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Decision

Matter of: Nolij Consulting, LLC

File: B-421563

Date: July 3, 2023

Thomas K. David, Esq., Kenneth D. Brody, Esq., and Katherine A. David, Esq., Reston Law Group, LLP, for the protester.

Jennifer S. Zucker, Esq., and Christopher M. O'Brien, Esq., Greenberg Traurig, LLP, for BCG Federal Corporation, the intervenor.

Timothy J. Haight, Esq., Michael C. Ahl, Esq., and Bradley E. Richardson, Esq., Department of Defense, and John W. Klein, Esq., and Mark Hagedorn, Esq., Small Business Administration, for the agencies.

Katherine I. Riback, Esq., and Alexander O. Levine, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester is not an interested party to challenge the removal of a requirement from the Small Business Administration's 8(a) program where the protester is not an 8(a) small business and would not be eligible to compete for the contract even if the protest was sustained.

DECISION

Nolij Consulting, LLC, a small business of Tysons, Virginia, protests the proposed modification of a task order issued by the Department of Defense (DOD), Defense Health Agency (DHA), to BCG Federal Corporation, of Bethesda, Maryland, to add testing and evaluation services that are being performed by an 8(a) small business.¹ Nolij argues that the agency improperly removed the requirement from the 8(a) business development program in order to place it with a large business concern.

¹ Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes the Small Business Administration (SBA) to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small businesses. Federal Acquisition Regulation (FAR) subpart 19.8. This program is commonly referred to as the "8(a) program."

We dismiss the protest.

BACKGROUND

The Program Executive Office, Defense Healthcare Management Systems (PEO DHMS) is responsible for the day-to-day execution of several acquisition programs established to support the modernization of DOD healthcare management systems. The PEO DHMS is “chartered to deliver the single Electronic Health Record” and other health-related information technology to the DOD, the Department of Veterans Affairs, and the United States Coast Guard. Agency Report (AR), Tab 5, WF3 Sol., attach. 1, Scope and Ordering Guide at 2.

On September 2016, the Department of the Interior issued a task order for test and evaluation support services (TESS) on behalf of PEO DHMS.² AR, Tab 71, Dept. of Interior Task Order; Contracting Officer Statement (COS) at 7. The task order was issued to SDB Alliant, LLC, a small business joint venture, of which Nolij was a member, under a workforce support contract known as PEO 2.0. *Id.*

In September of 2020, DHA began drafting a solicitation, referred to as the workforce 3.0 (WF3) solicitation, that would be a fully “managed solution” intended to deliver a “full breadth of digital workforce capabilities,” including testing and evaluation services across the agency. AR, Tab 9, RFP, at 76-77. To this end, the agency issued various drafts of the request for proposals (RFP) and posted questions posed by potential vendors, including Nolij, along with the agency’s responses. For example, several of Nolij’s questions expressly asked whether the Department of the Interior contract for testing evaluation support services would continue through a contracting solution outside of WF3. Req. for Dismissal at 3-7; COS 8-12; Memorandum of Law (MOL) at 3; AR, Tabs 14-21, Eight Question and Answer Rounds. The agency provided answers that put Nolij on notice that the WF3 solicitation would include testing management, and that the agency would “sunset” existing contracts involving testing and evaluation services, such as the Department of the Interior contract. Req. for Summary Dismissal, Attach 4, WF3 Questions and Answers (Q&A) (Nov. 2, 2020) No. 105; Req. for Summary Dismissal, attach. 4, WF3 Q&A (Nov. 23, 2020) No. 53; MOL at 3.

The agency then conducted extensive market research and coordinated with DHA’s Office of Small Business Participation and the SBA. AR, Tab 26, Small Business Coordination Record. Based on the results of its market research, the agency concluded that the WF3 effort is a new requirement. COS at 28. The SBA concurred with the agency’s conclusion, which meant that the SBA did not consider whether the

² TESS was the term used to describe the testing management assisted acquisition contract between PEO DHMS and the Department of Interior.

requirement had previously been set aside. *Id.*; AR, Tab 26, Small Business Coordination Record at 2.

DHA issued the WF3 solicitation on April 22, 2021, seeking proposals for indefinite-delivery indefinite-quantity (IDIQ) contracts and associated task orders. AR, Tab 9, WF3 RFP at 1.³ As described below, the solicitation contemplated the issuance of an initial design-to-outcome (DTO) task order, a core task order (CTO), and certain incubator task orders.⁴ *Id.* at 76. The solicitation was divided into two task order lots: lot 1 was unrestricted, and lot 2 was limited to small business.⁵ AR, Tab 5, RFP amend. 2 at 6 and 18. The DTO task order award within lot 1 would allow the lead lot 1 awardee to observe incumbent solutions and propose an approach to inform the objectives and outcomes of the CTO. The initial DTO task order allows for the transition of PEO DHMS mid- and back-office functions to the contractor. AR, Tab 5, WF3 Sol., attach. 1, Scope and Ordering Guide at 20.

On March 24, 2021, Nolij executed a teaming agreement with lot 1 offeror, Capgemini Government Solutions, LLC, covering testing related tasks awarded to Capgemini under WF3. AR, Tab 28, Capgemini Teaming Agreement at 9.⁶ The teaming agreement contemplated Nolij receiving a subcontract if Capgemini was issued the DTO task order and contemplated Nolij “leading all currently-scoped DHMS testing and test-related tasks and capabilities, and will continue them under the PEO DHMS Workforce 3.0 contract.” *Id.* at 9.

On January 27, 2022, DHA concurrently awarded a lead lot 1 contract and a DTO task order to BCG. AR, Tab 33, BCG WF3 IDIQ Contract; AR, Tab 34, WF3 DTO Task Order. Following the awards, a disappointed lot 1 offeror protested the awards to GAO, and a stop work order followed. COS at 7. Due to the stoppage of work under BCG’s lot 1 contract and DTO task order, the agency, using the Naval Information Warfare Center (NIWC), awarded a 12-month “bridge” or interim contract for TESS work to

³ The solicitation was amended five times total. Unless otherwise stated, all citations to the solicitation are to the conformed version of the RFP provided by the agency.

⁴ Incubator task orders are awarded to the two non-lead awardees, to evaluate the current state the PEO DHMS’s transformation and identify capability gaps. RFP at 76.

⁵ Awardees under the unrestricted lot 1 would be accountable for the overall delivery of the new workforce paradigm. Awardees under the lot 2 small business set-aside portion would perform *ad-hoc* and accelerator task orders to address specific problems or supplement lot 1 functions. AR, Tab 5, RFP amend. 2 at 19-20. An accelerator task order is issued with a duration of 30 days, prior to an *ad-hoc* task order, to accurately scope and negotiate the terms of the *ad hoc* task order. RFP at 75. The *ad hoc* task order is a task order issued to address a specific need, such as short-term projects. *Id.*

⁶ Nolij also executed a teaming agreement with lot 2 offeror, Optimal Strategix Group, Inc. AR, Tab 70, Optimal Strategix Group Teaming Agreement.

Echelon, an 8(a) firm, which had teamed with Nolij as its subcontractor.⁷ AR, Tab 69, NIWC Task Order to Echelon. On May 24, GAO denied and dismissed the protest (*Booz Allen Hamilton, Inc.*, B-420535; B-420535.2, May 24, 2022, 2022 CPD ¶ 131), and the stop work order was lifted. COS at 7.

On September 1, 2022, the agency issued a CTO to BCG for a variety of requirements, but it did not include testing management. COS at 25. On March 15, 2023, the agency executed and publicly posted a justification for an exception to fair opportunity (JEFO) to modify the CTO issued to BCG, to include the testing management work. AR, Tab 65, Justification for an Exception to Fair Opportunity.⁸ This protest of the modification of BCG's CTO followed.⁹

DISCUSSION

Nolij, a small business, argues that the agency improperly removed the TESS requirement from the 8(a) business development program, where it was being performed via a bridge contract with Echelon, to award the requirement to a large business as part of a modification to an existing task order. Nolij asserts that this removal of the requirement from the 8(a) program violates the FAR and applicable SBA regulations. In addition, the protester asserts that the modification violates the logical follow-on exception to an agency's obligation to provide a fair opportunity for IDIQ awardees to compete for task orders found at FAR section 16.505(b)(2)(i)(C). For the reasons discussed below, we conclude that the protester is not an interested party to contest the removal of the TESS requirement from the 8(a) program and the modification of the CTO.

⁷ As stated above, TESS was the term used to describe the testing management assisted acquisition contract between PEO DHMS and the Department of Interior. The testing requirement was included in subsequent acquisitions, but was labeled differently. Under the contract effort with the NIWC, the applicable solicitation used the term "testing and evaluation services." The WF3 solicitation uses the term "testing management." MOL at 2 n.2.

⁸ The JEFO documents the agency's conclusion that the CTO is part of the effort to implement the WF3 requirement which, as explained above, the agency developed and coordinated with the SBA, and determined was a new requirement. The agency states that as the CTO is associated with the new WF3 requirement the agency did not have to coordinate the transition of the test and evaluation services with the SBA. MOL at 11.

⁹ The total price of the task order at issue here is over \$25 million; accordingly, this procurement is within our jurisdiction to hear protests of task orders placed under DOD indefinite-delivery, indefinite quantity contracts. 10 U.S.C. § 3406(f)(1)(B).

Interested Party

The agency argues that Nolij is not an interested party to challenge the removal of the TESS requirement from the 8(a) program or the agency's alleged failure to comply with the requirements of FAR section 16.505(b). Specifically, the agency contends that because the protester is neither an 8(a) firm nor a WF3 IDIQ contractor, it is not an interested party to raise these protest allegations.

Nolij acknowledges that it is not an 8(a) firm. However the protester asserts that, as a woman-owned small business it is challenging the removal of the requirement to a large business, which is impermissible under applicable SBA regulations and the FAR. Response to Agency Req. for Dismissal at 6. Nolij argues that once the TESS requirement was placed in the SBA's 8(a) program, it could only be removed under a very limited set of circumstances. *Id.* Further, if those conditions are met, "the requirement[] must be set aside for small businesses such as Nolij." *Id.* The protester therefore contends that it is an interested party because "it is a small business that is in line to continue performing the TESS work requirements." *Id.* at 7.

Nolij also concedes that it is not a WF3 IDIQ contract holder.¹⁰ The protester asserts that it is an interested party, however, because it argues the work cannot be placed within the WF3 contract. In this regard, the protester asserts that the agency cannot award the TESS work to a large business within lot 1, because work being performed under the 8(a) program can only be removed if it is set aside for a small business such as Nolij. Response to Agency Req. for Dismissal at 7. Although lot 2 of the WF3 contract is reserved for small businesses, the protester contends that the TESS work is outside the scope of lot 2. Accordingly, the protester argues that it remains an interested party to compete for the TESS work, since, if the protest is sustained, the agency will be required to compete the work outside the WF3 contract. Comments at 15.

Under the bid protest provisions of the Competition in Contracting Act of 1984, 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. 4 C.F.R. § 21.0(a)(1). Determining whether a party is interested involves consideration of a variety of factors,

¹⁰ As made clear from the facts above, Nolij was aware that it was the agency's intention that the testing management function would eventually migrate into the WF3 contract. However, Nolij chose not to submit a proposal to become a lot 1 or lot 2 contractor under the WF3 contract. Instead, Nolij states that it made the business judgment not to "put all their eggs in one basket," and chose to become a subcontractor with vendors that were seeking a WF3 contract, while simultaneously participating as a subcontractor to the firm performing the TESS requirement. Response to Agency Req. for Dismissal at 6.

including the nature of the issues raised, the benefit of the relief sought by the protester, and the party's status in relation to the procurement. *RELM Wireless Corp.*, B-405358, Oct. 7, 2011, 2011 CPD ¶ 211 at 2. 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.

Here, Nolij is not an 8(a) small business, rather it is a subcontractor of the 8(a) contractor performing the requirement. Yet, the protest challenges the removal of the requirement from the 8(a) program. Our decisions are clear that a party is not interested where it would not be eligible to receive an award were its protest to be sustained. *MINACT, Inc.*, B-414615, B-414615.2, July 12, 2017, 2017 CPD ¶ 221 at 3. Thus, even if the TESS work were required to remain in the 8(a) program, Nolij would not be eligible for such work, and Nolij is therefore not an interested party to argue that the agency improperly removed the requirement from the 8(a) program. Nolij's status as a subcontractor does not bolster its interested party status since a prospective subcontractor does not qualify as an interested party. *Dash Eng'g, Inc.; Engineered Fabrics Corp.*, B-246304.8, B-246304.9, May 4, 1993, 93-1 CPD ¶ 363 at 5.

While Nolij argues that it would be an interested party if the requirement was removed from the 8(a) program and set aside for small businesses, Nolij is not an interested party to argue that it was improper for DHA to remove the TESS requirement from the 8(a) program. Although the protester makes conclusory assertions that the TESS work could only be removed from the 8(a) program if it was set-aside for small business, see Comments at 3 (*citing* FAR 19.815(c)(2)),¹¹ Nolij's protest concerns itself not with this issue but with whether applicable requirements were met for removing the requirement from the 8(a) program. The protester is not an interested party to assert these arguments since, if the requirement remained within the 8(a) program as Nolij argues, Nolij would not be able to compete for it because it is not an 8(a) contractor.

Similarly, since Nolij is not a WF3 contract holder, it is not an interested party to challenge the agency's alleged misuse of an exception to the fair opportunity process set forth in FAR section 16.505(b). Such fair opportunity requirements obligate the agency to provide each IDIQ contractor with "a fair opportunity to be considered for each order exceeding the micro-purchase threshold," unless an applicable exception applies. FAR 16.505(b)(1). Nolij is not a WF3 awardee, however, and therefore would not be eligible to compete for the TESS work even if it was competed amongst WF3

¹¹ The protester has not provided sufficient explanation of its basis for this argument. We note, at any rate, that at our Office's invitation, the SBA provided comments in response to this protest, which took the position that DHA is not required to solicit the TESS work as a small-business set aside. SBA Comments at 8 n.6. In this regard, the SBA stated that it considers the TESS work to be part of a new requirement based on a significant change in contract duration and magnitude. *Id.* at 8. Because the SBA has represented that it would not require the TESS work to be set-aside for small businesses, we are not persuaded by Nolij's assertion otherwise.

contractors. Accordingly, we conclude that it is not an interested party to challenge the agency's use of an exception to the fair opportunity process.

The protest is dismissed.

Edda Emmanuelli Perez
General Counsel