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Decision

Matter of: Tom Smith Fire Equipment Company, Inc.

File: B-414349

Date: May 15, 2017

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DIGEST

Protest challenging an agency's decision to set an acquisition aside for small businesses is denied where the contracting officer had a reasonable expectation that the agency would receive proposals from two or more capable small businesses at a fair market price.

DECISION

Tom Smith Fire Equipment Company, Inc. (Tom Smith), of Brandon, Florida, protests the terms of request for proposals (RFP) No. FA8056-17-R-0001 for Fire Emergency Services Personal Protective Equipment. Tom Smith argues that the determination to set aside certain products included in the RFP for small business competition was improper and that several other aspects of the solicitation were flawed.

We deny the protest in part and dismiss it in part.

BACKGROUND

The RFP, issued on December 21, 2016, seeks proposals to provide fire-fighting equipment for Air Force installations both within the contiguous United States and abroad. RFP at 301-2. The RFP includes five categories of equipment to be provided at fixed prices on an indefinite-delivery/indefinite-quantity (ID/IQ) basis during the contract's base year and four one-year option periods. Id. at 301. The solicitation anticipates the award of individual indefinite-delivery, indefinite-quantity (ID/IQ) contracts for each of five product categories, based on independent, simultaneous

source selections. AR, Tab 2, Contracting Officer's Statement (COS), at 2. The five product categories are as follows:

- Product Category A: Structural fire-fighting garments
- Product Category B: Proximity fire-fighting garments¹
- Product Category C: Fire-fighting boots
- Product Category D: Fire-fighting helmets
- Product Category E: General purpose boots

RFP at 301.

The RFP is partially set aside for small business concerns, restricting competition on categories A, B, and C to small businesses. Id. at 302. The solicitation instructs prospective offerors that they must comply with Federal Acquisition Regulation (FAR) clause 52.219-14, Limitation on Subcontracting, and with the Small Business Administration's (SBA) nonmanufacturer rule, 13 C.F.R. § 121.406. Id. In this regard, the RFP explains that offerors that are not manufacturers must propose items manufactured by small businesses and that no waivers of this rule have been issued for the procurement. Id.

This procurement was preceded by an earlier Air Force solicitation for the same items, in November, 2014, that was set aside entirely for small business concerns and anticipated the award of a single ID/IQ contract for all five categories. AR, Tab 2, COS, at 4. Following protests filed with both the agency and our Office, the agency took corrective action by cancelling that solicitation, reviewing technical specifications, and conducting renewed market research. AR, Tab 2, COS, at 5-6. During the course of the corrective action, the acquisition team (including the contracting officer, program manager, and lead contract specialist) were replaced to ensure objectivity prior to issuing a new solicitation. Id. at 7.

Beginning in March, 2015, the agency conducted additional market research to ensure its understanding of the manufacturing and market conditions surrounding the equipment sought and to reconsider the structure of the procurement. AR, Tab 1, Memorandum of Law (MOL), at 4. These efforts included issuing multiple Requests for Information (RFI), and holding in-person capability sessions to build on the information gathered during the earlier procurement. AR, Tab 10, Market Intelligence Report, at 28-29. The market research efforts culminated with a Market Intelligence Report regarding the fire-fighting equipment sought. See AR, Tab 10, Market Intelligence Report. In this report, the Air Force analyzed the research and, for each of the five product categories, considered the capability and capacity of the businesses that

¹ Structural fire-fighting garments are the equipment commonly used by fire fighters. By comparison, proximity suits are generally used in fire situations where fire fighters will operate in excessive temperatures due to aircraft fires, flammable gas fires, and bulk flammable liquid fires. AR, Tab 10, Market Intelligence Report, at 35.

responded, and separately considered those businesses' financial viability based on third-party ratings in order to make a set-aside determination. Id. at 36-40.

As relevant to this matter, the Air Force estimated that it will require 10,500 complete sets (i.e., coat, pants, and suspenders) of the structural garments and 6,830 complete sets of the proximity garments over the potential life of the contract. Id. at 36-37. The agency found two small business manufacturers capable of providing acceptable products and meeting the capacity requirements, that were considered financially viable. Id. at 37. Further, the Air Force reviewed the distribution networks for the manufactured products and found responses from five small businesses that could distribute the required annual quantity of the garment sets. Id. at 44. This report recommended issuing a single solicitation under which a single ID/IQ contract would be awarded for each product category, to ensure product interoperability. Id. at 47.

Based on the agency's research, the contracting officer concluded that product categories A, B, and C should be set aside for small business participation. AR, Tab 2, COS at 18. The agency shared the supporting details, coordinating this decision with the SBA, which concurred with the partial set-aside determination. AR, Tab 18, Form DD 2579, at 2. The Air Force documented the set-aside decisions regarding the three product categories and issued the RFP. AR, Tab 21, Set-Aside Decision Memorandum ¶ 3.

The Air Force assigned North American Industrial Classification System (NAICS) code 339113, Surgical Appliances and Supplies Manufacturing, to the solicitation. RFP at 306. The size standard for this code is established at 750 employees. AR, Tab 25, RFP Amend. 01, at 2; see also 13.C.F.R. § 121.201. As amended, the RFP required proposals to be submitted before 2 p.m. on February 8, 2017. AR, Tab 28, RFP Amend. 02, at 2. This protest was filed February 7, 2017.

DISCUSSION

Tom Smith challenges the Air Force's decision to set aside product categories A and B for exclusive small business participation. Protest at 15-16. The protester avers that the decision is unreasonable, as the Air Force cannot expect proposals from small business manufacturers or from small businesses distributing the products of capable small business manufacturers. Id. Tom Smith alleges that of one of the small business manufacturers upon which the agency relied for its set-aside decision does not have the production capacity to meet the agency's projected needs, thus making the decision unreasonable. Comments at 11-12. The protester further contends that the Air Force's market research did not support a reasonable conclusion that two small businesses were interested in offering proposals. Id. at 7-8.

The agency responds that its market research was adequate to support the set-aside determination, citing the detailed history of the procurement and the market research conducted. AR, Tab 1, MOL at 8-13; Tab 2, COS, at 4-9. Relying on this research, the agency argues that it identified multiple, capable small business manufacturers and

distributors before reasonably determining that categories A and B should be set aside for small businesses. AR, Tab 1, MOL, at 11-12.

Generally, under Federal Acquisition Regulation (FAR) § 19.502-2(b), a procurement with an anticipated dollar value of more than \$150,000, must be set aside for exclusive small business participation when there is a reasonable expectation that offers will be received from at least two responsible small business concerns, and award will be made at a fair market price.² This is often referred to as the “rule of two.” Where, as here, a procuring agency treats multiple contracts to be awarded under a single solicitation as separate requirements, it is appropriate to perform small business set-aside determinations for each requirement. Belleville Shoe Mfg. Co. et al., B-287237 et al., May 17, 2001, 2001 CPD ¶ 87.

An agency must undertake reasonable efforts to ascertain whether it is likely to receive offers from at least two responsible small businesses capable of performing the work in question. The Protective Group, Inc., B-310018, Nov. 13, 2007, 2007 CPD ¶ 208 at 3. To this end, an agency’s investigation must address not only the existence of small businesses that might submit proposals, but also their capability to perform the contract; the fact that multiple small businesses are identified in the course of market research is not necessarily determinative. DNO Inc., B-406256, B-406256.2, Mar. 22, 2012, 2012 CPD ¶ 136 at 4. While there is no particular required method of assessing the availability of capable small business, the assessment must be based on sufficient facts so as to establish its reasonableness. The Protective Group, Inc., supra. The decision whether to set aside a procurement may be based on an analysis of factors such as the prior procurement history, the recommendations of appropriate small business specialists, and market surveys that include responses to sources-sought announcements or requests for information. Commonwealth Home Health Care, Inc., B-400163, July 24, 2008, 2008 CPD ¶ 140 at 3. Because a decision whether to set aside a procurement is a matter of business judgment within the contracting officer’s discretion, our review generally is limited to ascertaining whether that official abused his or her discretion. Management Consulting, Inc., B-409332, March 5, 2014, 2014 CPD ¶ 89 at 4.

As relevant here, in order to qualify as a small business concern to provide manufactured products, an offeror must either be the manufacturer or producer of the end item being procured, or, if it does not manufacture the items being purchased, the offeror must comply with what is known as the nonmanufacturer rule. 13 C.F.R. § 121.406(a). The rule provides that an offer from a nonmanufacturer small business concern can be considered, provided, among other things, that the small business concern represents that it will supply the product of a domestic small business manufacturer or processor, or that a waiver of this requirement is granted by the SBA.

² The protester does not argue that the government could not reasonably expect to make an award at a fair market price. Accordingly, this decision does not address this aspect of the rule of two standard.

15 U.S.C. § 637(a)(17); see also 13 C.F.R. § 121.406(b). Whether or not the nonmanufacturer rule applies to a set-aside procurement primarily depends on the NAICS code assigned to the procurement by the agency, as the rule only applies if a manufacturing code was assigned.³ BlueStar Energy Solutions, B-405690, Dec. 12, 2011, 2011 CPD ¶ 275 at 3.

The Air Force's decision to set aside for small business competition the two categories of fire-fighting equipment is unobjectionable here because the record shows that the agency reasonably determined that it was likely to receive offers from two capable small business concerns offering products manufactured by small businesses. The record reflects the agency's on-going efforts since 2012 to understand not only its needs, but the realities of the marketplace for the personal protective equipment.

Here, the Air Force considered the physical characteristics of both categories of garments and their availability from small businesses. The market research conducted for the prior procurement concluded that there were at least two small business manufacturers. AR, Tab 2, COS, at 5; see AR, Tab 4, July 2014 Market Intelligence Report. As part of the corrective action taken in response to the earlier protest, the agency updated its understanding of the current market and reconsidered the set-aside decision for each product category, taking into account multiple RFIs and draft RFPs, in addition to publishing over 100 industry questions and answers, and hosting interactions with interested parties. AR, Tab 10, Market Intelligence Report, at 31. These interactions over the course of the procurement provided multiple opportunities for the specifications to be challenged and amended. The agency determined, based on this information, that no changes were necessary for either the structural or proximity fire-fighting garments. Id. at 30.

The documentation reflects that the Air Force reviewed the products produced by several manufacturers and concluded that two small business manufacturers, Globe Manufacturing Co., LLC (Globe) and Quaker Safety Products Corp. (Quaker) had the capability to provide both categories of garments at issue. Id. at 34. We have no basis to question the agency's conclusion that the two small business manufacturers identified in the market intelligence report can meet the requirements for the two categories of garments.⁴

³ The NAICS code scheme is used by the federal government to identify and classify categories of business activity, and for each such category to establish a size standard by which to determine if a business is small or other-than-small. 13 C.F.R. §§ 121.403; 121.406.

⁴ Tom Smith also argued that the set-aside unduly restricted competition because the specifications effectively limit the competition to one small business manufacturer that has an exclusive business relationship with one small business distributor. Protest at 12-14, 16. Although the Air Force provided a detailed response, explaining the reasons for each of the specifications and their relation to the agency's need to protect the health and welfare of fire fighters, the protester did not address, or seek to rebut, the
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The Market Intelligence Report also shows that the agency took into account the manufacturing capability of small business producers, to determine whether adequate quantities could be produced during the life of the contract. The record reflects that the agency expects to require a total of 17,300 sets of garments (covering both categories). Id. at 37. The Air Force concluded from its research that both of the small business manufacturers could be expected to be able to furnish this quantity. Id. In this regard, Tom Smith questions Quaker's ability to meet the anticipated requirements but does not dispute Globe's manufacturing capabilities. The research reflects that Quaker expects to produce a total of [DELETED] sets of garments (of both categories, combined) annually, or [DELETED] sets over the anticipated term of the contract. Id. As this exceeds the 17,300 sets anticipated by the Air Force, we agree that the agency's conclusion that two small business manufacturers have the capability and capacity to meet the RFP's requirements is reasonable.

We also agree that the Air Force's conclusion that it could expect to receive two or more proposals from small businesses was reasonable and not an abuse of discretion. The market research explained that the sale of personal protective equipment is conducted through a series of distributors and described the industry as "highly competitive." Id. at 20-22. The agency identified multiple small business distributors through its various market research efforts. Specifically relevant here, the research identified at least two small businesses that distribute the products of at least one of the small business manufacturers. Id. at 21. In addition to these findings, the market research documents identify other small business distributors and manufacturers that expressed an intent to submit a proposal or otherwise indicated interest in the procurement. See AR, Tab 6, Summary of Capability Sessions, at 15, 29-33, 41; see also, AR, Tab 8, March 2016 RFI, at 1, 16, 30, 37, 65, 98, 135, 151, 226, 299, 306.

In sum, the agency's research reveals several small business distributors that distribute products manufactured by the small businesses above, and others interested in participating in the procurement. Given the highly competitive nature of the market for fire-fighting equipment, and these results, the agency reasonably determined it could expect to receive proposals from two or more qualified small businesses at fair market prices, and thus, reasonably concluded that the rule of two was satisfied at both the manufacturing and distribution levels.

Tom Smith raises various additional objections to other terms of the solicitation, which we dismiss. Protest at 6-14. Under our Bid Protest Regulations, a protester must be an actual or prospective offeror whose direct economic interest would be affected by the award of a contract. 4 C.F.R. § 21.0(a). Because we have concluded, above, that the

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agency's response. In this circumstance, we consider the protester to have abandoned its argument, and dismiss it. Nexagen Networks, Inc., B-411209.7, June 20, 2016, 2016 CPD ¶ 164 at 3 n.4.

determination to set the procurement aside for small business participation was proper, and because the protester acknowledges that it neither is itself a small business manufacturer, nor does it resell products manufactured by a small business manufacturer, Tom Smith is not an interested party to maintain the various remaining protest grounds it has raised. See Protest, at 3-4. This is so because, even were we to sustain its protest on another basis, Tom Smith would be ineligible for award. See DAI, Inc., B-408625, B-408625.2, Nov. 6, 2013, 2013 CPD ¶ 259 at 5. Accordingly, Tom Smith's remaining protest grounds are dismissed.

The protest is denied in part and dismissed in part.

Susan A. Poling
General Counsel