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Decision

Matter of: SEK Solutions, LLC

File: B-406939.2

Date: February 27, 2014

Ronald K. Henry, Esq., Jennifer B. Patterson, Esq., John S. Cahalan, Esq., and David M. Hibey, Esq., Kaye Scholer LLP, for the protester. Allison Colsey Eck, Esq., and Judith Pullman Gever, Esq., Defense Logistics Agency; and Laura Mann Eyester, Esq., and John W. Klein, Esq., Small Business Administration, for the agencies. Peter D. Verchinski, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's contention that a solicitation for the award of multiple indefinite-delivery, indefinite-quantity contracts for commercial soft shelter systems is so vague and ambiguous as to prevent offerors from competing intelligently and on an equal basis is denied where the solicitation provided sufficient information and detail to allow offerors to seek award of a contract.
 2. A solicitation for the award of multiple indefinite-delivery, indefinite-quantity contracts for commercial soft shelter systems was not required to be set aside for small businesses where the agency reasonably determined that no small businesses could perform all of the requirements, and where the agency will set aside orders for small businesses when the agency has a reasonable expectation of receiving fair market price offers from two or more small businesses for the order requirements.
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DECISION

SEK Solutions, LLC, of Virginia Beach, Virginia, protests the terms of request for proposals (RFP) No. SPM1C1-12-R-0031, issued by the Defense Logistics Agency (DLA) for commercial soft shelter systems. SEK protests that the RFP is vague and ambiguous and that the solicitation should have been set aside for small businesses.

We deny the protest.

BACKGROUND

The RFP, which was issued on March 6, 2012, on an unrestricted basis, provides for the award of multiple indefinite-delivery, indefinite-quantity contracts for commercial-design textile shelter systems and support components that will be used by soldiers, marines, and airmen and for civilian disaster relief purposes.¹ RFP amend. 4, at 12. The RFP states that the orders issued under a contract would have a minimum value of \$25,000 per year and a maximum value of \$200,000,000 per year. Id. at 7.

The RFP informs offerors that the agency is seeking offers for “entire product lines,” see id. at 7, which may include:

complete commercial soft shelter systems and their respective support components for General Purpose Tentage, Utility Shelters, Maintenance Shelters, Command Post Shelters, Vehicle Crew Tents, Lightweight Nylon Tents[,] Assembly Tents, Medical Tents or Arctic Region Tents, [and] Hybrid Soft/Hard Wall Shelters. Support equipment may include stakes or pins, tent lines, textile or modular flooring, environmental support components, storage covers, storage/shipping containers and trailer mounted shelter support systems.

Id. at 12. The RFP identifies minimum performance level and features that an offeror’s commercial soft shelter system would be required to have to be considered for award. See id. at 12, 14-18; see also RFP amend. 6, append. B, Shelter Test Data Sheet, Rev. B, at 2-6. In this regard, the RFP states that the shelter systems

must be modular in design allowing accessory upgrades or connectable to another shelter to allow for expansion. The shelter must be frame, air beam supported or hard wall box with [extendable] fabric extensions and constructed from a lightweight, water-resistant, mildew resistant and flame resistant fabric.

RFP amend. 4, at 12. The RFP elsewhere provided that the shelter must satisfy flame resistant requirements in accordance with ASTM-D6413,² conform to Occupational Safety and Health Administration (OSHA) requirements, be designed to be repairable by the user in the field, and include printed instructions attached to

¹ The solicitation was amended a number of times.

² ASTM, International (formerly American Society for Testing and Materials) develops and publishes international standards for a number of products, including textiles. See www.astm.org.

the inside surface of the end fabric transport covers. Id. at 16-17; RFP amend. 6, append. B, Shelter Test Data Sheet, Rev. B, at 2-6.

The RFP also identifies characteristics and features of the shelter systems (such as snow loads) that are “to be vendor determined (TBVD),” which the solicitation states allows vendors to define the characteristics and features of the tent systems that they offer. RFP amend. 4, at 18. The RFP informs offerors that this vendor-provided information would be used when competing orders to determine whether the offeror’s items would satisfy the government’s requirements. Id.

The RFP states that awards would be made to all firms offering commercial soft shelters that satisfy the terms and conditions of the RFP, whose product line satisfies the statement of work, and whose prices can be determined to be fair and reasonable. Id. at 63. In this regard, the RFP identifies no evaluation factors, other than price, for the evaluation of offers. Id. The RFP instructs offerors to provide the following information with their proposals: commercial product catalog; detailed information on product line requirements; product data sheets for each item; a joint photographic experts group (jpeg) photograph; pricing; subcontracting plan and warranties.³ Id. at 63-64.

The RFP also informs offerors that, following the award of contracts, the awardees will be required to submit a “Final Test Report,” documenting safety and mobility testing at a “U.S. Military Test Center,” and will be responsible for maintaining technical data package documentation for all their shelter systems and components throughout the contract. Id. at 13. The solicitation states that this information will be maintained on the Department of Defense’s (DOD) E-mail Tent Specialty Store website. Id. The RFP further informs offerors that their product data information will be used by DOD E-mail customers to evaluate which products would be appropriate for their missions. Id. In this regard, the RFP states that delivery orders will be competed among the contract holders through requests for quotations that will include evaluation factors. Id. at 38.

On June 25, 2012, SEK protested to our Office, challenging the terms of the RFP. The following day, DLA received [DELETED] proposals from both large and small business offerors. SEK did not submit a proposal. Following receipt of the agency’s report and the protester’s comments, our Office provided the parties with outcome prediction alternative dispute resolution, in which we informed the parties that we were likely to sustain SEK’s protest on the grounds that the RFP should have been set aside for small businesses. Specifically, we informed the parties that there was

³ With respect to price, the RFP instructs that offerors are to provide their commercial pricing for each product offered and identify their government discount. Id. at 64.

insufficient information in the record to support DLA's conclusion that the procurement should not be set aside for small businesses. DLA informed our Office and SEK that the agency would take corrective action by reviewing its acquisition strategy, market research, and its determination that the solicitation be issued on an unrestricted basis. We dismissed the protest as academic. SEL Solutions LLC, B-406939, Sept. 26, 2012.

Following the dismissal of SEK's protest, DLA reviewed its decision to not set aside the RFP for small businesses. The contracting officer reviewed the proposals received in response to the RFP to determine whether there were two or more small businesses that could provide the same or similar items as the large business offerors. See Agency Report (AR), Tab 13, Market Research Memorandum, at 3. The contracting officer also reviewed historical sales information in the agency's Tailored Logistics Support Program to determine the three most popular shelters for each of the large business offerors.⁴ Id. at 3, 9, and 15. The contracting officer then reviewed the proposals of the [DELETED] small business offerors to determine whether their offered product lines included shelters similar to, or the same as, the large businesses' shelters, and found that there was a significant demand in the past for products that were offered only by the large businesses. Id. at 21. As a result, the contracting officer concluded that the RFP could not be set aside for small businesses because there was no evidence that two or more small businesses offered all of the shelters. Id. The contracting officer also concluded that the RFP should be amended to provide that the agency would consider setting aside individual delivery orders for small businesses. Id. at 22.

The contracting officer presented her market research and set-aside determination to the Small Business Administration's representative, who concurred with the DLA's determination to not set the RFP aside for small businesses. AR, Tab, 14, Small Business Coordination Record, Oct. 23, 2013. Shortly thereafter, DLA amended the RFP to provide that the contracting officer would, prior to issuing any request for quotations under the multiple award contracts, "determine whether the conditions for issuing the RFQ as a Small Business Set-Aside have been met, and, if so, will issue the RFQ as a Set-Aside for Small Business in accordance with [Federal Acquisition Regulation (FAR) §] 16.505(b)(2)(i)(F)." RFP amend. 7, at 1. Amendment 7 extended the closing date for submission of proposals to December 2, 2013.

This protest, which challenges the terms of the RFP, followed.

⁴ The large businesses offerors' three most popular shelters were different.

DISCUSSION

Vague and Ambiguous Terms

The protester complains that the solicitation is vague and ambiguous, such that offerors are unable to understand what is being procured and how proposals will be evaluated. Protest at 5-6. In this regard, the protester contends that the RFP does not define commercial soft shelter systems and fails to specify performance requirements for the shelters. Id. at 7. SEK also argues that the identification of some characteristics and features of the shelter systems as “to be vendor determined (TBVD)” does not allow for a rational evaluation. Id. at 9-10; Comments at 12-13. The protester further complains that, although the RFP solicits commercial items, the solicitation provides for testing based upon military specifications. Protest at 11.

As a general rule, the contracting agency must give offerors sufficient detail in a solicitation to enable them to compete intelligently and on a relatively equal basis. C3, Inc., B-241983.2, Mar. 13, 1991, 91-1 CPD ¶ 279 at 3. A solicitation’s evaluation factors and subfactors must be tailored to the acquisition in question. FAR § 15.304(a). However, there is no legal requirement that a competition be based on specifications drafted in such detail as to completely eliminate all risk or remove every uncertainty from the mind of every prospective offeror. Sunbelt Properties, Inc., B-249469 et al., Nov. 17, 1992, 92-2 CPD ¶ 353 at 4. The determination of the agency’s needs and the best method of accommodating them is primarily within the agency’s discretion. Premiere Vending, B-256437, June 23, 1994, 94-1 CPD ¶ 380 at 7. Agencies enjoy broad discretion in the selection of evaluation factors, and we will not object to the use of particular evaluation criteria or an evaluation scheme so long as the factors used reasonably relate to the agency’s needs. Leon D. Dematteis Constr. Corp., B-276877, July 30, 1997, 97-2 CPD ¶ 36 at 3-4.

Here, the RFP provides offerors with sufficient information and detail to allow offerors to seek award of a contract. Contrary to the protester’s apparent belief, the solicitation identified a number of performance requirements that proposed shelters must satisfy.⁵ For example, offerors were informed that the shelters must be a commercial product constructed from a lightweight fabric that is water, mildew, and

⁵ With respect to SEK’s complaint that the RFP solicits commercial items but provides for testing against military specifications, DLA explains that the military specifications were only provided as guidelines, and were not mandatory requirements. See Legal Memorandum at 31 n.13. SEK does not dispute this, other than to complain that this too contributes to the vagueness of the solicitation. See Comments at 14.

flame resistant fabric. RFP amend. 4, at 12. Offerors were also informed that the shelter must satisfy flame resistant requirements in accordance with ASTM-D6413, conform to OSHA requirements, be designed to be repairable by the user in the field, and include printed instructions attached to the inside surface of the end fabric transport covers. Id. at 16-17; RFP amend. 6, append. B, Shelter Test Data Sheet, Rev. B, at 4-6. Although a number of other requirements were left to the offerors to determine, the solicitation contemplates that offerors will propose their own product lines that encompass numerous shelters meeting the solicitation's minimum identified requirements. Allowing offerors to define certain characteristics and features of their commercially available shelters was intended to permit the inclusion of many different types of shelters on the various contracts, which could later be viewed by DLA customers to identify shelters meeting their needs. RFP amend. 4, at 18.

The crux of SEK's complaint is that the solicitation does not provide sufficient information to allow it or other offerors to compete on an intelligent and equal basis. See Comments at 1-2. This argument ignores that the RFP does not provide for a competition among offerors to receive awards. Rather, the RFP explicitly states that DLA will award contracts to all firms offering commercial soft shelters that satisfy the minimum terms and conditions of the RFP, whose product line satisfies the statement of work requirements, and whose prices can be determined to be fair and reasonable. RFP amend. 4, at 63. The RFP here is essentially establishing a catalog or schedule of commercially available soft shelter systems from which DLA customers can determine their needs and conduct task order competitions. SEK has not identified any law or regulation that prohibits DLA from structuring the acquisition in this manner.

Small Business Set-Aside

SEK also complains that the RFP should have been set aside for small businesses, arguing that there are numerous small businesses that can provide the desired products at fair market prices.⁶ Protest at 12-13; Comments at 20. In this regard,

⁶ SEK also argues that the RFP "prejudices" small business vendors because it utilizes an electronic solicitation and ordering process that will favor large businesses which can afford the infrastructure needed to establish a management system for electronic data interchange transactions and invoices. Protest at 12. In response, the agency denies that its intention to electronically solicit and order its requirements under the contracts will prejudice small businesses, and states that the requirements for electronic solicitations and orders are not "extensive." Legal Memorandum at 38-40. In this regard, the agency notes that it received a number of proposals from small businesses. We find that the protester's arguments concerning the agency's planned use of electronic solicitations and ordering provide no basis to

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the protester contends that the agency's market research was inadequate, because it merely found that small businesses' product lines do not offer the same or similar items as those manufactured by large businesses. Id.

Agencies are generally required to set aside for small businesses procurements that exceed \$150,000 if there is a reasonable expectation of receiving fair market price offers from at least two responsible small business concerns. FAR § 19.502-2(b); e.g., Metasoft, LLC, B-402800, July 23, 2010, 2010 CPD ¶ 170 at 2. An agency must undertake reasonable efforts to ascertain whether it is likely that it will receive offers from at least two responsible small businesses capable of performing the work in question. EMMES Corp., B-402245, B-402245.2, Feb. 17, 2010, 2010 CPD ¶ 53 at 5; Rochester Optical Mfg. Co., B-292247, B-292247.2, Aug. 6, 2003, 2003 CPD ¶ 138 at 4. No particular method of assessing the availability of capable small businesses is required; rather, the assessment must be based on sufficient facts so as to establish its reasonableness. See, e.g., EMMES Corp., supra, at 5.

Here, the record shows that DLA as part of its market research considered whether it could reasonably expect to receive offers from two or more small businesses that could provide all of the shelters that the agency anticipated it would procure. Specifically, the agency considered whether any small businesses offerors' product lines included the same or similar shelters to the three most popular shelters ordered from [DELETED] of its large business offerors. See AR, Tab 13, Market Research Memorandum, at 3-21. DLA found from this analysis that no small business could provide the full range of shelter systems that the agency intends to procure.⁷ Id. at 21. Although SEK disagrees with the agency's judgment in this regard, it has not shown that the agency's analysis was faulty or could not reasonably be relied upon.

We also sought and obtained the views of the Small Business Administration (SBA) with respect to DLA's determination not to set aside the RFP for small businesses. SBA does not contend that DLA's actions violate the Small Business Act or any other applicable law or regulation, but explains that it "is concerned that the scope of the requirement is so broad that it is difficult to make a reasonable determination as to whether two or more small businesses can meet the requirement." See SBA Legal Memorandum at 4. On the basis of the record here, and in the absence of

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object to the RFP, particularly given the federal policy in favor of using electronic commerce in contracting. See FAR § 4.502.

⁷ The RFP commits DLA to making a determination on an order-by-order basis as to whether any given order should be set aside for small businesses. RFP amend. 7, at 1.

any contention that the agency is violating a procurement law or regulation, we have no basis to sustain this protest.

The protest is denied.

Susan A. Poling
General Counsel