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Decision

Matter of: ELS, Inc.

File: B-421989; B-421989.2

Date: December 21, 2023

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Lee Dougherty, Esq., Effectus PLLC, for Green Expert Technology Inc., an intervenor.
Nicole M. Trask, Esq., Department of the Navy, 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 the agency unreasonably evaluated technical and price proposals is dismissed for lack of jurisdiction, where the dollar amount of the task order is below the threshold for GAO jurisdiction, notwithstanding that the agency's evaluated cost for the awardee exceeded that threshold.

DECISION

ELS, Inc., of Washington, DC, protests the issuance of a task order to Green Expert Technology Inc. (GreenXT), of Haddonfield, New Jersey, under request for proposals (RFP) No. N00164-22-R-3023, issued by the Department of the Navy, Naval Sea Systems Command (NAVSEA), for support services. ELS, the incumbent contractor, challenges the reasonableness of the Navy's evaluation of technical and price proposals and asserts that the agency conducted a flawed best-value tradeoff analysis.

We dismiss the protest.

BACKGROUND

The RFP, issued to small business holders of the Navy's SeaPort Next Generation indefinite-delivery, indefinite-quantity (IDIQ) contracts, sought proposals to provide

administrative and engineering support services for the AN/USQ-82(V)¹ Program Office and Gigabit Ethernet Data Multiplex System (GEDMS).² RFP at 2, 68, 77. The RFP anticipated the award of a single cost-plus-fixed-fee task order to the offeror whose proposal represented the best value to the Navy, considering three factors: technical and management, past performance, and total evaluated price.³ *Id.* at 77-78. The technical and management factor was more important than the past performance factor; those two factors, when combined, were significantly more important than total evaluated price. *Id.*

The Navy received proposals from the protester and the intervenor. AR, Tab 6, Best-Value Determination at 5. The table below summarizes the Navy's evaluation of those proposals:

Factors	Offerors	
	ELS	GreenXT
Technical and Management	Outstanding	Good
Past Performance	Substantial Confidence	Satisfactory Confidence
Proposed Price	\$30,478,050	\$24,848,774 ^[4]
Total Evaluated Price	\$30,566,297	\$25,116,561

Id. at 5, 7. Relying on the technical evaluation team report, the cost evaluation team report, and the proposals, the source selection authority determined that GreenXT's proposal represented the best value to the government. *Id.* at 12. Award was made to GreenXT, and this protest followed.

¹ AN/USQ-82(V) is the mission critical, general purpose, control data, shipboard network. Gigabit Ethernet Data Multiplex System (GEDMS) is the third generation of this network, performing the same functions as the first two generations, but with greater bandwidth and throughput. Agency Report (AR), Tab 3, Conformed RFP at 7.

² Although firms that compete for task orders under IDIQ contracts are generally referred to as "vendors" that submit "quotations" and are "issued" task orders, here, the agency issued the solicitation as a negotiated procurement and sought proposals from offerors. Therefore, we refer to the firms that competed here as offerors that submitted proposals for the award of a task order.

³ The solicitation referred to total evaluated price despite the fact that award of a cost-plus-fixed-fee task order was contemplated; the agency uses the terms "cost" and "price" interchangeably.

⁴ The proposed price included the base period, all option periods, and surge pricing. Req. for Dismissal at 1.

DISCUSSION

Under 10 U.S.C. § 3406(f)(1), GAO has jurisdiction to hear a protest of the issuance or proposed issuance of a task order by the Navy if one of two conditions are met: first, if the protester alleges that the order increases the scope, period, or maximum value of the IDIQ contract under which the order was issued, or second, if the protester challenges an order “valued in excess” of \$25,000,000. Federal Acquisition Regulation (FAR) 16.505(a)(10)(i). Our analysis below reflects our consideration of the second condition as the record contains no assertion that the protest meets the first. See Response to Req. for Dismissal at 1-3.

The Navy requests dismissal of the protest, asserting that the value of the task order here is below \$25,000,000 and that, consequently, GAO does not have jurisdiction to consider the protest. In this regard, the Navy contends that “GAO has held that the appropriate measure for evaluating the value of the task order is the value of the task order as awarded, not the value alleged by the protester concerning what the task order value should have been.” Req. for Dismissal at 2, *citing Goldbelt Glacier Health Servs., LLC*, B-410378, B-410378.2, Sept. 25, 2014, 2014 CPD ¶ 281 at 3.

The Navy relies, in part, on our reconsideration decision in *Goldbelt Glacier Health Servs., LLC*, to support its request for dismissal. In that decision, we stated that “where an order has in fact been issued by the government, we view the jurisdictional limit to turn on the value of the disputed order, which is reflected in the terms of the order itself since the order defines the scope and terms of the contractual commitment between the selected contractor and the government.” *Goldbelt Glacier Health Servs., LLC--Recon.*, B-410378.3, Feb. 6, 2015, 2015 CPD ¶ 75 at 2, *citing Goldbelt Glacier Health Servs., LLC, supra* at 2. This is the case, the Navy argues, even when the contemplated task order contains cost-reimbursable contract line item numbers (CLINs). Req. for Dismissal at 2, *citing Erickson Helicopters, Inc.*, B-415176.3, B-415176.5, Dec. 11, 2017, 2017 CPD ¶ 378 at 9-10; *Basic Eng’g Concepts & Tech., Inc.--Recon.*, B-409231.4, Feb. 6, 2015, 2015 CPD ¶ 74 at 6.

The Navy also contends that value of the task order should be based on the actual contract award amount rather than the evaluated price where the task order includes NAVSEA clause B-232-H006 Limitation of Cost or Limitation of Funds Clarification, which incorporates FAR clause 52.232-20. Req. for Dismissal at 2, *citing* encl. 2, Task Order Contract at 10. Under FAR clause 52.232-20, Limitation of Cost, the agency argues, the government is not obligated to reimburse the contractor for costs incurred in excess of the amount listed in the contract. Req. for Dismissal at 2-3; *see Basic Eng’g Concepts & Techs., Inc.-Recon., supra* at 6 (finding no basis to reconsider our previous determination that the limitation of costs or funds language in the awarded order is relevant to determining the “value” of the order for jurisdictional purposes).

ELS argues that GAO has jurisdiction to consider its protest. The protester asserts that, while it is true that for purposes of determining if GAO has jurisdiction to consider a task order protest, in some cases the value of a task order is the awarded value of the task

order, in other cases GAO has recognized that “the successful contractor’s proposed price is not the sole determinant of the value of an order.” Response to Req. for Dismissal at 2, *quoting Qwest Gov’t Servs., Inc.*, B-404845, Mar. 25, 2011, 2011 CPD ¶ 77 at 3, *citing U.S. Bank*, B-404169.3, Feb. 15, 2011, 2011 CPD ¶ 43 at 3-4; *ESCO Marine, Inc.*, B-401438, Sept. 4, 2009, 2009 CPD ¶ 234 at 5-6. Citing *ESCO Marine, Inc.*, and *U.S. Bank*, ELS contends that, “when determining the value of a task order for jurisdictional purposes, the focus is on the total anticipated funds to be paid to the contractor, regardless of what the awarded value of the task order is.” Response to Req. for Dismissal at 2. This is particularly germane under a cost-reimbursable task order, the protester argues, because the agency is obligated to pay a contractor its actual and allowable cost of performance. *Id.* Consequently, ELS argues that “the value of the task order cannot be determined based solely on the offeror’s proposed costs, but rather must be based on the total anticipated funds expected to be paid to the contractor,” that is, the total evaluated cost. *Id.* at 3. Because the agency’s total evaluated cost of GreenXT’s proposal exceeds the jurisdictional threshold, ELS contends that GAO has jurisdiction to consider the protest. *Id.* at 6.

We agree with the agency that, following *Goldbelt Glacier Health Servs., LLC--Recon.*, *Erickson Helicopters, Inc.*, and *Basic Eng’g Concepts & Tech., Inc.--Recon.*, the determining factor in this protest is the amount of the contract award, which is below our jurisdictional threshold. Moreover, as the Navy asserts, FAR clause 52.232-20 does not obligate the government to reimburse the contractor for costs incurred in excess of the amount listed in the contract. In short, the usual rule is that contract value, for the purpose of determining jurisdiction, will be determined by the amount of contract award, and the facts of this case provide no rationale for departing from this general rule.

The decisions on which ELS relies for the proposition that we will look beyond the awarded value of a contract to determine our jurisdiction involved either unconventional methods for compensating the contractor or an unusual price evaluation technique. In *U.S. Bank*, the contract was to be awarded on a no-cost basis, and the contractor would be permitted to charge transaction fees for the use of a third-party payment service. See *U.S. Bank*, *supra* at 2. While in *ESCO Marine, Inc.*, the value of the task order was chiefly from the sale of scrap from dismantled ships and not the award price. See *ESCO Marine, Inc.*, *supra* at 3 (noting that the awardee and the protester proposed prices of \$.06 and \$4,679,726, respectively, and both estimated approximately \$13M from the proceeds of the sale of scrap). In *Qwest Gov’t Servs., Inc.*, the RFQ provided for the evaluated prices of the non-incumbent contractors to include the costs associated with transition to a new location; the parties disputed whether the transition costs should be considered part of the value of the task order. See *Qwest Gov’t Servs., Inc.*, *supra* at 2-3. The unusual circumstances that distinguish these decisions are not present in this solicitation for administrative and engineering support services. For that reason, they do not provide a basis for us to deviate from the analysis articulated in *Goldbelt Glacier Health Servs., LLC*.

ELS also attempts to distinguish the decisions relied on by the agency from the facts of this protest. See Response to Req. for Dismissal at 4-6. ELS first argues that there is a

stark difference between the facts in this protest and those in *Basic Eng'g Concepts & Techs., Inc.--Recon.*, in which the contract award value and the agency's evaluated most probable cost both fell below the jurisdictional threshold. Response to Req. for Dismissal at 5, *citing Basic Eng'g Concepts & Techs., Inc.--Recon.*, *supra* at 6. ELS further argues that in *Goldbelt Glacier Health Servs., LLC--Recon.*, the protester relied on its own estimate of the cost of task order performance, whereas here, the Navy's realism analysis calculated that the expected cost of performance would exceed the jurisdictional threshold. *Id.* at 4-5.

In both cases, the protester relies on distinctions without meaning. In both, *Basic Eng'g Concepts & Techs., Inc.--Recon.* and *Goldbelt Glacier Health Servs., LLC--Recon.*, although we ultimately concluded that the contract values were under the threshold for GAO's task order jurisdiction, our jurisdictional inquiry expressly focused on the terms of the contractual agreements between the parties to reach those conclusions. *Basic Eng'g Concepts & Techs., Inc.--Recon.*, *supra* at 5; *Goldbelt Glacier Health Servs., LLC--Recon.*, *supra* at 5 (noting that, where an award has been made, our Office will look to the terms of the award to determine the total anticipated funds to be received by the awardee to determine the value of the award). Thus, the determining fact in both decisions was the actual contractual award amount.

Finally, ELS argues that the Navy erroneously "cite[d] *Erickson Helicopters* for the proposition that GAO must reference only the value of the task order award to assess jurisdiction--even for contracts with cost reimbursement contract line items." Response to Req. for Dismissal at 5, *citing* Req. for Dismissal at 2. The protester asserts that *Erickson Helicopters* is not analogous to the facts of this protest, because, again, "the agency in *Erickson Helicopters* had not made a determination that the likely cost of the awardee's proposal would exceed the jurisdictional threshold." Response to Req. for Dismissal at 5; see *Erickson Helicopters*, *supra* at 10, *citing Goldbelt Glacier Health Servs., LLC*, *supra* at 3 (noting that the actual dollar amount of the order issued was the appropriate measure of task order value). The protester argues that *Erickson Helicopters* instead supports ELS's position because in that decision GAO in fact "looked beyond the award amount and concluded that 'for the purpose of establishing . . . jurisdiction,' the task order's value should be calculated using the award amount plus a potential option period." Response to Req. for Dismissal at 6, *quoting Erickson Helicopters*, *supra* at 13. According to ELS, *Erickson Helicopters* stands for the broad proposition that the jurisdictional inquiry accounts for the nuances of each procurement when determining the value of a task order for jurisdictional purposes. Response to Req. for Dismissal at 6.

ELS is again mistaken in its reading of our decisions. In fact, *Erickson Helicopters* stated that, for the purposes of determining jurisdiction, the value of the task order on its face is controlling, because "the terms of the order define the scope and terms of the contractual commitment between the contractor and the government." *Erickson Helicopters*, *supra* at 10, *citing Serco, Inc.*, B-410676.2, Dec. 12, 2014, 2014 CPD ¶ 371 at 3 (finding "no basis to consider the value of the original order when determining the value of the bridge task order" for our jurisdiction); *Goldbelt Glacier Health Servs., LLC*,

supra at 3 (noting that the actual dollar amount of order issued was the appropriate measure of task order value). Simply put, *Erickson Helicopters* stands for the premise that the value of the order should be based on the entire contractual award amount to include all options. We explained that “the value of a task order may also include the value of the task order’s option to extend services under the clause at FAR [clause] 52.217-8 where the value of the option was included in the total price that the agency considered in its task order award determination.” *Erickson Helicopters, supra* at 10, *citing Serco Inc.*, B-406061, B-406061.2, Feb. 1, 2012, 2012 CPD ¶ 61 at 9. Here, the contractual award amount, including all options, is less than \$25 million. Thus, we do not have jurisdiction to resolve the protest.

The protest is dismissed.

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