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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Delex Systems, Inc.

File: B-400321; B-400402

Date: August 5, 2008

Pamela J. Mazza, Esq., and Isaias Alba, IV, Esq., PilieroMazza PLLC, for the protester. Duncan Butts, Esq., and Julie Griffiths, Esq., Department of the Navy, for the agency. Paula A. Williams, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Government Accountability Office does not have jurisdiction over protests challenging the proposed issuance of delivery orders under a multiple-award indefinite-delivery, indefinite-quantity contract where the delivery orders are valued at less than \$10 million.

DECISION

Delex Systems, Inc. protests the terms of two solicitations for delivery orders issued by the Department of the Navy, Naval Air Systems Command to holders of an existing indefinite-delivery, indefinite-quantity (ID/IQ) contract. The first solicitation, request for proposals (RFP) No. N61339-08-R-0032 (RFP 0032), is for the revision and maintenance of the Naval Strike Air Warfare Center training program curriculum; the second solicitation, RFP No. N61339-08-R-0033 (RFP 0033), is for the revision and maintenance of training curricula for the Tidewater Naval Aviation Training Systems.¹ Delex, a small business concern, and an awardee under the existing ID/IQ contract, argues that these solicitations should have been set-aside for a competition limited to small businesses holding the ID/IQ contract.

We dismiss the protests.

¹ A third solicitation, RFP No. N61339-08-R-0035 is also the subject of a pending protest from Delex, which is docketed as B-400403.

BACKGROUND

Prior to the issuance of the solicitations at issue here, on August 15, 2003, the agency awarded ID/IQ contracts to four small businesses, including Delex, and three large businesses to supply the agency's Training Systems Contract II (TSC II), Lot II requirements.² The base ordering period under the TSC II, Lot II ID/IQ contract is 8 years and the agency reserved the right to compete future delivery orders among the small business ID/IQ contract holders.

As amended, each of the protested solicitations provides for the issuance of cost-plus-fixed-fee (CPFF) delivery orders. The record shows that the anticipated orders under RFP 0032 have a total value of \$2,654,568, and the orders under RFP 0033 have a total value of \$9,099,422. Agency Request for Dismissal, attach. 2, RFP 0032, amend. 3; attach. 3, RFP 0033, amend. 3. Both RFPs advised offerors that proposals exceeding the stated total value for each solicitation would be eliminated from the competition. Id.

The Navy requests dismissal of these protests because challenges to the proposed issuance of delivery orders under a multiple-award ID/IQ contract valued under \$10 million are precluded by section 843 of the National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. 110-181, 122 Stat. 3, 237 (2008) (to be codified at 10 U.S.C. § 2304c(e)). In contrast, Delex argues that our Office has jurisdiction because the protests are not, in Delex's view, challenging the proposed issuance of the orders, but are instead challenging the "removal of the task orders from the small business set-aside component of the [c]ontract" without regard to the requirements of Federal Acquisition Regulation (FAR) § 19.502-2(b).³ Protester's Initial Response at 2 (July 9, 2008). According to the protester, in view of our decision in LBM, Inc., B-290682, Sept. 18, 2002, 2002 CPD ¶ 157, and cases cited therein, our Office has jurisdiction over this issue despite the acknowledged statutory bar to our jurisdiction when task or delivery orders are valued under \$10 million. Id.; Protester's Supplemental Response (July 14, 2008).

² The TSC II ID/IQ contract was comprised of two award groups described as:

Lot I -- Training Systems Analysis, Development and Support
Lot II -- Technology-based Curricula, Electronic Classrooms and
Computer Laboratories

RFP, Statement of Work, at 1.

³ FAR § 19.502-2(b) provides that an acquisition with an anticipated dollar value of more than \$100,000 must be set aside for small business concerns if the agency determines that there is a reasonable expectation that offers will be received from at least two responsible small businesses, and that award will be made at a fair market price.

DISCUSSION

This analysis necessarily begins with the language of the NDAA. Specifically, it states:

(1) A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for--

(A) a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued; or

(B) a protest of an order valued in excess of \$10,000,000.

10 U.S.C. § 2304c(e)(1). Accordingly, our authority to consider protests challenging the issuance of task or delivery orders does not extend to orders valued below \$10 million, absent an allegation that the order increases the scope, period, or maximum value of the underlying contract.

Here, the record does not indicate, and the protester does not otherwise allege, that the proposed delivery orders will exceed the scope, period, or maximum value of the underlying ID/IQ contract. Nor is there any dispute that the values of the proposed orders under either RFP are less than the \$10 million jurisdictional threshold. Under these circumstances, this Office does not have jurisdiction under the NDAA to consider the protests of alleged violations of procurement statutes or regulations such as the small business set-aside requirements.

We also think Delex's reliance on our decision in LBM is misplaced. In that decision, LBM, a small business contractor that had been performing transportation motor pool services for the Army under a small business set-aside, challenged the agency's decision to transfer the follow-on requirement for the motor pool services to an existing ID/IQ contract without consideration of the set-aside requirements in FAR § 19.502-2(b). We concluded that the LBM protest was, in essence, a challenge to the terms of the underlying ID/IQ task order contract. Unlike Delex, LBM did not hold an ID/IQ contract and never received effective notice that the ID/IQ contract would, later, be viewed as including the work LBM was performing under a small business set-aside. LBM, *supra*, at 4-7. As a consequence, the Delex protests are not analogous to the facts and circumstances in the LBM decision, and provide no basis for our Office to hear this protest in the face of the unambiguous statutory bar to protests of delivery orders valued under \$10 million.

The protests are dismissed.

Gary L. Kepplinger
General Counsel