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Decision

Matter of: The Noble Attorney, LLC; American Medical Equipment, Inc.

File: B-419884; B-419884.3; B-419884.4

Date: August 2, 2021

Carol A. Thompson, Esq., Eric S. Montalvo, Esq., and Haley Freking, Esq., The Federal Practice Group, for The Noble Attorney, LLC; and Carol A. Thompson, Esq., The Federal Practice Group, for American Medical Equipment, Inc., the protesters. Natica Chapman Neely, Esq., Department of Veterans Affairs, for the agency. Raymond Richards, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests that the agency unreasonably awarded reprocurement contracts for a quantity of goods greater than the undelivered quantity under terminated contracts are dismissed where the agency has provided evidence showing that the challenged awards were not reprocurements, but rather, were awards made under the same multiple-award solicitation which resulted in awards to the protesting firms.

DECISION

The Noble Attorney, LLC (Noble) of Miami Beach, Florida, and American Medical Equipment, Inc. (American Medical) of Memphis, Tennessee, protest the award of contracts to Atlantic Trading, LLC (Atlantic) of Austin, Texas, and Bizcon LLC of Council Bluffs, Iowa, under request for quotations (RFQ) No. 36C24921Q0115, issued by the Department of Veterans Affairs (VA), for the provision of nitrile examination gloves. The protesters argue that the awards to Atlantic and Bizcon were reprocurements that violated applicable regulations.

We dismiss the protests.

BACKGROUND

The RFQ was issued on February 9, 2021, under the commercial item procedures of Federal Acquisition Regulation (FAR) part 12, and the simplified acquisition procedures

of FAR part 13. Req. for Dismissal,¹ ex. 2, RFQ at 1, 40-41.² The RFQ contemplated the award of either one fixed-price contract or multiple fixed-price contracts. *Id.* at 39. Award was to be made to the vendor or vendors representing the best value to the government considering technical capability, delivery schedule, and price. *Id.* at 40-41. Quotations were due by February 16. *Id.* at 3.

The agency received 78 quotations in response to the RFQ. Req. for Dismissal, ex. 1, Contracting Officer Statement (COS) at ¶ 6.³ On a staggered timeline, the agency made a total of nine awards under the RFQ. *Id.* Relevant to the instant protests, on April 20, the agency awarded a contract to American Medical for the provision of 10 million gloves; on April 23, the agency awarded a contract to Noble for the provision of 25 million gloves; on May 26, the agency awarded a contract to Atlantic for the provision of 50 million gloves; and on June 1, the agency awarded a contract to Bizcon for the provision of 50 million gloves.⁴ *Id.* ¶¶ 6(e)-(f), (h)-(i).

On May 19, the agency received the first and only shipment of gloves from Noble. *Id.* ¶ 8(a). Upon inspection, the agency determined that Noble's gloves did not conform to the requirements of Noble's contract. *Id.* The contracting officer issued a cure notice on May 20, to which Noble responded the same day. *Id.* ¶ 8(b). Noble's contract was terminated for default on May 25. *Id.* ¶ 8(c).

On June 8, the agency terminated American Medical's contract for default. 3rd COS at ¶ (e)(i). The agency explains that American Medical failed to make delivery by the

¹ Noble filed two separate protests with our Office; one challenging the award to Atlantic (B-419884), and the other challenging the award to Bizcon (B-419884.3). American Medical filed one protest with our Office challenging the award to Bizcon (B-419884.4). The request for dismissal referenced here was filed in B-419884, and similar requests were filed in B-419884.3 and B-419884.4. Where we cite to the request for dismissal, the relevant language is essentially the same in all three requests. Where necessary, we will include additional citations to the request for dismissal filed in B-419884.3 by citing to the "2nd Req. for Dismissal," and B-419884.4 by citing to the "3rd Req. for Dismissal."

² Exhibit 2 of the request for dismissal is a combined Adobe PDF document containing RFQ amendment 0001 and amendment 0002. For simplicity, we cite to this document as "RFQ"; the pinpoint citations reference the Adobe PDF page numbers of the document.

³ The contracting officer's statement cited here was filed in B-419884. Where it is necessary, we will cite to the contracting officer's statement filed in B-419884.3 by citing to the "2nd COS," and the contracting officer's statement filed in B-419884.4 by citing to the "3rd COS."

⁴ The other five awards were made between February 23 and May 11. COS at ¶ 6.

delivery date set forth in the contract. *Id.* The agency further explains that at the time of contract termination, American Medical had not delivered any gloves. *Id.* ¶ (e)(ii).

As previously mentioned, Atlantic and Bizcon were awarded contracts under the RFQ on May 26 and June 1, respectively. COS at ¶¶ 6(h)-(i). On June 4, Noble filed a protest with our Office challenging the award to Atlantic; on June 15, Noble filed a second protest with our Office, this time challenging the award to Bizcon; and on June 17, American Medical filed a protest with our Office, also challenging the award to Bizcon.

DISCUSSION

The basis for all three protests is that the awards to Atlantic and Bizcon were reprocurments related to the protesters' terminated contracts, and that the reprocurments violate FAR subsection 49.402-6, repurchase against contractor's account. Noble Protest⁵ at 3-5; Noble 2nd Protest at 3; American Medical Protest at 3. In this regard, Noble argues that since its terminated contract was for the provision of 25 million gloves and the VA's awards to Atlantic and Bizcon were each for the provision of 50 million gloves, the VA was required to resolicit its requirement since the quantity purchased from both awardees was in excess of the quantity covered by Noble's contract. Noble Protest at 3-5; Noble 2nd Protest at 3. American Medical makes essentially the same argument; its terminated contract was for the provision of 10 million gloves and the VA's award to Bizcon was for the provision of 50 million gloves.⁶ American Medical Protest at 3.

The VA requests dismissal of the protests, arguing that the protesters each fail to state a valid basis of protest, and that neither protester is an interested party to challenge the awards to Atlantic or Bizcon. Req. for Dismissal at 6-10; 3rd Req. for Dismissal at 6-7. For the reasons explained below, we dismiss the protests.

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. *Honeywell Tech. Sols., Inc.*, B-407159.4, May 2, 2013, 2013 CPD ¶ 110 at 3. To achieve this end, our Bid Protest Regulations, 4 C.F.R. §§ 21.1(c)(4) and (f), require

⁵ Citations to "Noble Protest" are to the protest filed in B-419884, which challenges the award to Atlantic. Citations to "Noble 2nd Protest" are to the protest filed in B-419884.3, which challenges the award to Bizcon.

⁶ The protesters raise other collateral arguments. While we do not discuss every argument, we have reviewed them all and find no basis to sustain the protest. For example, Noble argues that the gloves it delivered were in full compliance with the terms of its contract. Resp. to Req. for Dismissal at 5. This is a matter of contract administration which our Office does not review, therefore, it is dismissed. 4 C.F.R. § 21.5(a).

that a protest include a detailed statement of the legal and factual grounds for protest, and that the grounds stated be legally sufficient. These requirements contemplate that 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.

With regard to the repurchase of supplies or services not delivered under a contract terminated for default, the FAR requires contracting officers to repurchase the same or similar supplies or services as soon as practical. FAR 49.402-6(a). If the repurchase is for a quantity not over the undelivered quantity terminated for default, the contracting officer may use any terms and acquisition method deemed appropriate for the repurchase. FAR 49.402-6(b). If that agency repurchases a quantity more than the undelivered quantity under the terminated contract, “the contracting officer shall treat the entire quantity as a new acquisition.” *Id.* As a general rule, the statutes and regulations governing regular procurements are not strictly applicable to reprocurements after a termination for default. *Steel Point Sols., LLC*, B-418224, B-418224.2, Jan. 31, 2020, 2020 CPD ¶ 45 at 3; *Maersk Line, Ltd.*, B-410445, B-410445.2, Dec. 29, 2014, 2015 CPD ¶ 16 at 4. Our Office will review a reprocurement to determine whether the contracting agency acted reasonably under the circumstances. *Id.*

The protesters ask our Office to deny the agency’s request for dismissal and ultimately sustain the protests because, according to the protesters, the awards to Atlantic and Bizcon were reprocurements that violated the FAR. Noble Resp. to Req. for Dismissal at 1-7⁷; American Medical Resp. to Req. for Dismissal at 4-7. The protesters argue that the agency has terminated five of the nine contracts awarded under this solicitation “only to subsequently award those similar orders to other contractors.” Noble Resp. to Req. for Dismissal at 7; American Medical Resp. to Req. for Dismissal at 6-7. According to the protesters, this demonstrates that the agency has “functionally reawarded or reprocured the nitrile gloves.” Noble Resp. to Req. for Dismissal at 7; see *also* American Medical Resp. to Req. for Dismissal at 6-7.

Here, the factual basis for these challenges has been rebutted by the agency. The agency explains that the awards made to Atlantic and Bizcon were not reprocurements related to the terminated contracts. COS at ¶¶ 7-8; 2nd COS at ¶ 8; 3rd COS at ¶¶ 6-8. The VA explains that these awards were made under the same solicitation which resulted in awards to Noble and American Medical. *Id.* The VA states that the goal of the RFQ was to procure “hundreds of millions of nitrile examination gloves” to be distributed to VA healthcare facilities across the country. COS at ¶ 7. The agency planned to meet its requirement by “awarding multiple smaller quantity contracts” to multiple nitrile examination glove distributors. *Id.* ¶ 2. The agency therefore asks our Office to dismiss the protests as failing to state a factually sufficient basis of protest

⁷ Noble filed its response to the request for dismissal in B-419884 and B-419884.3; the language is identical in both filings.

since they are based on erroneous factual grounds. Req. for Dismissal at 7-9. That is, neither the award to Atlantic nor the award to Bizcon was a reprocurement. COS at ¶¶ 7-8; 2nd COS at ¶¶ 7-8.

Based on our review of the record, we agree with the agency that these two awards were made under the existing solicitation and were not reprocurements. The agency's explanation is consistent with the RFQ, which contemplated the award of multiple fixed-price contracts. The notices detailing the awards to Atlantic and Bizcon show that the awards were made under the existing solicitation. Noble Protest, exh. C, Award Notice; Noble 2nd Protest. exh. C, Award Notice; American Medical Protest, exh. D, Award Notice. We therefore conclude that the protesters have not provided our Office with allegations or evidence sufficient to establish that the agency's actions were improper. The protests are dismissed without further action. 4 C.F.R. §§ 21.1(c)(4), (f); 21.5(f).

The protests are dismissed.

Edda Emmanuelli Perez
General Counsel