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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: InfoReliance Corporation

File: B-413298

Date: September 19, 2016

William A. Shook, Esq., Law Offices of William A. Shook PLLC, for the protester. William D. Robinson, Esq., and Sarah Bloom, Esq., Department of Justice, Federal Bureau of Prisons; Sam Q. Le, Esq., and John W. Klein, Esq., Small Business Administration; and Michael D. Tully, Esq., General Services Administration, for the agencies.

Louis A. Chiarella, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging an agency's small business set-aside decision under a procurement conducted pursuant to the Federal Supply Schedule procedures of Federal Acquisition Regulation subpart 8.4 is denied where the protester does not show that the agency violated any law or regulation; the decision whether to set aside such an order is within the discretion of the contracting agency.

DECISION

InfoReliance Corporation, of Fairfax, Virginia, a large business concern, protests the terms of request for quotations (RFQ) No. RFQP0700NAS160879A, issued by the Department of Justice, Federal Bureau of Prisons (BOP), to holders of General Services Administration (GSA) Federal Supply Schedule (FSS) contracts for Amazon Web Services. InfoReliance argues that the agency's decision to set aside the procurement for small business concerns was unreasonable because no small business will be able to comply with the limitation on subcontracting for the required services.

We deny the protest.

BACKGROUND

The RFQ, issued under the FSS procedures of Federal Acquisition Regulation (FAR) subpart 8.4 as a small business set-aside, sought Amazon Web Services

(AWS) cloud computing services for maintaining the bop.gov website.¹ In general terms, the RFQ's statement of work requires the contractors to: (1) provide a mechanism for billing pass-through via CloudWatch; (2) provide real-time billing access; (3) configure complete administrator access and privileges to enable the agency to monitor its AWS environment; and (4) provide as needed miscellaneous technical support for cloud computing assessments, technical architecture design, and migration and maintenance support of cloud solutions.² RFQ at 18-19; Contracting Officer's Statement, July 21, 2016, at 2.

The RFQ provided for the issuance of multiple blanket purchase agreements (BPA), with fixed unit prices, for a base year and four 1-year options.³ RFQ at 17. Vendors were informed that BPA award would be made on a low-price, technically acceptable basis, considering technical capability, past performance, and price. RFQ at 26-27.

In determining to set aside the RFQ for small businesses, the BOP conducted market research and identified the small business concerns holding FSS contracts that could provide AWS cloud computing services.⁴ The contracting officer's initial research found three eligible small businesses. Contracting Officer's Statement, July 21, 2016, at 3. However, the contracting officer subsequently determined that within FSS Schedule 70 (General Purpose Commercial Information Technology Equipment, Software, and Services), two special item numbers (SIN) covered cloud computing services--SIN 132-40 (Cloud Computing Services) and SIN 132-52 (Electronic Commerce and Subscription Services). Based on this expanded search, the contracting officer identified at least eight small businesses that were authorized resellers of AWS cloud services. Id.; AR, Tab 4, Small Business Set-Aside Determination, May 31, 2016, at 1. The contracting officer thereafter concluded that there was a reasonable expectation that two or more small businesses would

¹ Bop.gov is the agency's public-facing website that provides information such as inmate location, agency policies and program statements, and institution locations. RFQ at 17; Contracting Officer's Statement, July 21, 2016, at 1-2. The bop.gov server which hosted the information was previously located at the agency's datacenter, and has now been migrated to AWS GovCloud in the United States. RFQ at 17.

² The estimated value of the procurement is in excess of \$150,000. Agency Email to GAO, Sept. 9, 2016.

³ The agency, however, also reserved the right to make a single BPA award if determined appropriate. RFQ at 17.

⁴ The contracting officer also determined that the agency's requirements could be met through use of the FSS program. Agency Report (AR), Tab 4, Small Business Set-Aside Determination, May 31, 2016, at 1.

respond to the solicitation. AR, Tab 4, Small Business Set-Aside Determination, May 31, 2016, at 1.

The agency issued the RFQ on May 31, 2016, to FSS Schedule 70 small business concerns, and subsequently received one quotation in response thereto. BOP Email to GAO, Sept. 9, 2016. On June 21, prior to the closing date and time for receipt of quotations, InfoReliance filed its protest with our Office.⁵

DISCUSSION

InfoReliance challenges the agency's decision to set aside the procurement for small business concerns. Specifically, the protester alleges that the requirement here--AWS cloud computing services--is not one that any small business will be able to perform while complying with the limitation on subcontracting. InfoReliance argues that the contracting agency therefore lacked a reasonable basis for concluding, in accordance with FAR § 19.502-2(b),⁶ that two or more responsible small business concerns could provide the required services while complying with such subcontracting limitations. Protest at 3.

The FAR provides that, although the preference programs of FAR part 19 are generally not applicable to procurements under the FSS procedures of FAR subpart 8.4, an agency may, in its discretion, set aside orders or BPAs for any of the small business concerns identified in FAR § 19.000(a)(3).⁷ FAR § 8.405-5(a)(1); see Aldevra, B-411752, Oct. 16, 2015, 2015 CPD ¶ 339 at 4 (holding that FAR § 19.502-2 does not apply when placing orders under the FSS program);

⁵ Because the legal issues raised by the protest relate to the Small Business Act, as well as the FSS program which is administered by the GSA, our Office solicited the views of both the Small Business Administration (SBA) and the GSA.

⁶ Under FAR § 19.502-2(b) (commonly referred to as the "rule of two" requirement), a procurement with an anticipated dollar value of more than \$150,000 (such as the one here) is to 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 that award will be made at fair market prices. See, e.g., Marshall & Swift-Boeckh, LLC, B-407329, B-407329.2, Dec. 18, 2012, 2013 CPD ¶ 10 at 2.

⁷ Insofar as the socio-economic programs set forth under FAR part 19 are not mandatory when placing orders under the FSS program, and contracting officers are instead vested with the discretion to set aside orders for small business concerns, InfoReliance's assertion that the BOP failed to comply with the requirements of FAR § 19.502-2(b) when making its set-aside decision fails to state a valid basis for protest. See FAR § 8.405-5(a)(1); Swank Healthcare, B-407367, Dec. 12, 2012, 2013 CPD ¶ 7 at 3 n.3; 4 C.F.R. § 21.5(f).

Encompass Group, LLC, B-410726, Feb. 2, 2015, 2015 CPD ¶ 93 at 3-4; Swank Healthcare, *supra*; *see also* FAR § 19.502-4(c). Here, the record shows that the BOP exercised this discretion to set aside the RFQ for small businesses, after identifying at least eight small business concerns holding FSS contracts that could perform this work. Moreover, the BOP received a quotation from one apparently responsible small business in response to the RFQ. *See Swank Healthcare*, *supra*; York Int'l Corp., B-244748, Sept. 30, 1991, 91-2 CPD ¶ 282 at 7 (receipt of offers from small businesses supports an agency's determination to set aside a procurement for small businesses). Although InfoReliance disagrees with the agency's decision to set aside this FSS procurement for small businesses, it fails to show that the agency violated any law or regulation in doing so.

InfoReliance also complains that the BOP did not verify each small business concern's responsibility prior to making its set-aside decision.⁸ Protest at 3. There is no merit to this complaint. Agencies need not make either actual determinations of responsibility or decisions tantamount to determinations of responsibility in determining whether to set aside a procurement. *See, e.g., Swank Healthcare*, *supra*; Ceradyne, Inc., B-402281, Feb. 17, 2010, 2010 CPD ¶ 70 at 4. Rather, agencies need only make an informed business judgment that there are small businesses expected to submit offers that are capable of performing. Marshall & Swift-Boeckh, LLC, *supra*, at 4; ViroMed Labs., B-298931, Dec. 20, 2006, 2007 CPD ¶ 4 at 3-4.

Lastly, InfoReliance argues that because no small business concern will be able to comply with the limitation on subcontracting for the required AWS cloud services, no BPA may be issued when statutory requirements will be violated. Protest at 4. This argument, however, puts the cart before the proverbial horse: an agency's determination whether a small business concern will comply with a solicitation's subcontracting limitation is to be made as part of the award decision, and based on the particular quotation submitted. *See Geiler/Schrudde & Zimmerman*, B-412219 *et al.*, Jan. 7, 2016, 2016 CPD ¶ 16 at 8; Sealift, Inc., B-409001, Jan. 6, 2014, 2014 CPD ¶ 22 at 4.

The protest is denied.

Susan A. Poling
General Counsel

⁸ The protester maintains that determining whether a vendor can successfully perform the requirements--including complying with the limitation on subcontracting --was part of the responsibility determination the contracting officer was required to make as part of her set-aside decision. Protest at 3, *citing* FAR § 9.104-1(g).