



Decision

Matter of: ASG Solutions Corporation d/b/a American Systems Group

File: B-420743

Date: August 10, 2022

Ritobrata Banerjee for the protester.

Andrew McCabe, Esq., and Robert McCall, Esq., Department of the Navy, for the agency.

Hannah Barnes, Esq., Christopher Alwood, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging that the agency was required by regulation to conduct a procurement for warehouse services using the Navy's SeaPort Next Generation contract vehicle is denied where the plain language of the regulation exempts the agency from the requirement to consider this contract vehicle when acquiring commercial items.

DECISION

ASG Solutions Corporation, d/b/a American Systems Group (ASG), a small business of San Diego, California, protests the terms of request for quotations (RFQ) No. N00244-22-R-0035, issued by the Department of the Navy, Naval Supply Systems Command, for warehouse services in San Diego and Port Hueneme, California. ASG contends that the Navy is required by regulation to conduct this procurement using the Navy's SeaPort Next Generation (SeaPort NxG) contract vehicle.

We deny the protest.

BACKGROUND

On April 28, 2022, pursuant to Federal Acquisition Regulation (FAR) subpart 8.4, the agency issued the RFQ, using General Services Administration (GSA) Federal Supply Schedule (FSS) procedures, as a set-aside for historically underutilized business zone (HUBZone) small business concerns. Agency Report (AR), Tab 2, RFQ at 1. The solicitation sought warehouse services, including material receipt, identification, stowage, and delivery, for Navy ships in San Diego and Port Hueneme. *Id.* at 10-14.

The RFQ provided for award on a best-value tradeoff basis, considering the following three evaluation factors, listed in descending order of importance: technical capability, past performance, and price. *Id.* at 66.

During the pre-solicitation process, the agency conducted market research and reviewed various contract vehicles, including the Navy SeaPort NxG vehicle, and determined that there was no existing contract vehicle to procure the warehouse support services sought by the agency. Contracting Officer's Statement (COS) at 2. As part of its market research, the Navy issued a sources sought notice seeking qualified small businesses and received 24 responses by the January 31 closing date for responses to the notice. *Id.* On January 13, GSA contacted the Navy in response to the sources sought notice and provided market research information that the Navy determined indicated sufficient competition among small businesses, including among HUBZone small business concerns. *Id.*

As a result of this research and information, the contracting officer determined that a HUBZone set-aside was in the best interest of the government. *Id.* On February 8, the contracting officer completed a commercial item determination supporting the conclusion that the warehouse services required by the agency were of "a type offered and sold competitively in substantial quantities in the commercial marketplace." Memorandum of Law (MOL) at 3; see COS at 2, citing FAR part 12 (Acquisition of Commercial Products and Commercial Services); see FAR 2.101 (defining a commercial service). As a result of this determination, the agency concluded that the SeaPort NxG contract was not an appropriate vehicle for the required services and that the solicitation would be issued pursuant to FAR part 8 as a HUBZone set-aside. COS at 2-3.

The agency issued a pre-solicitation notice between April 22 and April 28. AR, Tab 4, Pre-solicitation Notice at 2. Beginning April 23, the protester initiated a series of communications with the agency asserting that the Navy was required to source these warehouse services through SeaPort NxG. COS at 3. The agency issued the solicitation on April 28, and the protester continued to email and call the agency from different phone numbers. *Id.* at 4. On May 4, the protester was referred to the contracting officer, who provided the protester with an explanation of why the agency believed SeaPort NxG was not the appropriate contract vehicle for this procurement. *Id.* at 4-5; see Protest exh. A, Email Communication. On May 10, this protest followed.

DISCUSSION

ASG argues that the Navy is required by regulation to conduct this procurement using the SeaPort NxG contract vehicle.¹ Protest at 2. The protester cites to its regulations,

¹ In pursuing this protest, ASG has made various arguments that are in addition to, or variations of, the core argument discussed here. For example, the protester argues that the agency "declin[ed] our offer for open and frank discussions," seemingly referring to

arguing that the Navy has failed to meet any of the exemptions for use of the SeaPort NxG vehicle. Protest at 3-4. ASG refers to subpart 5237.1 of the Navy Marine Corps Acquisition Regulation Supplement (NMCARS), which lists exceptions to the mandatory “consideration of using SeaPort” as a contract vehicle for certain requirements.² NMCARS 5237.102.

The agency responds that its decision not to use the SeaPort NxG contract vehicle was consistent with its regulations and with SeaPort NxG standard operating procedures. MOL at 4. The Navy argues that SeaPort NxG operating procedures emphasize that this contract vehicle is for non-commercial services, not commercial ones, and MCARS section 5237.102 clearly provides an exception to the requirement that the agency consider the use of SeaPort NxG when there are “Actions for Commercial Items under Part 12.” NMCARS 5237.102(4); MOL at 6; AR, Tab 5, SeaPort NxG Standard Operating Procedures at 7 (stating that SeaPort NxG is not considered commercial and that strictly commercial buys should be processed outside of SeaPort). The agency also asserts that the contracting officer cited this exception in signing an internal waiver from the use of SeaPort for the procurement of the required warehouse services and in signing the commercial item determination that SeaPort was not the appropriate vehicle for the requirement at issue. MOL at 7. The Navy argues that it correctly considered the FSS program, which “provides [f]ederal agencies with a simplified process of acquiring commercial supplies and commercial services.” *Id.* (quoting FAR 38.101(a)).

Our analysis begins with the interpretation of the relevant statute or regulation. See *Curtin Mar. Corp.*, B-417175.2, Mar. 29, 2019, 2019 CPD ¶ 117 at 9 (quoting *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (“As in any case of statutory construction, our analysis begins with the ‘language of the statute.’”)). In construing the statute or regulation, “[t]he first step ‘is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.’” *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2001) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). If the statutory or regulatory language is clear and unambiguous, the inquiry ends with the plain meaning. *Curtin Mar. Corp.*, *supra* (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

Here, the relevant section of the Navy’s regulations specifically and unambiguously states that the agency is exempt from the requirement to consider the SeaPort contract vehicle for “[a]ctions for [c]ommercial [i]tems.” NMCARS 5237.102(4). We note that the

ASG’s emails and calls to the agency between April 28 and May 4. Protest at 5. To the extent that ASG argues that the Navy should have chosen a different contract vehicle that suited the protester’s interests based upon these communications, ASG has failed to state a valid basis for protest. See 4 C.F.R. § 21.1(c)(4). We have considered all of ASG’s arguments and find no basis to sustain its protest.

² NMCARS “implement[s] and supplement[s] the Federal Acquisition Regulation (FAR) and the Defense Far Supplement (DFARS).” NMCARS 5201.101

agency's statement that it "determined the required services are a type offered and sold competitively in substantial quantities in the commercial marketplace," is supported by the contracting officer's commercial item determination.³ MOL at 3-4; see FAR 2.101(b)(2) (defining a commercial service as a service "of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions"). We agree with the agency that its determination that the required warehouse services are commercial in nature means that the procurement falls under one of the relevant exceptions in the Navy's regulations, as the plain language of the regulation does not require SeaPort NxG to be considered for commercial services. We do not find, and no party has demonstrated, that there is any other reasonable meaning to this section of the NMCARS.

In sum, as the protester's arguments conflict with the plain meaning of the unambiguous section of the NMCARS, which clearly exempts the agency from considering SeaPort NxG as a contract vehicle when procuring commercial services, we find no basis to question the reasonableness of the agency's decision to issue the solicitation pursuant to FAR subpart 8.4 as a HUBZone set aside using GSA FSS procedures.

The protest is denied.

Edda Emmanuelli Perez
General Counsel

³ The protester does not dispute this determination. See Protest; MOL at 4 n.20.