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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: American Warehouse Systems

File: B-402292

Date: January 28, 2010

Mark Juelich for the protester.

Melissa McWilliams, Esq., General Services Administration, for the agency.

Sharon L. Larkin, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency placed order for “construction” services that were not on vendor’s General Services Administration (GSA) Schedule 56 contract is denied, where GSA reasonably determined that the solicitation did not require construction services and all of the services purchased were on the vendor’s or its subcontractors’ schedule contracts.

DECISION

American Warehouse Systems (AWS), of Minneapolis, Minnesota, protests the issuance of an order to FedSource, Inc., of Union, Missouri, under the firm’s General Services Administration (GSA) schedule contract by the GSA under request for quotations (RFQ) No. RFQ421147 for mezzanine installation. AWS contends that the order includes labor services that are not on FedSource’s GSA schedule contract.

We deny the protest.

The RFQ required the selected vendor to “furnish and install a storage system consisting of a free-standing mezzanine with bollards, fluorescent lighting, fire sprinkler system, storage racks, bin shelving, wire mesh partitions, modular wall units, work tables, personnel lockers, and storage cabinets” at Langley Air Force Base, Virginia.¹ RFQ at 1. The mezzanine structure was to be a “free-standing”

¹ The RFQ “recommended” that lighting and sprinklers be installed by identified vendors. RFQ, Statement of Work, at 4-5.

structure, measured at 96 feet by 42 feet, with shelving systems that “shall not be connected to any existing building structure except the floor.” RFQ, Statement of Work, at 2, 10.

The acquisition was to be conducted in accordance with Federal Acquisition Regulation (FAR) subpart 8.4 governing the Federal Supply Schedule (FSS) program. The RFQ required that vendors hold GSA “Schedule 56” contracts for “Building Materials/Industrial Services and Supplies.” The RFQ also identified that the supplies and services could be supplied under the following “applicable” Special Item Numbers (SIN): 361-10B (“Pre-Engineered and Prefabricated Buildings and Structures for In-Plant Solutions”) and 361-30 (“Ancillary Services Relating to Pre-Engineered/Prefabricated Buildings and Structures”). RFQ at 1. After AWS informed the agency that additional SINS might apply,² the RFQ was modified to state that “products may also fall within any other applicable [SIN] under this schedule.” RFQ, mod. 2, at 1.

The RFQ stated that award would be made on a best value basis, considering technical, past performance, and price factors. The solicitation provided that the technical and past performance factors were “approximately equal” in importance and, combined, were “significantly more important” than the price factor. RFQ at 2.

AWS and FedSource hold GSA Schedule 56 contracts and competed for the work. The agency placed the order for mezzanine installation with FedSource in the amount of \$234,230.77 and AWS protested. Agency Report, Tab 16, Best Value Determination, at 5. AWS contends that FedSource’s GSA contract does not contain the applicable SIN to install the mezzanine, and therefore the agency cannot purchase these services from FedSource. Specifically, AWS contends that installation of the mezzanine structure must be considered to be “construction” and that the procurement of the services from FedSource through SIN 361-30, which does not include construction, is inappropriate. Instead, AWS argues, labor must be provided under SIN 361-32, “Installation and Site Preparation for Pre-Engineered/Prefabricated Buildings and Structures,” which does include construction and which is not included in FedSource’s GSA contract. Protester’s Comments at 2.

It is true that an agency may not use FSS procedures to purchase items that are not listed on a vendor’s GSA schedule without conducting a competition for those non-schedule items. Firearms Training Sys., Inc., B-292819.2 et al., Apr. 26, 2004, 2004 CPD ¶ 107 at 9; Symplcity Corp., B-291902, Apr. 29, 2003, 2003 CPD ¶ 89 at 4.

² Specifically, AWS asserted the SIN 357-11C, “Warehouse Equipment and Supplies,” could be used to procure the mezzanine components. Agency Report, Tab 12, E-Mail from AWS to GSA, Oct. 27, 2009, at 1.

However, as discussed below, we find that GSA reasonably found that the required services were included in FedSource's or its subcontractors' schedule contracts and purchased under the appropriate SINS.

As AWS properly notes, FAR § 2.101 defines "construction" to mean "construction, alteration, or repair (including dredging, excavating, and painting) of buildings, structures, or other real property." However, the agency reasonably determined here that the RFQ did not contemplate construction services.³ As the agency correctly notes, the RFQ seeks the installation of a free-standing mezzanine system that requires no construction, alteration, or repair of the building structure; it requires only that the mezzanine structure be bolted to the floor. According to the agency, the mezzanine structure is manufactured off site and assembled on site, and it can easily be disassembled and reassembled in another location. GSA Legal Memorandum at 4. The RFQ generally requires that installation occur "in accordance with [the] manufacturer's specified installation procedures," RFQ, Statement of Work, at 3, and does not include any FAR provisions concerning construction or Davis Bacon wage rates. Although the RFQ generally references "[International Building Code] design" in describing the width and rise requirements for the mezzanine stairs, *id.* at 2, and generally requires that design, fabrication, and installation of the mezzanine systems occur "in accordance with the applicable industry codes and standards," *id.* at 1, these general provisions, in our view, do not transform this order into construction services as AWS contends.

In addition, GSA's market research confirmed that the services are not construction. In this regard, prior to issuing the solicitation, the contracting officer consulted with a project engineer from the Air Force, as well as representatives from AWS and FedSource. All three indicated that fabrication and installation of the mezzanine structure was not construction, but rather was assembly.⁴ Contracting Officer's Statement at 3, 7. Furthermore, we note that AWS's website shows that it "designs, manufactures, and installs" mezzanine systems, and makes no reference to performing construction services. See www.aw-systems.com/mezzanine-systems.htm.

³ The only possible construction services--fire sprinkler and lighting installation--are going to be performed by the recommended vendors identified in the RFQ and not by FedSource. Contracting Officer's Statement at 8. This aspect of the award was not challenged here.

⁴ Although AWS indicated that sometimes construction could be involved, AWS did not contend that this solicitation included construction, and AWS did not raise with the agency that SIN 361-32 should apply here until the agency selected another firm for the order.

The contracting officer also reviewed the SIN descriptions for SIN 361-30 (“Ancillary Services Relating to Pre-Engineered/Prefabricated Buildings and Structures”) and SIN 361-32 (“Installation and Site Preparation for Pre-Engineered/Prefabricated Buildings and Structures”) under Schedule 56 to determine the appropriate labor SIN to use. These descriptions are as follows:

SIN 361-30, Ancillary Services Relating to Pre-Engineered/Prefabricated Buildings and Structures -- Including services relating to and ordered in conjunction with products purchased under the supply schedule contract, such as, field assembly, training, consultation and design assistance. EXCLUDES Construction as defined by FAR 2.101; Architectural Engineering Services (A&E) under the Brooks Architect-Engineers Act as stated in [FAR] Part 36; and services applicable to the Service Contract Act.

* * * * *

SIN 361-32, Installation and Site Preparation for Pre-Engineered/Prefabricated Buildings and Structures -- Applicable to installation and site preparation services ordered in conjunction with buildings and structures purchased under the supply schedule contract. SPECIAL ORDERING PROCEDURES, WHICH INCLUDE DAVIS BACON WAGE RATES AND CONSTRUCTION CLAUSES FOR INSTALLATION AND SITE PREPARATION APPLY TO THIS SIN. EXCLUDES Architectural Engineering Services (A&E) under the Brooks Architect-Engineers Act as stated in [FAR] Part 36.

Agency Report, Tab 23, SIN Descriptions; Contracting Officer’s Statement at 2.

As noted above, the agency has provided a reasonable basis for its determination that the installation services here are for assembly and not construction, and, therefore, are more appropriately procured under SIN 361-30. In this regard, the RFQ requirements were reasonably found to not involve construction, alteration, or repair of the building or building structures, and the RFQ does not contain any construction clauses or Davis Bacon Act wage rate requirements. Thus, we find that the agency reasonably determined that SIN 361-32 was not applicable. Since FedSource’s GSA schedule and its subcontractors’ GSA schedules contained SIN 361-30, and since of the services purchased were either on these schedules or purchased through competition as “open market” items, we find that the order placed with FedSource was unobjectionable.

The protest is denied.

Lynn H. Gibson
Acting General Counsel