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Decision

Matter of: Cygnus Corporation

File: B-406350; B-406350.2

Date: April 11, 2012

Hilary S. Cairnie, Esq., Baker & Hostetler LLP, for the protester.
Jason Blindauer, Esq., Sam Q. Le, Esq., National Institutes of Health, for the agency.
Gary R. Allen, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that task orders for scientific, professional and technical support services were outside the scope of a requirements contract is denied where the contract's statement of work and illustrative labor categories reasonably identified these services.
 2. Protest that an agency violated various small business rules and requirements by cancelling a solicitation set aside for small businesses without consulting the Small Business Administration, and by ordering the services under an existing contract without considering whether two or more small businesses could perform, is dismissed as untimely where the protester did not diligently pursue its grounds of protest.
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DECISION

Cygnus Corporation of Rockville, Maryland, protests the decision of the Department of Health and Human Services (HHS) to issue task orders for scientific, professional, and technical support services for the National Institute of Allergy and Infectious Diseases (NIAID), located in Bethesda, Maryland, and Hamilton, Montana, under a National Institutes of Health (NIH) requirements contract (Contract No. HHSN-271-2010-00005I (Requirements Contract)), which NIH has

with Kelly Services, Inc., a large business.¹ Cygnus, a small business concern, complains that NIAID improperly canceled request for proposals (RFP) No. NIHAO2011061 (NIAID RFP), which the agency had issued for these same services, without coordinating with the Small Business Administration (SBA). Cygnus also contends that the task orders are outside the scope of the requirements contract.

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

BACKGROUND

In 2005, NIAID awarded a contract, under a solicitation set aside for small businesses, to LTS Corporation for temporary professional, technical and logistics support and expertise for NIAID's extramural research programs. Protest at 4. This contract was scheduled to expire on January 31, 2012.

While the LTS contract was ongoing, and after coordination with the Small Business Administration (SBA), NIH issued a solicitation in June 2009, on an unrestricted basis, for a requirements contract. This solicitation anticipated purchasing all NIH requirements for scientific and technical support services in six task areas (scientific research support, IT support, professional/executive support, healthcare support, clinical research support, and industrial and facility maintenance support).² See Agency Report (AR), Tab 20, Solicitation No. NIMH-09-OD-0001, at 9.

The NIH solicitation's statement of work identified 231 labor categories supporting the task areas and indicated that the work would be performed primarily in the Rockville-Bethesda, Maryland area, where NIH's main campus is located, but included 25 other locations nationwide. Id. at 12-13; statement of work at 95-115. The solicitation also informed offerors that the identified labor categories were "considered typical, but not all inclusive," and that additional labor categories could be added. AR, Tab 20, Solicitation No. NIMH-09-OD-0001, at 5. A requirements contract was awarded to Kelly Services under this solicitation on March 15, 2010. Both the issuance of the solicitation and the award to Kelly Services were published on the FedBizOpps website. See NIH Contracting Officer's (CO) Statement at 3.

¹ NIH is an operating division within HHS. NIAID is one of the institutes comprising NIH.

² Prior to issuing the solicitation, the agency published a sources sought notice on the FedBizOpps website. See AR, Tab 37, Sources Sought Notice, at 23. Based upon responses from small businesses, the agency determined that no small business could fulfill the contract requirements.

In July 2011 in anticipation of the expiration of NIAID's small business contract with LTS, an NIAID contracting officer reviewed the Requirements Contract with Kelly Services to determine whether the requirements of LTS's contract were within the scope of the Requirements Contract.³ NIAID CO Statement at 2. Because she was uncertain as to whether to issue a new solicitation to re-compete the requirements of the LTS contract, or to obtain these services under the Requirements Contract, she decided to issue the NIAID RFP, as a follow-on small business set-aside. Id. Subsequently, the NIAID CO determined that the services sought by NIAID RFP were in fact within the scope of the Requirements Contract. On October 4, she amended the RFP to inform prospective offerors to stop work on their proposals, and, on October 18, canceled the RFP. Id. at 3.

Four firms (but not the protester) contacted the CO in the Fall of 2011 to ask whether the NIAID would re-solicit the requirements specified in the NIAID RFP; she informed them that the agency would not be re-soliciting these requirements. Id. at 3-4. One of the four firms also asked why the solicitation had been cancelled, and was informed that the requirement would be filled by "existing contract mechanisms." Id. There is no evidence in the record that Cygnus inquired about the cancellation of the NIAID RFP. Between January 4 and January 24, 2012, HHS issued 38 task orders to Kelly Services under the Requirements Contract.

Cygnus protested to our Office on January 20.⁴

DISCUSSION

Scope of the Requirements Contract

Cygnus argues that the task orders issued to Kelly Services for scientific, professional, and technical support services for NIAID in Bethesda, Maryland, are outside the scope of the Requirements Contract. Cygnus contends that the

³ The NIAID RFP stated that the purpose of the contract would be to provide scientific, professional and technical support services and expertise for NIAID's research programs and operational objectives, in the following areas: scientific review; program writing; technical writing and copy editing; acquisition and contracts management; advisory council and committee operations; conference management; performance assessment; administrative services; technical and scientific analysis; scientific consultation; information technology; and grants management. AR, Tab 13, NIAID RFP, statement of work, at 1-7.

⁴ On February 15, the agency took corrective action with respect to 9 task orders for certain administrative services, stating that these services were not within the scope of the Requirements Contract. These 9 task orders were terminated, and the agency stated that it would re-solicit these administrative services later.

Requirements Contract only provides for staff, and not services, which Cygnus believes is materially different. Protest at 14. We disagree.

The Competition in Contracting Act of 1984 (CICA) requires that agencies specify their needs and solicit offers in a manner designed to achieve full and open competition, so that all responsible sources are permitted to compete. 41 U.S.C. § 3301 (2011). When a protester alleges that the issuance of a task or delivery order under a multiple-award contract is beyond the scope of the contract, we analyze the protest in essentially the same manner as those in which the protester argues that a contract modification is outside the scope of the underlying contract. The fundamental issue is whether issuance of the task or delivery order in effect circumvents the general statutory requirement under CICA that agencies use competitive procedures when procuring their requirements. Specialty Marine, Inc., B-293871; B-293871.2, June 17, 2004, 2004 CPD ¶ 130 at 4.

In determining whether a task or delivery order is outside the scope of the underlying contract, and thus falls within CICA's competition requirement, our Office examines whether the order is materially different from the original contract, as reasonably interpreted. See Emergent BioSolutions Inc., B-402576, June 8, 2010, 2010 CPD ¶ 136 at 8 (where the type of work under a contract as modified remains substantially unchanged, we do not view modifications of the technical requirements of performance to be outside the scope). 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. In other words, the inquiry is whether the order is one which potential offerors would have reasonably anticipated. Symetrics Indus., Inc., B-289606, Apr. 8, 2002, 2002 CPD ¶ 65 at 5.

Here, we find that the task orders issued to Kelly Services are within the scope of the Requirements Contract. The protested task orders provided for the performance of support services, such as contract and grant processing, for NIAID in Bethesda. See, e.g., AR, Tab 18, Task Order, at 13-18 (contract and grant specialist to perform support services related to grant activities at NIAID in Bethesda). The statement of work for the Requirements Contract identifies six staffing support services areas for which task orders could be issued. The identified areas are:

- a. scientific research support in a wide variety of healthcare related areas.
- b. professional/executive support to NIH research effort.
- c. information technology support to NIH research effort.

- d. healthcare support to the NIH research and patient contact effort.
- e. clinical research support to the NIH research.
- f. industrial and facility maintenance support to the NIH research effort.

See AR, Tab 25, Requirements Contract, statement of work, at 2. In addition, the Requirements Contract identified 231 labor categories that the contractor may be required to provide, including such positions as contract and grants assistants, editorial assistants to support these service areas, and grants management executives and specialists. See id., attach. 4, Listing of Specific Labor Categories, at 95-115. Also, the Requirements Contract stated that in addition to the identified labor categories the contractor may be required to provide other “independent contractors,” and that additional labor categories may be ordered, to perform the services within the scope of the contract,. See id., at 4, 114-15.

The crux of Cygnus’s argument that the task orders are not within the scope of the Requirements Contract is that providing “staffing” support for each of these areas is materially different from providing the support services. Cygnus contends that the NIAID RFP requires that the contractor itself actually perform the services sought, not merely provide personnel to perform identified services. Protest at 14-15. We find no merit to this argument. Both the NIAID RFP and the Requirements Contract provide for the performance of services for the agency by contractor staff. In this regard, the Requirements Contract states in multiple places that it is for “non-personal” services, where the contractor is responsible for the management, direction and supervision of personnel. This direction is also included in each of the task orders. AR, Tab 20, Requirements RFP SOW, at 6, 140; Tab 25, Requirements Contract at 5; statement of work at 10; Tab 18, Task Orders. We simply fail to see the distinction that the protester attempts to draw between providing identified services and providing staffing to perform the services.

Cygnus also complains that some of the task orders are for consultants, which the protester argues is not within the scope of the Requirements Contract. For example, one of the task orders is for a consultant to assist in (a) managing scientific peer review of grant and cooperative agreement applications; (b) recommending potential peer review experts to facilitate the selection, assignment and instruction of committees of scientists; and (c) identifying highly qualified consultants from the world-wide scientific community for initial review groups. See AR, Tab 18, Task Orders, at 123. As noted above, however, the Requirements Contract specifically provided that the contractor may be required to provide “independent contractors” to perform the contract requirements. In any event, the more pertinent inquiry is whether the services to be performed are within

the scope of work identified in the Requirements Contract.⁵ Again, our review of the task orders, including those for “consultants,” indicates that the services sought are within the scope of the six service areas identified in the Requirements Contract.

Small Business Act and Regulations

Cygnus also protests the cancellation of the NIAID RFP and transfer of its requirements to the Requirements Contract. Cygnus contends that this reflects improper bundling of requirements under the Small Business Act, 15 U.S.C. § 631(j)(3), and CICA, 41 U.S.C. § 3306(a)(2)(B), and that the agency failed to coordinate its actions with the SBA. The protester also contends that the agency violated FAR § 19.502-2(b) (“rule of two”), because the agency transferred work to the Requirements Contract knowing that two or more small businesses could perform the requirements. Protest at 7-14.

In response to our request, SBA provided its views on the protest; SBA agrees with Cygnus that HHS has not satisfied its obligations under the Small Business Act. Specifically, SBA states that the agency violated the Small Business Act by not coordinating with an SBA Procurement Center Representative (PCR).⁶ The SBA also contends that HHS violated FAR § 19.502-2(b), because there are small

⁵ Cygnus also contends that the agency improperly relies upon labor category catalogs that were added to the Requirements Contract after the agency’s October 18 decision to cancel the NIAID RFP and issue task orders under the contract. Supp. Protest at 4. We find, however, that the services ordered (with the exception of administrative services that have been terminated) are consistent with the Requirements Contract scope of work, including the original List of Specific Labor Categories attached to the contract.

⁶ SBA argues that, other than sending out a sources sought notice, HHS did not conduct any market research concerning small businesses before awarding the Requirements Contract. SBA Comments at 18. The record shows, however, that HHS not only sent out a sources sought notice that was vetted by the HHS small business specialists assigned to NIH, but received and reviewed statements of capability from 14 small businesses. See AR, Tab 35, HHS Small Business Specialist’s Statement, at 3; Tab 38, Sources Sought Notice and Agency Review of Small Business Submissions, at 13-97 and 101-187. Furthermore, HHS coordinated its efforts with an SBA PCR, who reviewed all of the market research, and made suggestions concerning the segregation of a portion of the work as a small business set-aside (administrative services) and small business subcontracting goals. Tab 34, SBA PCR Statement at 1-2. The SBA PCR specifically found that the market research was sufficient and that there were no bundling issues. Id.

businesses that could perform the requirements in the six areas covered by the Requirements Contract.⁷ SBA Comments at 4-11.

HHS argues that Cygnus's challenge to the cancellation of the NIAID solicitation and decision to order this work from the Requirements Contract is untimely. Cygnus responds that it is not challenging the cancellation of the NIAID RFP and that it could not have known the basis of its protest prior to the issuance of the task orders to Kelly Services. We agree with HHS that the protest is untimely.

Although Cygnus learned on October 18 that HHS canceled the NIAID RFP, the protester, unlike some other small business offerors, made no effort to determine why the agency had canceled the solicitation or whether the requirements would be re-solicited from small business concerns. Rather, Cygnus waited 3 months to protest to our Office that HHS was acquiring these services from the Requirements Contract.⁸

Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, a protest based on alleged improprieties in a solicitation must be filed prior to bid opening or the time established for receipt of proposals, 4 C.F.R. § 21.2(a)(1) (2011), and all other protests generally 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). To ensure meeting these timeliness requirements, a protester has the obligation to diligently pursue the information that forms the basis for its protest. Professional Rehab. Consultants, Inc., B-275871, Feb. 28, 1997, 97-1 CPD ¶ 94.

Moreover, we agree with HHS that Cygnus should have been aware that a requirements contract from which the agency was obligated to order contained the requirements of the canceled NIAID solicitation. As noted above, both the solicitation for, and the award of, the Requirements Contract was published on the FedBizOpps website. Publication on the FedBizOpps website provided Cygnus with constructive notice of the terms of the solicitation. PR Newswire Association, LLC, B-400430, Sept. 26, 2008, 2008 CPD ¶ 178 at 2. The canceled NIAID solicitation sought scientific, professional and technical support services and expertise for NIAID's research programs and operational objectives. Similarly, one

⁷ SBA also complains that HHS issued task orders for administrative services that were not covered by the Requirements Contract. As noted above, however, the agency terminated the orders for these administrative services.

⁸ Although Cygnus argues that it is not challenging the cancellation of the NIAID RFP, the cancellation of the solicitation is intertwined with the agency's decision to acquire these services from the Requirements Contract, and not through a solicitation set aside for small businesses.

of the Requirements Contract's service areas, for which orders could be issued, was for professional and executive services. Possible labor categories identified for these services included contracts and grants executives, assistants, and specialists. See AR, Tab 25, Requirements Contract, statement of work, at 2; attach. 4, Listing of Specific Labor Categories, at 95-115. In short, we do not agree with Cygnus that the scope of the Requirements Contract was so broad and ambiguous that the protester could not know that the canceled services could be ordered under that contract. Cf. LBM, Inc., B-290682, Sept. 18, 2002, 2002 ¶ 157 at 5.

The protest is denied in part and dismissed in part.

Lynn H. Gibson
General Counsel