a contract is generally not an interested party to file a protest arguing that a modification of the contract is outside the scope of the contract. *See id.* Such firms would only be interested parties if they argue that they would have competed for the award of the prime contract if the solicitation had advised offerors of the potential for the modified requirements. *See id.*; Chase Supply, Inc., *supra*.

Here, Team Wendy is a supplier of pad inserts to NIB, which is in turn the mandatory source of these items under the procurement list.⁴ The competition that resulted in the award of a contract to Gentex, however, was for ECHs--not pad inserts. The protester is not an interested party to challenge a modification of Gentex's ECH contract because it does not allege that, had it known that the agency might modify the contract to include a different kind of a pad insert for the ECH, it would have competed for the award of a

⁴ Our Office requested that Team Wendy explain why it was an interested party in light of the fact that it "was not a bidder on the ECH contract, does not contend that it would have been a bidder for the ECH had it known of the alleged change in scope to the pad requirements, and does not contend that it would compete for the ECH contract if a new competition were conducted that incorporates different pad specifications." GAO Questions for Protester, Aug. 9, 2019, at 2. The protester stated that it was an interested party based on its status as the producer of pad inserts, but did not contend that it would compete for the award of a contract for ECHs. *See* Protester's Response to GAO Questions, Aug. 16, at 10-13.

contract to provide ECHs.⁵ See 4 C.F.R. § 21.0(a)(1); Chase Supply, Inc., supra. We therefore dismiss this argument.⁶

Corrective Action

Finally, Team Wendy argues that the Corps' actions--its exchanges with NIB and alleged attempt to modify Gentex's ECH contract--constitute a failure to implement the corrective action it proposed in connection with the prior protest (B-417700). Protest (B-417700.2) at 11-12. As discussed above, the agency's notice of corrective action stated that it canceled the proposed notice of sole-source award, and that the agency had not awarded a contract to Gentex pursuant to that notice. Agency Request for Dismissal (B-417770), July 1, 2019, at 1. We conclude that this argument fails to state a valid basis of protest.

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557. Our role in resolving bid protests is to ensure that the statutory requirements for full and open competition are met. Cybermedia Techs., Inc., B-405511.3, Sept. 22, 2011, 2011 CPD ¶ 180 at 2. To achieve this end, our Bid Protest Regulations require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. 4 C.F.R. §§ 21.1(c)(4), (f). These requirements contemplate that

⁵ Team Wendy contends it would be a "prospective bidder or offeror for any proper procurement" of pad inserts, and that the agency should procure the pad inserts separately from the ECH. Protest (B-417700.2) at 3. The protester knew or should have known, however, that the 2016 solicitation for the ECH contract included the requirement to provide pad inserts, and therefore did not anticipate a separate competition for those items. To the extent the protester contends that the agency should have procured the pad inserts separately from the rest of the ECH, this argument is untimely. 4 C.F.R. § 21.2(a)(1) (a protest based on alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of proposals must be filed by that time).

⁶ Team Wendy also contends that it is an interested party because: (1) in 2005, the Army established a standard for the pad insert used in its advanced combat helmet (ACH) based on the protester's product; (2) the Army's selection of the protester's pad insert was a "competitive" process that compared the products of various firms' products; and (3) the Corps's standards for the ECH adopted the ACH's standard for pad inserts. See Protest (B-417700.2) at 3; Protester's Response to Agency Request for Dismissal (B-417770), July 1, 2019, at 15-16; Protester's Response to GAO Questions, Aug. 16, at 1-3. As discussed above, however, the protester did not compete for the award of the ECH contract. Regardless of the process by which the protester's pad inserts were included in the ECH solicitation, the protester remains a supplier of the pad inserts under Gentex's current contract, rather than a prospective offeror for the ECHs.

protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. Midwest Tube Fabricators, Inc., B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

Team Wendy's prior protest (B-417770) and the agency's corrective action related to the June 2019 notice of proposed sole-source award. Team Wendy's current protest does not argue that the agency has awarded or intends to award a sole-source contract based on the cancelled notice of proposed sole-source award. The Corps states that it is not currently procuring pad inserts from Gentex, and there is no active solicitation or notice or intent to award a sole-source contract. Agency Request for Dismissal, July 31, 2019, at 3-4.

To the extent Team Wendy characterizes the Corps' corrective action as prohibiting the agency from taking any actions--procurement related or otherwise--which might jeopardize the protester's standing as the sole supplier of pad inserts to NIB and thereby to the ECH contract, the protester does not establish that the agency's notice of corrective action made such a commitment. The agency's corrective action cancelled the notice of a proposed sole-source award that was challenged by the protester and the agency did not award a contract to Gentex pursuant to that notice. See Protest (B-417700.2) at 11-12. We therefore find that the protester's argument that the agency has failed to implement its corrective action in connection with the prior protest fails to state a valid basis of protest. See 4 C.F.R. § 21.5(f).

The protest is dismissed.

Thomas H. Armstrong
General Counsel