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Decision

Matter of: UpToDate, Inc.

File: B-422550.2

Date: June 24, 2024

Justin A. Benson, Esq., and Charles A. Weiss, Esq., Bryan Cave Leighton Paisner, LLP, for the protester.

Shane J. McCall, Esq., Nicole D. Pottroff, Esq., John L. Holtz, Esq., Gregory P. Weber, Esq., and Stephanie L. Ellis, Esq., Koprince Law LLC, for J.E. Federal Enterprises, LLC, the intervenor.

Matthew Vasquez, Esq., and M. Aaron Lee, Esq., Defense Health Agency, for the agency.

Kenneth Kilgour, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly canceled sole-source contract in favor of a competitive procurement is dismissed because the allegation that an agency should solicit a requirement on a sole-source basis is not for GAO's review.

DECISION

UpToDate, Inc., of Waltham, Massachusetts, protests the decision of the Defense Health Agency (DHA) to cancel contract No. HT001124C0010, awarded to UpToDate by DHA for a commercial-off-the-shelf point-of-care clinical decision support tool. The protester contends that DHA's decision to terminate UpToDate's contract was improper.

We dismiss the protest.

The agency procured a subscription to UpToDate's product on a sole-source basis. Protest at 1. J.E. Federal Enterprises, LLC, protested with our Office the reasonableness of that contract award--as well as the award of a sole-source interim or "bridge" contract. GAO dismissed those protests when the agency indicated its intent to take corrective action, namely, terminating the contracts and conducting a competitive procurement to meet its point-of-care database requirement. *See J.E. Federal Enterprises, LLC*, B-422495, B-422550, May 13, 2024 (unpublished decision). This protest, challenging the reasonableness of the contract termination, followed.

UpToDate asserts that it provides the only product capable of meeting DHA's requirement. Protest at 7. The protester argues, therefore, that "DHA's decision to terminate the contract as a corrective action in response to J.E. Federal's protest was improper." *Id.* at 9. UpToDate requests that GAO "recommend that DHA not terminate UpToDate, Inc.'s contract and conduct a new solicitation when DHA already knows that only one offeror can meet its requirements." *Id.* at 11.

The agency requests dismissal of the protest. Req. for Dismissal at 1-2. DHA argues that "GAO has held that it 'will not review protests which seek to mandate a sole-source award, or, put differently, seek the remedy of a sole-source award.'" *Id.* at 2, quoting *Rante Corp.--Recon.*, B-411188.2, Sept. 30, 2015, 2015 CPD ¶ 307 at 3. The agency asserts that, "[i]n essence, UpToDate argues that DHA is required to reinstate the sole source award and not compete its requirements." Req. for Dismissal at 2. The agency contends that this is the type of assertion that GAO will not review. *Id.*, citing *Excell, Inc.--Recon.*, B-228304.2, Oct. 19, 1987, 87-2 CPD ¶ 374 (noting that GAO will not review the merits of an allegation that a contract should be awarded on a sole-source basis).

We agree with the agency. In *Excell, Inc.--Reconsideration*, as here, the protester argued that "it should be awarded the contract on a sole-source basis because of its belief that it is the only bidder capable of providing the materials required in the specification." *Excell, Inc.--Recon.*, *supra* at 2. We concluded the allegation was "not a matter that we will consider." *Id.* Moreover, GAO has declined, as a matter of policy, to permit a protester to use the Bid Protest function to restrict, rather than promote, competition. *New Mexico State Univ.*, B-409566, June 16, 2014, 2014 CPD ¶ 228 at 5.

UpToDate claims that it does not seek a mandate from GAO that the agency procure its requirement from a particular firm on a sole-source basis. Resp. to Req. for Dismissal at 2. Rather, the protester asserts that "UpToDate's protest [seeks] review of DHA's decision to 'determine that it was necessary to terminate UpToDate, Inc.'s contract and engage in a new competitive solicitation.'" *Id.* at 3, quoting Protest at 2. In other words, UpToDate contends that the agency should determine that it was unnecessary to terminate the sole-source award to UpToDate. The protester offers a distinction without meaning; the assertion that it was unnecessary for the agency to engage in a new competitive solicitation is, in fact, tantamount to a request that the agency fulfill its requirement on a sole-source basis. Again, the allegation that an agency should solicit a requirement on a sole-source basis--regardless of how nuanced--is not for GAO's review. *Excell, Inc.--Recon.*, *supra*.

UpToDate argues alternatively that "GAO has made clear that it will 'review the propriety of a contract termination where it flows from a defect that the contracting agency perceived in the award process.'" Resp. to Req. for Dismissal at 1, quoting

Citizen Contracting Grp., LLC, B-420810, Sept. 13, 2022, 2022 CPD ¶ 238 at 3.¹ While GAO generally reviews the propriety of a contract termination where the protest alleges that the termination was based on improprieties in the award of the contract, we will not do so when, as here, the protester is essentially arguing that termination is improper because it should receive a sole-source award.

The protest is dismissed.

Edda Emmanuelli Perez
General Counsel

¹ Although in *Citizen Contracting Group, LLC*, we reviewed the protester’s allegation that the agency had improperly terminated its contract, we ultimately denied the protest, stating that, “as a general rule, agencies have broad discretion to take corrective action where the agency has determined that such action is necessary to ensure a fair and impartial competition.” *Citizen Contracting Grp., LLC, supra*, at 4.