



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Six3 Systems, Inc.

File: B-404885.2

Date: October 20, 2011

Jennifer S. Zucker, Esq., Jon W. Burd, Esq., and John R. Prairie, Esq., Wiley Rein LLP, for the protester.

Capt. Bernal Rodriguez, Department of the Army, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency decision to set aside acquisition for small business competition is denied where record demonstrates reasonable basis for contracting officer's determination that at least two capable small businesses may be expected to submit offers.

DECISION

Six3 Systems, Inc., of McLean, Virginia, protests the decision by the Department of the Army Intelligence and Security Command (INSCOM) to set aside for small business competition request for proposals (RFP) No. W911W4-11-R-0004, for identity intelligence (I2) biometrics services. The protester contends that the contracting officer unreasonably determined that two responsible small businesses were capable of satisfying the RFP's requirements at fair market prices.

We deny the protest.

BACKGROUND

The RFP at issue contemplates a total small business set-aside, multiple-award, indefinite-delivery/indefinite-quantity contract under North American Industrial Classification System (NAICS) code 541690, with a size standard of \$7 million. The solicitation identifies the areas to be supported as including program management, I2 resource management, and strategic planning; intelligence analysis, production, and dissemination; forensic-related biometric operations support and production; I2 education and awareness; deployed biometrics and forensics subject matter experts;

architecture and enterprise services support; data sharing development, management and support; information assurance and intelligence oversight support; counter biometric capability support; and biometric modality development. RFP, amend. 0002, at 6. The solicitation sets out four sample task orders, and offerors are to describe their approaches to accomplishing the sample task orders in their technical proposals.

Prior to deciding to set aside the solicitation here for small businesses, the agency issued three sources sought notices (dated Nov. 24, 2009, Apr. 19, 2010, and July 29, 2010) and a combined presolicitation announcement/advisory multi-step notification (AMS).¹ After reviewing the responses to the first two sources sought notices and the AMS, the contracting officer determined that small businesses lacked the breadth of capabilities and experience necessary for successful performance of the requirements, and, accordingly, that the acquisition should not be set aside for small business. After reviewing the results of the third sources sought notice, which differed from the preceding two in that it sought information regarding the capabilities of small businesses' teaming partners, as well as the small businesses themselves, the contracting officer reversed his previous finding and determined that "there [were] a sufficient number of small businesses professing the capability to provide the required I2 Biometrics support." Small Business Coordination Record (DD Form 2579), Aug. 26, 2010. The agency's small business specialist concurred with the contracting officer's determination that the acquisition should be set aside for small businesses. Among the firms determined to have the capabilities to perform were [deleted].

On January 12, 2011, the agency issued the RFP as a total small business set-aside. On March 14, prior to the closing date for receipt of proposals, Six3 filed a protest with our Office objecting to the set-aside determination. On April 14, the agency notified our Office that it intended to reevaluate the market research to determine if the decision to set aside the acquisition for small business was proper.² We dismissed the protest as academic. Six3 Systems, Inc., B-404885, Apr. 25, 2011.

¹ In the advisory multi-step process, the agency publishes a presolicitation notice that provides a general description of the scope or purpose of the acquisition and invites potential offerors to submit information that allows the Government to advise the offerors about their potential to be viable competitors. The agency then evaluates the responses and advises each respondent either that it will be invited to participate in the competition or that it is unlikely to be a viable competitor. Federal Acquisition Regulation (FAR) § 15.202.

² The current contracting officer, who was appointed to that role in January 2011 (that is, after the determination to set aside the acquisition for small businesses had been made), explained that before proceeding with the set-aside, she wanted to conduct her own market research and analysis to verify the determination that there were small businesses capable of handling the effort.

The current contracting officer reviewed the responses to the most recent sources sought notice and found that two small businesses, [deleted] and [deleted], were capable of performing, and that four other small businesses looked either “very promising” or “promising”—that is, while she could not conclude, based on the results of her research, that they had the capability to perform, she thought it likely that the proposals of some, if not all, would demonstrate such capability. The contracting officer verified the firms’ representations regarding their capabilities by reviewing their websites and searching various Government databases (e.g., the Central Contractor Registration and Dynamic Small Business system).

On July 22, the contracting officer notified protester’s counsel that she had completed her review and determined that the solicitation would remain a small business set-aside. On July 25, Six3 protested the contracting officer’s determination to our Office.

DISCUSSION

Under Federal Acquisition Regulation (FAR) § 19.502-2(b), a procurement with an anticipated dollar value of more than \$150,000, such as the one here, must 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. The use of any particular method of assessing the availability of small businesses is not required so long as the agency undertakes reasonable efforts to locate responsible small business competitors. National Linen Serv., B-285458, Aug. 22, 2000, 2000 CPD ¶ 138 at 2. The decision whether to set aside a procurement may be based on an analysis of factors such as the prior procurement history, the recommendations of appropriate small business specialists, and market surveys that include responses to sources sought announcements. SAB Co., B-283883, Jan. 20, 2000, 2000 CPD ¶ 58 at 1-2; PR Newswire, B-279216, Apr. 23, 1998, 98-1 CPD ¶ 118 at 2. Because a decision whether to set aside a procurement is a matter of business judgment within the contracting officer’s discretion, our review generally is limited to ascertaining whether that official abused his or her discretion. ViroMed Labs., B-298931, Dec. 20, 2006, 2007 CPD ¶ 4 at 3. We will not question a small business set-aside determination where the record demonstrates a reasonable basis for the contracting officer’s conclusion that small business competition may be expected. Id.

In its initial protest, Six3 argued that a small business meeting the specified size standard of \$7 million could not possibly have the personnel required to meet the solicitation’s requirements; it was unlikely that a small business would be capable of successfully deploying qualified personnel immediately after award due to high demand for individuals with the required skill sets; small businesses were unlikely to have the infrastructure necessary to recruit, train, and manage the necessary personnel; and small businesses were not financially capable of performing. The protester further argued that the sources sought notice failed to elicit information

that INSCOM needed to assess the capability of small businesses to perform, and that the small businesses might be intending to rely on large business partners to an improper extent.

The agency responded to these arguments in its report, maintaining that both [deleted] and [deleted] were rapidly growing companies that had demonstrated the capability to take on larger workloads; the protester had failed to furnish any support for its claim that small businesses were unlikely to be able to deploy qualified personnel (and to the extent that there was any validity to the protester's argument regarding high demand for personnel with biometrics-related qualifications, it would apply equally to large businesses); the protester had presented no evidence that small businesses lack the infrastructure to recruit, train, and manage employees and subcontractors, and the protester's own experience demonstrated that it was possible for a small business to gear up for a substantially increased workload quickly; and the protester's argument that small businesses lacked the financial resources for performance was speculative. The agency further argued that the contracting officer had reviewed sufficient information to allow her to make an informed business judgment that offers from at least two small businesses that were capable of performing could reasonably be expected, and that the protester's argument regarding improper reliance upon large business partners was speculative.

In commenting on the agency report, the protester did not seek to rebut the Army's responses to the above arguments, but instead challenged the reasonableness of the contracting officer's finding that [deleted] and [deleted] were capable of satisfying the RFP's requirements.³ In this connection, the protester asserted that to set aside the procurement for small business, the contracting officer had to determine that offers would be obtained from at least two responsible small businesses, and that to be determined responsible, prospective contractors had to demonstrate, among other things, a satisfactory performance record and the necessary organization, experience, and technical skills to perform, or the ability to obtain them. Protester's Comments at 9. Six3 contends that the contracting officer did not reasonably assess whether [deleted] and [deleted] had the skills, experience, and organization necessary for successful performance, and that the record does not contain evidence supporting the contracting officer's conclusion that both companies had good past performance.

At the outset, we note that the protester incorrectly asserts that before making a small business set-aside determination, a contracting officer must determine that offers will be received from two or more responsible small businesses. The FAR does not require a determination that offers will be received from two or more

³ We consider the protester to have abandoned the arguments that it did not pursue in its comments.

responsible small businesses--it requires only a determination that offers from two or more responsible small businesses may reasonably be expected. Moreover, in making set-aside decisions, agencies need not make either actual determinations of responsibility or decisions tantamount to determinations of responsibility with regard to prospective offerors; they need only make an informed business judgment that there are small businesses expected to submit offers that are capable of performing. ViroMed Labs., *supra*, at 3-4.

In our view, the record here demonstrates a reasonable basis for the contracting officer's conclusion that both [deleted] and [deleted] are capable of performing. In their responses to the sources sought notice, prospective offerors were asked to self assess their teams' skill level in each of ten biometric functional areas on a scale of 1-5, with 1 representing little or no experience and 5 representing a high level of experience. [Deleted] represented that its team had a skill level of 4 or 5 in eight of the required functional areas, and a skill level of 3 in a ninth area, whereas [deleted] represented that its team had a skill level of 4 or 5 in nine of the required functional areas, and a skill level of 3 in the tenth area.⁴ The contracting officer found that both companies had grown significantly in the past year, demonstrating, in her view, that they were capable of taking on a sizeable workload increase and enlarging their operations to meet the requirements of the RFP. The contracting officer also found that both had good past performance, both had provided fair and reasonable pricing on other government contracts, and neither had delinquent federal debt.⁵

Six3 also alleges that [deleted] no longer qualifies as a small business because its average annual revenue for the past 3 years has exceeded \$7 million. According to the protester, the contracting officer should have recalculated [deleted] average annual receipts in July 2011 using information regarding recent sales that [deleted] had posted on its website. We disagree. [Deleted] represented in its response to the sources sought notice that it was a small business under NAICS code 541690 and a

⁴ In the tenth area, [deleted] rated its skill level as a 1; however, it represented in its response to the sources sought notice that while it did not currently possess the capabilities to support the task, it would be able to fill the need by recruiting additional subject matter experts.

⁵ While the protester maintains that the contracting officer improperly failed to document the basis for her finding that both companies had good past performance--that is, according to the protester, the contracting officer's statement in her market research summary that she had been able to validate that both companies had good past performance was not enough, and she should instead have identified the particular contracts on which she based her finding--we do not agree that such documentation was required. As previously noted, the contracting officer was not required to make documented determinations as to the responsibility of the prospective small business offerors as part of her set-aside determination.

service-disabled, veteran-owned small business, and that it was not scheduled to graduate from any small business programs within the next 365 days; moreover, the contracting officer verified that [deleted] continued to be certified as a small business when she conducted her summer-2011 market research. The contracting officer's reliance upon [deleted] self-representations and information available in the Dynamic Small Business database was clearly reasonable.⁶

Finally, Six3 argues that the contracting officer did not adequately document the basis for her finding that there was a reasonable expectation of award at fair market prices. We disagree. The contracting officer found that both [deleted] and [deleted] had provided fair and reasonable pricing under other government contracts, including an INSCOM multiple-award ID/IQ contract with an overall value of \$492 million (the "Omnibus III" contract), and that it was evident from their work on the Omnibus III contract that "both [deleted] and [deleted] [were] able to provide fair market support to large requirements in both a U.S. and overseas setting." Contracting Officer's Memorandum for Record, Aug. 22, 2011, at 8. We think that it was reasonable for the contracting officer to conclude, based on the two offerors' general history of providing fair and reasonable pricing and on their specific history of providing fair and reasonable pricing under the Omnibus III contract, which has similarities to the contract here, that award at fair market prices could be expected here. We also note that the task orders to be issued under the multiple-award contract here will be competed among the awardees, and that the agency thus has a reasonable basis to anticipate price competition, resulting in fair market prices, for the task orders.

The protest is denied.

Lynn H. Gibson
General Counsel

⁶ Moreover, the protester's argument that the contracting officer should have recalculated [deleted] average annual revenue on the basis of a partial fiscal year using information taken from the firm's website is unreasonable and inconsistent with the guidance furnished in Small Business Administration regulations, which provide for the use of federal income tax returns (or documentation such as audited financial statements) to determine size status. See 13 C.F.R. §121.104(a).