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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: American Toner & Ink; KPaul Properties, LLC; Dolphin Blue, Inc.; Capital Shredder Corp.

File: B-409528.7; B-409528.11; B-409528.14; B-409528.18

Date: June 9, 2014

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Kristen M. Nowadly, Esq., General Services Administration; and Laura Mann Eyester, Esq., and John W. Klein, Esq., U.S. Small Business Administration, for the agencies.

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DIGEST

Protest that a procurement for government-wide provision of office supply items improperly consolidated smaller contracts is denied, where, consistent with the relevant statutory requirements, the agency reasonably considered the potential impact on small businesses, and concluded that the consolidation would result in substantial benefits to the government.

DECISION

American Toner & Ink, of Spring Lake, Minnesota; KPaul Properties, LLC, of Indianapolis, Indiana; Dolphin Blue, Inc., of Dallas, Texas; and Capital Shredder Corp., of Rockville, Maryland, protest the terms of request for proposals (RFP) No. GSQ02-14-R-SA0001, which was issued by the General Services Administration (GSA) for a full range of office supply items that will be available for order by participating federal agencies. The protesters, which are all small businesses, argue that the solicitation consolidates numerous existing contracts for office supply items into a smaller pool of multiple-award contracts, and that the agency failed to comply with a statutory requirement to consider the consolidation's potential economic effect on small businesses.

We deny the protests.

BACKGROUND

GSA issued the solicitation on January 31, 2014. The RFP seeks proposals for the award of multiple indefinite-delivery/indefinite-quantity contracts for GSA's Office Supplies Third Generation (OS3) program, which is part of the agency's effort to "carry out the Office of Management and Budget (OMB) and GSA mandate to maximize use of strategic sourcing while building a new, more sustainable business model."¹ Agency Report (AR) at 1. The solicitation anticipates the award of approximately 24 contracts with fixed-unit-prices (with economic price adjustments), for a base period of 1 year and four 1-year options.² AR at 4; RFP at 2.

The OS3 procurement is the successor to GSA's Office Supplies Second Generation (OS2) program, which expired in May 2014. The OS2 program consisted of blanket purchase agreements (BPA) that were placed under GSA's multiple award schedule (MAS) No. 75 for office supplies.³ AR at 1. Under the OS2 program, 13 of the 15 BPA holders were small businesses. AR at 4.

The goal of the OS3 program is to "provide [GSA's] customers with a wide and best range of commercial office products and services, faster delivery, and better reporting information on orders and products, at the lowest overall costs." RFP at 4. The OS3 program is designed to leverage industry purchasing volume power and dynamic pricing capabilities to the maximum extent, which is intended to increase internal efficiencies and effectiveness in supporting customer requirements,

¹ Strategic sourcing is a process that moves an organization away from numerous individual procurements for the same or similar products or services toward a broader aggregate approach. The Office of Management and Budget established a government-wide strategic sourcing program known as the Federal Strategic Sourcing Initiative (FSSI) in 2005. FSSI was created to address government-wide opportunities to strategically source commonly purchased products and services and eliminate duplication of efforts across agencies. The mission of the FSSI program is to encourage agencies to aggregate contract requirements, streamline processes, and coordinate purchases of like products and services to leverage spending to the maximum extent possible. See STRATEGIC SOURCING: Selected Agencies Should Develop Performance Measures on Inclusion of Small Businesses and OMB Should Improve Monitoring, GAO-14-126, at 6-7 (Jan. 2014).

² The government reserves the right to adjust the number of awards based upon receipt of successful qualified proposals as set forth in the evaluation criteria. RFP at 4.

³ GSA's MAS program is also known as the Federal Supply Schedule (FSS). Federal Acquisition Regulation (FAR) § 8.401. The agency primarily uses the term MAS in the record here.

increase small business opportunity--resulting in lower cost to the government. Id. GSA estimates that agencies will spend \$1.25 billion under its OS3 contracts over the course of the 5-year contract term, including options. CO Statement at 1. The OS3 solicitation will be available for use by the entire Federal Government.⁴

The RFP anticipates separate awards under each of four contract line item numbers (CLIN), which are described below. The solicitation states that for CLIN Nos. 1, 2 and 3, award will be made on a best-value basis. RFP, Statement of Work (SOW), at 2. For CLIN 4, award will be made to the offeror that submits the lowest-price, technically-acceptable offeror. Id.

The solicitation states that the “government has [a] significant preference for small businesses over other than small businesses.” Id. at 2. The solicitation does not specifically define the phrase “significant preference,” but states that the preference will “result in best-value proposals being those from small business contractors.” Id. at 37. The RFP does not state that any awards are expressly reserved for small businesses, or that other than small firms are prohibited from competing. The solicitation also provides, under CLIN No. 1, for a 1-percent price evaluation preference for Historically Underutilized Business Zone (HUBZone) firms. Id. at 3, 37.

The solicitation divides the requirements, along with the associated preferences, into the following four CLINs:

CLIN 1-General Office Products

- This CLIN has 15 estimated awards and the agency states that it has a “significant preference for small businesses over other than small businesses.” RFP, SOW, at 2. For 2 of these 15 awards, the agency states it has a “significant preference” for SDVOSB firms over other small businesses. Id. For one of these awards, the agency has a “significant preference” for a small business which partners with at least 25 other small businesses, over small businesses and other than small businesses. Id. Additionally, HUBZone firms would receive a “1% price preference” that is “calculated in the form of a price reduction of the evaluated price.” Id. at 3.

⁴ The OS3 contracts will not be mandatory sources for office supplies. The agency notes that federal customers will still be able to purchase office supplies from one of the more than 400 vendors who hold MAS contracts for these items. AR at 4.

CLIN 2-Office Paper

- This CLIN has three estimated awards. The agency states that it has a “significant preference for small businesses over other than small businesses.” Id. at 3.

CLIN 3-Toner and Ink Jet

- This CLIN has five estimated awards. For three of the awards, the agency has a “significant preference” for SDVOSB firms over other small businesses and other than small businesses. Id. at 3. For the remaining two awards, all small business sub-categories would be deemed of equal value to the government. Id.

CLIN 4-GSA On-the-Go⁵

- This CLIN anticipates a minimum of one award, and there is no preference for small businesses. Id. at 3-7.

As relevant here, and discussed in detail below, the Small Business Jobs Act of 2010 (SB Jobs Act), Pub. L. No. 111-240, 124 Stat. 2504 (2010) (codified at 15 U.S.C. § 657q), requires agencies to consider the effect on small businesses of the consolidation of agency contract requirements over \$2 million. Specifically, prior to issuing a solicitation that involves consolidation of contract requirements, the SB Jobs Act requires agencies to conduct market research, assess and identify the impact of contract consolidation on small businesses, and make a written determination that the consolidation is “necessary and justified,” and that “the benefits of the acquisition strategy substantially exceed the benefits of each of the possible alternative contracting approaches” identified by the agency. 15 U.S.C. § 657q(c)(1), (2).

Prior to issuing the solicitation, GSA prepared an 11-page “Consolidation Analysis,” which was signed by the agency’s senior procurement executive. Although the agency stated that it “did not necessarily agree” that the SB Jobs Act requirements regarding consolidation applied to the OS3 procurement, GSA contends that its analysis met the requirements of the Act. AR, Tab 2, Consolidation Analysis, at 1. As discussed in greater detail below, the agency conducted market research, identified alternate contract approaches that would involve less consolidation, and set out its views on the negative impact the consolidation strategy would have on

⁵ This CLIN covers the same catalog of general office supply requirements as CLIN No. 1, as well as additional capacities for same-day, secure desktop, expedited, and store presence service within the 10 largest U.S. metropolitan areas. RFP, SOW, at 4.

small businesses. GSA concluded that the benefits to be gained through OS3 outweighed the potential negative impact to small business concerns. Id. at 7-11.

Our Office received protests from 21 firms prior to the closing date of March 24, all of which argued that GSA's procurement approach for the OS3 program had not adequately considered the effect of consolidation on small businesses.⁶ In addition, we received four protests challenging the terms of the solicitation after the closing date; we dismissed these protests as untimely.⁷ See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2014). Two of the timely-filed protests were subsequently withdrawn.⁸ GSA provided its report responding to the protests on March 24. The four protesters addressed in this decision, American Toner, KPaul, Dolphin Blue, and Capital Shredder, filed timely comments; the other protesters failed to timely file comments, and we dismissed those protests. See 4 C.F.R. § 21.3(i). We also requested the views of the Small Business Administration (SBA) concerning these protests, and we address SBA's comments below as well.

DISCUSSION

The protesters contend that GSA failed to reasonably consider the economic effect on small businesses that would result from the award of the OS3 contracts. The protesters argue that despite the requirements in the SB Jobs Act that GSA "identif[y] any negative impact by the acquisition strategy on contracting with small business concerns," the agency failed to give any consideration to the economic consequences of the OS3 program on small businesses. The protesters note that

⁶ In addition to the four protesters here, the following protests were received: APRISA Technology, LLC, B-409528; Image Supply Service, Inc., B-409528.2; National Office Outlet, B-409528.3; FarraTech, Inc., B-409528.4; Werth Sanitary Supply, B-409528.5; BahFed Corp., B-409528.6; ServCorp, Inc., B-409528.8; DBISP, LLC, B-409528.9; Corporate Office Solutions, LLC, B-409528.10; Copier Doctors, B-409528.12; Federal Merchants Corp., B-409528.13; B&D Supplies, Inc., B-409528.15; Imaging Technologies Direct, LLC, B-409528.16; Tantaquidgeon Office Supply, B-409528.17; Writing Specialties, Inc., B-409528.19; and Alpha Sum Business Machines, B-409528.21. Our Office also received a protest from the National Industries for the Blind, B-409528.20 prior to the closing date, which raised a different set of issues, and will be addressed in a separate decision.

⁷ The following protests were dismissed as untimely: Corporate Office Solutions, LLC, B-409528.24; Alpha Industries, Inc., B-409528.25; SOLONY Inc., B-409528.26; and Heritage Paper Co., Inc., B-409528.27.

⁸ The following protests were withdrawn: Werth Sanitary Supply, B-409528.5, and Corporate Office Solutions, LLC, B-409528.10.

while there are several hundred⁹ office supply vendors currently on GSA MAS No. 75 for office supplies, this solicitation anticipates the award of approximately 24 contracts. The protesters argue that the companies that are not awarded contracts “are effectively locked out of business with the government.” American Toner Protest at 1. Therefore the protester requests an “accurate economic analysis of the consequences for small businesses, prior to the acceptance of [proposals] for this solicitation.” Id. Similarly, SBA joins the protesters in arguing that GSA’s consolidation analysis did not adequately or meaningfully address the requirements of the SB Jobs Act. For the reasons discussed below, we conclude that GSA’s consolidation analysis was reasonable.

Section 1313 of the SB Jobs Act requires agencies to consider the effect of contract consolidation on small businesses for procurements over \$2 million. 15 U.S.C. § 657q(c). Consolidation means the use of a solicitation to obtain offers for a single contract or a multiple award contract:

(A) to satisfy 2 or more requirements of the Federal agency for goods or services that have been provided to or performed for the Federal agency under 2 or more separate contracts lower in cost than the total cost of the contract for which the offers are solicited; or

(B) to satisfy requirements of the Federal agency for construction projects to be performed at 2 or more discrete sites[.]

Id. § 657q(a).

The SB Jobs Act does not preclude agencies from consolidating requirements. The Act states, however, that an agency may not use an acquisition strategy that consolidates contract requirements with a total value of more than \$2 million unless the agency’s senior procurement executive or chief acquisition officer takes the following actions:

(A) conducts market research;

(B) identifies any alternative contracting approaches that would involve a lesser degree of consolidation of contract requirements;

(C) makes a written determination that the consolidation of contract requirements is necessary and justified;

⁹ GSA states that there are “400+” vendors under MAS No. 75, AR at 4, whereas the protesters contend that there are “over 560” vendors, see, e.g., American Toner & Ink Protest at 1.

(D) identifies any negative impact by the acquisition strategy on contracting with small business concerns; and

(E) ensures that steps will be taken to include small business concerns in the acquisition strategy.

Id. § 657q(c)(1). In addition, the senior procurement executive or chief acquisition officer must make a determination that the consolidation is “necessary and justified” and that “the benefits of the acquisition strategy substantially exceed the benefits of each of the possible alternative contracting approaches” identified by the agency. Id. § 657q(c)(1), (2).

Our Office has addressed the bundling or consolidation of contract requirements with regard to the Small Business Act, 15 U.S.C. § 631(j)(3), and the Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 3306(a)(2)(B).¹⁰ Because bundled or consolidated procurements combine separate and multiple requirements into one contract, they have the potential for restricting competition by excluding firms that furnish only a portion of the requirement; we therefore review challenges to such solicitations to determine whether the approach is reasonably required to satisfy the agency’s needs. 2B Brokers et al., B-298651, Nov. 27, 2006, 2006 CPD ¶ 178 at 9. We have recognized that bundling may serve to meet an agency’s needs where the agency reasonably determines that consolidation will result in significant cost savings or operational efficiencies. Id.; Teximara, Inc., B-293221.2, July 9, 2004, 2004 CPD ¶ 151 at 6.

Although our Office has not previously addressed the consolidation analysis requirements under the SB Jobs Act, we conclude that the statute requires an inquiry similar to that set forth in our decisions concerning consolidation or bundling under the Small Business Act and CICA. Specifically, we will look to whether GSA has conducted market research, and has reasonably found that the consolidation is “necessary and justified,” and that the benefits “substantially exceed” those of other contracting approaches. See 15 U.S.C. § 657(q)(c)(2).

¹⁰ The Small Business Act, as amended, states that, “to the maximum extent practicable,” each agency shall “avoid unnecessary and unjustified bundling of contract requirements that precludes small business participation in procurements as prime contractors.” 15 U.S.C. § 631(j)(3). CICA contains a similar limitation on unnecessary consolidation of agency requirements. We have held that an agency’s compliance with the Small Business Act requirements may constitute compliance with the similar CICA requirements. See Nautical Eng’g Inc., B-309955, Nov. 7, 2007, 2007 CPD ¶ 204 at 13-14.

As discussed above, prior to the issuance of the RFP, GSA prepared a consolidation analysis, which was signed by its senior procurement executive. This analysis concluded that the benefits of the consolidation approach under the OS3 program outweigh the potential negative impact to small business concerns. AR, Tab 2, Consolidation Analysis, at 7-11. The agency contends that it “gave careful consideration to increasing small business concerns’ ability to participate in this solicitation and specifically chose to solicit this as a full and open competition to get the widest small business participation possible.”¹¹ Supp. AR at 2.

As discussed in the consolidation analysis, GSA found that although government-wide purchasing through MAS schedule No. 75 has worked well for many years, the growth of that contract vehicle has resulted in scattered purchases and a wide range of prices for similar items. AR, Tab 2, Consolidation Analysis, at 3. To support its approach of using a non-MAS contract vehicle, GSA conducted market research and outreach to industry. Id. The market research found that small office supply providers often specialize within an office supply sub-segment, as opposed to offering the full range of office supplies. Id. at 3, 7. In the consolidation analysis, GSA states that it took “active steps” to include small businesses in the OS3 acquisition strategy by engaging with the industry through the GSA’s Interact web blog site, and sponsoring one-on-one listening sessions with small businesses to gather information. Id. at 1. GSA also states that it hosted an “OS3 Listen to Industry Day” event to solicit feedback to the OS3 solicitation and engage in an “open and transparent dialogue” with the industry. Id. at 5.

GSA stated that it anticipates “very substantial benefits” from the OS3 consolidation, such as part number standardization to enable smart shopping, better terms and conditions, reduced cycle time, and improvements for the needs of the federal employee. Id. at 10. The agency estimated that this consolidation would result in a savings of 18 percent, as compared to alternative procurement approaches that did not involve consolidation. Id. at 8, 10.

GSA’s analysis also addressed the negative impact of the potential reduction in sales for small businesses not chosen as OS3 CLIN providers, but “determined the benefits to be gained through OS3 CLINs will outweigh this negative impact.” Id. To increase small business participation, and in response to the results of the

¹¹ We note that GSA states that it “does not necessarily agree that a careful reading of the [SB Jobs Act] would find it applicable” to the OS3 procurement. AR, Tab 2, Consolidation Analysis, at 1. SBA’s brief provides a detailed analysis of its position that the procurement here requires a consolidation analysis. SBA Comments (Apr. 3, 2014). Because GSA performed a consolidation analysis, notwithstanding its reservations about the need for such an analysis, and we conclude that the analysis was reasonable, we need not resolve whether an analysis was required.

market research described above, the agency divided the contract requirements into four separate CLINs of office supply products. These CLINs were intended to be broad enough to allow for adequate sales volume to drive pricing discounts, and narrow enough to ensure small businesses are not excluded. Id. at 7. GSA states that to increase small business awards that it anticipates that “[a]t least 95%” of the awards will be made to small businesses. Id. In this regard, the solicitation expresses a “significant preference” for small businesses. RFP, SOW, at 2. Although the RFP does not explain in detail the term “significant preference,” neither the protesters nor SBA dispute GSA’s expectation that 23 of 24 contracts will be awarded to small businesses. The agency further notes that the OS3 contracts will not be mandatory, and that small business vendors who have MAS contracts will still be eligible to receive orders under those contracts. AR at 4.

GSA states that it also considered other contracting approaches that would result in less consolidation of the contract requirements, such as establishing single-agency contracts, placing orders against existing MAS contracts, and full-and-open single-award contracts. AR, Tab 2, Consolidation Analysis, at 8. The agency concluded that these alternative approaches would have yielded less in savings than the estimated 18 percent savings benefit that is estimated for under the OS3 program. Id.

The protesters generally contend that GSA has failed to give adequate consideration to the economic consequences of the OS3 procurement. In particular, Dolphin Blue and Capital Shredder contend that GSA should be required to conduct a cost-benefit analysis to specifically quantify the economic impact on small businesses that would result from the OS3 procurement approach. Dolphin Blue’s Supp. Comments at 3; Capital Shredder Comments at 2.

Similarly, in a brief submitted in support of the protesters, SBA argues that GSA was required to perform “some type of data analysis” of the potential impact by OS3 on the federal government’s small business suppliers. SBA Comments (Apr. 3, 2014) at 7. Although SBA acknowledges that the SB Jobs Act requires an agency’s consolidation analysis to “identif[y] any negative impact by the acquisition strategy on contracting with small business concerns,” 15 U.S.C. § 657q(c)(1)(D), the agency contends that the statute should be interpreted to require “some type of data analysis” to justify the consolidation. SBA Comments (Apr. 3, 2014) at 7. With regard to GSA’s analysis, SBA argues that GSA’s assessment of the effect of consolidation on small businesses was “perfunctory” and lacked concrete data or analysis.¹² SBA Comments (Apr. 11, 2014) at 3.

¹² SBA notes that its procurement center representative (PCR) “non-concurred” with this acquisition. SBA Comments (Apr. 11, 2014) at 3. SBA also notes that a PCR has the authority to “review any bundled or consolidated solicitation or contract in accordance with this chapter.” 15 U.S.C. § 644(l)(2)(D). The relevant statutory and
(continued...)

We find that GSA met the requirement under the Small Business Jobs Act to perform an analysis addressing whether the benefits of the consolidation acquisition strategy “substantially exceed” the benefits of each of the possible alternative contracting approaches. 15 U.S.C § 657q(c)(2)(A). While the protesters and SBA argue that the SB Jobs Act requires a more detailed or quantified cost-benefit analysis to justify the agency’s solicitation approach, we do not find such a requirement in the Act. Instead, as discussed above, the SB Jobs Act requires agencies to: conduct market research; identify potential alternative contracting approaches that involve lesser degrees of consolidation; issue a written determination in support of the consolidation; identify negative impacts on small businesses; and ensure that steps will be taken to include small business concerns in the acquisition strategy. 15 U.S.C. § 657q(c)(1).

As discussed above, GSA conducted market research and considered alternatives to the procurement approach set forth in the solicitation. Further, the agency prepared a consolidation analysis which recognized that there was a potential for a reduction in sales for small business contractors who did not receive awards under the OS3 solicitation. AR, Tab 2, Consolidation Analysis, at 7. The agency concluded, however, that the benefits to be gained through OS3 outweigh the potential negative impact to small business concerns. Id. at 7-11. We find that GSA’s analysis addressed the relevant requirements of the SB Jobs Act, and therefore find no basis to sustain the protest.

We deny the protests.

Susan A. Poling
General Counsel

(...continued)

FAR provisions state that a PCR may appeal a contracting officer’s rejection of a recommendation concerning, for example, bundling or consolidation. See 15 U.S.C. § 644(l)(3); FAR §§ 19.403, 19.505. SBA does not state, however, that an appeal was taken here. On this record, we do not find that the PCR’s disagreement with GSA’s consolidation analysis provides a basis for our Office to conclude that the analysis was unreasonable.