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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Sea Box, Inc.

File: B-401523; B-401523.2

Date: September 25, 2009

Robert A. Farber for the protester.
Henry M. Burwell, Esq., and Steven D. Allen, Esq., Nelson Mullins Riley & Scarborough LLP, for Charleston Marine Containers, Inc., the intervenor.
Melissa McWilliams, Esq., and Erica Ordonez, Esq., General Services Administration, for the agency.
Eric M. Ransom, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Issuance of a Federal Supply Schedule (FSS) order to vendor was proper where the ordered items were added to vendor's FSS contract by a timely-executed modification.

DECISION

Sea Box, Inc., of East Riverton, New Jersey, protests the issuance of an order to Charleston Marine Containers, Inc., (CMCI) of Charleston, South Carolina, by the General Services Administration (GSA) under request for quotations (RFQ) No. 361134, for refrigerated containers and clip-on diesel generator sets.

We dismiss the protest in part and deny it in part.

The RFQ was posted to the GSA Advantage! e-Buy system[1] on May 6, 2009, with a closing time of 5 p.m. on May 12, 2009.[2] The RFQ was issued on a brand name or equal, low price/technically acceptable basis, and stated that the acquisition was to

[1] The GSA Advantage! e-Buy system allows ordering activities to post requirements, obtain quotes, and issue orders electronically.

[2] Sea Box disputes the closing time of the solicitation. As discussed below, we consider the issue untimely.

be conducted as a Federal Supply Schedule (FSS) procurement under Federal Acquisition Regulation (FAR) subpart 8.4. RFQ at 1. The RFQ contained the brand name part number and salient characteristics for Sea Box parts SB8140.6, a 20-foot refrigerated cargo container, and SB572, a clip-on diesel generator set compatible with SB8140.6. Three vendors listed on the applicable GSA FSS schedule received email notice of the RFQ, including Sea Box and CMCI.

Also on May 6, CMCI submitted to GSA a modification request for 17 new item additions to its FSS contract. Among the additions, CMCI listed two products equivalent to the Sea Box part numbers requested in the RFQ. On May 8, the GSA FSS contracting officer contacted CMCI by email to request that CMCI review and resubmit its modification request because she suspected that certain price calculations were incorrect. CMCI resubmitted its modification later that day. On May 12, the GSA FSS contracting officer signed an Amendment of Solicitation/Modification of Contract form adding the 17 new items to CMCI's FSS contract and, at 3:11 p.m., emailed a copy of the signed modification form to CMCI.

Sea Box and CMCI each submitted a quotation on May 11. After the RFQ closed, a technical review was performed on each quotation to determine technical acceptability. Sea Box offered the brand name items identified in the RFQ, and its quotation was determined to be technically acceptable. CMCI offered the "or equal" items listed in its modification request and, after a comparison of the items to the salient characteristics identified in the RFQ, its quotation was also determined to be technically acceptable. After the technical review was complete, the contracting officer determined that both quotations were technically acceptable and that CMCI offered the lowest price. The contracting officer then issued two purchase orders to CMCI on June 18.

Sea Box requested a debriefing on the day the orders were issued, and was informed that because the procurement was conducted under FAR subpart 8.4, a formal debriefing was not required, though a brief explanation could be provided. Sea Box then reiterated its request and inquired as to whether the agency had confirmed that the "or equal" items offered by CMCI were in fact on CMCI's FSS contract, as Sea Box had been unable to find equivalent items on CMCI's GSA Advantage! electronic listing. The agency provided Sea Box with a brief explanation of the basis for the issuance of the orders on June 19, and stated that the agency had reviewed CMCI's FSS contract and that the relevant "or equal" items had been added to CMCI's FSS contract on May 12. Sea Box then filed this protest on June 23.

Sea Box alleges that the "or equal" items offered by CMCI were not timely or properly added to CMCI's FSS contract and that CMCI therefore offered impermissible "open market" items that were ineligible for consideration under the

RFQ.[3] Sea Box advances several arguments in support of this allegation. First, Sea Box argues that the actual closing date of the solicitation was May 11, not May 12, and thus the "or equal" items were not on CMCI's FSS contract by the time the RFQ closed.[4] Second, Sea Box argues that the GSA FSS contracting officer acted improperly in accepting CMCI's modification request, rendering the modification void. Finally, Sea Box argues that the May 12 contract modification was not effective until June 26, under the terms of the applicable modifications clause, and that it was improper for the agency to order items under CMCI's FSS contract before the contract modification adding those items became effective.

With regard to its first argument, Sea Box asserts that the actual closing time of the RFQ was 5 p.m. on May 11, rather than May 12, and that CMCI was ineligible to receive an order because its "or equal" items had not been added to its FSS contract by that time.[5] This argument is based on the fact that two closing dates were listed for this procurement, May 12 on the GSA e-Buy system, and May 11 on the RFQ. The agency responds that the RFQ closed at 5 p.m. on May 12, and that Sea Box is untimely to challenge the agency's interpretation.

We conclude that Sea Box's challenge to the closing date is untimely. The conflict between the closing date listed on the GSA e-Buy system and the closing date listed on the RFQ constituted a patent ambiguity that was apparent prior to the time set for receipt of quotations. In accordance with our Bid Protest Regulations, 4 C.F.R.

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[3] Sea Box correctly points out that an agency may not use FSS procedures to purchase items that are not listed on a vendor's FSS contract (also known as "open market" items) without conducting a competition for those non-FSS items. Symplicity Corp., B-291902, Apr. 29, 2003, 2003 CPD ¶ 89 at 4.

[4] We note that the RFQ had no late quotation clause, and thus the agency could have accepted quotations until the date of order issuance. See Data Integrators, Inc., B-310928, Jan. 31, 2008, 2008 CPD ¶ 27 at 2.

[5] Sea Box implicitly asserts that the closing time should control for the purpose of the application of the open market rule. The RFQ, however, did not identify the point at which the status of the offered items would be determined. We need not resolve the issue of the proper time for determining of the status of offered items in this case given our conclusion, explained below, that the relevant items were in fact added to CMCI's FSS contract prior to the closing time. Sea Box also argues that it was improper for CMCI to offer items that had not yet been added to its GSA FSS contract as of the date it submitted its quotation, May 11. Sea Box bases this argument on two GSA documents, a "Seller's Guidance" package for GSA vendors, and an on-line document titled, "How does GSA e-Buy Work." These user guides are not matters of law or regulation, and provide no basis for our Office to sustain this ground of protest.

§ 21.2(a) (2009), solicitation improprieties apparent prior to the time set for receipt of quotations must be filed prior to that time. Having failed to seek clarification or file a protest before the closing time of the RFQ, Sea Box may not now assert that the only legally permissible interpretation of the ambiguity is its own. Kellogg Brown & Root, Inc., B-291769, B-291769.2, Mar. 24, 2003, 2003 CPD ¶ 96 at 8-9. Accordingly, this basis of the protest is dismissed.

Sea Box next argues that the GSA FSS contracting officer abused her discretion and acted outside of her authority in accepting CMCI's modification request, by failing to require CMCI to provide all of the documentation set forth in the applicable modifications clause, GSA Regulation (GSAR) § 552-243.72 (2001).[6] Specifically, Sea Box argues that CMCI failed to provide certain documentation required under GSAR § 552-243.72(b), which Sea Box argues the contracting officer was required to review prior to approving the modification request. Sea Box concludes that by improperly waiving this documentation requirement, the GSA FSS contracting officer abused her discretion and acted outside her authority, rendering the modification void.

Our Office considers bid protest challenges to the award or proposed award of contracts. 31 U.S.C. § 3552 (2006). Therefore, we generally do not review matters of contract administration, which are within the discretion of the contracting agency and for review by a cognizant board of contract appeals or the Court of Federal Claims. Bid Protest Regulations, 4 C.F.R. § 21.5(a). The few exceptions to this rule include situations where it is alleged that a contract modification improperly exceeds the scope of the contract and therefore should have been the subject of a new procurement; where a protest alleges that the exercise of a contractor's option is contrary to applicable regulations; or where an agency's basis for contract termination is that the contract was improperly awarded. See Sprint Communications Co., L.P., B-271495, Apr. 26, 1996, 96-1 CPD ¶ 211 at 4. We conclude that Sea Box's challenge to the propriety of the GSA FSS contracting officer's decision to approve a request to modify an existing FSS contract is a matter of contract administration and that none of the stated exceptions apply. See Zafer Constr. Co.; Kolin Constr., Tourism, Indus. and Trading Co. Inc., B-295903, B-295903.2, May 9, 2005, 2005 CPD ¶ 87 at 6 (our Office will not review protests based on an awardee's alleged failure to comply with contract terms after award, or on allegedly improper contract modifications). Accordingly, this basis of protest is also dismissed.

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[6] The agency notes that this clause has been removed from the GSAR; however, the solicitation under which CMCI's GSA FSS contract was awarded states that the applicable clause is the clause in effect at the time the solicitation was issued, December 11, 2001. Accordingly, it is the 2001 version of the GSAR clause that applies here and that we discuss above.

Finally, Sea Box argues that issuing the orders was improper because the modification to CMCI's FSS contract did not take effect until after the orders were issued. Citing GSAR § 552-243.72(d), which states that a GSA FSS contract modification "will not be made effective until the government receives the [contractor's] electronic file updates," Sea Box asserts that FSS contract modifications are not valid until the contracting officer personally reviews and approves the electronic file updates. Here, CMCI's electronic file updates were not approved by the GSA FSS contracting officer until June 26, eight days after the orders were issued to CMCI. Therefore, Sea Box argues, it was improper for the agency to issue the orders to CMCI because the ordered items had not yet been validly added to its FSS contract.

The GSA FSS contracting officer responds that she received the electronic file submission from CMCI on June 17, one day prior to the issuance of the orders, and that, in any event, the submission of a contractor's electronic file update is an administrative action that does not affect the effective date of the modification. We agree.

A bilateral contract modification is a supplemental agreement requiring mutual intent to contract consisting of three substantive components: offer and acceptance, consideration, and a government representative with actual authority to bind the government. FAR § 43.103(a); La Van v. U.S., 382 F.3d 1340, 1346 (Fed. Cir. 2004). In this case, the record shows that the required mutual intent to contract existed on May 12, when the GSA FSS contracting officer accepted CMCI's modification request, and thus that a binding modification was created at that time.

With regard to the electronic file update, as a preliminary matter, the record shows that CMCI's electronic file update was received by the GSA FSS contracting officer on June 17, and thus met the operative requirement of GSAR § 552-243.72(d) one day prior to issuance of the orders. Moreover, while the substantive requirement of mutual intent to contract is clearly necessary to the formation of a contract modification, GSAR § 552-243.72(d) merely sets forth a procedure for updating a vendor's electronic contract listing. In full, the provision states:

> (d) Electronic File Updates. The Contractor shall update electronic file submission to reflect all modifications. For additional items or [special item numbers], the Contractor shall obtain the contracting officer's approval before transmitting changes. Contract modification will not be made effective until the Government receives the electronic file updates. The Contractor may transmit price reductions, item deletions, and corrections without prior approval. However, the Contractor shall notify the contracting officer as set forth in the Price Reductions clause at 552.238-75.

GSAR § 552-243.72(d).

While Sea Box points to the language in the clause stating that a modification will not be "made effective" until the government receives the contractor's electronic file update, we view the clause, including the specific language on which Sea Box relies, as a procedural admonition directed at the contractor. As a result, it does not limit the agency's authority to issue an order where, as here, the relevant items already have been added to the vendor's FSS by a binding modification. In sum, we conclude that the modification to CMCI's contract was valid and effective on May 12, and that a delay in updating a contractor's electronic files or GSA Advantage! listing provides no basis for our Office to sustain a protest. See Raytheon Support Servs. Co., B-228352, Jan. 19, 1988, 88-1 CPD ¶ 44 at 4.

The protest is dismissed in part and denied in part.[7]

Daniel I. Gordon
Acting General Counsel

[7] To the extent Sea Box maintains that the agency conducted improper discussions with CMCI, we have reviewed the record and find no support for that basis of protest.