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Decision

Matter of: Magnum Multimedia

File: B-420227

Date: November 2, 2021

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DIGEST

Protest that task order requirements are beyond the scope of the underlying indefinite-delivery, indefinite-quantity contract is dismissed as untimely where it was not filed within 10 days of when the protester knew, or should have known, of the basis for its protest.

DECISION

Magnum Multimedia of Herndon, Virginia, protests the Department of Labor’s (DOL) issuance of task order No. 1605TA21F00080 for enterprise web support services to Insignia Federal Group, LLC, of McLean, Virginia, pursuant to indefinite-delivery, indefinite-quantity (IDIQ) contract No. 1605DC-18-D-0007. The protester contends that the activities being performed under the task order, and the modification of the underlying IDIQ contract allegedly for the purpose of issuing the task order, are beyond the scope of the underlying IDIQ contract.

We dismiss the protest as untimely.

BACKGROUND

The undisputed facts are as follows. The procurement at issue here involves two separate IDIQ contracts: the one awarded to Insignia in 2018, referenced above, and one awarded to Magnum in 2016 (DOL-OPS-16-D-0015). Under Magnum’s contract, the protester provided enterprise web support services to the agency’s Office of the Chief Information Officer. This contract was set to expire in September 2021. Protest at 4-5.

On August 25, prior to the expiration of Magnum's contract, the Magnum program manager contacted an agency employee who was the contracting officer's representative for the Insignia contract, asking about the status of the work that was, at that time, being performed by the protester. That same day, the agency employee responded:

Unfortunately I don't have any information about [Magnum's] contract other than we're combining the Task Orders providing Web Services Support against expiring [contract] DOL-OPS-16-D-0015 with Magnum Multimedia into (1) New Task Order against the Insignia IDIQ 1605DC-18-D-0007. The start of the new task order is 09/16/2021.

Agency Resp. to Intervenor's Req. for Dismissal, exh. 1, Emails Between Magnum and Agency, at 2.

Following receipt of the agency's August 25 email, Magnum took several actions in August and September. Also on August 25, the Magnum program manager contacted another agency employee who was the federal program manager in the agency's Office of the Chief Information Officer, seeking more information about the agency's decision. They had a meeting the next day, on August 26, which, according to the agency employee, occurred as follows:

During the call, I myself told [the Magnum program manager] that DOL had decided to combine all work being performed under Magnum's IDIQ (with minor and limited exceptions) into a new Task Order to be issued on the Insignia IDIQ contract 1605DC-18-D-0007.

It was clear to me from [the Magnum program manager's] statements during that meeting that she clearly understood DOL's decision. She did not express any confusion about DOL's direction and she instead focused on determining next steps to implement transition out activities, including whatever staff transition activities Magnum believed were appropriate.

In short, [the Magnum program manager] knew, as of August 25, 2021, that except for very few and limited exceptions, DOL would not extend the Magnum IDIQ contract and related task orders and that the work would be ordered by DOL under the existing Insignia IDIQ.

Agency Resp. to Intervenor's Req. for Dismissal, exh. 2, Declaration of Agency Employee, at 1-2.

Subsequently, on September 9 and 14, DOL requested that Magnum submit two proposals for limited work that would remain past the expiration of its IDIQ contract. Agency Resp. to Intervenor's Req. for Dismissal, exh. 2, Declaration of Agency Employee, at 2. The agency employee explains that these requests for proposals were

“consistent with my statements to [the Magnum program manager] on August 26th and in [the other agency employee’s] email of August 25th that all other work would be ordered under the Insignia IDIQ.” *Id.* Magnum submitted its two proposals on September 13 and 20, and received two task orders from the agency based on those proposals. *Id.*

On September 20 and 21, Magnum also reached out to Insignia regarding what the Magnum employee characterized as “this transition.” Intervenor’s Req. for Dismissal, exh. 2, Emails Between Magnum and Insignia, at 1-3. In those communications, Magnum provided a detailed list of its employees and their contact information, and reiterated that it would have its employees contact Insignia’s human resources department. *Id.* The Magnum employee and the Insignia employee expressed a degree of uncertainty about the situation--specifically, the Insignia employee stated that “[w]e have heard verbally that DOL may add a task order to our IDIQ, but we haven’t received anything official,” and the Magnum employee stated that “[t]hey [i.e., the agency] have left us in the dark about the whole thing so any info you can share will be appreciated.” *Id.*

On September 22 and 23, notices regarding a modification to Insignia’s IDIQ contract and issuance of a task order to Insignia under that contract were posted to the Federal Procurement Data System (FPDS) website. Protest, exh. F, FPDS Notification, Sept. 22, 2021; Protest, exh. G, FPDS Notification, Sept. 23, 2021. This protest from Magnum followed on October 4.

DISCUSSION

Magnum argues that the issuance of the task order to Insignia was outside of the scope of the underlying Insignia IDIQ contract. Magnum also questioned the agency’s decision to modify Insignia’s underlying IDIQ contract, which increased the value of the contract. In this regard, Magnum argues that “one can only conclude that DOL issued the modification to the Insignia IDIQ,” prior to issuing the new task order to Insignia, in order to “subsume” the work that Magnum had previously performed.¹ Protest at 6-8. The intervenor filed a request for dismissal of the protest as untimely; the agency

¹ By way of background, we note that, in determining whether a task or delivery order is outside the scope of the underlying contract, and thus falls within the Competition in Contracting Act’s competition requirement, 31 U.S.C. §§ 3551-3557, our Office examines whether the order is materially different from the original contract, as reasonably interpreted. Evidence of a material difference is found by reviewing the circumstances attending the original procurement; any changes in the type of work, performance period, and costs between the contract as awarded and the order as issued; and whether the original solicitation effectively advised offerors of the potential for the type of orders issued. *Nuance Commc’ns, Inc.*, B-418106, Jan. 8, 2020, 2020 CPD ¶ 23 at 5. In other words, the inquiry is whether the order is one which potential offerors should have reasonably anticipated. *Symetrics Indus., Inc.*, B-289606, Apr. 8, 2002, 2002 CPD ¶ 65 at 5.

provided a separate response agreeing with, and providing additional support for, the intervenor's request for dismissal. The protester filed two responses to the intervenor's and the agency's filings.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. *Verizon Wireless*, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4. Under these rules, a protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2).

As discussed above, on August 25, the agency informed Magnum of, in essence, its decision to issue a task order to Insignia for the work then being performed by Magnum. Specifically, the agency employee wrote that "we're combining the Task Orders providing Web Services Support against" Magnum's expiring contract "into (1) New Task Order against the Insignia IDIQ" contract, and provided a specific start date for "the new task order." Agency Resp. to Intervenor's Req. for Dismissal, exh. 1, Emails Between Magnum and Agency, at 2. Also as discussed above, Magnum then took several distinct actions consistent with a clear understanding of the agency's decision, including but not limited to: contacting another agency employee and meeting with him about the transition; submitting proposals, at the request of the agency, for limited work to be performed during the transition period; and communicating with Insignia about the transition, to include providing a detailed list of Magnum's employees and contact information. Agency Resp. to Intervenor's Req. for Dismissal, exh. 1, Emails Between Magnum and Agency, at 2; Agency Resp. to Intervenor's Req. for Dismissal, exh. 2, Declaration of Agency Employee, at 1-2; Intervenor's Req. for Dismissal, exh. 2, Emails Between Magnum and Insignia, at 1-3.

On these facts, the agency argues that, to be timely, Magnum's protest had to be filed no later than 10 days after the agency's August 25 and 26 communications. In any event, Magnum cannot claim that it lacked notice any later than when the agency asked it on September 9 to submit proposals for the limited work remaining as the transition to Insignia began. Magnum's protest was filed on October 4 and, therefore, is untimely.

Nonetheless, Magnum argues that its protest was timely because it was filed no later than 10 days after the September 22 and 23 notices in FPDS. Magnum advances multiple reasons for why its protest should be considered timely filed, all of which we reject.

For example, the protester argues that, prior to the second FPDS notice posted on September 23, Magnum "did not know *definitively* that the [Office of the Chief Information Officer] enterprise web support services work would be issued to Insignia under its IDIQ contract or that the modification increasing the scope of the Insignia IDIQ would be needed." Protester's Resp. at 2 (emphasis original); Protester's Second

Resp. at 3 (emphasis original). Our decisions have repeatedly concluded that a protester need not await perfect knowledge before filing a protest. See, e.g., *Peraton, Inc.*, B-416916.11, Feb. 8, 2021, 2021 CPD ¶ 88 at 6, citing *Valkyrie Enters., LLC*, B-414516, June 30, 2017, 2017 CPD ¶ 212 at 3-4 n.2. Moreover, our timeliness rules do not hinge on whether a protester “definitively” knew of the basis for its protest but rather, as discussed above, require that a protest based on other than alleged improprieties in a solicitation be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2); see, e.g., *Makro Janitorial Servs., Inc.*, B-282690, Aug. 18, 1999, 99-2 CPD ¶ 39 at 2 n.1 (protest challenging the issuance of a task order as improperly exceeding the scope of the original contract is timely filed within 10 days of when the protester, under those circumstances, knew of the basis for its protest).

In this regard, we reject Magnum’s argument that it “had no basis to know to whom or how the work was going to be awarded until [the] September 23” FPDS notice. Protester’s Resp. at 2. Clearly, on August 25, Magnum knew “to whom” (Insignia) and “how” (a new task order pursuant to Insignia’s IDIQ contract) “the work was going to be awarded.” To the extent this was not sufficiently clear, the agency asked Magnum on September 9 to submit proposals for the limited work remaining as the transition to Insignia began. Moreover, Magnum’s contemporaneous disregard for the August “ineffective communications” from “subordinate [agency] personnel lacking actual contractual authority” is belied by the facts discussed above about its subsequent actions. Protester’s Second Resp. at 2. Indeed, as the agency argues: “Notably, Magnum’s actions after August 25, 2021 demonstrate Magnum knew DOL had decided that its IDIQ work would be ordered under the Insignia IDIQ. Magnum took affirmative irrevocable actions based on this knowledge to protect its interests in September before filing this protest.” Agency Resp. to Intervenor’s Req. for Dismissal at 4.

Moreover, Magnum’s protest as filed on October 4 is based on information it had earlier. In its protest, Magnum discusses the work previously performed by Magnum and argues that such work was “not originally contemplated by offerors (including Magnum Multimedia) that competed on the Insignia IDIQ” contract that was awarded in 2018. Protest at 8. Given Magnum’s familiarity with the work it had performed that would be issued in a new task order to Insignia, and the work it had competed for that was ultimately awarded in the IDIQ contract to Insignia, we fail to see how its out-of-scope arguments about the work could not have been raised earlier. See, e.g., *Oracle Corp.*, B-260963, May 4, 1995, 95-1 CPD ¶ 231 at 2 (protest that the agency “intends to meet its requirement by improperly modifying another firm’s existing contract beyond its current scope” is untimely where, under those circumstances, the protester was aware at an earlier date that “modification of an existing contract was the course of action being considered by the agency”).

While we acknowledge Magnum’s argument that it “had no basis” until the September 23 FPDS notice “to believe that the transfer of work to the Insignia IDIQ necessitated a \$10 million dollar modification,” Protester’s Second Resp. at 2, this specific aspect of Magnum’s protest is, in our view, subsumed by Magnum’s

fundamental concern about the improperly issued task order to Insignia. Indeed, the relief requested by Magnum reflects that its dispute is, ultimately, with the issuance of the task order to Insignia. Protest at 3 (requesting our Office recommend that the agency cancel the contract modification and task order award to Insignia, and issue a solicitation set aside for Section 8(a) small business concerns, like Magnum, to compete for the services contemplated by the task order). In sum, Magnum's disagreement with what it knew or should have known, under these circumstances, is unpersuasive.

As another example, Magnum argues that "it would have been premature and speculative for Magnum to assume improper agency action and initiate a protest prior to the agency's definitive actions on September 22nd and 23rd." Protester's Resp. at 3, *citing Arch Sys., LLC*, B-417567, B-417567.2, July 2, 2019, 2019 CPD ¶ 227 at 4 (dismissing protest challenging the issuance of a short-term task order as premature where the agency asserted that it had not evaluated or awarded any contract at that point; further, explaining that, where "an agency has not yet made an award decision, and the protest is merely anticipating prejudicial agency action, a protest challenging the agency's anticipated award of a task order is premature"); Protester's Second Resp. at 2.

Here, as discussed above, Magnum was expressly advised by the agency in August that the agency had decided to issue a task order to Insignia for the work then being performed by Magnum. Magnum was then asked by the agency in September to submit proposals for the limited work remaining as the transition to Insignia began. In our view, had Magnum filed an earlier protest, such protest would not have been speculative or premature, because the agency effectively had announced its decision to proceed in a manner that was inconsistent with Magnum's interests. *See, e.g., Blue Origin, LLC*, B-408823, Dec. 12, 2013, 2013 CPD ¶ 289 at 8-9 (finding protest with "an unusual procedural posture" timely where the agency "effectively has announced how it intends to evaluate proposals--that is, in a manner that is inconsistent with [the protester's] reading of the [solicitation]," and noting that "[t]he most efficient, least intrusive alternative is for our Office to consider the issue now rather than to wait until the acquisition proceeds to a source selection decision").

In sum, under the circumstances presented here, Magnum's October 4 protest was untimely as it was filed more than 10 days after it knew or should have known of the basis for its protest.

The protest is dismissed.

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General Counsel