



Decision

Matter of: Global Solutions Network, Inc.

File: B-401230

Date: June 26, 2009

Ronald S. Newlan for the protester.

Barry C. Hansen, Esq., and John R. Caterini, Esq., Department of Justice; and Kenneth Dodds, Esq., and John W. Klein, Esq., Small Business Administration, for the agencies.

Sharon L. Larkin, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that solicitation for administrative support services should have been set aside for historically under utilized business zone (HUBZone) or small business concerns is denied, where agency reasonably determined from market research, past procurement history, and consultation with the Small Business Administration that there was not a reasonable likelihood that two or more responsible HUBZone or small business offerors would submit proposals at a fair and reasonable price.

DECISION

Global Solutions Network, Inc. (GSN), of Rockville, Maryland, protests the terms of request for proposals (RFP) No. DJJK-09-RFP-0585, issued by the Department of Justice (DOJ) for administrative support services for the DOJ's Environment and Natural Resources Division (ENRD). GSN argues that the solicitation should have been set aside for historically underutilized business zone (HUBZone) concerns or, in the alternative, small business concerns, and that the requirements were improperly "bundled."

We deny the protest.

The ENRD is one of seven litigating divisions of the DOJ. It employs approximately 430 attorneys and 250 legal support staff, the vast majority of which work in Washington, D.C., although the ENRD also has 11 field offices throughout the United

States.¹ At any given time, the ENRD handles over 7,000 active matters involving complex civil and criminal litigation and investigations nationwide, and attorneys from different offices and geographic locations routinely work together on the same cases. The cases litigated by the ENRD are often document intensive and time sensitive. From a staffing and document management and administrative support standpoint, the “seamless coordination between the offices to the maximum extent possible is essential to [the] ENRD’s mission” of litigating and investigating complex cases. AR at 4-5.

The administrative support services contract was initially created in 1996 by the ENRD as a means of contracting out photocopying and copier maintenance, records management, fax and mail delivery, and supply management and distribution. The ENRD had two goals when it created the contract: first, to provide efficient, cost effective administrative support to the ENRD’s attorneys, and second, to free the ENRD’s existing support staff from these lower level clerical tasks so that they could focus on legal activities. The first administrative support services contract was awarded in 1997 and the second contract was awarded in 2003, both to large businesses for 5-year terms. RFP § C.1.1.

The RFP here provides for the award of a single indefinite-delivery/indefinite-quantity (ID/IQ) contract for a 1-year base period and five 1-year options.² RFP § B.1. The solicitation was issued on an unrestricted basis and requires the contractor to provide a full range of mail and messenger, fax, copy, scan, supply, and records management services, as well as coordinate and integrate the various administrative services for the ENRD facilities and field offices. RFP §§ C.3.1, C.4.1. In this regard, the contractor is expected to pick up, x-ray, scan, sort, and deliver, on average, between 350 and 500 pieces of mail each day to approximately 600 ENRD employees within 3 hours of receipt; receive, scan, and deliver approximately 600 incoming faxes each day; copy approximately 400,000 pages of documents each month; prepare up to 15,000 pages for scanning each day; supply and maintain copiers throughout the ENRD’s offices; manage four litigation file rooms containing approximately 165,000 files and two file warehouses storing approximately 100,000 documents each; and receive, save, and download approximately 100 electronic documents that are filed with and received from various courts each day.³ AR at 15; Tab 12, Contracting Officer’s Memorandum to Pre-Award File, at 1-2.

¹ Two field offices are located in California and other field offices are located in New Mexico, Alaska, Idaho, Massachusetts, New Hampshire, Colorado, Montana, Oregon, and Washington. Agency Report (AR) at 4.

² The maximum aggregate orders under the ID/IQ contract were not to exceed \$30,000,000. RFP § B.2(b).

³ The scope of work is essentially the same as for the 2003 contract, with the addition of scanning services, which were added because of advances in technology and an
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The RFP places the responsibility of successful performance of the ENRD's document management needs on a single contractor to reduce the risk and adverse impact of delay or non-performance in meeting the ENRD's document management and administrative support service needs. AR at 14.

GSN protests the terms of the RFP, asserting that the solicitation should have been set aside for HUBZone or small business concerns.

An acquisition expected to exceed \$100,000, such as the one here, must be set aside exclusively for HUBZone or small business contractors where there is a reasonable expectation that offers will be obtained from at least two responsible HUBZone or small business concerns and the award will be made at a fair and reasonable price.⁴ Federal Acquisition Regulation (FAR) §§ 19.502-2(b), 19.1305(b); Ruchman and Assocs., Inc., B-275974, Apr. 25, 1997, 97-1 CPD ¶ 155 at 1-2. A contracting officer must make reasonable efforts to ascertain the likelihood of receiving HUBZone or small business offers, but no particular method of assessing the availability of small businesses is required; measures such as prior procurement history, market surveys, and advice from the Small Business Administration (SBA) may all constitute adequate grounds for not setting aside the procurement for HUBZone or small business concerns. American Artisan Prods., Inc., B-292380, July 30, 2003, 2003 CPD ¶ 132 at 5-6; Information Ventures, Inc., B-279924, Aug. 7, 1998, 98-2 CPD ¶ 37 at 3. The determination of whether to set aside a particular procurement involves a business decision within the broad discretion of the contracting officer, and we will not sustain a protest challenging the determination absent a showing that the determination was unreasonable. American Artisan Prods., Inc., *supra*, at 5.

Here, the contracting officer conducted a market survey of available small businesses within North American Industry Classification System (NAICS) code 561210.⁵ The contracting officer published a "sources sought notice" with a detailed statement of work on FedBizOpps and received responses from 15 small businesses, including three HUBZone concerns. The contracting officer evaluated these responses in light of the volume, scope, and nature of the work to be performed

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increased use of electronic documents in litigation. AR at 12-13. The RFP here also requires the contractor to provide copiers and copier maintenance for field offices for the entire duration of the contract. Copier equipment and maintenance was not initially provided under the 2003 contract, but was later ordered under that contract and provided during performance. DOJ's Reply to Comments (May 20, 2009), at 14-15.

⁴ The contracting officer is required to consider HUBZone set-asides before considering small business set-asides. FAR § 19.1305(a).

⁵ Neither the protester nor the SBA challenge the use of this NAICS code here.

under the RFP; documented her findings and analysis; and concluded that none of the 15 responding HUBZone or small business contractors would be able to submit proposals that would meet all of the requirements of the RFP. In this regard, she stated that none of the 15 responding HUBZone or small business contractors had the “personnel, equipment, capital or experience necessary to handle the integration of [the] ENRD’s diverse services.” AR, Tab 12, Contracting Officer’s Memorandum to Pre-Award File, at 8. Significantly, the protester did not respond to the sources sought notice or otherwise express interest in the procurement. Although the protester now generally asserts that it is capable of performing the requirements, it has provided no evidence to support the general assertions that it can perform the requirements of the RFP.

The contracting officer also considered the history of the procurement, including the nearly identical solicitations for the 1997 and 2003 contracts, neither of which was set aside for HUBZone or small business concerns because the market surveys revealed that the DOJ would not likely receive at least two offers from responsible HUBZone or small business concerns. Although the first solicitation was protested for failing to set aside the requirement, the GAO upheld the agency’s decision to issue the solicitation on an unrestricted basis. Ruchman and Assocs., Inc., supra, at 3. The second solicitation was not challenged on this basis, and no acceptable proposals were submitted by small business concerns in response to the solicitation. AR at 8, 20.

The contracting officer also consulted with a DOJ small business specialist and the director of the DOJ’s Office of Small and Disadvantaged Business Utilization (OSDBU), both of who concurred with the decision not to set aside the procurement. AR, Tab 11, DOJ Record of Small Business Procurement Review. The director of the OSDBU met with the SBA procurement center representative to discuss the procurement and the responses to the sources sought notice, and the director made the contract file available to the SBA procurement center representative for the SBA’s review. The SBA procurement center representative did not object to or express concern with the DOJ’s determination to not set aside the procurement for HUBZone or small business concerns. Declaration of Director of OSDBU ¶¶ 6-10.⁶

In response to the protest and the DOJ’s agency report, the SBA challenged, for the first time, the DOJ’s market research and contended that four of the small businesses that responded to the sources sought notice demonstrated the capability to perform the work. However, as the DOJ points out, two of these small businesses demonstrated the capability to perform only part of the required work, a third asserted that it would team with a large business without providing any information about the teaming arrangement or the large business’ capability, and the fourth could

⁶ The SBA does not challenge the accuracy of the declaration of the director of OSDBU.

only perform the work through a teaming arrangement that was “untested.” DOJ’s Reply to Comments (May 20, 2009), at 7-12; AR, Tab 12, Contracting Officer’s Memorandum to Pre-Award File, at 4-7. Although there may be some merit to the SBA’s concerns regarding the appropriateness of denying the capability of the fourth small business based on an “untested” teaming arrangement, the record does not show as unreasonable the contracting officer’s determination that the other three small businesses failed to sufficiently establish that they could perform the work. Therefore, even assuming that the SBA’s objections regarding the fourth small business are meritorious, we would have no basis to find unreasonable the contracting officer’s determination that there was not a reasonable likelihood of receiving an offer from two or more responsible small business concerns.

In sum, based on the procuring agency’s market research, and in the absence of any objection from the SBA procurement center representative, we find the contracting officer’s decision to issue the solicitation on an unrestricted basis to be reasonable. Information Ventures, Inc., supra.

GSN also contends that the agency improperly “bundled” the requirements in violation of Competition in Contracting Act of 1984 (CICA), which requires “full and open competition” and limits restrictive provisions in a solicitation “only to the extent necessary” to satisfy the agency’s needs. 41 U.S.C. §§ 253a(a)(1)(a), 253a(a)(2)(B) (2006). In response to the protest, the DOJ provided a detailed explanation of the efficiencies, cost savings, reduced performance risk, and other reasons why performing the requirements under one contract was necessary to meet the agency’s needs. AR at 21-32. The protester responds only in a cursory way that multiple contractors can perform the requirements and that bundling was done for administrative convenience. Protester’s Comments at 10-12. The protester does not explain, other than in the most general terms, what requirements should be removed from the solicitation to increase competition, that is, were improperly “bundled.” Moreover, GSN otherwise asserts that it can perform all of the requirements as “bundled” under this RFP. Thus, the protester has not shown that the agency violated CICA here or that it was prejudiced as a result.

GSN also asserts, for the first time in its comments on the agency report, that the DOJ improperly “bundled” the requirements in violation of the Small Business Act and its implementing regulations. However, these allegations are untimely as they should have been raised prior to the closing time for receipt of proposals and were not. 4 C.F.R. § 21.2 (a)(1); National Customer Eng’g, B-251166, Feb. 9, 1993, 93-1 CPD ¶ 118 at 3; see also JAVIS Automation & Eng’g, Inc., B-290434, B-290434.2, Aug. 5, 2002, 2002 CPD ¶ 140 at 7 n.11 (piecemeal presentation of protest grounds, raised for the first time in comments, are untimely).

The protest is denied.

Daniel I. Gordon
Acting General Counsel