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Decision

Matter of: EDP Enterprises, Inc.

File: B-284533.6

Date: May 19, 2003

Keith L. Baker, Esq., and William T. Welch, Esq., Barton, Baker, McMahon & Tolle, for the protester.

Raymond M. Saunders, Esq., Captain Anissa N. Parekh, and Kevin LaChance, Esq., Department of the Army, and John W. Klein, Esq., and Kenneth Dodds, Esq., U.S. Small Business Administration, for the agencies.

Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that food services are improperly bundled with other logistics support functions, thereby unduly restricting the private-sector portion of the competition conducted pursuant to Office of Management and Budget Circular A-76, is sustained where the agency has failed to provide a reasonable justification that this bundling is necessary to meet its needs.

DECISION

EDP Enterprises, Inc. protests the terms of request for proposals (RFP) No. DAKF19-99-R-0014, issued by the Department of the Army pursuant to Office of Management and Budget (OMB) Circular A-76, to determine whether it would be more economical to perform installation-level logistics support functions in-house at Fort Riley, Kansas, or to contract for these services under the referenced solicitation.¹ EDP, the incumbent small business food service provider at Fort Riley, argues that the Army has improperly bundled food services and dining facility attendant services (hereinafter, collectively referred to as “food services”) with other

¹ The procedures for determining whether the government should transfer an activity from in-house performance to performance by a contractor, or vice versa, are set forth in OMB Circular A-76 and the Circular’s Revised Supplemental Handbook (RSH), which have been made expressly applicable to the Department of Defense and its military departments and agencies. See 32 C.F.R. § 169a.15(d) (2002).

logistics support functions, thereby unduly restricting the private-sector portion of this A-76 competition.

We sustain the protest.

BACKGROUND

Original Competition

The RFP was originally issued on December 1, 1999, as a total small business set-aside and contemplated the award of a contract for a 1-year base period and four 1-year option periods if a private-sector offeror successfully competed against the government's "most efficient organization" (MEO), the in-house staffing plan. The RFP incorporated by reference the clause at Federal Acquisition Regulation (FAR) § 52.219-14, captioned "Limitations on Subcontracting," which provides that in performing non-construction services, the offeror/contractor agrees that at least 50 percent of the cost of contract performance incurred for personnel will be expended for employees of the concern. The following requirements, which previously had been performed on a non-bundled basis at Fort Riley by either government personnel or private contractors, were bundled in this RFP: central issue facility operations; oil analysis laboratory operations; storage, warehouse, and distribution operations; hazardous material control center operations; transportation motor pool services; general and direct support maintenance services, including aviation maintenance services; ammunition supply point operations; bulk petroleum oil and lubricant operations; and food services.

EDP participated in the original private-sector portion of the A-76 competition as a subcontractor to the private-sector offeror whose proposal ultimately was selected as representing the best value to the government. In March 2001, pursuant to OMB Circular A-76 and the Circular's RSH, the agency performed a cost comparison between this best value private-sector proposal and the government's MEO, and concluded that it would be more economical to perform the bundled logistics support functions in-house by implementing the MEO, rather than by awarding a contract.

The best value private-sector offeror subsequently filed an administrative appeal challenging the agency's cost comparison decision. On May 14, 2001, the administrative appeals board (AAB) sustained in part and denied in part the issues raised in the administrative appeal. The AAB concluded, among other things, that the private-sector offerors and the MEO did not compete on an equal basis due to particular ambiguities and deficiencies in the terms of the RFP. The AAB directed Fort Riley to take "corrective action by restarting the acquisition process and issuing a new solicitation that corrects the identified deficiencies." Agency Report (AR), Tab 25, AAB Decision, May 14, 2001, at 3.

Current Competition

On August 22, 2001, the agency implemented the decision of the AAB by issuing amendment No. 22 to conduct a new competition.² Under this amendment, the RFP remained a total small business set-aside (and continued to include the clause at FAR § 52.219-14, as described above) and food services remained bundled with the other logistics support functions, as previously listed. By amendment No. 47, the agency established February 14, 2003 as the closing date for receipt of initial proposals. Three firms timely submitted initial proposals as prime contractors. On February 11, 3 days prior to the closing date, EDP, which participated in the current competition as a subcontractor to another private-sector offeror, but not as a prime contractor in its own right, filed this protest of the terms of the solicitation.³

² While this current private-sector competition and the subsequent cost comparison are pending, the logistics support functions, including food services, will be provided by a contractor (for whom EDP is not a subcontractor) under an interim bridge contract awarded in March 2003 for a 1-year base period and six 6-month option periods to begin in June 2003.

³ The agency argues that this protest should be dismissed as untimely because EDP has known since 1999, when the original solicitation was issued, that the agency had determined to bundle food services with the other logistics support functions at Fort Riley. We disagree, because, although the August 22, 2001 action was technically simply a solicitation amendment, in substance it began a new competition. Thus, in implementing the AAB's recommendation, the Deputy Chief of Staff for Personnel and Installation Management directed Fort Riley to take corrective action by issuing a new solicitation. AR, Tab 26, Memorandum from the Deputy Chief of Staff for Personnel and Installation Management to the Commander 24th Infantry Division (Mech) and Fort Riley (May 15, 2001). In addition, the Deputy Chief of Staff stated that "[t]o ensure that a level basis for competition is afforded to all offerors, we must go back to the beginning of the solicitation process." AR, Tab 27, Memorandum from the Deputy Chief of Staff for Personnel and Installation Management to the Garrison Commander 24th Infantry Division (Mech) and Fort Riley (May 18, 2001). While the bundling terms were not changed when the agency implemented the decision of the AAB by issuing amendment No. 22, the issuance of this amendment constituted a complete resolicitation of Fort Riley's requirements. In this regard, the cover page to amendment No. 22 described the purpose of this amendment as, in relevant part, "[t]o make changes throughout [the] solicitation after the AAB decision to amend the solicitation and re-solicit." Accordingly, we conclude that EDP's protest of the RFP's bundling terms was timely filed prior to the closing date for that resolicitation. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2003).

ISSUE AND ANALYSIS

EDP argues that the Army has violated the Competition in Contracting Act of 1984 (CICA) by improperly bundling food services (which, according to the agency, comprise approximately 15 percent of the total contract value, Hearing Transcript (Tr.) at 63), with unrelated base, vehicle, and aircraft maintenance services. EDP maintains, and the agency does not dispute, that the RFP, as currently structured, precludes the firm from submitting a proposal as a small business prime contractor because its employees would not be able to perform 50 percent of the cost of contract performance since its expertise in the food services area does not represent at least 50 percent of the total contract value. Tr. at 73.

CICA generally requires that solicitations permit full and open competition and contain restrictive provisions and conditions only to the extent necessary to satisfy the needs of the agency. 10 U.S.C. § 2305(a)(1) (2000). Since “bundled” (or “consolidated”) procurements combine separate, multiple requirements into one contract, they have the potential for restricting competition by excluding firms that can furnish only a portion of the requirement. Phoenix Scientific Corp., B-286817, Feb. 22, 2001, 2001 CPD ¶ 24 at 5. Because of the restrictive impact of bundling, we will sustain a protest challenging a bundled solicitation, unless the agency has a reasonable basis for its contention that bundling is necessary. Id. at 10; National Customer Eng’g, B-251135, Mar. 11, 1993, 93-1 CPD ¶ 225 at 5.⁴ CICA and its implementing regulations require that the scales be tipped in favor of ensuring full and open competition, whenever concerns of economy or efficiency are being weighed against ensuring full and open competition. Vantex Serv. Corp., B-290415, Aug. 8, 2002, 2002 CPD ¶ 131 at 4; National Customer Eng’g, supra, at 6. This is true even in the context of a competition, like the one here, conducted pursuant to OMB Circular A-76. Thus, when an agency conducts an A-76 competition, that competition is subject to CICA’s requirements that solicitations permit full and open

⁴ In its original protest, EDP also argued that the RFP violated the Small Business Act’s prohibition on bundling. 15 U.S.C. § 631(j) (“to the maximum extent practicable,” an agency is required to “avoid unnecessary and unjustified bundling of contract requirements that precludes small business participation in procurements as prime contractors”). At GAO’s request, the Small Business Administration (SBA) filed a report responding to this issue. The SBA, citing our decision in Phoenix, concluded that a procurement that is exclusively set aside for small business concerns, like the procurement here, cannot constitute improper bundling under the Small Business Act (even if it is improper under CICA). In its comments on the agency report, EDP withdrew this ground for protest; our decision, therefore, addresses only the alleged violation of CICA. (During the course of this protest, EDP also withdrew issues involving the agency’s price evaluation methodology and alleged inconsistencies in the contract periods and workload estimates.)

competition and contain restrictions only to the extent necessary to satisfy the agency's needs.

We agree with EDP that the bundling here restricts competition, so the question becomes whether the restriction reflects the agency's needs. The restrictive effect of the bundling is most severe on firms, such as EDP, whose work is limited to providing food services. While there may be small business prime contractors that could provide more than 50 percent of the cost of contract performance themselves (potentially subcontracting out the 15 percent related to food services), the bundled nature of this RFP, particularly where coupled with the clause requiring performance of at least 50 percent of the cost of contract performance by the prime contractor, precludes a food services firm, such as EDP, from competing.

The agency states that in conducting the private-sector portion of this A-76 competition, it has not violated CICA because "a key reason for including the food service[s] and dining facility attendant services with other DOL [Directorate of Logistics] functions is because Army doctrine and operational organization is predicated upon these services being integrated within its overall logistical functions." Agency's Post-Hearing Comments at 2. Explaining that logistics support functions are administered by the Office of the Deputy Chief of Staff, Logistics, the agency states that:

food services are doctrinally grouped into the logistical functions in all Army organizations, to include Fort Riley. The reason for this is not arbitrary. The Army is organized in the manner in which it goes to war. Feeding the troops, as well as clothing and equipping them, is a key war fighting competency. To accomplish this requirement, food services are imbedded in the logistics functions of all Army organizations.

Id. at 3. The agency concludes by stating that "the achievement of its mission requires that food services be grouped into the other logistic functions where they are required to be by doctrine and regulation. This therefore is a statement of the Agency's minimum needs." Id. at 6.

We do not question the agency's decision to classify food services as logistics support functions to be administered by the DOL. Rather, our concern is whether the agency has provided a reasonable justification of its needs in terms of including food services in the same RFP with base, vehicle, and aircraft maintenance services. In our view, the fact that the agency is organized in a manner which results in the administration of the performance of all of these functions by one particular office (which may itself be reasonable) does not provide a basis for insisting that all of these varied services be procured from one source. In other words, Fort Riley could, consistent with its view that food services are just as integral to the work of its DOL as the other functions, continue to have the contract for food services, as well as the

contract for the other services, administered by the DOL. Beyond the question of whether all of the services are part of logistics and relate to supporting the troops, the agency's reason for bundling them all in a solicitation seems to merely reflect the belief that it is administratively more convenient to manage one entity performing all of the requirements--either the MEO or a private-sector offeror--as opposed to two entities--either the MEO or a private-sector offeror for the food services, and either another MEO or another private-sector offeror for the other base, vehicle, and aircraft maintenance requirements. Administrative convenience is not a legal basis to justify bundling of requirements, if the bundling of requirements restricts competition, as we believe it does here. Vantex Serv. Corp., *supra*, at 4; National Customer Eng'g, *supra*, at 6.

The agency argues that to separately procure (*i.e.*, "de-couple") food services, or for that matter, any of the other logistics support functions, "would lead inevitably to the dismemberment of the Agency's DOL function into independent islands of activity. The Agency would be deprived of any meaningful efficiencies derived from management techniques such as cross-utilization and cross-training of personnel." Agency's Post-Hearing Comments at 12. We recognize that management efficiencies could reasonably justify an agency's needs, particularly where cross-utilization and cross-training are planned. Here, however, the agency has not provided a reasonable basis for any efficiencies associated with including food services in the RFP with other base, vehicle, and aircraft maintenance requirements. For example, at the hearing conducted by our Office in connection with this protest, we asked the agency to address how cross-utilization of personnel would work in terms of food services and the other requirements included in the RFP. The following exchange took place:

AGENCY: . . . How the efficiencies are to be achieved, that's up to the contractors and [the] government's [MEO] to figure that out. I can't tell you that, because I don't make the offers.

GAO: . . . What did the agency consider in making the determination back in the late '90s to consolidate food service[s] with everything else as opposed to separately contracting [for food services]? . . . I'm having a hard time seeing . . . how food services--other than saying these are services that need to be performed on the base, I'm having a hard time trying to figure out how those [services] fit in with [the] other functions.

AGENCY: They may have been thinking of . . . cross utilization of personnel.

GAO: So, someone who works on maintaining an airplane can also [be tasked with performing food services or vice versa].

AGENCY: Not necessarily in that area, perhaps someone out of the supply or warehousing area could be cross utilized at times if they needed them, because the food service, not all of those jobs are full time positions, they are on call positions.

GAO: Is there anything to support that position?

AGENCY: Ma'am, I don't have that information.

....

GAO: So, you don't think it's really an improper bundling? You don't think it's improper bundling as alleged by [the] protester, putting food services in with everything else?

AGENCY: No, I don't. I think it fit[s] right in. It is part of services that is included as part of the logistical [tree] that the Army considers as logistics, and therefore it ties together with food services, your maintenance, you feed the troops, you maintain the vehicles, you provide beans and bullets as supply function[s].

Tr. at 50-53.

In our view, neither in this exchange nor elsewhere in the record has the agency provided a reasonable basis to conclude that the bundling of food services with the other logistics support functions at Fort Riley will lead to any meaningful efficiencies.

In addition to the claimed efficiencies, the agency argues that "significant cost savings" will accrue as a result of bundling the logistics support functions at Fort Riley, including food services. In making this argument, the agency points to the results of the 2001 A-76 cost comparison, where performance by either the MEO or the private-sector offeror would have been less costly than the prior situation. Agency's Post-Hearing Comments at 8. However, the results of the A-76 cost comparison are not relevant to, and do not provide a justification for, the agency's decision in the first instance to bundle the services as protested here. It is well documented that A-76 competitions lead to savings. See, e.g., Commercial Activities Panel, Improving the Sourcing Decisions of the Government (Washington, D.C.: Apr. 30, 2002), at 8. There is no evidence that the savings pointed to by the agency here reflect savings associated with the decision to bundle food services with the other requirements. Simply stated, savings arising from the A-76 process are not relevant for purposes of reviewing the reasonableness of the agency's claim that bundling reflects its needs.

Finally, to the extent the agency argues that the consolidation of functions will attract "robust competition from suitably-sized small businesses," Agency's

Post-Hearing Comments at 10, we point out that this is not a legitimate basis upon which to justify the bundling of requirements to meet the agency's needs. The issue is not whether there are any potential offerors which can surmount barriers to competition by, for example, entering into teaming or partnering arrangements as argued by the agency, Tr. at 73, but rather whether the barriers themselves--here, bundling--are required to meet the government's needs. Vantex Serv. Corp., supra, at 5; National Customer Eng'g, supra, at 5. As discussed above, the agency here has not provided a reasonable justification for its decision to bundle food services with other logistics support functions at Fort Riley.

RECOMMENDATION

On this record, where the agency has not reasonably justified its decision to bundle food services with the other logistics support functions at Fort Riley, we sustain the protest and recommend that the agency separately procure its requirements for food services. We also recommend that EDP be reimbursed the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). EDP's certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days of receiving this decision.

The protest is sustained.

Anthony H. Gamboa
General Counsel