



Decision

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Matter of: Win Aviation, Inc.

File: B-422037, B-422037.2

Date: December 21, 2023

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Colonel Frank Yoon, and Major Candice D. Schubbe, Department of the Air Force, for the agency.
Heather Weiner, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester is not an interested party to allege improprieties in agency's exercise of an option extending a contract for parachute training courses, where, even if the protest were sustained, protester cannot meet the required security clearance requirements and therefore would not be eligible for award of the requirement if it were recomputed.

DECISION

Win Aviation, Inc., a small business of Dekalb, Illinois, protests the decision of the Naval Special Warfare Command (NSWC) on behalf of the United States Special Operations Command (USSOCOM), to exercise an option under task order No. H9224022F0392, awarded to Rampart Aviation, LLC, of Colorado Springs, Colorado, for Navy parachute courses. The protester argues that the agency's exercise of the option improperly failed to comply with regulatory requirements.

We dismiss the protest because the protester is not an interested party.

BACKGROUND

NSWC issued task order request for proposals (TORFP) No. H9224021R0002 on May 18, 2022, using the procedures of Federal Acquisition Regulation (FAR) subpart 16.5. The solicitation was issued to vendors holding contracts under NSWC's

Enterprise-wide Military Freefall multiple-award contract.¹ Agency Report (AR), Tab 5, TORFP at 1; Contracting Officer's Statement (COS) at 2. The TORFP sought proposals to fulfill the Naval Special Warfare Advance Training Command's Navy parachute course requirement.² TORFP at 1. The solicitation contemplated issuance of a single fixed-price task order for a base year and four option years. *Id.* at 2. Award was to be made on a best-value tradeoff basis considering two factors: technical capability and price. *Id.* at 5. The solicitation also provided for the evaluation of the following two factors on a pass/fail basis: security qualifying criteria and key personnel resume/letter of intent. *Id.*

As relevant here, under the security qualifying criteria factor, the solicitation required that the prime contractor "have at a minimum, an active Secret Facility Clearance (FCL) as accredited by the Defense Security Service (DSS) at time of proposal submission."³ *Id.*; AR, Tab 8, Vendor Questions and Answers (Q&A) (amend. 0001) at 1. The TORFP advised that, following proposal submission, the agency would "review the offer[or]'s submission and also verify the offeror's clearance status and level in the DSS Industrial Security Facilities Database." TORFP at 5. The solicitation also provided that this factor would be "evaluated on a pass/fail basis where the Government reserves the right to exclude the proposal from further consideration in the case of a 'Fail.'" *Id.*

NSWC received timely proposals from three offerors, including Win and Rampart. COS at 4. Win's proposal, which included two subcontractors, received an overall technical

¹ Although the procurement at issue here was a task order competition under the NSWC's Enterprise-wide Military Freefall, which is a multiple-award indefinite-delivery, indefinite-quantity (IDIQ) contract, the agency issued the solicitation as an RFP, rather than as a request for quotations, and refers to the submission of proposals from offerors instead of quotations from vendors. For consistency and ease of reference to the record, we do the same.

² The Navy parachute course requirement involves the provision of two different courses of instruction--the static line course and the military free fall course. COS at 2.

³ The TORFP was amended two times. Amendment 0001 included a personnel security clearance requirement stating, "Contractor team individual(s) supporting this task shall be cleared at the SECRET level at task order award." AR, Tab 7, TORFP, amend. 0001; Tab 9, TORFP, amend. 0001, att. 1, Performance Work Statement (PWS) at 18. In response to amendment 0001, NSWC received a question from an offeror (not Win) asking whether the agency would allow contractor personnel to meet the individual security clearance requirement by the end of the 120-day phase-in period. COS at 6; AR, Tab 11, Vendor Questions at 1. Following this inquiry, the agency issued amendment 0002, clarifying that "[a]ll contractor personnel supporting this contract shall be cleared at the US SECRET level prior to the initial course start date." AR, Tab 12, TORFP, amend. 0002, attach. 1, PWS at 18-19. The "Security Qualifying Criteria" evaluation factor remained unchanged, requiring all offerors to possess a Secret FCL at the time of proposal submission. COS at 7; *compare* AR, Tab 7, TORFP, amend. 0001 at 4, *with* Tab 10, TORFP, amend. 0002 at 4.

rating of unacceptable because it did not meet the solicitation requirement that the prime offeror possess an active secret FCL at the time of proposal submission. COS at 5 (citing AR, Tab 33, Source Selection Decision Document (SSDD) at 5-8). On July 25, 2022, the agency notified Win that its proposal received a “fail” rating under the security qualifying criteria factor because it did not have an active FCL at the time of proposal submission. AR, Tab 16, Unsuccessful Offeror Letter at 1. The agency therefore advised Win that its proposal was rendered “ineligible for award” and that the agency would “not further evaluate the remainder of the proposal.” *Id.*

Win’s Initial Protest to GAO

On August 4, 2022, Win filed a protest with our Office challenging NSWC’s determination that Win was ineligible for the task order because it did not possess an active secret FCL at proposal submission. AR, Tab 17, Win Protest (Aug. 4, 2022). Win claimed that the agency had amended the TORFP requirement, in response to a question submitted by an offeror as part of the solicitation’s Q&As, to permit offerors to meet the FCL requirement by the end of the 120-day phase-in period. *Id.* at 1. The agency responded that the offeror question specifically asked about individual clearances, not facility clearance requirements, and that in response, the agency clearly revised the solicitation concerning only the personnel clearance requirement, without making any changes to the TORFP’s facility clearance requirement. AR, Tab 18, Req. for Dismissal (Aug. 12, 2022) at 3. As such, the agency requested dismissal of Win’s protest as an untimely challenge to the terms of the solicitation. *Id.* at 5. In response, on August 17, Win withdrew its protest. AR, Tab 19, Withdrawal Confirmation.

Task Order Award

On August 19, 2022, the agency issued task order No. H9224022F0392 to Rampart.⁴ AR, Tab 20, Rampart Task Order; COS at 7. As contemplated by the TORFP, the task order included a 12-month base ordering period and four consecutive 12-month option periods to be exercised in accordance with FAR clause 52.217-9, Option to Extend the Term of the Contract. AR, Tab 20, Rampart Task Order at 11-42, 50.

On August 17, 2023, the agency exercised option period 1 in accordance with FAR section 17.207, Defense Federal Acquisition Regulations Supplement (DFARS) 217.207(c), and Special Operations Federal Acquisition Regulations Supplement (SOFARS) 5617.207-90 for a period of performance beginning August 19, 2023, to August 18, 2024, for continued static line and military free fall support services. COS at 7; AR, Tab 22, Task Order Modification P00010, Option Period 1. The agency explains that it did not publish notice of the option exercise because the FAR exempts an order placed under FAR subpart 16.5 from notice requirements. COS at 10 (citing FAR 5.202(a)(11)).

⁴ The value of the task order here exceeds \$25 million. Accordingly, this protest is within our Office’s jurisdiction to resolve protests involving task orders issued under IDIQ contracts established pursuant to the authority in title 10 of the United States Code. 10 U.S.C. § 3406(f)(1)(B).

On September 29, 2023, Win filed the instant protest with our Office, challenging the agency's decision to exercise option year 1 of Rampart's task order.

DISCUSSION

Win's protest raises numerous allegations asserting that the agency's decision to exercise option year 1 of Rampart's task order improperly failed to comply with regulatory requirements.⁵ The protester maintains that because the agency failed to properly exercise the option, the agency must now recompetete the requirement.⁶

In addition to addressing the merits of the protest, the agency argues that Win is not an interested party to challenge the agency's decision to exercise the option. Although the protester submitted a proposal in response to the TORFP, the agency notes that Win's proposal was found ineligible for award because Win did not hold a secret FCL at the

⁵ For example, Win raises the following arguments: (1) the contracting officer did not reasonably consider the awardee's performance in deciding to exercise the option, (2) once the contracting officer is aware of the awardee's alleged negative performance, he cannot reasonably exercise the option, (3) evidence suggests that the awardee's contract has experienced cost overruns and scope changes during the base year such that exercising the option would be inappropriate, (4) in exercising the option, the contracting officer failed to consider the cost savings represented by Win and its team, (5) the contracting officer did not properly synopsise the option or perform market research, (6) the decision to exercise the option should be set aside in light of the contracting officer's behavior, (7) considering the awardee's performance issues and the cost savings provided by Win, the contracting officer cannot lawfully move forward with exercising the option, (8) the contracting officer's representative has a conflict of interest that taints any reports or recommendations by this individual, and (9) the contracting officer cannot lawfully argue that urgent and compelling circumstances or similar exigencies justify moving forward with the option exercise. Protest at 1-18.

⁶ While our Office views an agency's decision not to exercise an option as a matter of contract administration, we will entertain protests arguing that an agency unreasonably decided to exercise an option in an existing contract, rather than conduct a new procurement. *Antmarin Inc. et al.*, B-296317, July 26, 2005, 2005 CPD ¶ 149 at 2 n.2. Because the exercise of an option permits an agency to satisfy current needs for goods or services without going through formal competitive procedures, the FAR provides that before an option can be exercised, an agency must make a determination that exercise of the option is the most advantageous method of fulfilling its need, price and other factors considered. FAR 17.207(c)(3). As a general rule, option provisions in a contract are exercisable at the discretion of the government. *Nutriom, LLC*, B-402511, May 11, 2010, 2010 CPD ¶ 113 at 3. Our Office will not question an agency's exercise of an option under an existing contract unless the protester shows that the agency failed to follow applicable regulations or that the determination to exercise the option, rather than conduct a new procurement, was unreasonable. *InGenesis, Inc.*, B-412101.2, Mar. 28, 2016, 2016 CPD ¶ 102 at 5; *Sippican, Inc.*, B-257047.2, Nov. 13, 1995, 95-2 CPD ¶ 220 at 2.

time of proposal submission as required by the solicitation and necessary for the requirement. The agency argues that the record demonstrates that Win still does not hold a secret FCL. Thus, the agency argues that even if our Office sustains the protest and requires the agency to re-compete the requirement, Win would not be able to compete for award because it cannot meet the required security clearance requirements. Memorandum of Law (MOL) at 13-15.

The protester does not challenge the agency's need for a secret level facility clearance. Comments & Supp. Protest at 10-11. The protester also does not dispute that Win does not hold a secret FCL.⁷ Resp. to Req. for Dismissal (Oct. 20, 2023) at 1 (noting that Win only "maintain[s] an FCL at the 'confidential' level."). Instead, the protester asserts that it can meet the requirement because it "currently has a partner . . . that has an FCL at the secret level." *Id.* at 2. The protester maintains that "Win and [its partner] have a teaming agreement in place, and [the partner] will most certainly be a part of Win's proposed team." *Id.* The protester asserts that "Win and [the partner] have the capabilities of providing cleared instructors in order to fully comply with and meet [USSOCOM]'s training requirements[.]" *Id.* at 2. As such, the protester maintains that it is an interested party because its "team will very much be able to comply with [the security level] requirements," and "will be able to meet the requirements of a new procurement." *Id.*

In response, the agency asserts that the requirement for a secret FCL must be met by Win, as the prime contractor. MOL at 15. The agency explains that the FCL requirement is mandated by the National Industrial Security Program Operating Manual (NISPOM), codified at 32 C.F.R. § 117.10. COS at 3. In this regard, the NISPOM defines FCL as "[a]n administrative determination that, from a security viewpoint, a company is eligible for access to classified information of a certain category (and all lower categories)." 32 C.F.R. § 117.3(b). Personnel security clearance (PCL) is defined as "[a]n administrative determination that an individual is eligible, from a security point of view, for access to classified information of the same or lower category as the level of the personnel clearance being granted." *Id.* In addition, the NISPOM only allows a contractor to give an employee access to classified information at the same or lower level of classification that the contractor entity holds. 32 C.F.R. 117.10(a)(iii).

The agency also states that the NISPOM requires a government contracting agency--in this case, the Navy--"not to provide contractor employees access to classified [information] unless the company has the appropriate FCL for that level of classified

⁷ The agency's contracting officer security representative explains that the "United States government classifies sensitive information according to the degree which its unauthorized disclosure would damage national security" and that "[t]hose classification levels are Confidential, Secret, and Top Secret." AR, Tab 30, Statement of Contracting Officer Security Representative (COSR) at 2. The security representative further explains that "[c]onfidential is the lowest level of severity where unauthorized disclosure could reasonably be expected to cause damage to national security" and that "[a] facility that is cleared at the Confidential level is not authorized to access, process, store, or transmit classified material at the Secret or Top Secret level." *Id.*

information.” MOL at 2 (citing 32 C.F.R. § 117.10). The agency maintains that “[b]ecause contractor employees supporting the [task order] need access to Secret classified [information], the [task order] awardee must have a Secret FCL.” *Id.* at 14. The agency therefore asserts that, “[e]ven if the [task order] were recompeted, the [a]gency must comply with the NISPOM, meaning the solicitation would contain the same requirement for an offeror to hold a Secret FCL.” MOL at 15. In addition, the agency maintains that “[t]o satisfy the NISPOM, Win, as the prime contractor with which the agency has privity, must have the required FCL.” *Id.* (citing 32 C.F.R. § 117.10); see also 32 C.F.R. § 117.9(a)(5) (“The requirement for a favorable [FCL] for a prime contractor includes instances where all access to classified information will be limited to subcontractors. A prime contractor must have a favorable entity eligibility determination at the same or higher classification level as its subcontractors.”).

In response, the protester reiterates that “Win Aviation has a partner with an FCL and cleared personnel” and thus “[w]ere this recompeted, Win Aviation and its team meet such requirements.” Comments & Supp. Protest at 10. The protester also maintains, however, that even if an FCL is required at the prime contractor level, the agency should provide Win with an “accommodation” to provide it time after award to obtain a clearance. *Id.*; Resp. to Req. for Dismissal (Oct. 20, 2023) at 2, n.1. In support of this position, Win points to the fact that the TORFP originally included a requirement that all contractor personnel supporting the requirement must be cleared at the secret level prior to proposal submission, but that the agency was willing to revise this requirement to allow the offeror until the end of the 120-day phase-in period to meet the requirement. Comments & Supp. Protest at 11; AR, Tab 10, TORFP amend. 0002 at 4. In the protester’s view, “it follows that a similar period for an FCL approval would be acceptable.” Comments & Supp. Protest at 11.

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557, only an “interested party” may protest a federal procurement. That is, a protester must be an actual or prospective 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, including the nature of issues raised, the benefit or relief sought by the protester, and the party’s status in relation to the procurement. *Four Winds Servs., Inc.*, B-280714, Aug. 28, 1998, 98-2 CPD ¶ 57. Whether a protester is an interested party is determined by the nature of the issues raised and the direct or indirect benefit or relief sought. *Courtney Contracting Corp.*, B-242945, June 24, 1991, 91-1 CPD ¶ 593 at 4. A protester is not an interested party where it would not be eligible to receive a contract award were its protest to be sustained. *International Training, Inc.*, B-272699, Oct. 2, 1996, 96-2 CPD ¶ 132 at 2.

Here, we conclude that Win has failed to establish that it is an interested party to pursue this protest. Win acknowledges that the requirement necessitates a secret level FCL so that contractor personnel can access classified facilities or information and that Win does not have a secret FCL. Comments & Supp. Protest at 10-11. The record also demonstrates that the FCL requirement is mandated by the NISPOM, and the protester does not challenge the application of the NISPOM to the requirement. COS at 3; 32

C.F.R. §§ 117.3(b), 117.10; Comments & Supp. Protest at 10-11. Although the protester alleges that it can satisfy the requirement by having a partner with a secret FCL, the NISPOM restricts an agency from providing contractor employees access to classified information unless the company has the appropriate FCL for that level of classification. 32 C.F.R. § 117.10(a)(iii).

As the agency explains, because contractor employees supporting the task order need access to secret classified information or facilities, the contractor personnel require secret level clearances. COS at 4. Per the NISPOM, a company cannot get its personnel cleared without having a secret FCL; as a result, the task order awardee must have a secret FCL. 32 C.F.R. § 117.10(a)(iii); COS at 3-4. As such, because contractor employees supporting the task order need access to secret classified information or facilities and because the FCL requirement is mandated by the NISPOM, with which the agency must comply, if the task order were recompeted, the solicitation would contain the same requirement for an offeror to hold a secret FCL. In this instance, as noted above, Win acknowledges that it does not have a secret FCL. Resp. to Req. for Dismissal (Oct. 20, 2023) at 1. Thus, because Win does not have a secret FCL, Win is not eligible to compete for award even if the agency was required to recompeted the requirement. Accordingly, because Win could not be eligible for contract award even if its protest were sustained, Win is not an interested party for the purposes of this protest. *National Customer Eng'g*, B-251166, Feb. 9, 1993, 93-1 CPD ¶ 118 at 4.

In reaching this conclusion, we are unpersuaded by the arguments marshaled by Win concerning its interested party status. As explained above, we find the protester's argument that it could meet the FCL requirement via a teaming partner unconvincing. Moreover, with regard to its argument that the agency should provide it time after award to obtain the secret FCL, the only argument that the protester puts forth in support of this position is that although the TORFP originally included a requirement that all contractor personnel supporting the requirement must be cleared at the secret level prior to proposal submission, the agency was willing to revise this requirement to allow the offeror until the end of the 120-day phase-in period to meet the requirement. Comments & Supp. Protest at 11; AR Tab 12, TORFP, amend. 0002, att. 1, PWS at 18-19. ("All contractor personnel supporting this contract shall be cleared at the US SECRET level prior to the initial course start date.").

As discussed above, however, a company cannot get its personnel cleared at the secret level until the company has a secret FCL. COS at 3-5; AR, Tab 30, Statement of COSR at 1-2. Win does not provide any explanation or discussion as to how it could meet the requirement to have all of its contractor personnel supporting the contract cleared at the secret level prior to the initial course start date, if it is still seeking a secret FCL during this same timeframe. While the protester could challenge the terms of the requirement on recompeted, the protester has not provided a sufficient factual or legal basis to demonstrate a legitimate challenge to the requirement that the prime contractor must have an FCL at the time of proposal submission. Without more, the protester has not articulated a challenge that would make Win eligible for award.

Because Win cannot meet the requirement for the prime contractor to have a secret FCL at the time of proposal submission, Win would not be eligible to be awarded the task order in a recompetition, even if its protest were to be sustained. Accordingly, it is not an interested party to protest the agency's exercise of the option in Rampart's task order.

The protest is dismissed.

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General Counsel