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Decision

Matter of: American Systems Group

File: B-421828

Date: October 26, 2023

Ritobrata Banerjee, American Systems Group, and David S. Demain, Esq., Finch, Thornton, and Baird, LLP, for the protester.
Javier E. Gonzalez, Esq., and Edna Tejeda-Oyola, Esq., Department of the Navy, for the agency.
Glenn G. Wolcott, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of a task order solicitation on the basis that the services being procured are beyond the scope of the underlying indefinite-delivery, indefinite-quantity (IDIQ) contract is dismissed as outside GAO's bid protest jurisdiction where the protester holds an IDIQ contract and does not demonstrate competitive prejudice.

DECISION

American Solutions Corporation d/b/a American Systems Group (ASG), of San Diego, California, protests the terms of task order request for proposals (TORP) No. N69450-23-R-3004, issued by the Department of the Navy, to provide technical and management support services at Guantanamo Bay, Cuba. ASG asserts that the services sought under the TORP are beyond the scope of the indefinite-delivery, indefinite-quantity (IDIQ) contract under which the TORP was issued. Protest at 1-2, 9.¹

We dismiss the protest.

¹ Page number citations in this decision refer to the Adobe PDF page numbers in the documents submitted.

BACKGROUND

In June 2019, the agency issued solicitation No. N00178-18-R-7000, seeking proposals for the award of multiple IDIQ contracts (referred to as “Seaport Next Generation” or “Seaport-NxG” contracts) to perform a wide variety of services.² ASG was one of over 2,400 offerors that received Seaport-NxG contracts. *Id.* at 2; see Memorandum of Law (MOL) at 1-2. The solicitation provided that, pursuant to the Seaport-NxG contracts, task orders would subsequently be issued in two areas--engineering services and program management services--and further divided these areas into 23 subcategories. AR, Tab 1, Seaport-NxG RFP at 9.

On June 20, 2023, the agency issued TORP No. N69450-23-R-3004 as an unrestricted task order solicitation under the Seaport-NxG contracts. AR, Tab 2, TORP. The TORP sought “two (2) Construction Engineering Technicians (ETs) with options for up to 10 additional Construction ETs and up to nine (9) Construction Managers (CMs)” to provide support services for the Navy’s Facilities Engineering Acquisition Division at Guantanamo Bay, Cuba.³ *Id.* at 5. The TORP provided that award will be made to the offeror whose proposal offers the best value to the government based on price and non-price evaluation factors. *Id.* at 123-124. The closing date for submission of proposals was July 25, 2023.

DISCUSSION

On July 20, ASG filed this protest complaining that the services sought under the TORP are beyond the scope of the underlying Seaport-NxG contracts. Protest at 1. More specifically, ASG asserts that the services contemplated under the Seaport-NxG contracts do not extend to services performed by “construction professional[s].” *Id.* at 12-13. Accordingly, ASG maintains that the TORP requirements should be competed as a separate procurement, subject to the provisions of the small business programs in part 19 of the Federal Acquisition Regulation (FAR). In this context, ASG asserts that the evaluated price of ASG’s proposal under a separate procurement would benefit from application of a 10 percent HUBZone (Historically Underutilized Business Zone) preference in accordance with FAR section 19.1307. *Id.* at 28. Based on its assertion of entitlement to a HUBZone preference under a separate procurement, ASG maintains that it has established competitive prejudice flowing from the allegedly out-of-scope requirements of the TORP. *Id.*

² The Seaport-NxG RFP advised potential offerors that “task orders issued under this contract . . . shall provide services that potentially span the entire spectrum of mission areas and technical capabilities supported by the [Navy’s] ordering activities.” Agency Report (AR), Tab 1, Seaport-NxG RFP at 9.

³ More specifically, the TORP provided that the contractor will assist the agency with enforcement of construction contract provisions, including those related to quality control, safety, budget, and schedule. TORP at 5.

In responding to ASG's protest, the agency maintains that the statements of work in the Seaport-NxG contracts reasonably extend to the construction-related services sought under this TORP.⁴ Moreover, as a threshold matter, the agency maintains that ASG's protest challenges matters outside of GAO's bid protest jurisdiction. Specifically, the agency notes that, as a holder of a Seaport-NxG contract, ASG is not precluded from competing for the TORP requirements, adding that ASG, in fact, submitted a proposal prior to the July 25 closing date. The agency further notes that the estimated value of this procurement, as well as ASG's actual proposed price, is substantially below the \$25 million threshold for GAO's bid protest jurisdiction in this matter. See AR, Tab 6, Independent Government Cost Estimate; Tab 3, ASG Proposal. Finally, the agency notes that, in preparing for this procurement, the agency documented its determination, as authorized by FAR subsection 19.000(b)(1)(ii), that the provisions of FAR part 19 would not be applied because the task order will be performed at Guantanamo Bay, Cuba.⁵ Specifically, the agency stated that:

The remote, self-contained nature of the place of performance for this requirement presents extensive administrative, logistical and operational challenges that would be difficult for small businesses to overcome.

AR, Tab 18, Management and Oversight Process for the Acquisition of Services at 3.

The agency indicates that, consistent with its discretionary authority, the FAR part 19 small business provisions are not generally applied to contracts performed at Guantanamo Bay "since it is a politically isolated and challenging location without any support from the local economy." MOL at 4. The agency further notes that the Assistant Deputy Director for Small Business, Naval Facilities Engineering Systems Command Southeast, concurred with the agency's determination not to apply FAR

⁴ As noted above, the Seaport-NxG RFP advised offerors that "task orders issued under this contract . . . shall provide services that potentially span the entire spectrum of mission areas and technical capabilities supported by the [Navy's] ordering activities." AR, Tab 1, Seaport NxG RFP at 9. More specifically, in describing the various services contemplated under the "Engineering Services" category, the solicitation stated: "[t]his category also includes all support required within the area of . . . base related infrastructure." *Id.*

⁵ Prior to 2022, FAR section 19.000(b) provided that the FAR part 19 provisions at issue here did not apply to contracts performed outside of the United States. FAR 19.000(b) (2019); see *American Sys. Grp.*, B-418667, July 23, 2020, 2020 CPD ¶ 243. Effective May 26, 2022, FAR section 19.000(b) was amended to state that contracting officers "may apply" FAR part 19 provisions to contracts performed outside of the United States. See *Applicability of Small Business Regulations Outside the United States*, 82 Fed. Reg. 24836 (April 26, 2022). In amending FAR section 19.000(b), the FAR Councils expressly considered--and rejected--mandatory application of FAR part 19 provisions to contracts performed outside the United States, concluding that the matter should be left to the discretion of contracting officers. *Id.*

part 19 provisions to this procurement. Contracting Officer's Statement at 7; see AR, Tab 19, Small Business Coordination Record at 2-3,

Accordingly, the agency maintains that, even if the terms of the TORP were construed to be outside the scope of the underlying IDIQ contract, ASG has failed to demonstrate competitive prejudice, because it would not receive any preferential treatment under FAR part 19 even if the TORP requirements were solicited under a separate procurement.

Under the Federal Acquisition and Streamlining Act of 1994, as modified by the National Defense Authorization Act for Fiscal Year 2017, our Office is authorized to hear protests of task orders that are issued under multiple-award IDIQ contracts established within defense agencies (or protests of the solicitations for those task orders) only where the task order is valued in excess of \$25 million or where the protester asserts that the task order increases the scope, period, or maximum value of the contract under which the order is issued. 10 U.S.C. § 2304c(e)(1); see also *Threat Mgmt. Grp., LLC*, B-413729, Dec. 21, 2016, 2017 CPD ¶ 9 at 1-2 n.1.

Protests alleging that services requested under a task order solicitation are outside the scope of the underlying IDIQ contracts are usually filed by protesters that have not been awarded one of the underlying contracts and, therefore, are precluded from participating in the task order competition. See e.g., *People, Technology, and Processes, LLC*, B-417273, May 7, 2019, 2019 CPD ¶ 173; *Dyncorp International LLC*, B-402349, Mar. 15, 2010, 2010 CPD ¶ 59. Contractors, like ASG here, that have been awarded a contract under the multiple-award solicitation are not barred from competing for the alleged out-of-scope task order and therefore are not generally prejudiced.

In this context, where a protest alleging an out-of-scope task order is submitted by a company that has been awarded one of the underlying IDIQ contracts, our Office will consider the protest only where the protester demonstrates that it has been competitively prejudiced in competing for the allegedly out-of-scope task order. *Western Pilot Service; Aerial Timber Applicators, Inc.; Evergreen Flying Services, Inc.; G.B. Aerial Applications, Inc.*, B-415732 et al., Mar. 6, 2018, 2018 CPD ¶ 104 at 10; see *Datastream Sys., Inc.*, B-291653, Jan. 24, 2003, 2003 CPD ¶ 30 at 6.

Our Office has previously considered, and rejected, multiple protests filed by ASG wherein ASG has made the same or similar arguments to those presented here. See *American Sys. Grp.*, B-418469, Apr. 7, 2020, 2020 CPD ¶ 140; *American Sys. Grp.*, B-418667, July 23, 2020, 2020 CPD ¶ 243; *American Sys. Grp.*, B-418802, Aug. 17, 2020 (unpublished decision). For example, in responding to a prior protest in which ASG asserted competitive prejudice flowing from its purported entitlement to a HUBZone preference for a contract performed outside the United States prior to 2022,⁶ we stated:

⁶ As noted above, prior to 2022, the FAR part 19 small business programs did not apply to any contract performed outside of the United States.

Since the HUBZone preference would not apply to the agency's requirements even if the agency used a different procurement vehicle, we do not find that this contention establishes competitive prejudice.

American Sys. Grp., B-418667 *supra* at 4 n.3.

Here, based on the record presented, we again reject ASG's assertion that it has been competitively prejudiced. As discussed above, there is no meaningful dispute that ASG is able to compete in this procurement or that the value of the procurement is less than \$25 million. See AR, Tab 6, Independent Government Cost Estimate; Tab 3, ASG Proposal. Further, consistent with the agency's discretionary authority, the agency determined that it would not be appropriate to apply the provisions of FAR part 19 to acquire the requirements of the task order--and the record here does not provide a basis for our Office to question the reasonableness of the agency's exercise of its discretion in that regard.

Accordingly, even if the agency were to solicit the requirements at issue here under a separate procurement, ASG would not be entitled to a HUBZone preference on which it bases its claim of prejudice. In short, ASG has not shown any prejudice flowing from the alleged out-of-scope provisions of the TORP.

The protest is dismissed.

Edda Emmanuelli Perez
General Counsel