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Decision

Matter of: M.D. Thompson Consulting, LLC; PMTech, Inc.

File: B-297616; B-297616.2

Date: February 14, 2006

Charlotte Rothenberg Rosen, Esq., Bradley D. Wine, Esq., and Joseph R. Berger, Esq., Dickstein Shapiro Morin & Oshinsky LLP, and G. David Fensterheim, Esq., Fensterheim & Bean, P.C., for M.D. Thompson Consulting, LLC; Kenneth B. Weckstein, Esq., and Shlomo D. Katz, Esq., Epstein Becker & Green, PC, for PMTech, Inc., the protesters.

Helaine G. Elderkin, Esq., and Carl J. Peckinpough, Esq., for CSC Systems & Solutions LLC, an intervenor.

Laura L. Hoffman, Esq., and Joseph A. Lenhard, Esq., Department of Energy, and John W. Klein, Esq., and Laura Mann Eyester, Esq., Small Business Administration, for the agencies.

Paul N. Wengert, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests are sustained where agency notice of intent to modify contract to extend performance on a sole-source basis did not comply with requirement for an accurate description of the services to be furnished and thus did not provide enough information to allow all prospective sources a meaningful opportunity to demonstrate the ability to meet the agency's requirements.

DECISION

M.D. Thompson Consulting, LLC and PMTech, Inc., both small business concerns, protest a 9-month extension of a sole-source "bridge" contract by the Department of Energy (DOE) for guidance development services. Thompson and PMTech argue that the agency failed to properly synopsize the requirement in order to allow them to prepare meaningful responses, thus rendering the sole-source contracting action improper.

We sustain the protests.

On November 10, 2005, DOE published a "Presolicitation Notice" on the Federal Business Opportunities website (www.fedbizopps.gov) expressing its intent to

extend contract No. DE-AC01-04SO20188 with CSC Systems & Solutions LLC for certain unspecified services for up to 9 months (divided into three consecutive 3-month periods) on the basis that CSC was the only responsible source.¹ Under the title of “Notice of Intent to Extend the Period of Performance,” the sole descriptive information in the synopsis were these statements: “CSC has the requisite number of key and non-key personnel possessing the required security clearances. No other firm has the requisite knowledge, experience, and capability to assume the critical, highly specialized technical and administrative support without interruption on December 22, 2005.” AR, Tab 1, Presolicitation Notice, at 1-2.²

Thompson and PMTech filed their protests on November 18 and 21, respectively.³ On November 21, DOE prepared a sole-source justification which, over the following 18 days, was approved by the contracting officer, legal counsel, and the agency competition advocate, among others. By December 9, the justification contained all of the required signature approvals. AR, Tab 3, Justification for Other than Full and Open Competition, at 7.

On December 12, Thompson and PMTech each submitted a capability statement. Thompson AR, Tab 30, Thompson Capability Statement, at 1; PMTech AR, Tab 30, PMTech Updated Statement of Qualifications, at 2. After review of the capability statements, DOE concluded that neither Thompson nor PMTech had shown that it could meet the agency requirements. For example, the agency states that

Thompson does not specifically note that the personnel listed are actually available or merely prospective employees. For example, [deleted], is a full time employee of another company under contract to

¹ The record indicates that the CSC contract calls for guidance development services. This work primarily involves drafting classification guidance and developing classification/declassification policy in order to inhibit the spread of nuclear/radiological weapons, nuclear materials, and associated technologies through cooperative and coordinated policies with other agencies and nations. The contract also includes other matters, such as “General and Mail/File Room Support involving classified materials.” Agency Report (AR), Tab 3, Justification for Other than Full and Open Competition, at 1-2.

² These protests were developed separately, and DOE provided a separate agency report for each protest. Where the same document is found at the same location in both records, our decision will refer to the document by a generic reference: “AR.” Whenever necessary to make a distinction, our decision will refer to an exhibit tab in the “Thompson AR” or the “PMTech AR.”

³ On December 12, DOE posted a modification to the notice in order to extend the response time to December 13 at 9:00 a.m. Eastern Standard Time, and to provide instructions on how to use the e-center website software to submit a response.

DOE. Thompson experience is limited to the weapons area and has no demonstrated experience or ability to provide technical reviews of a wide variety of technical and security areas. Specifically, Thompson lacks required experienced personnel in isotope separation technology, an area of utmost importance to the DOE. Isotope separation methods are of utmost importance to the DOE and lack of support in this area would have a serious impact to DOE as it handles a number of ongoing declassification proposals relating to uranium isotope separation.

Thompson AR, Tab 31, Evaluation of Thompson Capability Statement, at 2.

In the evaluation, DOE further criticized Thompson for failing to “show experience or ability” in its capability statement in the areas of use of specific language-based computer applications, materials production, gaseous diffusion, gas centrifuge, atomic vapor laser isotope separation, enrichment technologies, arms control, nonproliferation, material control and accountability inventories, radiological emergency response, radioactive disposal devices, improvised nuclear devices, international programs such as the “URENCO” centrifuge,⁴ United Kingdom material transfers, North Korean nuclear activities, and space nuclear reactors. Thompson AR, Tab 31, Evaluation of Thompson Capability Statement, at 3.

DOE criticized PMTech’s capability statement for similar reasons. For example, the agency states that

PMTech provides evidence that they have personnel with technical backgrounds in the weapons area, but they have no demonstrated experience or ability to provide technical reviews of a wide variety of technical and security areas. Specifically, PMTech lacks required experienced personnel in isotope separation technology, an area of utmost importance to the DOE.

PMTech AR, Tab 31, Evaluation of PMTech Capability Statement, at 1.

The protesters both argue that the synopsis did not indicate that any of these matters needed to be addressed in their respective responses. Thompson argues that “were Thompson given the chance [it] could demonstrate expertise in all of these topics,” and, as examples, Thompson provides additional background about the company and its capabilities. Thompson Supplemental Comments at 11. Similarly, PMTech argues that “[i]f DOE had not concealed its needs, PMTech could have demonstrated its ability to meet those needs,” and used illustrations to show how it would have

⁴ It appears that “URENCO” is the name of a manufacturer of uranium enrichment technology. See <<http://www.urengo.com>> (visited Jan. 30, 2006).

addressed the subjects identified by DOE. PMTech Supplemental Comments at 4, 14 nn.3-4.⁵

While the overriding mandate of the Competition in Contracting Act of 1984 (CICA) is for full and open competition in government procurements, 41 U.S.C. § 253(a)(1)(A) (2000), CICA does permit noncompetitive acquisitions in specified circumstances, such as when the services needed are available from only one responsible source. 41 U.S.C. § 253(c)(1).

The Federal Acquisition Regulation (FAR) requires publication of a synopsis of a sole-source procurement in accordance with the Small Business Act, 15 U.S.C. § 637(e), and the Office of Federal Procurement Policy Act, 41 U.S.C. § 416, unless the procurement fits one of the exceptions to the synopsis requirement set forth in the regulations, none of which is applicable here (and none of which has been asserted as applicable by the agency). See FAR §§ 5.101(a)(1), 6.302-1(d)(2).

A synopsis must provide an “accurate description” of the property or services to be purchased and must be sufficient to allow a prospective contractor to make an informed business judgment as to whether to request a copy of the solicitation. 41 U.S.C. § 416(b); 15 U.S.C. § 637(f); see also Pacific Sky Supply, Inc., B-225420, Feb. 24, 1987, 87-1 CPD ¶ 206 at 4-5 (protest sustained where a sole-source synopsis identified only 2 of 15 items included in the solicitation, thereby failing to provide an “accurate description” of the procurement, as required by the Small Business Act). In addition, the FAR requires that the description of the supplies or services be “clear and concise.” FAR § 5.207(c), (d). Moreover, as directly relevant here, a synopsis must provide prospective alternative sources a meaningful opportunity to demonstrate their ability to provide what the agency seeks to purchase. See Sabreliner Corp., B-288030, B-288030.2, Sept. 13, 2001, 2001 CPD ¶ 170 at 6-7 (protest challenging sole-source award sustained where both the justification and the published synopsis inaccurately described the requirements to overhaul helicopter engines). In short, the fundamental purpose of these notices, including in the

⁵ In preparing its capability statement, PMTech referred to a copy of the statement of work from contract No. DE-AC01-04SO20188 (CSC’s contract), which PMTech states it obtained from an unnamed third party. Even though that statement of work provided some additional information about the services required, the record does not establish, and DOE does not argue, that PMTech could have understood from that statement of work the areas to be addressed, and the importance of certain areas. Nevertheless, since PMTech included a copy of the statement of work as an exhibit to its supplemental comments, we have reviewed it, and agree with PMTech that the statement of work from the CSC contract does not identify any of the areas that the DOE evaluation asserts needed to be addressed in the capability statements (including isotope separation technology, an area that DOE identifies as being “of utmost importance”).

circumstance where an agency contemplates a sole-source award, is to enhance the possibility of competition. Information Ventures, Inc., B-293541, Apr. 9, 2004, 2004 CPD ¶ 81 at 4.

Here, the notice, as issued, did not meaningfully describe DOE's requirements. As quoted above, the notice merely identifies the contract number that is being extended and indicates that the work involves "critical, highly specialized technical and administrative support," yet provides essentially no information about the experience and abilities that DOE believes potential sources need to have. Even though the agency's evaluation of the two capability statements identifies numerous specific topics as being essential to successful performance, or even "of utmost importance," none of these capabilities is mentioned in the synopsis. In our view, DOE's requirements were not adequately described in the notice, and the notice did not provide enough information to allow prospective sources a meaningful opportunity to demonstrate the ability to meet the agency's requirements.⁶ In this regard, Thompson advises that it has extensive experience in managing classified information in the subject areas relevant to the procurement; that it has the ability to identify and retain additional staff with the required backgrounds and security clearances; and that it would have competed for the contract had the agency accurately described its needs. PMTech makes similar assertions.⁷

⁶ While these protests were pending, and after reviewing the protesters' responses to the synopsis, DOE prepared an addendum, approved on December 20, confirming the original justification. AR, Tab 32, Addendum to Justification for Other than Full and Open Competition, at 1. Although DOE argues that it "finalized" its sole-source justification only after reviewing the protesters' capability statements, Supplemental Agency Report at 3, the sole-source justification was already fully approved and cleared by December 9, before DOE had evaluated (or even received) the capability statements. DOE's actions appear inconsistent with FAR § 6.302-1, which clearly contemplates that the "notices required by [FAR §] 5.201 shall have been published and any bids and proposals [here, capability statements] must have been considered" as a prerequisite to invoking FAR § 6.302-1.

⁷ DOE argues that it was already familiar with Thompson and PMTech as a result of earlier market research conducted in June through August 2005 into the firms' respective capabilities in considering the potential for a small business set-aside for a larger contract that would include the work under the CSC contract. Supplemental Legal Memorandum at 2-4. Thus, DOE believes that this earlier market research supports its position that Thompson and PMTech are not capable of performing this contract. In our view, the earlier market research does not resolve the current issue relating to the firms' capabilities to perform this smaller contract. Determining capability of a source in the context of a potential small business set-aside (for a larger contract), which involves limitations on subcontracting and affiliations, is not necessarily conclusive in the context of an unrestricted procurement, where a small
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By providing an inadequate description of its sole-source procurement in the synopsis, DOE restricted competition in violation of statute and regulation. Moreover, DOE compounded the shortcomings of this particular notice by providing no information on the availability of a statement of work⁸ and by stating in the synopsis that the notice “is for informational purposes only and is not a request for proposals or other information.” Cf. 41 U.S.C. § 416(b)(4); 15 U.S.C. § 637(f); FAR § 5.207(c)(15).⁹ The protesters and the Small Business Administration (SBA) argue, and we agree, that the language of the synopsis discouraged, and may have been intended to discourage, responses.

We sustain the protests.

During the course of this protest, DOE notified our Office and the protesters that DOE had decided to proceed with award (i.e., modification of the CSC contract) on the basis that continued performance was justified by “urgent and compelling circumstances which significantly affect the interest of the United States.” Letters from Contracting Officer to GAO (Dec. 20, 2005). On December 20, DOE and CSC executed a bilateral modification of the contract. AR, Tab 34, Modification A014, at 1.¹⁰ In light of this determination, we recommend that DOE, as promptly as

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business may have greater flexibility with regard to subcontracting and affiliations. In these circumstances, we think that it was only by reviewing capability statements (or proposals) submitted in response to an accurate description of the agency’s needs that DOE could evaluate the protesters as potential sources, and reasonably determine whether they could satisfy the agency’s requirements.

⁸ The evaluations seem to compare the capability statements to an apparently newly-drafted statement of work (which appears significantly different from the statement of work from the CSC contract that PMTech had obtained, as referred to above) that DOE did not make available in connection with the synopsis. See Thompson AR, Tab 31, Evaluation of Thompson Capability Statement; PMTech AR, Tab 31, Evaluation of PMTech Capability Statement.

⁹ We note that, although it is no longer explicitly required to be included in a sole-source synopsis, see 68 Fed. Reg. 56668, 56679 (Oct. 1, 2003), numbered note 22 provides for interested persons to identify their interest and capability to respond to the synopsis requirement, and provides that the “[i]nformation received will normally be considered solely for the purpose of determining whether to conduct a competitive procurement.” See <http://www.fbo.gov/Numbered_Notes.html> (visited February 6, 2006).

¹⁰ The modification provides a “provisional” increase in the total cost-plus-fixed-fee of \$500,000 for an additional 3 months, and unpriced options for two additional 3-month option periods. Id. at 2.

practicable, issue a revised synopsis that adequately communicates DOE's specific requirements and requests capability statements, and that DOE review those capability statements in conformance with the requirements disclosed in the synopsis.¹¹ Only after reviewing responses to the revised synopsis should DOE consider whether it has a legal basis for any further sole-source contract action. If DOE concludes that it does not have a basis for a sole-source contract, DOE should acquire these services on a competitive basis. We also recommend that the agency reimburse Thompson and PMTech the reasonable costs associated with filing and pursuing these protests, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2005). The protesters' certified claims for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protests are sustained.¹²

Anthony H. Gamboa
General Counsel

¹¹ In this regard, we note that the evaluations of Thompson's and PMTech's capability statements make repeated references to the inability of the firms to provide sufficient qualified staff to perform the work and a lack of clarity about the role of subcontractors. Nothing in the synopsis suggested that detailed information about staffing and subcontractors was being sought in the responses. Indeed, DOE appears to have reviewed the capability statements as if they were proposals in response to a request for proposals, in which case, the solicitation would have been required to state the basis on which proposals would be evaluated. See FAR § 15.203(a). We need not address here the level of detail that can be required of a capability statement; if, however, DOE believes that it needs a proposal to accurately assess the capability of firms to provide these services, DOE should consider issuing an RFP.

¹² Since we conclude that the sole-source contracting action extending CSC's contract did not conform to statute and regulation, we need not address the protesters' arguments that the agency's evaluation of the capability statements was tantamount to a nonresponsibility finding which had to be referred to the SBA under the Small Business Act, 15 U.S.C. § 637(b)(7). We also need not address Thompson's argument that, when issued, a solicitation for guidance development services should be set aside for small businesses.