



Decision

Matter of: Land Shark Shredding, LLC

File: B-415785

Date: March 6, 2018

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DIGEST

Protest challenging solicitation requirements as unduly restrictive is denied where the record supports the agency's position that the requirement is reasonably necessary to meet the agency's needs.

DECISION

Land Shark Shredding, LLC, of Bowling Green, Kentucky, challenges the terms of request for proposals (RFP) No. 36C24718R0021, issued by the Department of Veterans Affairs (VA) for on-site document, hard drive, and electronic media destruction services. Land Shark Shredding argues that the solicitation is unduly restrictive of competition.

We deny the protest in part and dismiss it in part.

BACKGROUND

The solicitation, set-aside for service-disabled veteran-owned small business concerns, was issued on November 24, 2017, under Federal Acquisition Regulation (FAR) part 12, and contemplated the award of a single fixed-price contract for one 1-year base period and four 1-year options. RFP at 1, 19, 96. As relevant here, under the statement of work (SOW) the contractor was to provide all labor, supervision, secure collection containers, equipment, and transportation necessary to perform on-site document destruction and disposal of confidential documents at the Charlie Norwood VA Medical Center (CNVAMC), its satellite community based outpatient clinics, and other offices

serviced by CNVAMC, in accordance with the performance requirements set forth in the solicitation and VA Directive 6371, Destruction of Temporary Paper Records. Id. at 14, 17.

Of further relevance here, the solicitation stated that for paper destruction “[t]he contractor shall provide equipment that is capable of shredding large volumes of documents per hour that shall produce cross cut shred articles within 1 mm x 5 mm (0.04 in. x 0.2 in.), pulped for recycling and prepare a certificate of destruction per the National Association for Information Destruction (NAID) standards for mobile units.” Id. at 21. Prior to the solicitation closing date, the protester inquired about the inclusion of this requirement, noting that it was in violation of VA policy as reflected in VA Directive 6371, and requested that the provision be removed. See Protest, encls. at 137-138 (Land Shark Shredding Nov. 29, 2017 Email to Agency). This protest followed.

DISCUSSION

The protester primarily argues that the solicitation’s requirement for paper destruction is unduly restrictive of competition because it exceeds and contradicts VA Directive 6371,¹ which merely requires destruction “to a degree that definitively ensures that they are not readable or reconstructable to any degree.” Protest at 2-3; Protester’s Comments at 1-2.

In response, the agency argues that its requirements are necessary to meet a legitimate need of the agency and do not contradict VA policy or regulatory requirements. See AR, Memorandum of Law (MOL) at 3-8. Specifically, the agency argues that CNVAMC has a mission need to ensure documents and electronic media containing veteran medical information are properly destroyed so there is no opportunity for reconstruction or improper disclosure in light of the prevalence of identity theft. Id. at 8.

In this regard, the agency first explains that VA Directive 6371 establishes agency-wide policy to ensure that all temporary paper records, in particular those that contain personally identifiable information (PII), personal health information (PHI), and VA sensitive information under the jurisdiction of VA, will be handled securely, economically, and effectively in accordance with applicable disposition instructions. Id. at 5. The agency further states that the directive sets forth minimum standards and specifically states that “[t]his policy does not preclude the Administrations or Staff

¹ As relevant here, the protester relies on the following definition provided by this directive for “[f]inal [d]estruction”: “The process through which temporary paper records are pulped, macerated, shredded or otherwise destroyed to a degree that definitively ensures that they are not readable or reconstructable to any degree.” See Protest at 2; Agency Report (AR), Tab 3, VA Directive 6371, at 6.

Offices from issuing their own more stringent destruction policies.” Id. (quoting AR, Tab 3, VA Directive 6371, at 4).

The agency next explains that the Medical Center Director for CNVAMC issued a memorandum to prescribe department-wide paperwork/data destruction policy for CNVAMC. Id. at 6; see also AR, Tab 4, Memorandum 90-16-26. As relevant here, this memorandum states that “[w]hen a determination is made that the disposition of any paper record or other data containing PHI, PII, IIHI or other sensitive information is made, [National Archives and Record Administration (NARA)] Rules and the National Institute of Standards and Technology (NIST) 800-88, Guidelines for Media Sanitation will be followed” AR, Tab 4, Memorandum 90-16-26, at 2. The memorandum also states that “[d]ocuments . . . to be destroyed via document . . . destruction contracts shall be reduced to particles that are not larger than 1 X 5 millimeters in size”² Id.

The agency finally explains that the solicitation’s requirements mirror the objective set forth in the memorandum and evidence the agency’s legitimate need to safeguard the confidentiality of the information being disposed. AR, MOL at 8.

Where a protester challenges a specification or requirement as unduly restrictive of competition, the procuring agency has the responsibility of establishing that the specification or requirement is reasonably necessary to meet the agency’s needs. Remote Diagnostic Techs., LLC, B-413375.4, B-413375.5, Feb. 28, 2017, 2017 CPD ¶ 80 at 3-4. We examine the adequacy of the agency’s justification for a restrictive solicitation provision to ensure that it is rational and can withstand logical scrutiny. Coulson Aviation (USA), Inc., B-414566, July 12, 2017, 2017 CPD ¶ 242 at 3. A protester’s disagreement with the agency’s judgment concerning the agency’s needs and how to accommodate them, without more, does not show that the agency’s judgment is unreasonable. Protein Sciences Corp., B-412794, June 2, 2016, 2016 CPD ¶ 158 at 2.

Here, we find that the agency has established a reasonable basis for its requirements for shredding paper. Although the protester disagrees with the agency, this disagreement does not show that the agency’s judgment is unreasonable. In its comments on the agency report, the protester states the agency’s requirements are unobtainable unless the agency is willing to pay a higher price or require off-site shredding. Protester’s Comments at 1-2. Again, the issue is not whether the specification restricts competition, but whether the specification unduly restricts competition; in other words, whether it is reasonably necessary to meet the agency’s

² In this regard, the agency further explains that NIST’s minimum sanitization recommendation for hard copy storage is to destroy paper using cross cut shredders which produce particles that are 1 mm x 5 mm (0.04 in. x 0.2 in.) in size (or smaller), or pulverize/disintegrate paper materials using disintegrator devices equipped with 3/32 in. (2.4 mm) security screen. AR, MOL at 7 (citing NIST 800-88, Guidelines for Media Sanitation, at 27).

actual needs. On this record, we find that the agency's explanation for this restrictive solicitation provision withstands logical scrutiny and is rational.

The protester raises a number of additional arguments challenging the terms of the solicitation. See Protest at 3-5. We have considered all of the protester's arguments and allegations and find no basis to sustain the protest. Further, for the reasons stated below, we dismiss several of the protester's arguments.

First, the protester challenges the agency's designation of position sensitivity as high risk under the SOW's contractor personnel security requirements and background investigation requirements. See Protest at 4-5. In response to this argument, the agency stated that after reviewing the protest, as well as the agency's requirement, it determined that corrective action was necessary. See AR, MOL at 12-13. In this regard, the agency represented that it would first determine the appropriate position risk and sensitivity level designation required for the position and, if necessary, revise the position risk and sensitivity level designations. Id. The agency's representation that it would revise the challenged position sensitivity designations rendered that basis for protest academic. See Protester's Comments at 3. We do not consider academic protests. Dyna-Air Eng'g Corp., B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132. As a result, because we do not consider academic protests, this protest ground is dismissed.

The protester also argues that the solicitation was ambiguous based on a clause requiring the contractor to disclose information concerning its compliance with the limitation on subcontracting. See Protest at 3-4. In response, the VA correctly notes that a solicitation is ambiguous only where it is susceptible to two or more reasonable interpretations, and here, Land Shark has neither identified any specific language as being ambiguous, nor offered two reasonable interpretations. See AR, MOL at 9-10. In its comments, the protester concedes that the subcontracting provision that were incorporated by reference in the solicitation were unambiguous, but argues, for the first time, that the solicitation was ambiguous with regard to the information offerors were required to provide in their past performance proposals concerning subcontracting requirements. See Comments at 2-3. This new argument, based on information that the protester had when it filed its protest, constitutes a piecemeal presentation of issues. The timeliness requirements of our Bid Protest Regulations do not contemplate the piecemeal presentation or development of protest issues. See Battelle Memorial Institute, B-278673, Feb. 27, 1998, 98-1 CPD ¶ 107 at 24 n.32; 4 C.F.R. § 21.2(a)(1). This includes the identification of "examples" of flaws in the solicitation generally alleged, as here, in the initial protest. Accordingly, this protest ground is dismissed.

Finally, the protester argues that while the solicitation incorporated the Service Contract Act's labor standards, it failed to include the current wage determination. See Protest at 5. Our Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) and (f), require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. Here, the solicitation package posted to the Federal Business Opportunities (FBO) website on November 24, 2017, included the current wage determination along with the solicitation and other documents. See AR,

Tab 6, FBO Notice Details and Packages; AR, Tab 7, Wage Determination No. 2016-4466. See also Protest, encls. at 120 (FBO notice reflecting inclusion of wage determination). Accordingly, the protester's arguments are based on incorrect facts, and therefore, the protester has failed to provide factual grounds that are legally sufficient to support its protest. Accordingly, this protest ground is dismissed.

The protest is denied in part and dismissed in part.

Thomas H. Armstrong
General Counsel