



Decision

Matter of: General Dynamics Mission Systems, Inc.

File: B-414587; B-414587.2

Date: May 11, 2017

Gregory H. Petkoff, Esq., Carrie F. Apfel, Esq., Carla J. Weiss, Esq., and Joshua A. Violanti, Esq., Jenner & Block LLP, for the protester.
Andrew E. Shipley, Esq., Lee P. Curtis, Esq., Seth H. Locke, Esq., and Andrew J. Victor, Esq., Perkins Coie LLP, and Suzette W. Derrevere, Esq., and Jade C. Toman, Esq., for The Boeing Company, the intervenor.
Alexis J. Bernstein, Esq., and Maj. Samuel T. Miller, Department of the Air Force, for the agency.
Elizabeth Witwer, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's award of a sole-source contract is dismissed where the agency proposes to seek capability statements from responsible sources in order to determine whether competition is necessary.

DECISION

General Dynamics Mission Systems, Inc. (GDMS) of Fairfax, Virginia, protests the decision of the Department of the Air Force to award contract No. FA8217-17-C-0003 on a sole-source basis to The Boeing Company, Defense, Space, and Security, of Huntington Beach, California, for the Next Generation Cryptographic Architecture on the Combat Survivor Evader Locator (CSEL) program. The protester contends that the Air Force failed to follow the requisite competitive bidding procedures and that the stated justification for awarding the contract on a sole-source basis to The Boeing Company is unreasonable. The protester also contends that the agency improperly bundled its requirements.

We dismiss the protest as academic because the agency has notified our Office that it intends to take corrective action. Agency Notice, Apr. 26, 2017; Agency Email Clarification, May 2, 2017. We do not consider academic protests because to do so would serve no useful public policy purpose. Ferris Optical, B-403012.2, B-403012.3,

Oct. 21, 2010, 2010 CPD ¶ 265 at 1-2; Dyna-Air Eng'g Corp., B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132.

In its notice of corrective action and subsequent email clarification, the agency states that it intends to provide all responsible sources an opportunity to submit a capability statement pursuant to Federal Acquisition Regulation (FAR) § 5.207(c). The agency will then review offerors' responses to determine whether competition of the requirement is necessary. The agency also proposes to provide sources the opportunity to address the alleged bundling of the agency's requirement. Finally, the agency states that it "may also take any other corrective action it deems appropriate." Agency Notice, Apr. 26, 2017, at 1. During the pendency of the corrective action, the agency represents that performance under the sole-source contract awarded to The Boeing Company will be stayed.

GDMS objects to the agency's proposed corrective action. GDMS Response, May 1, 2017. First, GDMS argues that the agency cannot issue a pre-solicitation synopsis and seek capability statements from offerors while the solicitation and contract award remain in place. Id. at 1, 4-5. To do so, it argues, would be to "go back in time to effectuate a pre-award procedure in a post-award context." Id. at 5. Instead, GDMS argues that our Office should require the Air Force to terminate the contract. Id. at 1. We disagree. There is no requirement that an agency terminate a challenged contract prior to implementing its corrective action, even where the proposed corrective action impacts a pre-award phase of the procurement. In fact, nearly all corrective action impacts a pre-award phase of the procurement in the post-award context.

Second, GDMS argues the corrective action does not render academic its challenge to the alleged bundling of the agency's requirement. GDMS Email, May 5, 2017. Instead, GDMS contends that the agency's corrective action "makes clear" that the agency does not intend to alter the scope of the requirement. Id. We do not concur with GDMS's characterization of the agency's corrective action. The agency states that offerors will be given an "opportunity to address why they believe it is not necessary for the agency to bundle the requirement." Agency Email Clarification, May 2, 2017. Presumably, the agency will also consider those responses in determining whether to alter the scope of its requirement. In the event the scope of the requirement is reaffirmed by the agency following corrective action, the protester may reassert its bundling argument, subject to our Bid Protest Regulations.

Finally, GDMS argues that the agency's proposed corrective action shifts the burden to contractors to justify why competition, in lieu of a sole-source award, is necessary. GDMS Email, May 5, 2017. GDMS contends that it is the agency's burden to justify its sole-source and bundling decisions and that the agency's proposed corrective action "essentially asks the GAO to flip these obligations on their head" and seeks to "alleviat[e] agencies of their obligations" by "requiring contractors to convince the agency that 'competing the requirement is necessary.'" Id. (quoting Agency Email Clarification, May 2, 2017). Although we agree with GDMS that it is the agency, not contractors, that must justify any future decision to issue an award on a sole-source

basis or to bundle its requirement, we do not view the agency's corrective action as proposing to shift this burden. Rather, in our opinion, the agency's proposed corrective action seeks to gather information from responsible sources in order to inform and assist the agency in making its procurement decision. See Agency Email Clarification, May 2, 2017 (“[A]ny capability statements received by responsible sources will be considered by the agency to determine if competing the requirement is necessary.”). In any event, the protester presupposes improper action by the agency. As noted above, if the agency reaffirms its sole-source award and/or scope of its requirement, the protester may reassert its arguments, subject to our regulations.

The protest is dismissed.

Susan A. Poling
General Counsel