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Decision

Matter of: XTec, Inc.

File: B-405505

Date: November 8, 2011

Daniel S. Koch, Esq., and Kevin K. D'Anna, Esq., Paley, Rothman, Goldstein, Rosenberg, Eig & Cooper, Chartered, for the protester.

Daniel R. Forman, Esq., Puja Satiani, Esq., and James G. Peyster, Esq., Crowell & Moring LLP, for the intervenor.

John E. Cornell, Esq., General Services Administration, for the agency.

Tania Calhoun, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting agency's justification for noncompetitive issuance of a task order because it was logical follow-on to a task order previously issued to a firm under a Federal Supply Schedule contract pursuant to the prior version of Federal Acquisition Regulation § 8.405-6(a)(1)(C) was reasonably based on documented concerns regarding disruption, duplication of costs, transition delays, and increased costs and was therefore in the interest of economy and efficiency, as required by the current version of the FAR.

DECISION

XTec, Inc., of Reston, Virginia, protests the issuance of a task order to HP Enterprise Services, LLC (HPES), of Herndon, Virginia, by the General Services Administration (GSA) as a logical follow-on to a task order previously issued to HPES, under a Federal Supply Schedule (FSS) contract, for a shared service solution for an end-to-end contractor managed system to issue and maintain common identification cards for government employees and contractors. XTec argues that the agency's limited source justification lacked a reasonable basis and resulted from an improper lack of advance planning.

We deny the protest in part.

BACKGROUND

Homeland Security Presidential Directive 12 (HSPD-12), issued in 2004, provided for a new standardized federal identity credential that would enhance security, reduce identity fraud, and protect the personal privacy of those issued government identification. GSA launched the HSPD-12 Managed Service Office (MSO) to provide federal agencies turn-key services to produce credentials that would satisfy federal guidance. Agency Report (AR), exh. 24, Justification ¶ II.a. Beginning in 2005, GSA began planning a complete end-to-end service, USAccess, to issue fully compliant credentials for government employees and contractors. Contracting Officer's (CO) Declaration ¶ 3. In April 2007, GSA awarded a shared service provider task order to Electronic Data Systems (EDS). EDS was subsequently acquired by HPES. This award was made pursuant to a competitive process following the procedures set forth in Federal Acquisition Regulation (FAR) Subpart 8.4 for FSS acquisitions.¹ That task order entered its final option period on October 1, 2010 and ended on September 30, 2011.

In late 2009, GSA began planning for continued provision of these services when the task order ended. CO's Declaration ¶ 25. When it issued the original task order, GSA intended to acquire a contractor-operated service but, as enhancements and customizations began to result in increased investment, GSA determined that it required greater control. *Id.* ¶ 5. In the summer of 2010, the agency issued and analyzed the results of a request for information concerning the requirements in order to inform its decision-making. AR Exhibits 11, 12. Consistent with its developing Information Technology Strategic Plan, GSA decided to change its acquisition model of one contractor providing all services associated with the requirement to a modular model. Under this new acquisition model, non-core services would be separated from the current end-to-end service and competed separately. CO's Declaration ¶ 6; AR, exh. 14, Comprehensive Acquisition Plan. The instant acquisition covers activities necessary for HPES to continue providing the core services in order to minimize risk and migrate the system in an orderly way. CO's Declaration ¶¶ 7, 10.

On October 27, 2010, the head of GSA's procuring activity signed a limited source justification for the award of a logical follow-on to HPES's original FSS task order under the authority of FAR §§ 8.405-6(a)(1) and (b)(2) in effect at that time. The justification contemplated the award of a fixed-price order, with time and materials elements, over a 1-year base period with up to two 1-year options, at an estimated value of approximately \$37 million. As discussed further below, the justification stated that award to another source would likely result in disruption of customer agencies' access deployments, substantial duplication of costs to the government not

¹ We denied XTec's protest of this order. XTec, Inc., B-299744.2, B-299744.3, Aug. 6, 2007, 2007 CPD ¶ 148.

expected to be recovered through competition, unacceptable transition delays, and increased costs for any new end-to-end solution. AR, exh. 24, Justification ¶ IV.b.2. After the justification was signed, GSA issued a request for quotations to HPES and received and evaluated its response. The task order was issued to HPES on July 25, 2011, and GSA posted notice of the award and the limited source justification to the FedBizOpps website on July 27. This protest followed.

DISCUSSION

XTec argues that GSA's limited source justification was unreasonable because it relied upon facts and supposed "risks" that cannot withstand scrutiny. The firm asserts that it provides similar services to other agencies and could easily provide them to GSA with a seamless transition, no risk of disruption, and no substantial duplication or increase in costs.

Applicable FAR Provision

The parties first dispute which version of the FAR is applicable to this noncompetitive extension of HPES' FSS contract. The limited source justification, signed on October 27, 2010, relied for its legal authority on the language of a FAR provision in effect at that time, FAR § 8.405-6, "Limited sources justification and approval," and, more specifically, FAR §§ 8.405-6(a)(1) and (b)(2), which read in relevant part:

(a) Orders placed under Federal Supply Schedules are exempt from the requirements in Part 6. However, an ordering activity must justify its action when restricting consideration--

(1) Of schedule contractors to fewer than required in 8.405-1 or 8.504-2;

* * * * *

(b) Circumstances that may justify restriction cited in paragraph (a)(1) of this subsection include--

* * * * *

(2) The new work is a logical follow-on to an original Federal Supply Schedule order provided that the original order was placed in accordance with the applicable Federal Supply Schedule ordering procedures. The original order must not have been previously issued under sole source or limited source procedures;

FAR § 8.405-6 (FAC 2005-13), Sept. 28, 2006.²

On March 16, 2011, a new interim rule was published in the Federal Register amending the FAR to implement section 863 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, 122 Stat. 4345, 4547-48 (2008). Among other things, the interim rule, published at 76 Fed. Reg. 14,548, 14,555-56 (Mar. 16, 2011), retitled FAR § 8.405-6, which is now called “Limiting sources,” and added a clause to the provision applicable to the issue here, which is now found in FAR § 8.405-6(a)(1)(C). The provision still provides that orders placed under the FSS are exempt from the requirements in FAR Part 6, but that ordering activities must justify their actions when restricting consideration in accordance with paragraphs (a) or (b) of this section. As relevant here, the provision now reads:

(a) Orders or [Blanket Purchase Agreements] BPAs exceeding the micro-purchase threshold based on a limited sources justification.

(1) Circumstances justifying limiting the source.

(i) For a proposed order or BPA with an estimated value exceeding the micro-purchase threshold not placed or established in accordance with the procedures in 8.405-1, 8.405-2, or 8.405-3, the only circumstances that may justify the action are—

* * * * *

(C) **In the interest of economy and efficiency**, the new work is a logical follow-on to an original Federal Supply Schedule order provided that the original order was placed in accordance with the applicable Federal Supply Schedule ordering procedures. The original order or BPA must not have been previously issued under sole-source or limited-sources procedures.

FAR § 8.405-6 (FAC 2005-50), May 16, 2011 (emphasis added). The information required for inclusion in a limited source justification, now set forth in FAR § 8.405-6(c), is nearly identical to that required in the prior FAR provision.

In its protest, XTec argued that the limited source justification was unreasonable for various reasons, and quoted the language in the justification citing the older FAR provision GSA relied on. GSA asked us to dismiss the allegation as lacking a valid basis because XTec did not dispute that the task order was a logical follow-on to the

² The language of FAR § 8.405-6(g) in effect at the time specified the information a limited source justification must include, such as rationale and other supporting facts, a description of market research conducted, and a statement of any actions taken to remove or overcome barriers that led to the restricted consideration.

prior FSS order or challenge GSA's legal authority under this FAR provision. In its motion, GSA cited to and quoted the now-effective FAR provision, which includes the "in the interest of economy and efficiency" clause. GSA Motion to Dismiss, Aug. 24, 2011, at 2. In response, XTec seized upon this clause and argued that the justification was unreasonable in light of that language. XTec Opposition to Motion, Aug. 31, 2011, at 1-3. GSA replied by arguing that XTec was relying on the wrong FAR provision, although this was the one that GSA itself had cited in its motion to dismiss. GSA asserted that the controlling provision was the one in effect when the justification was signed in 2010. GSA Reply to XTec Opposition to Motion, Sept. 1, 2011, at 1-2. XTec countered that the current FAR provision is controlling because the justification was published after its effective date. XTec Sur-Reply in Opposition to GSA Motion, Sept. 6, 2011, at 1-3.

The Federal Register notice publishing the interim rule stated that the effective date for the rule was May 16, 2011. 76 Fed. Reg. 14,548, supra. As relevant here, the notice further stated that the changes in the rule applied to (1) solicitations issued and contracts awarded on or after May 16, 2011, and (2) orders issued on or after the effective date of this regulation, without regard to whether the underlying contracts were awarded before May 16, 2011. Id. Here, GSA issued its task order to HPES on July 25, 2011. Since the order was issued after the effective date of the regulation, the current FAR provision applies.³

Reasonableness of Limited Source Determination

XTec challenges the reasonableness of the limited source justification, and argues that it has not been shown to be "in the interest of economy and efficiency." GSA responds that, whichever FAR provision applies, the agency fully documented its justification considering economy and efficiency.

We will review an agency's use of a limited source justification under FAR Part 8.4 for reasonableness. See STG, Inc., B-405082, B-405082.2, July 27, 2011, 2011 CPD ¶ 155 at 3; Systems Integration & Mgmt., Inc., B-402785.2, Aug. 10, 2010, 2010 CPD ¶ 207 at 2-3. We agree with GSA that the justification was reasonable and in the interest of economy and efficiency.

After explaining the history of GSA's acquisition of these services and its plans for the future, the limited source justification stated:

³ Section 863(e) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 states that the regulations required under the section "shall apply to all individual purchases of property or services that are made under multiple award contracts on or after the effective date of such regulations, without regard to whether the multiple award contracts were entered into before, on, or after such effective date." 122 Stat. at 4548.

This acquisition is suited to a logical follow-on in accordance with [FAR §] 8.405-6(b)(2) as the new work is for the continued development or production of a major system, USAccess, and the original order was awarded competitively and placed in accordance with applicable FSS ordering procedures. Award to another source is likely to result in disruption of GSA customer agencies' Logical/Physical access deployments, substantial duplication of costs to the Government not expected to be recovered through competition, and unacceptable delays in the transition of this service. Any new end-to-end solution would require a similar process of development and deployment that would unavoidably increase cost. The MSO has chosen to minimize its risk by keeping the core service intact and migrating the system in an orderly way, in accordance with the developing IT Strategic Plan.

[HPES] developed and deployed the USAccess system and has operated it for the past 3 years. The present system took more than a year to develop and two more to deploy. The incumbent contractor is the most familiar with the customer population, operational considerations, and technical challenges. The primary reason for pursuing this strategy is to reduce risk. The largest risk identified by the MSO is that the 500,000 current cardholders will not have working cards upon the close of the current contract. Over 90 customer agencies, commissions, and boards who are issuing PIV [personal identity verification] cards for logical and physical access are in varying stages of completion, ranging from less than 5% to over 90% of government and contract employees having been issued and activated cards. Changing contractors when at least the majority of customer agency employees have either not been badged or are in the process of being badged would create substantial disruptions of their missions.

AR, exh. 24, Justification ¶ IV.b.2. The justification went on to explain that GSA's market research had shown that even using government furnished facilities or equipment would still require a different contractor to integrate its own offering with the existing data and customer base, and thereby greatly increase the risk to the MSO and its customers. Id. ¶ VI. Using a logical follow-on to continue the core services while separating and competing the external services, along with developing a longer-term strategy for using a fully-competed contract or contracts, represented the highest likelihood of success with the lowest program risk. This transition strategy would enable GSA to achieve a more flexible and competition-friendly HSPD-12 service. Id.

XTec argues that no evidence supports GSA's assertion that a transition to a new contractor would entail substantial duplication of costs or new development expenses. The protester contends that it already has a system ready to deliver; the

protester acknowledges that certain equipment might need new software patches to interface with XTec's solution, or replacements, but contends that these would be minor in scope and less expensive than recreating the entire infrastructure. XTec Comments, Sept. 23, 2011, at 9-11.

That XTec has a system to provide these services is not in dispute. Instead, the agency's concern is that any other vendor's system would have to be integrated into the system already provided by HPES, and that this integration process would result in disruption, transition delays, duplication of costs, and new costs.

The contracting officer explains that GSA did not acquire a system under the prior task order, but used the services HPES offered. CO's Declaration ¶ 14. The core service is built around a proprietary set of technologies that combine databases and middleware to provide a managed service for the MSO to provide its customer agencies and, apart from a few items, GSA does not own any of the hardware. Id. Not only is a major data migration involved, but also a substantial hardware infrastructure, multiple interfaces, and countless service considerations. Id. ¶ 15. The hardware, software, and communications infrastructure that supports the solution, as well as an infrastructure upgrade, was procured and implemented by HPES, with the costs recovered through the service-based pricing. Id. ¶ 18.

The contracting officer also states that more than 200 HPES-procured and implemented shared fixed credentialing center configurations are integrated into the application and infrastructure, and many of these would have to be replaced if an alternate solution were implemented. Id. ¶ 19. As HPES notes, this hardware replacement would likely result in a duplication of costs. HPES Comments, Sept. 23, 2011, at 18. In addition, the contracting officer states that most customers have slightly different requirements for interface with their internal systems, each of which required HPES to develop and deploy a custom interface, so any contractor attempting to provide the core services would have to provide not only the basic hardware necessary for the service but also the interfaces to each customer's computer systems. CO's Declaration ¶ 15. This would, as HPES asserts, likely involve a significant investment of time--and thus transition delay and potential disruption--and money. HPES Comments at 18-19.

XTec's assertions that it could provide a seamless transition, notwithstanding these issues, is not sufficient to find GSA's justification, which is in substance based on concerns about economy and efficiency, unreasonable.

The contracting officer also explains that GSA and its customers have invested significantly into customer-directed enhancements to HPES's proprietary application, totaling \$6,973,624 in enhancements through 366 chargeable change requests, which required 57,127 hours of customization work. She states that all of this work and investment would have to be replicated and duplicated if an alternate solution were implemented. CO's Declaration ¶¶ 21, 22.

XTec asserts that it is “far from clear” how much of this would need to be duplicated, speculating that, for example, some change orders might have installed functionality that XTec’s solution already possesses. XTec Comments, Sept. 23, 2011, at 11. However, this speculation does not provide a basis to find that the agency’s concern about duplication of costs and disruption—in other words, economy and efficiency—was unreasonable.

XTec challenges the justification’s statement that there was a risk that the 500,000 current cardholders would not have working cards upon the close of the initial task order, arguing that the cards are interoperable regardless of the system used to issue them. XTec also disputes the agency’s characterization of the progress made toward card issuance. *Id.* at 7-9

As HPES notes, however, while the cards once produced and activated may be interoperable, the systems that produce, manage, and maintain the cards are not. That is the reason XTec would have to duplicate the software customization efforts already taken by HPES. HPES Comments, Sept. 23, 2011, at 15-17. The contracting officer explains that each of GSA’s customers was on-boarded using agency-specific configuration data. She states that agency cards cannot be printed and subsequently activated without this unique configuration data and would have to be re-initialized if an alternate solution were implemented. CO’s Declaration ¶ 20. While XTec disagrees, here, too, it has not shown the agency’s concerns are not valid.

In sum, we find that the agency’s limited source justification to extend the HPES task order based was reasonable and was made in the interest of economy and efficiency, as required by the now-applicable FAR provision.

Untimely Issue

In its protest, XTec also argued that the limited source award resulted from a lack of advance planning citing a provision of FAR Part 6, which concerns competition requirements in federal contracting. As GSA noted in its motion to dismiss, both the prior and current versions of the FAR provision at issue here, FAR § 8.405-6, clearly state that orders placed under FSS schedules are exempt from the requirements in FAR Part 6. In its sur-reply in opposition to GSA’s motion to dismiss, XTec shifts from its reliance on FAR Part 6 to argue that FAR § 8.404(c) provides that orders placed under an FSS contract are not exempt from the development of acquisition plans, citing to FAR Subpart 7.1.⁴

⁴ FAR Subpart 7.1 sets forth various requirements for agency acquisition planning. The record includes GSA’s original and updated acquisition plans pursuant to FAR § 7.105. AR Exhibits 14, 20.

XTec's allegation relying on FAR Part 6 fails to state a legally sufficient basis and will not be considered further. See 4 C.F.R. §§ 21.1(f), 21.5(f) (2011); Source Diversified, Inc., B-403437.2, Dec. 16, 2010, 2010 CPD ¶ 297 at 5. XTec's challenge to GSA's compliance with the requirements of FAR Part 7.1, through FAR § 8.404(c), is a separate challenge made 41 days after publication of the limited source justification.

Our Bid Protest Regulations require that protests other than those based on alleged solicitation improprieties shall be filed not later than 10 days after the basis of protest was known, or should have been known. 4 C.F.R. § 21.2(a)(2). The regulations do not contemplate the piecemeal presentation or development of protest issues through later submissions providing alternate or more specific legal arguments missing from earlier general allegations of impropriety. CapRock Gov't Solutions, Inc.; ARTEL, Inc.; Segovia, Inc., B-402490 et al., May 11, 2010, 2010 CPD ¶ 124 at 24; University Research Co., LLC, B-294358.8 et al., Apr. 6, 2006, 2006 CPD ¶ 66 at 16. Our Office will dismiss a protester's piecemeal presentation of arguments that could have been raised earlier in the protest process. Alfa Consult S.A., B-298164.2, B-298288, Aug. 3, 2006, 2006 CPD ¶ 127 at 3 n. 2. Because XTec did not present its argument earlier in the protest process, even though it could have done so, the protester's argument here is untimely.

The protest is denied.

Lynn H. Gibson
General Counsel