

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: GIBBCO LLC

File: B-401890

Date: December 14, 2009

Jonathan Gibb for the protester.

Michael McCabe, Esq., Federal Emergency Management Agency, for the agency.
Pedro E. Briones, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly issued a solicitation for housing units meeting certain air quality standards under Federal Acquisition Regulation (FAR) subpart 12.6 streamlined procedures for commercial items is denied, where the agency reasonably determined that the solicited units were commercial items.
 2. In a procurement conducted under FAR subpart 12.6 streamlined procedures for commercial items, protest that agency required submission of proposals in less than 30 days is denied, where the agency was only required to provide offerors with a reasonable opportunity to respond.
-

DECISION

GIBBCO LLC of Prattville, Alabama, protests the terms of solicitation No. HSFEHQ-09-R-0105, issued as a commercial item acquisition by the Department of Homeland Security, Federal Emergency Management Agency (FEMA), for “alternative housing units” for disaster victims. GIBBCO contends that the solicited units are not commercial items and that the agency did not provide sufficient time for interested vendors to submit responses.

We deny the protest.

The solicitation, issued as a combined synopsis/solicitation on the FedBizOpps website on August 19, 2009, pursuant to the Federal Acquisition Regulation (FAR) subpart 12.6 streamlined procedures for evaluation and solicitation for commercial

items, provided for multiple awards of fixed-price, indefinite-delivery/indefinite-quantity contracts for alternative housing units.¹ According to the solicitation's statement of work (SOW), this acquisition was "intended to expand FEMA's repertoire of available disaster housing with new units that address the most crucial issues facing FEMA today." SOW at C-1. Offerors were informed that the closing date for receipt of proposals was September 10. FebBizOpps Notice, Aug. 19, 2009.

Offerors were informed that the solicited housing units were for the purpose of providing temporary housing to disaster victims and would likely be subjected to extended road travel, multiple installations and deactivations, and various extreme weather conditions. In this regard, the SOW stated that the solicitation was open to all unit types, including "Factory Built Housing, Manufactured Housing (HUD-Code), Modular Housing, Panelized Housing, and other types of alternative units such as yurts, shipping containers, transportable multiple dwelling units, duplex units, and stackable units." SOW at C-1. The SOW identified a number of requirements that the housing units must meet, including compliance with air quality standards specified in the solicitation. Among other things, offerors were informed that all housing units must "emit no or limited levels of formaldehyde" and "[o]nce constructed, a unit's indoor formaldehyde level must be less than 0.016 parts per million (ppm) prior to government acceptance from the manufacturing plant." Id. at C-3.

Gibbco protests that FEMA cannot use the FAR subpart 12.6 streamlined procedures to acquire these housing units, because the housing units, as specified in the SOW, are not commercial items. Protest at 2. The protester argues that the solicited housing units must be custom-made to meet the solicitation's air quality specifications and would be of much higher quality than the industry standard for a manufactured housing unit. Specifically, Gibbco asserts that the specified low formaldehyde levels and air quality testing for the solicited housing units require different source materials and costly, time-consuming changes in the manufacturing process and are therefore not "minor modifications" to a commercial item that would be permitted by the FAR. Comments at 2.

FEMA disagrees that the solicited housing units are not commercial items. The contracting officer states that he considered the extensive market research and field assessments performed by FEMA's Joint Housing Solutions Group (JHSG) (which considered more than 200 housing units and performed field assessments on nearly

¹ Although the solicitation was posted as a combined synopsis/solicitation, a solicitation on standard form 33 was included with the FedBizOpps notice, even though the FAR does not contemplate that a separate solicitation will be issued in the acquisition of commercial items using streamlined procedures when a combined synopsis/solicitation is issued. See FAR § 12.603(c)(2)(i). This was not challenged by the protester.

50 units)² and a commercial item acquisition conducted by FEMA in 2008 for housing units to conclude that the solicited housing units here were commercial items. With respect to the 2008 commercial item acquisition for housing units (solicitation No. HSFEHQ-08-R-0106), FEMA solicited proposals for similar housing units with the same formaldehyde levels and similar air quality testing requirements, receiving a number of proposals from which the agency made seven awards and pre-qualified a number of other commercial item vendors. AR at 7; Contracting Officer's Statement at 1. FEMA contends that any modifications that must be made to commercial housing units to satisfy the solicitation's air quality specifications are minor because these modifications do not alter the commercial nature, nongovernmental functions, or essential physical characteristics of the units. See AR at 7. In this regard, FEMA states that it received proposals from a large number of offerors in response to the solicitation here. Finally, FEMA states that the agency is aware that since Hurricane Katrina in 2005 and the public disclosure of the numerous claims made concerning air emissions and formaldehyde in alternative housing units that the alternative housing unit industry began making changes to limit formaldehyde emissions.

Determining whether a product is a commercial item is largely within the discretion of the contracting agency, and such a determination will not be disturbed by our Office unless it is shown to be unreasonable. See Aalco Forwarding, Inc., et al., B-277241 et al., Oct. 21, 1997, 97-2 CPD ¶ 110 at 8, (agency properly determined that services could be acquired as commercial item under FAR part 12 procedures notwithstanding inclusion of government-unique requirements in solicitation); see also Premier Eng'g & Mfg., Inc., B-283028, B-283028.2, Sept. 27, 1999, 99-2 CPD ¶ 65 at 5 (determination as to whether modifications to a commercial item are minor are within the agency's technical judgment that will be disturbed only where unreasonable).

The FAR defines a “commercial item,” as relevant here, to be:

- (1) Any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and
 - (i) Has been sold, leased, or licensed to the general public; or
 - (ii) Has been offered for sale, lease, or license to the general public;

² GAO was provided with a copy of FEMA's Alternative Housing Procurement Acquisition Plan, which was the result of JHSG's research and assessments; however, because the protester was not represented by counsel and a protective order was not issued in connection with this protest, this source-selection-sensitive document was not provided to the protester.

* * * * *

- (3) Any item that would satisfy a criterion expressed in paragraphs (1) or (2) of this definition, but for
- (i) Modifications of a type customarily available in the commercial marketplace; or
 - (ii) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. Minor modifications mean modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor[.]

FAR § 2.101. The solicitation incorporated by reference FAR § 52.202-1, which in turn incorporates this FAR commercial item definition.

The record shows that FEMA reasonably determined that the housing units solicited here are commercial items. As noted by the agency, and not disputed by Gibbco, FEMA conducted an earlier commercial item acquisition for alternative housing units meeting air quality standards and testing specifications that are nearly identical to the solicitation at issue here and made several awards and pre-qualified a number of other vendors. Given this history, we find that the contracting officer could reasonably determine that FEMA could expect to receive commercial items in response to the solicitation here. With respect to Gibbco's complaint that, to satisfy the solicitation's emission and air quality testing requirements, it would have to use different materials and that the required testing would require the services of an "industrial hygienist" and would entail additional production time, this does not establish that any modifications that would have to be performed on commercial housing units to satisfy the solicitation's specifications were not minor. See Canberra Indus., Inc., B-271016, June 5, 1996, 96-1 CPD ¶ 269 at 5 (solicited item within FAR definition of commercial item where regularly sold to public and modification does not alter item's function or physical characteristics). Accordingly, we find that Gibbco's arguments provide us with no basis to object to the agency's decision to issue the solicitation under FAR subpart 12.6 streamlined procedures for the acquisition of commercial items.

Gibbco also complains that the solicitation required the submission of proposals within 22 days of the date the solicitation was issued and that the agency should

have provided at least a 30-day response time for receipt of bids or proposals as required by the FAR for the acquisition of non-commercial items.³

Part 12 of the FAR prescribes policies and procedures unique to the acquisition of commercial items, including streamlined procedures for evaluation and solicitation for commercial items. See FAR §§ 12.000 - 12.603. Among other things, the streamlined procedures under FAR subpart 12.6 permit a contracting officer to reduce the time required to solicit and award contracts for commercial items. See FAR § 12.603(a). In this regard, FAR § 5.203(b) provides that, for the acquisition of commercial items in an amount estimated to be in excess of \$25,000, an agency must provide potential offerors with a reasonable opportunity to respond to the solicitation.

Given our decision above that the contracting officer had a reasonable basis to issue the solicitation under the FAR subpart 12.6 streamlined procedures for the acquisition of commercial items, Gibbco's argument that the agency was required to provide at least a 30-day response time is without merit. Agencies need only establish a solicitation response time that will afford potential offerors a reasonable opportunity to respond to each proposed contract action for the acquisition of commercial items. See American Artisan Prod., B-281409, Dec. 21, 1998, 98-2 CPD ¶ 155 at 3 (contracting officer's decision to allow 15-day response time for commercial item acquisition reasonable based on prior experience with previous procurement). Gibbco provides no information or arguments showing that the requirement for the submission of proposals within 22 days for this commercial item acquisition was unreasonable.

The protest is denied.

Lynn H. Gibson
Acting General Counsel

³ FAR § 5.203(c) provides that “[e]xcept for the acquisition of commercial items (see 5.203(b)), agencies shall allow at least a 30-day response time for receipt of bids or proposals from the date of issuance of a solicitation, if the proposed contract action is expected to exceed the simplified acquisition threshold.”