



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Jacqueline R. Sims, dba JRS Staffing Services

File: B-409613; B-409613.2

Date: June 16, 2014

Jacqueline R. Sims for the protester.
Pawandeep Chatha, Esq., and William D. Robinson, Esq., Department of Justice, Bureau of Prisons, for the agency.
Kathleen A. Gilhooly, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of an agency's determination not to set a procurement aside for small business concerns is denied where the agency reasonably concluded from its market research and the procurement history of the prior requirement that it could not reasonably expect to receive quotations from at least two responsible small businesses at fair market prices.
2. Protest that a solicitation did not state the relative importance of evaluation factors is denied where the solicitation was issued under the simplified acquisition procedures of Federal Acquisition Regulation (FAR) Part 13 which does not require procurements conducted as simplified acquisitions to state the relative importance of the evaluation factors.
3. Protest challenging the inclusion in a solicitation of certain standard Federal Acquisition Regulation (FAR) clauses is denied where the FAR requires the inclusion of these clauses in procurements exceeding the simplified acquisition threshold and the agency estimated that the solicitation would exceed that threshold.

DECISION

Jacqueline R. Sims, dba JRS Staffing Services, of Lawrenceville, Georgia, a small business concern, protests the terms of request for quotations (RFQ) No. P03031300070, issued by the Department of Justice, Bureau of Prisons (BOP), for parenting program services at the Federal Correctional Institution (FCI) in Edgefield, South Carolina. JRS contends that the RFQ should have been set

aside for small business, that the RFQ does not clearly state the basis for award, and that the RFQ improperly includes a number of inapplicable FAR clauses.

We deny the protest.

BACKGROUND

The RFQ was issued on an unrestricted basis as a combined synopsis/solicitation on the Fed BizOpps website using the commercial acquisition procedures of Federal Acquisition Regulation (FAR) Part 12 and simplified acquisition procedures of Part 13. The solicitation included North American Industry Classification System (NAICS) code 611710, Educational Support Services. Vendors were informed that the agency contemplated the award of an indefinite-delivery, requirements type contract for parenting instruction at Edgefield FCI and its minimum security satellite prison camp for a base year and four option years. RFQ at 10.

Vendors were informed that award would be based upon consideration of technical merit, past performance, and price. Id. at 5. In this regard, the RFQ provided that vendors “must demonstrate that they can provide a Parenting Program with qualified service providers who meet qualifications listed in the Description of Requirement document to be determined technically acceptable.” Id. The RFQ’s description of the requirement stated in pertinent part:

The contract staff providing service on-site must possess a Bachelor’s degree in Education or Social Work. The contractor shall be able to demonstrate past experience in providing Parenting, Family Literacy, or similar programs.

RFQ, Description of Requirement, at 3.

Vendors were asked to provide a fixed price, as follows:

Quoted price per session (session is defined as one hour in duration) for an estimated maximum requirement of 850 sessions per contract year. Example format: Base Year – Estimated 850 sessions x \$_____ per session = \$ _____. Responses must include a price quote per session for the Base Year, Option 1, Option 2, Option 3, and Option 4.

RFQ at 5-6.

As amended, the RFQ incorporated by reference a number of standard FAR clauses, including as relevant here, the following: clause 52.203-3, Gratuities, Alternate 1; clause 52.203-6, Alternate 1, Restrictions on Subcontractor Sales to the Government ; clause 52.222-40, Notification of Employee Rights under the National

Labor Relations Act; clause 52.222-54, Employment Eligibility Verification; and clause 52.242-13, Bankruptcy.

DISCUSSION

Small Business Set-Aside

JRS complains that the RFQ should have been set aside for small businesses, arguing that there are numerous small business concerns under NAICS code 611710, including the protester, which could provide the required services. In this regard, JRS notes that the three most recent procurements for parenting services at FCI Edgefield have been awarded to small business concerns. Comments at 9. JRS also argues that the vast majority of BOP's contracts, nationwide, for parenting services have been issued as total small business set-asides, and complains that the agency improperly restricted its market research to firms in South Carolina. JRS complains that it notified the contracting officer three days after the solicitation was issued of the protester's interest in competing under the RFQ as a small business concern. Comments at 10.

BOP responds that prior to issuing the RFQ, the agency's contracting officer conducted market research and reviewed procurement history to determine whether to set the solicitation aside for small businesses. The procurement history for these services at FCI Edgefield indicated that the last three contracts were awarded to the same individual, which the agency concluded would be the only small business likely to submit a quotation at a fair price. AR at 3. The contracting officer concluded that, given the size of the procurement and the requirement to perform the services on-site, that it was likely that only small businesses located in South Carolina would compete for the work. The contracting officer also reviewed the Small Business Administration's (SBA) Dynamic Small Business Search database, which did not provide any small businesses within South Carolina under the applicable NAICS code that provided parenting instruction or similar instruction. Contracting Officer's Statement at 12,15. The contracting officer also found that BOP's procurement history nationwide for parenting instruction indicated that most awards were made to individuals or non-profit entities.¹

The FAR requires that acquisitions with an anticipated dollar value of more than \$150,000 be set aside for small business concerns if the agency determines there is a reasonable expectation that offers or quotations will be received from two or more responsible small business concerns, and that award will be made at a fair market price. FAR § 19.502-2(b). Generally, we regard such a determination as a matter

¹ SBA's regulations define a small business concern to be a business entity organized for profit, with a place of business located in the United States and which operates primarily within the United States. See 13 C.F.R. §121.105(a)(1).

of business judgment within the contracting officer's discretion, and we will not sustain a protest challenging the determination absent a showing that it was unreasonable. North Shore Medical Labs, Inc., B-310747, Feb. 6, 2008, 2009 CPD ¶ 70 at 4. However, an agency must undertake reasonable efforts to ascertain whether it is likely that it will receive offers from at least two small businesses capable of performing the work. Id. Our Office will review a protest of an agency determination not to set aside a procurement to determine whether the contracting officer has undertaken reasonable efforts to ascertain the availability of capable small businesses. Id.

Here, we find no basis to question the contracting officer's judgment that the agency was not likely to receive quotations from two or more responsible small business concerns at fair market prices. As noted above, the contracting officer conducted market research and reviewed the past procurement history to locate small businesses that might submit a quotation to provide the parenting instruction at FCI Edgefield. Based upon this research, the contracting officer found only one small business within South Carolina that might submit a quotation. Although JRS argues that the contracting officer should have considered whether there were small businesses outside South Carolina that may wish to compete, it has not shown that the contracting officer was unreasonable in her belief that only individuals and firms located in South Carolina were likely to compete, given the small size of this procurement and the requirement to perform the services on-site.

We recognize that JRS, a small business concern located outside South Carolina, notified the contracting officer three days after the solicitation was issued of its interest in competing for this work. Information that first becomes available after issuance of a solicitation does not demonstrate that the contracting officer's prior determination not to set aside the procurement was unreasonable. See FWK Inc., B-249189, Oct. 22, 1992, 92-2 CPD ¶ 270 at 5; Fayetteville Group Practice, Inc., B-226422, May 26, 1987, 87-1 CPD ¶ 541 at 4. Although it is permissible for a contracting officer to change a determination after a solicitation is issued, nothing in the procurement regulations requires the contracting officer to cancel or amend the solicitation when that official subsequently learns of interested, responsible small businesses, assuming that the contracting officer had conducted a reasonable investigation regarding the possibility of two or more responsible small businesses competing on the procurement. FWK Inc., supra, at 5.

Basis for Award

JRS also argues that the RFQ does not adequately inform vendors of the basis for award. Comments at 4. We find no merit to this argument. As noted above, the RFQ was issued pursuant to the simplified acquisition procedures of FAR Part 13, and informed offerors that award would be made considering price as well as technical merit and past performance. See RFQ at 5. Although JRS complains that the RFQ did not state relative importance of the evaluation criteria, this is not

required in a procurement conducted under FAR Part 13. See FAR § 13.106-1(a)(2), which states:

When soliciting quotations or offers, the contracting officer shall notify potential quoters or offerors of the basis on which award will be made (price alone or price and other factors, e.g., past performance and quality). Contracting officers are encouraged to use best value. Solicitations are not required to state the relative importance assigned to each evaluation factor and subfactor, nor are they required to include subfactors.

We also find no merit to JRS's complaint that the RFQ does not state how the agency will evaluate firms without a record of relevant past performance and the protester's speculation that a firm without a record of relevant past performance will be evaluated unfavorably under this factor. Protest at 7-8; Comments at 8. First, there is no requirement that a solicitation in a FAR Part 13 procurement specify how the agency will evaluate firms' past performance. Next, JRS's speculation as to how its past performance may be evaluated does not state a valid basis for protest and is premature. In any event, an agency is not permitted to evaluate a firm's lack of relevant past performance either favorably or unfavorably. See 41 U.S.C. § 1126(b).

We also find no merit to JRS's objection that the solicitation provides the agency with the right to extend the contract but does not provide for evaluation of that option. Specifically, the RFQ incorporated by reference FAR clause 52.217-8, Option to Extend Services, which provides that:

The Government may require continued performance of any services within the limits and at the rates specified in the contract. These rates may be adjusted only as a result of revisions to prevailing labor rates provided by the Secretary of Labor. The option provision may be exercised more than once, but the total extension of performance hereunder shall not exceed 6 months. The Contracting Officer may exercise the option by written notice to the Contractor within ____ [insert the period of time within which the Contracting Officer may exercise the option].

JRS argues, citing Major Contracting Servs., Inc., B-401472, September 14, 2009, 2009 CPD ¶ 170, that an agency cannot exercise this option without evaluating the value of the option during the initial competition. Comments at 6.

This clause reserves an agency's right to seek from the contractor--without further negotiation--an additional period of performance beyond the end of a contract period where exigent circumstances (such as delay in award of a follow-on contract) create the need for continued performance. See FAR § 37.111; Akal Security, Inc.,

B-244386, Oct. 16, 1991, 91-2 CPD ¶ 336 at 5. Contrary to JRS's apparent belief, our decision at Major Contracting does not stand for the proposition that an agency is precluded from exercising an option to extend services if it did not evaluate the value of that option during the initial competition; rather, we found in Major Contracting that, where an agency exercises an option that had not been evaluated as part of the initial competition, the agency must justify the extension of the contract in accordance with FAR Part 6. See also Department of the Army--Recon., B-401472.2, Dec. 7, 2009, 2009 CPD ¶ 250 at 6.

FAR Clauses

JRS also objects to the RFQ's inclusion of a number of standard FAR clauses, specifically clauses 52.203-3, Gratuities; 52.203-6, Alternate 1, Restrictions on Subcontractor Sales to the Government; 52.222.40, Notification of Employee Rights under the National Labor Relations Act; 52.222-54, Employment Eligibility Verification; and 52.242-13, Bankruptcy. JRS contends that these clauses should only be included in solicitations and contracts that exceed the simplified acquisition threshold (\$150,000, see FAR § 2.101) and states that its quotation does not exceed that threshold. Comments at 3. JRS contends that it could offer a more competitive price if the clauses were not included. Id.

We find no merit to this objection.² The agency responds that it estimates that the award will exceed the simplified acquisition threshold. See AR, Tab 6, Independent Government Estimate. Although JRS disagrees with the agency's judgment that this procurement will exceed the simplified acquisition threshold, this does not demonstrate that the agency acted unreasonably. With certain exceptions that are not relevant here, FAR §§ 3.202, 3.503-2, 22.1605, 22.1803, and 42.903, require

² JRS also complains that FAR clauses 52.203-3, Gratuities, and 52.242-13, Bankruptcy, should not be included in this commercial acquisition procurement because they are allegedly inconsistent with commercial practice. Comments at 3. Moreover, with respect to the Bankruptcy clause, JRS contends that "since the clause would be an express term of any resultant contract, the clause is prejudicial because any failure to comply with the clause could result in negative performance evaluations and/or contract termination." Protest at 6. JRS, however, provides no argument or evidence, beyond its bare allegations, that these clauses are inconsistent with commercial practices.

the inclusion of the protested clauses in solicitations exceeding the simplified acquisition threshold.

The protest is denied.

Susan A. Poling
General Counsel