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Decision

Matter of: MINACT, Inc.

File: B-414615; B-414615.2

Date: July 12, 2017

Lindsay Simmons, Esq., Jackson Kelly PLLC, for the protester.
Dennis A. Adelson, Esq., Vijaya S. Surampudi, Esq., Department of Labor, for the agency.
Mary G. Curcio, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Incumbent protester is not eligible to compete for task order under indefinite-delivery, indefinite-quantity (IDIQ) contingency contract, where agency did not exercise option to extend services in incumbent contract, and contingency contract precludes incumbent from receiving a task order under those circumstances.
 2. Protest that agency issued a task order outside the scope of the IDIQ contract under which it was issued is dismissed as untimely where protest was not filed until after the closing date for offers.
 3. Protest that agency intends to issue future solicitation as a small business set-aside to preclude protester, which is a large business, from competing is dismissed as premature where solicitation has not been issued.
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DECISION

MINACT, Inc., of Jackson, Mississippi, protests the issuance of task order No. 1630J3-17-T-00001 to Dynamic Educational Systems, Inc., of Phoenix, Arizona, under request for quotations (RFQ) No. DOL-ETA-17-D-0005, issued by the Department of Labor (DOL), for a vendor to operate the Finch Henry Job Corps Center in Batesville, Mississippi. MINACT complains that the agency performed an unreasonable evaluation of quotations, improperly issued the task order under the agency's indefinite-delivery, indefinite-quantity (IDIQ) contingency contract, and improperly plans to conduct a future procurement as a small business set-aside in retaliation for MINACT's filing the instant protest.

We dismiss the protest.

BACKGROUND

Job Corps is a national residential training and employment program administered by the DOL to address multiple barriers to employment faced by disadvantaged youth. The agency has established Job Corps centers throughout the country that are operated by contractors. Agency Reply to Opposition for Dismissal, May 25, 2017, at 3. The Job Corps program requires continuous services at its centers to ensure the health, safety and well-being of the students. Id.

To ensure the continuous operation of these centers when circumstances could result in a service gap, the agency established a multiple-award IDIQ contingency contract, under which it conducts competitions to issue task orders on an expedited basis. Contingency IDIQ Request for Proposals (RFP) at 7; MINACT IDIQ at 7. The purpose of the contingency contract is to provide the government with a rapid replacement mechanism that will permit uninterrupted operation of a Job Corp center in the event it is not in the government's best interest to continue performance under existing conditions. Agency Dismissal Request, May 17, 2017, at 2; see also Contingency IDIQ RFP at 7.

The agency awarded twelve contingency contracts in November 2016, including one to MINACT and one to Dynamic Educational Systems. Shortly after this award, the contingency IDIQ contract was modified to provide, "[it] is understood and agreed that if an awardee operates a Center for which operation is being changed (e.g. contract terminations or DOL determination not to exercise a contract option period), the incumbent is ineligible for award of the task order."¹ MINACT IDIQ, Mod. 0003, at 7.

Prior to establishing the multiple-award IDIQ contingency contracts, on October 30, 2015, the agency awarded MINACT a one-year interim contract, with a six-month option, on a sole-source basis to operate the Finch Henry Job Corps Center in Batesville, Mississippi. MINACT Sole-Source at 1. The sole-source contract included Federal Acquisition Regulation (FAR) clause 52.217-8, option to extend services, which provides the government with the ability to extend the contract for an additional six months. Id. at 39. After exercising the six-month option period in MINACT's contract, DOL concluded that the time remaining on MINACT's contract--the option to extend services for an additional six months--was not sufficient to conduct a follow-on procurement which could take approximately 18 months. Agency Reply to Opposition for Dismissal, May 25, 2017 at 4.

Rather than exercise the option to extend services, on March 6, 2017, the agency issued the current task order solicitation to holders of the IDIQ contingency contract for an offeror to operate the center until DOL completed a follow-on procurement. Id.

¹ Both the agency and a representative of MINACT signed the modification in February 2017. Id.

Quotations were due on March 22. RFQ Questions and Answers, at 1. On April 17, the agency notified MINACT, the incumbent holder of the interim contract, that it was not the successful offeror. DOL Notice of Unsuccessful Offeror, April 17, 2017. MINACT submitted its protest to our office on April 21.²

DISCUSSION

MINACT argues that the agency performed an unreasonable evaluation of quotations and improperly issued the task order. In response, the agency requested that we dismiss MINACT's protest. The agency asserts that since MINACT is the incumbent contractor at the center, and the agency did not execute the option to extend services in MINACT's contract, MINACT is not eligible to receive award of the task order and is therefore not an interested party to file this protest. For the following reasons, we agree.

Under the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556, only an "interested party" may protest a federal procurement. That is, a protester must be 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. Bid Protest Regulations, 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 relief sought by the protester, and the party's status in relation to the procurement. Four Winds Servs., Inc., B-280714, Aug. 28, 1998, 98-2 CPD ¶ 57. A protester is not an interested party where it would not be eligible to receive an award were its protest to be sustained. International Training, Inc., B-272699, Oct. 2, 1996, 96-2 CPD ¶ 132 at 2.

In MINACT's view, the restriction on an incumbent's eligibility to compete for a task order under the IDIQ contingency contract should be limited to situations where the incumbent defaulted, went bankrupt, or had some other performance issue that required the agency to find a new contractor. According to MINACT, since it has not experienced any performance issues, it should be eligible to receive the task order, and is an interested party to maintain this protest. We note that the provision in the IDIQ contingency contract is not limited to situations where the incumbent has experienced some sort of performance issue. Rather, the provision specifically precludes an incumbent contractor from receiving a task order where the agency chooses not to exercise an option, which is the situation here.

MINACT also argues that when the contingency IDIQ contract provides that an incumbent is ineligible to compete where the agency decides not to exercise an option, it is not referring to the option to extend services under FAR clause 52.217-8, but only to the decision not to exercise an option under FAR clause 52.217-9. In this regard,

² The awarded value of the task order is \$14,652,036. Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of orders valued in excess of \$10 million under multiple-award IDIQ contracts. 41 U.S.C. § 4106(f).

MINACT asserts that there are significant differences between an option to extend the term of a contract beyond its base period of performance (FAR clause 52.217-9), and the option to extend services (FAR clause 52.217-8). For example, MINACT notes that with respect to an option to extend the term of the contract beyond its base period of performance (FAR clause 52.217-9), there is a specified bid or negotiated price. In contrast, an option to extend services (FAR clause 52.217-8) is generally not separately priced, but instead is extended at the contract price.

The FAR defines an option as, “a unilateral right in a contract by which, for a specified time, the Government may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract.” FAR § 2.101; FAR § 37.111. Here, regardless of the differences between an option to extend the term of a contract beyond its base period of performance and an option to extend services for up to six months, the option to extend services clearly falls within the FAR’s definition of option. *Id.* § 37.111. Further, FAR part 17, which provides the policies and procedures for the acquisition of supplies and services through options, expressly includes the option to extend services. FAR §§ 17.000(b), 17.208(f).

Accordingly, the agency reasonably concluded that its decision not to exercise an option to extend services under FAR clause 52.217-8, is an option within the meaning of the exclusion provision that DOL added to the IDIQ contingency contract. Since the agency did not exercise the option to extend services in MINACT’s sole-source contract, we see no basis to object to the agency’s conclusion that MINACT is not eligible to receive a task order here. MINACT is therefore not an interested party to challenge the agency’s evaluation of quotations and award decision.³

MINACT next protests that the task order that the agency issued is outside the scope of the IDIQ contingency contract. Supp. Protest at 12-13. According to MINACT, the purpose of the contingency contract is to deal with situations where there will otherwise

³ MINACT also argues that it is an interested party because the agency accepted and evaluated its quotation, and only expressed its belief that MINACT is not an interested party after MINACT filed its protest. MINACT also contends that the agency’s actions are inconsistent with information provided to offerors during the task order procurement. Specifically, MINACT notes that during the task order procurement a potential offeror asked the agency whether an incumbent would be permitted to compete and the agency responded that the requirement is open to all awardees under the contingency contract. RFQ Questions and Answers, at 9. However, the express terms of the IDIQ contract, which provide that an incumbent is not eligible for award if the agency chooses not to exercise an option, are controlling and preclude MINACT from receiving a task-order award. *See* MINACT IDIQ at 20 (providing that all orders placed are subject to the terms and conditions of the contract); MINACT IDIQ at 40 (providing that where there is any conflict between a task order and the IDIQ contract, the IDIQ contract will control).

be a disruption in services. MINACT asserts that it could continue to operate the center under its option to extend services so there is no need for services to be disrupted. MINACT further asserts that the only reason the agency has for conducting this procurement under the contingency contract is a lack of advance planning.

This basis of protest is untimely. Under our Bid Protest Regulations, a protest that concerns an impropriety apparent from the face of the solicitation must be filed prior to the closing date for the receipt of offers. 4 C.F.R. § 21.2(a)(1). Here, MINACT knew that the task order solicitation was issued only to holders of the IDIQ contingency contract, and that a task order for operating the Fitch Henry Center was being awarded under the IDIQ contract. If MINACT believed that this was improper because the contingency contract was only available when there would be a disruption in service, MINACT was required to protest prior to March 22, the closing date for offers. MINACT's protest, filed on April 21, after the closing date for quotations, is untimely.

Finally, MINACT protests that the agency has indicated its intention to issue a future solicitation to operate the Finch Henry Center (following completion of performance of the contingency task order) as a small business set-aside. MINACT, a large business that will be ineligible to compete under a small business set-aside, speculates that this decision was made in retaliation for MINACT's current protest. Supp. Protest at 11. Our jurisdiction is limited to considering protests involving solicitations already issued by federal agencies and awards made or proposed to be made under those solicitations. East West, Inc. B-412719.2, et al., June 21, 2016, 2016 CPD ¶ 170 at 7. We therefore dismiss this ground of protest as premature as the solicitation MINACT is complaining about has not been issued.

The protest is dismissed.

Susan A. Poling
General Counsel