



Decision

Matter of: Doug Boyd Enterprises, LLC

File: B-400390

Date: October 2, 2008

Douglas M. Boyd, Doug Boyd Enterprises, LLC, for the protester.
John A. Thompson, Esq., Federal Emergency Management Agency, for the agency.
Jonathan L. Kang, Esq., and Ralph O. White, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging an agency's decision to cancel a task order solicitation is denied where the agency had reasonable basis for its action.
 2. Protester's argument that decision to cancel a task order solicitation renders earlier orders placed by the agency a downselection is denied because there was a reasonable expectation at the time the earlier orders were placed that vendors would have a fair opportunity to compete for future orders.
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DECISION

Doug Boyd Enterprises, LLC (DBE) protests the cancellation of task order proposal request (TOPR) No. HSFEHQ-06-R-SBMS, which was issued by the Department of Homeland Security, Federal Emergency Management Agency (FEMA) for the maintenance and deactivation of FEMA-supplied mobile homes. DBE is one of multiple vendors who were awarded indefinite-delivery/indefinite-quality (ID/IQ) contracts by FEMA. The protester contends that the cancellation of the TOPR was improper because the agency has extended the performance of the current task order, and thereby deprived vendors of a fair opportunity to compete for the agency's requirements. The protester also contends that the cancellation of the solicitation warrants reconsideration of the dismissal of its earlier protest concerning the current task order.

We deny the protest.

BACKGROUND

On May 19, 2007, FEMA awarded 10 ID/IQ contracts to small business contractors for maintenance and deactivation of mobile homes and travel trailers in the southern region of Mississippi. Each ID/IQ contract had a 5-year term, with a \$50,000 minimum guaranteed value and a \$100,000,000 maximum value. On March 7, 2007, FEMA issued a TOPR seeking quotes for the agency's "year 2" maintenance and deactivation requirements under the ID/IQ contract. The TOPR anticipated issuance of task orders with a 6-month base term, and one 6-month option. DBE submitted a quotation in response to the TOPR, but was not selected for issuance of a task order by FEMA.

DBE filed a protest on June 6, 2007, arguing that the agency had improperly evaluated its proposal and did not conduct a reasonable source selection decision. We dismissed the protest because, at the time it was filed, the Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, 108 Stat. 3243 (1994), barred protests concerning the issuance or proposed issuance of task orders under ID/IQ contracts, absent circumstances not relevant in that protest.¹ Doug Boyd Enters., LLC, B-298237.2, Aug. 6, 2007, 2007 CPD ¶ 147. In dismissing the protest, our Office rejected the protester's argument that the award of the task orders constituted an exception to FASA's bar on the protest of task orders for "downselections," that is, a task or delivery order that precludes competition for future orders for the duration of the contract performance period. Id. at 3.

On February 29, 2008, FEMA issued the TOPR for the agency's "year 3" requirements. The agency received proposals from eight offerors, including DBE. On March 19, the agency selected four vendors for award of task orders for the year 3 requirements; DBE was not one of the vendors selected. In response to inquiries from several disappointed vendors, the FEMA Ombudsman conducted a review of the procurement. The Ombudsman issued a report on April 22 which concluded that the selection decision was flawed because of a lack of estimated quantities in the solicitation, a flawed price analysis, and insufficient documentation of the past performance evaluations. Agency Report (AR) at 3.

FEMA issued a revised TOPR on May 2, which stated that award would be based solely on price/cost. On June 5, Madison Services Corp., one of the ID/IQ contract holders, filed a protest with our Office arguing that FEMA was not providing it a fair

¹ Section 843 of the National Defense Authorization Act for Fiscal Year 2008 amended GAO's jurisdiction under 10 U.S.C. 2304c(e) and 41 U.S.C. 253j(e) to authorize GAO to hear protests of the award or proposed award of certain task and delivery orders under ID/IQ contracts. Our Office now has jurisdiction to hear protests concerning orders valued at more than \$10,000,000 that were issued after May 27, 2008.

opportunity to compete for the task order because the solicitation did not consider past performance. FEMA advised our Office on June 25 that the agency intended to take corrective action by canceling the year 3 TOPR; based on the agency's corrective action, we dismissed the protest. On July 10, FEMA cancelled the year 3 TOPR. On July 21, DBE filed this protest. The agency has advised offerors that it does not intend to issue any new orders under the ID/IQ contract, and will instead obtain its requirements through new contracts.² AR at 5.

DISCUSSION

DBE argues that the agency's cancellation of the year 3 TOPR was unreasonable. Additionally, the protester contends that the cancellation of the year 3 TOPR demonstrates that the year 2 task order award was a downselection, and that its June 2007 protest of the issuance of that order should not have been dismissed. As discussed below, we find no merit in the protester's arguments.

Cancellation of the Year 3 TOPR and Extension of the Year 2 Task Order

DBE argues that FEMA's cancellation of the year 3 TOPR resulted in an improper extension of the year 2 task order. Specifically, DBA contends that the extension of the year 2 task order denies the protester a fair opportunity to compete for the agency's requirements. FEMA contends that it had a reasonable basis for canceling the solicitation and extending the year 2 task order. We agree with the agency.

A contracting agency need only establish a reasonable basis to support a decision to cancel an RFQ. Deva & Assoc. PC, B-309972.3, Apr. 29, 2008, 2008 CPD ¶ 89 at 3. A reasonable basis to cancel exists when, for example, an agency concludes that a solicitation does not accurately reflect its needs, or the agency determines that a new solicitation presents the potential for new competition or savings. Logistics Solutions Group, Inc., B-294604.7, B-294604.8, July 28, 2005, 2005 CPD ¶ 141 at 3; Para Scientific Co., B-310903, B-310742.2, Feb. 14, 2008, 2008 CPD ¶ 46 at 3.

Here, FEMA concluded that cancellation of the year 3 TOPR was warranted because the agency's requirements had changed. As discussed above, FEMA states that it will not place new orders against the ID/IQ contract, and will instead issue four new contracts to address the agency's revised requirements. The agency states that the new contracts will allow the government to address redefined requirements for the services, debundle the requirements, reduce costs to the government, and to improve

² The agency issued four solicitations through which it intends to obtain its requirements for the services covered by the ID/IQ contract: HSFEMS-08-R-0038 for mobile home deactivations; HSFEMS-08-R-0039 for maintenance services; HSFEMS-08-R-0040 for septic bladder pumping; and HSFEMS-08-R-0042 for travel trailer deactivations.

performance as compared to the current overlapping contracts. Contracting Officer (CO) Statement at 2. On this record, we think the agency had a reasonable basis to cancel the year 3 TOPR.

With regard to the extension of the year 2 task order, FEMA contends that it has the authority to extend the performance of the order under Federal Acquisition Regulation (FAR) § 37.111, which states that agencies may extend performance of recurring and continuing service requirements to address delays such as “bid protests and alleged mistakes in bid.”³ The agency contends that the extension of the order was required because of the bid protests and ombudsman reviews concerning the year 3 TOPR evaluations and awards, and the time needed to solicit and award the new contracts through which the agency will obtain its revised requirements.

The protester does not dispute the agency’s authority to extend the task order, but instead contends that the extension denied vendors an opportunity to compete for the remaining requirements under the contract. See Protester’s Comments on AR, at 2. The FAR requires agencies to provide all awardees “fair opportunity to be considered for each order exceeding \$3,000 issued under multiple delivery-order contracts or multiple task-order contracts.” FAR § 16.505(b)(1)(i).

As discussed above, we think the agency had a reasonable basis for the cancellation of the year 3 TOPR; we also think the extension of the year 2 task order was reasonable under these circumstances. We therefore view the protester’s argument as academic because there is no pending solicitation of a task order. In this regard, we do not consider academic protests because to do so would serve no useful public policy purpose. Dyna-Air Eng’g Corp., B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132. We only consider protests against specific procurement actions and will not render to a protester what would be, in effect, an advisory decision. Id. Stated differently, the agency’s current requirements are being met through an extension of the year 2 task order, which was made necessary by the cancellation of the year 3 TOPR. Thus, in the absence of a solicitation for a task order to meet the agency’s requirements, the agency’s actions here do not violate the vendors’ right to a fair opportunity to be considered for the issuance of an order under FAR § 16.505(b)(1)(i).

Challenge to Year 2 TOPR Issuance as a Downselection

Next, DBE argues that the cancellation of the year 3 TOPR demonstrates that the agency’s actions in June 2007 with regard to the year 2 task order constituted a “downselection,” and that, therefore, our Office should not have dismissed the protester’s challenge to the year 2 task order award. We find no merit in this argument.

³ The ID/IQ contracts awarded to DBE and the other contractors incorporated this provision in the clause at FAR § 52.237-3.

As discussed above, DBE filed a protest challenging the award of the year 2 task order on June 6, 2007. At the time DBE filed its protest of the year 2 task order, our Office did not have jurisdiction to hear protests concerning the issuance or proposed issuance of task and delivery orders. In several decisions, however, our Office recognized that an exception to this statutory bar existed where a task or delivery order constitutes a downselection because the order precludes competition for future orders for the duration of the contract performance period. See Electro-Voice, Inc., B-278319, B-278319.2, Jan. 15, 1998, 98-1 CPD ¶ 23 at 5-6; Palmetto GBA, LLC, B-299154, Dec. 19, 2006, 2006 CPD ¶ 200 at 3-4.

In its earlier protest, DBE argued that the issuance of the year 2 task order constituted a downselection because it would not receive a fair opportunity to compete for the agency's requirements for the duration of that order. Our Office dismissed the protest, concluding that the issuance of an order for one year of the contract did not constitute a downselection, in light of the fact that the vendors would have an opportunity to compete for the remaining years of the contract.⁴ Doug Boyd Enters., *supra*, at 3-4. Specifically, we noted that even though DBE would not receive any orders during the 6 to 12 month period of the year 2 task order, it would be eligible to compete for any requirements remaining during the remaining 36 to 42 months of the contract. *Id.* at 3.

DBE now argues that because FEMA has cancelled the year 3 TOPR and stated that it does not intend to issue further orders under the contract, we should construe the year 2 task order as a downselection. We disagree.

The record here shows that, based on subsequent events, FEMA concluded that the year 3 TOPR should be cancelled and that the agency's needs would be better met through a different procurement strategy. These facts do not provide a basis to challenge the assumptions underlying our earlier decision, *i.e.*, that at the time the year 2 task orders were issued, the record indicated that vendors would have an opportunity to compete for future task orders. The record here also does not support the protester's view that FEMA's award of the year 2 task orders was part of an intentional pattern to preclude vendors, such as DBE, from future opportunities to compete for task orders.⁵

⁴ As we noted in our earlier decision, the ID/IQ contract has a guaranteed minimum of \$50,000, which DBE has already received through prior orders. Doug Boyd Enters., *supra*, at n.5.

⁵ To the extent that DBE contends that FEMA actions indicate a bad-faith intent to preclude it from competing for task order awards, we find no basis for this allegation. Government officials are presumed to act in good faith, and a protester's claim that contracting officials were motivated by bias or bad faith must be supported by convincing proof; we will not attribute unfair or prejudicial motives to
(continued...)

In sum, we find no merit to any of the protester's arguments concerning the cancellation of the year 3 TOPR.⁶

The protest is denied.

Gary L. Kepplinger
General Counsel

(...continued)

procurement officials on the basis of inference or supposition. Harris Enters., Inc., B- 311143, Mar. 27, 2008, 2008 CPD ¶ 60 at 3. The protester offers no evidence supporting its claim, and its speculation as to the agency's intentions is insufficient to support a finding of bad faith.

⁶ In pursuing this protest, DBE raises several collateral issues. For example, the protester argues that the agency's evaluation of its past performance under the initial year 3 TOPR competition was unreasonable. Because the agency cancelled this solicitation, the protester's argument concerning the evaluation of DBE's past performance is academic. See Dyna-Air Eng'g Corp., supra. We have reviewed all of the protester's arguments, and conclude that none provides a basis for sustaining the protest.