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# Decision

**Matter of:** JSR, Inc.

**File:** B-419110

**Date:** November 2, 2020

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## DIGEST

1. Protest that the suspension and debarment provisions of the Federal Acquisition Regulation (FAR) do not apply to the award of indefinite-delivery, indefinite-quantity (IDIQ) contracts is denied.
  2. Protest that the provisions of FAR 9.405-1, which permit an agency to issue orders under an existing IDIQ contract that are below the minimum ordering guarantee to a suspended contractor, also permit an agency to award a new IDIQ contract to a suspended contractor, is denied where the protester's interpretation is inconsistent with the plain language of the FAR.
  3. Protest that a solicitation for an IDIQ contract is invalid because the minimum guarantee is insufficient to create a binding contract is dismissed as untimely and also dismissed because the protester, a suspended contractor, is not an interested party to challenge the solicitation.
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## DECISION

JSR, Inc., a small business, of Schertz, Texas, protests the decision by the Department of the Air Force to exclude its proposal from the competition conducted under (RFP) No. FA4661-20-R-0001, which was issued for construction and design-build services. JSR argues that the agency improperly excluded its proposal based on its suspension from federal contracting because, the protester contends, the suspension and debarment provisions of the Federal Acquisition Regulation (FAR) do not apply to the award of indefinite-delivery, indefinite-quantity (IDIQ) contracts; the FAR provisions

permit agencies to award new IDIQ contracts to suspended contractors; and the RFP's guaranteed minimum is insufficient to create a binding contract.

We deny in part and dismiss in part the protest.

The Air Force issued the RFP on April 8, 2020, seeking proposals to provide construction and design-build services at Dyess Air Force Base, Texas. Req. for Dismissal, attach. 2, RFP at 1. The RFP anticipates the award of multiple IDIQ contracts. *Id.*

JSR submitted a proposal before the RFP closing date of May 29. Protest at 6. The Air Force evaluated proposals and prepared a source selection decision document (SSDD). Req. for Dismissal, attach. 3, SSDD at 1. On August 27, the contracting officer consulted the System for Award Management (SAM) to determine each offeror's eligibility. *Id.* at 22; Req. for Dismissal at 2. The agency found that JSR had been suspended from federal contracting by the Small Business Administration (SBA) as of August 20, based on "pending criminal charges" against an individual.<sup>1</sup> Req. for Dismissal, attach. 1, JSR SAM Entry at 3.

The Air Force notified JSR on August 28 that its proposal was excluded from the competition based on its suspension. Protest, exh. A, Letter from Air Force to JSR, Aug. 28, 2020, at 1. On September 2, JSR requested the Agency reconsider the exclusion. *Id.*, exh. B, Letter from JSR to Air Force, Sept. 2, 2020, at 1. The contracting officer denied JSR's request on September 4. *Id.*, exh. C, Letter from Air Force to JSR, Sept. 4, 2020, at 1. The award decision was signed by the source selection authority on September 4. Req. for Dismissal, exh. 3, SSDD at 25. This protest followed.

## DISCUSSION

JSR challenges the Air Force's exclusion of its proposal from the competition based on three primary arguments: (1) an IDIQ contract is not a contract for purposes of the FAR provisions that prohibit debarred or suspended firms from receiving federal contracts; (2) even if an IDIQ contract is subject to the FAR suspension and debarment provisions, FAR 9.405-1 permits agencies to award IDIQ contracts to debarred or suspended contractors; and (3) the RFP anticipates the award of a contract that lacks binding

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<sup>1</sup> JSR states that the suspension was "based on the alleged actions of a *former* shareholder who the SBA mistakenly believed is still affiliated with JSR." Protest at 6. The protester states that it is currently contesting this matter with SBA. *Id.* Our Office does not review protests that an agency improperly debarred or suspended a contractor from receiving government contracts. *Shinwha Elecs.*, B-290603 *et al.*, Sept. 3, 2002, 2002 CPD ¶ 154 at 4.

consideration, and is therefore “void as a matter of law.”<sup>2</sup> Protest at 2-4. For the reasons discussed below, we find no basis to sustain the protest.<sup>3</sup>

The provisions at FAR subpart 9.4 address the process for debarring or suspending firms from federal contracting. Contractors that are debarred, suspended, or proposed for debarment are listed in SAM as being excluded from federal contracting. FAR 9.404. Debarred or suspended contractors are “excluded from receiving contracts,” and agencies “shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the agency head determines that there is a compelling reason for such action . . . .” *Id.* at 9.405(a). Additionally, as relevant here, contracting officers are required to review exclusion records in SAM “[i]mmediately prior to award . . . to ensure that no award is made to a listed contractor.” *Id.* at 9.405(d).

#### Applicability of FAR subpart 9.4 to IDIQ Contracts

JSR acknowledges that FAR 9.405(a) prohibits agencies from awarding contracts to debarred or suspended contractors. Protest at 2. The protester contends, however, that this provision does not apply to IDIQ contracts because they are not what the protester calls “traditional” contracts. *Id.* at 2, 7. We find no merit to this argument.

The FAR defines a contract as follows:

*Contract* means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative

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<sup>2</sup> JSR also raises other collateral arguments. Although we do not address every argument, we have reviewed them all and find no basis to sustain the protest.

<sup>3</sup> The Air Force requested that our Office dismiss the protest on September 17, arguing that it failed to state valid bases of protest and that the protester was not an interested party to challenge the terms of the solicitation. Req. for Dismissal, at 2-6. JSR responded to the request on September 22. On September 28, we advised the parties via teleconference that we would not dismiss the protest because the challenge to the interpretation of the provisions of FAR subpart 9.4 states valid bases of protest. We also advised that the protest, request for dismissal, and the protester’s response provided a sufficient record for our Office to resolve the protest, and that no additional documents or briefing were required.

agreements covered by 31 U.S.C. 6301, *et seq.* For discussion of various types of contracts, see part 16.

FAR 2.101.

Part 16 of the FAR identifies several types of contracts, including fixed-price contracts (FAR subpart 16.2), cost-reimbursement contracts (FAR subpart 16.3), incentive contracts (FAR subpart 16.4), indefinite-delivery contracts (FAR subpart 16.5), time-and-materials, labor-hour, and letter contracts (FAR subpart 16.6), and agreements (FAR subpart 16.7). As relevant here, an IDIQ contract is a type of indefinite-delivery contract that “provides for an indefinite quantity, within stated limits, of supplies or services during a fixed period.” FAR 16.504(a); see *also* FAR 16.501-2 (an indefinite-quantity contract is a type of indefinite-delivery contract). An IDIQ contract does not obligate the agency to issue any orders to a contractor, aside from a minimum quantity “to ensure that the contract is binding.” *Id.* 16.504(a)(1)&(2).

JSR contends that an IDIQ contract is not “a traditional government ‘contract’ as that term is defined in FAR 2.101.” Protest at 2, 7; Response to Req. for Dismissal at 2-4. Instead, the protester argues that an IDIQ contract is a type of agreement referred to in the government contracts industry as a “hunting license” or a “license[] to compete,” that “does not impose material obligations on the seller to provide services or supplies or the Government to pay for them.” *Id.* at 2; Response to Req. for Dismissal at 3-4. In support of its position, the protester cites legal commentators who observe, as provided by the FAR, that an IDIQ contract could result in a contractor receiving no orders above the guaranteed minimum. *Id.* Based on this characterization of the differences between IDIQ and non-IDIQ contracts, the protester contends that the prohibition in FAR 9.405(a) against awarding a “contract” to a debarred or suspended contractor does not apply to an IDIQ contract because it is not a traditional contract under FAR 2.101. *Id.* at 2, 7.

We find that the plain language of the FAR contradicts JSR’s argument. As a starting point, there is no definition in the FAR of a “traditional” contract, nor is there any express statement excluding IDIQ contracts from the definition of a contract in FAR 2.101. To the contrary, as discussed above, FAR 2.101 refers to FAR part 16 for a “[d]iscussion of various types of contracts.” FAR 2.101. In turn, FAR subpart 16.5 identifies an IDIQ contract as a type of indefinite-delivery contract. FAR 16.504(a), 16.501-2.

To the extent the protester argues that an IDIQ contract is not a contract within the scope of FAR 2.101 because it does not impose “material obligations” on the government or contractor, we find no merit to this argument. The FAR makes clear that an IDIQ contract “must require the Government to order and the contractor to furnish at least a stated minimum quantity of supplies or services.” FAR 16.504(a)(1). Although the agency is not required to issue orders in excess of this guaranteed minimum, the FAR states that this minimum must be “more than a nominal quantity” to “ensure that the contract is binding.” *Id.* 16.504(a)(2).

Finally, the protester cites the Supreme Court's opinion in *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969 (2016) for the proposition that "once an IDIQ [contract] is issued, the material obligations are included in the subsequent contracts issued under the IDIQ [contract]." Protest at 7; Response to Req. for Dismissal at 4. The Court in *Kingdomware* held that the Veterans Benefits, Health Care, and Information Technology Act of 2006 (2006 VA Act), 38 U.S.C. § 8127, requires the Department of Veterans Affairs to follow a "rule of two" set-aside analysis for veteran-owned firms prior to issuing orders under Federal Supply Schedule (FSS) contracts.<sup>4</sup> *Kingdomware*, 136 S. Ct. at 1978.

The Court explained that the issuance of an order under an FSS contract "creates a new contract" that involves "mutually binding obligations: for the contractor, to supply certain goods or services, and for the Government, to pay." *Id.* For this reason, the Court held that an order issued under the FSS was a "contract" for purposes of the rule of two set-aside requirements in the 2006 VA Act. *Id.* JSR argues that the Court's holding that an order issued under the FSS is a contract shows that an FSS or IDIQ contract "does not obligate the contractor [or] the Government in any material way," and is therefore not a contract for purposes of FAR 2.101 or FAR subpart 9.4. Protest at 7; Response to Req. for Dismissal at 3.

The Court's opinion in *Kingdomware* provides no support for the protester's argument. While the Court held that an order issued under an FSS contract is itself a new contract, the court did not conversely hold that an FSS or IDIQ contract is not a contract as defined by FAR 2.101. An IDIQ contract is a binding contract between the government and a contractor, the terms of which define how future legal obligations, *i.e.*, orders, will be entered into between the parties. FAR 16.504(a). The fact that the agency will issue future orders does not mean that an IDIQ contract is not itself a contract that binds the parties to mutual obligations.

In sum, we find no basis to conclude that the definition of a contract in FAR 2.101 excludes IDIQ contracts, or that the debarment and suspension provisions of FAR subpart 9.4 do not apply to IDIQ contracts. We therefore conclude that the Air Force reasonably found JRS's suspension from contracting rendered it ineligible for award of an IDIQ contract.

#### Continuation of Contracts under FAR 9.405-1

Next, JSR argues that agencies are permitted to award IDIQ contracts to debarred or suspended contractors under the provisions of FAR 9.405-1, Continuation of Current Contracts. Protest at 4, 9; Response to Req. for Dismissal at 5-6. The protester contends that the agency failed to consider its authority under this provision to award a contract to JSR. We find no merit to this argument.

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<sup>4</sup> FSS contracts are multiple-award, indefinite-delivery contracts awarded by the General Services Administration. FAR 8.401, 8.402(a).

The provisions of FAR 9.405-1 state that “[n]otwithstanding the debarment, suspension, or proposed debarment of a contractor, agencies may *continue* contracts or subcontracts in existence at the time the contractor was debarred, suspended, or proposed for debarment unless the agency head directs otherwise.” FAR 9.405-1(a) (emphasis added). For these debarred or suspended contractors, however, agencies may not “[p]lace orders exceeding the guaranteed minimum under indefinite quantity contracts” unless the “agency head makes a written determination of the compelling reasons for doing so.” *Id.* at 9.405-1(b), (b)(1). JSR argues that this FAR provision permits agencies to award an IDIQ contract to a debarred or suspended contractor, as long as the agency does not subsequently issue orders against the contract in excess of the minimum order guarantee. Protest at 4, 9; Response to Req. for Dismissal at 5-6.

JSR’s argument simply lacks any support in the text of FAR 9.405-1. This provision addresses the “continuation” of contracts that were “in existence at the time the contractor was debarred, suspended, or proposed for debarment.” FAR 9.405-1(a). With regard to the issuance of orders, nothing in the FAR provision states that agencies may award new contracts, provided they do not issue orders above the guaranteed minimum value. See FAR 9.405-1(b)(1). Such an interpretation would be directly contrary to the provisions of FAR 9.405(a), which prohibit the award of contracts to debarred or suspended firms. On this record, we find no basis to conclude that the agency’s exclusion of the protester from award was unreasonable.

#### Binding Consideration for the IDIQ Contract

Next, JSR argues that the solicitation is invalid because it lacks adequate consideration. We conclude that this argument is untimely, and also that the protester is in any event not an interested party to challenge this matter.

An IDIQ contract must require the government to order, and the contractor to furnish, a stated minimum quantity of supplies or services. FAR 16.504(a)(1). The stated minimum quantity forms the consideration for the contract. See *Willard, Sutherland & Co. v. United States*, 262 U.S. 489, 493 (1923) (holding that a contract without a minimum quantity is unenforceable for “lack of consideration and mutuality”); see also *U.S. Small Business Administration--Indefinite-Delivery Indefinite-Quantity Contract Guaranteed Minimum*, B-321640, Sept. 19, 2011, 2011 CPD ¶ 184 at 3. In order to ensure that an IDIQ contract is binding, the FAR requires that the minimum quantity be more than a nominal quantity; the stated minimum, however, should not “exceed the amount the Government is fairly certain to order.” FAR 16.504(a)(2).

Here, the minimum guarantee for the IDIQ contracts will be \$500, which will be provided as follows: “To cover the initial award requirement of each Indefinite Delivery-Indefinite Quantity (IDIQ) contract per [Air Force FAR supplement] 5316.504(a)(2), the Government will award a minimum guarantee of \$500.00 to all awardees for attending

the post-award briefing.” RFP section L at 1, 9.<sup>5</sup> JSR contends that this guarantee is “nominal” in terms of the value and task to be performed, and therefore does not satisfy the requirement for binding consideration under FAR 16.504(a)(2). Protest at 3, 8; Response to Req. for Dismissal at 5. In the absence of binding consideration, the protester argues that the RFP provides for the award of a contract that will be “void as a matter of law.” *Id.* at 5. The protester therefore argues that the agency should cancel the RFP and issue a new RFP that has an adequate minimum guarantee. Protest at 11.

The Air Force argues that this protest ground is an untimely challenge to the terms of the solicitation because it was not raised prior to the RFP’s May 29 closing date. Req. for Dismissal at 3. Our Bid Protest Regulations require that protests based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals must be filed before that time. 4 C.F.R. § 21.2(a)(1).

JSR did not file its challenge to the terms of the solicitation prior to the closing date, and does not dispute that this argument is untimely. See Response to Req. for Dismissal at 6-7. Instead, the protester requests that our Office consider its untimely protest under the significant issue exception to our timeliness rules. *Id.* Pursuant to 4 C.F.R. § 21.2(c), our Office may consider the merits of an untimely protest where good cause is shown or where the protest raises a significant issue of widespread interest to the procurement community. In order to prevent our timeliness rules from becoming meaningless, however, these exceptions are strictly construed and rarely used. *Vetterra, LLC, B-417991 et al.*, Dec. 29, 2019, 2019 CPD ¶ 15 at 3.

What constitutes a significant issue is decided on a case-by-case basis. *Cyberdata, Techs., Inc.*, B-406692, Aug. 8, 2012, 2012 CPD ¶ 230 at 3. We generally regard a significant issue as one of widespread interest to the procurement community that has not been considered on the merits in a prior decision. *Baldt Inc.*, B-402596.3, June 10, 2010, 2010 CPD ¶ 139 at 2-3.

JSR’s untimely challenge to the terms of the RFP here does not present a significant issue because our Office has already addressed in numerous decisions whether the minimum order guarantee in a solicitation provides adequate consideration under FAR 16.504(a). See *Information Ventures, Inc.*, B-299255, Mar. 19, 2007, 2007 CPD ¶ 80 at 6-7; *CW Gov. Travel, Inc.-Recon.*; *CW Gov. Travel, Inc., et al.*, B-295530.2, July 25, 2005, 2005 CPD ¶ 139 at 8-9; *CW Gov. Travel, Inc.*, B-295530, Mar. 7, 2005, 2005 CPD ¶ 59 at 2-4; *ABF Freight Sys., Inc., et al.*, B-291185, Nov. 8, 2002, 2002 CPD ¶ 201 at 4; *TRS Research*, B-290644, Sept. 13, 2002, 2002 CPD ¶ 159 at 9 n.9; *Carr’s Wild Horse Ctr.*, B-285833, Oct. 3, 2000, 2000 CPD ¶ 210 at 3-4; *Aalco Forwarding, Inc., et al.*, B-277241.15, Mar. 11, 1998, 98-1 CPD ¶ 87 at 6-8; *Sea-Land Serv., Inc.*, B-278404, B-278404.2, Feb. 9, 1998, 98-1 CPD ¶ 47 at 11-13. We therefore find that

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<sup>5</sup> Sections L and M of the RFP were provided at Tab 01b of the consolidated version of the solicitation filed by the agency. Electronic Protest Docketing System No. 15.

the protester's challenge does not present a significant issue for our review under 4 C.F.R. § 21.2(c).

In any event, we also find that JSR is not an interested party to challenge the terms of the solicitation because the protester is not eligible to receive the award. 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). 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. *Advanced Concept Enters., Inc.*, B-410069.3, B-410069.4 Jan. 22, 2015, 2015 CPD ¶ 53 at 2.

JSR is not an interested party to challenge the terms of the solicitation because it is a suspended contractor and would not be eligible to receive the award of a contract, even if its protest were sustained. See *Triton Elec. Enters., Inc.*, B-294221 *et al.*, July 9, 2004, 2004 CPD ¶ 139 at 1; *Space Dynamics Corp.*, B-220168.2, Nov. 29, 1985, 85-2 CPD ¶ 620 at 1. We therefore dismiss the protester's challenge to the adequacy of the RFP's minimum guarantee.

The protest is denied in part and dismissed in part.

Thomas H. Armstrong  
General Counsel