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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Phoenix Environmental Design, Inc.

File: B-413833

Date: January 5, 2017

C. Chad Gill, Phoenix Environmental Design, Inc., for the protester.
William Wallace, Walking Point Farms, LLC, the intervenor.
Brian A. Quint, Esq., Department of the Interior, for the agency.
Katherine I. Riback, Esq., and Amy B. Pereira, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest that the agency improperly issued an out-of-scope, sole-source award under a previously awarded Federal Supply Schedule contract is denied where the record shows that the agency complied with applicable regulations and that all of the products purchased by the agency were listed on the vendor's schedule contract.

DECISION

Phoenix Environmental Design, Inc., of Newman Lake, Washington, a service-disabled veteran-owned small business (SDVOSB), protests the award of a contract to Walking Point Farms, LLC, of Tigard, Oregon, by the Department of the Interior under request for quotations (RFQ) No. 1142365 for herbicides and surfactants for the Willapa and the Julia Butler Hansen National Wildlife Refuges, in Washington State. The protester objects to the use of Federal Supply Schedule (FSS) procedures, arguing that the agency failed to conduct market research as required by Federal Acquisition Regulation (FAR) part 8 and further argues that the products that the agency purchased as a result of this solicitation were not on the vendor's FSS contract.

We deny the protest.

On July 7, 2016, the technical coordinators at the Willapa National Wildlife Refuge prepared a statement of need for herbicides and surfactants for the treatment of invasive plants on the refuge with scheduled treatments to be conducted in the fall of 2016. Agency Report (AR), Tab 3, Statement of Need (July 7, 2016). A purchase request was initiated in July 2016. AR, Tab 4, Requisition; Contracting

Officer Statement at 1. The contracting officer conducted market research between August 24 and September 7, which included contacting knowledgeable individuals in the government and industry, and researching government databases. AR, Tab 3, Agency Statement of Need (July 7, 2016); Contracting Office Statement at 2 -3. The contracting officer researched various schedules under the FSS as part of this market research. When the contracting officer researched schedule number 51V Hardware Superstore, she retrieved numerous categories including Special Item Number (SIN) Title 341 100, Lawn and Garden Equipment, Machinery, Implements and Products, under which twenty-seven contractors were listed. Id. The search was then narrowed to include only SDVOSBs, which resulted in identifying three firms, including Walking Point Farms.¹ Id., AR, Tab 13, Schedule 51V SDVOSB Vendors.

On September 12, the agency posted the solicitation on General Services Administration (GSA) Advantage! e-buy website, for the three schedule holders that were listed as SDVOSBs under schedule 51V, SIN Title 341 100, with quotations due September 21. AR, Tab 5, RFQ. Technical information was not required in the RFQ, and, therefore, the award was to be made based on the lowest price found to be fair and reasonable. The agency received one quotation from Walking Point Farms and award was made to that vendor on September 21. Legal Memorandum at 2; AR, Tab 9, Order for Supplies (Sept. 21, 2016).

On September 28, Phoenix, which does not hold a FSS contract, protested to our office. The protester principally objects to the use of FSS procedures, arguing that the agency failed to conduct market research in accordance with FAR part 8, and that the products purchased were not included on Walking Point Farms' FSS contract.

Regarding Phoenix's allegation that the agency's use of FSS procedures for this procurement were improper and that the agency failed to conduct market research in accordance with FAR part 8, the FSS program provides federal agencies a simplified process for obtaining commonly used commercial supplies and services. Where, as here, an agency is ordering supplies from the FSS in excess of the

¹ To the extent that Phoenix appears to assert that, if any FSS were to be utilized for this procurement it must be FSS 73 Food Service, Hospitality, Cleaning Equipment and Supplies, Chemicals and Services, Phoenix does not hold any FSS contract and therefore is not an interested party to raise this protest issue. A protester is not an interested party where it would not be in line for contract award were its protest to be sustained. See FitNet Purchasing Alliance, B-309911, Nov. 2, 2007, 2007 CPD ¶ 201 at 2-3 (protest dismissed where offerors were required to hold an FSS contract in order to be eligible to submit a quotation and protester represented that it did not hold an FSS contract). This protest allegation is dismissed.

micro-purchase threshold but not exceeding the simplified acquisition threshold, an agency shall place orders with the schedule contractor that can provide the supply that represents the best value. FAR § 8.405-1(c). Before placing an order, an agency must consider “reasonably available information about the supply” by “surveying at least three schedule contractors through the GSA Advantage! On-line shopping service, by reviewing the catalogs or pricelists of at least three schedule contractors, or by requesting quotations from at least three schedule contractors.” FAR § 8.405-1(c)(1).

Here, the agency determined that it could meet its needs through the FSS, and that there were sufficient numbers of contractors holding FSS contracts to permit a competition. Contracting Officer Statement at 2-3. The requirements of FAR § 8.405-1(c) were met by the agency requesting quotations from at least three schedule contractors. Limiting the pool of competition to vendors holding FSS contracts is legally permissible, even if an individual protester may be unable to compete because it does not hold an FSS contract. See Information Ventures, Inc., B-299422, B-299422.2, May 1, 2007, 2007 CPD ¶ 88 at 3. We find that the agency reasonably met the requirements of FAR subpart 8.4, and deny Phoenix’s protest that the agency failed to comply with the FAR requirements to utilize the FSS.²

Phoenix further argues that Walking Point Farms’ FSS contract did not include all of the products requested by the agency. Protest at 1. The purchase of items not on Walking Point Farms’ FSS contract would be tantamount to a sole-source award of a contract, and Phoenix’s direct economic interest would be affected if the agency failed to conduct a competition for these requirements for which Phoenix would have had an opportunity to complete. 4 C.F.R. § 21.0(a)(1); see also Onix Networking Corp., B-411841, Nov. 9, 2015, 2015 CPD ¶ 330 at 5-6.

According to the record before us, the products that the agency purchased under this solicitation were listed under the Walking Point Farms’ GSA schedule.³ AR,

² Phoenix also asserts that herbicides, insecticides, and pesticides are assigned North American Industry Classification System (NAICS) Code 325320, and that “NAICS 325320 is assigned to GSA schedule 73[] and not 51V.” Protest at 1. With respect to the agency’s assignment of NAICS codes, challenges to the selected standard industrial classification are heard solely by the Small Business Administration, and not reviewed by GAO. 4 C.F.R. § 21.5(b)(1). This protest allegation is therefore dismissed.

³ To the extent Phoenix cites to certain emails between Walking Point Farms and the contracting officer that referenced various products, some of which were not on Walking Point Farm’s FSS contract, as evidence that the agency was purchasing products not on its FSS contract, the intervenor notes that these email exchanges involved multiple contracts for multiple locations. Comments at 7; AR, Tab 11,
(continued...)

Tab 7, Walking Point Farms' Quotation; Intervenor Supp. Comments (Dec. 13, 2016). We therefore deny Phoenix's protest allegation that the agency purchased items that were not included on Walking Point Farm's schedule contract.

The protest is denied.

Susan A. Poling
General Counsel

(...continued)
Agency Email Correspondence with Walking Point Farms; Intervenor Supp.
Comments (Dec. 13, 2016).