



Decision

Matter of: BlueStar Energy Solutions

File: B-405690

Date: December 12, 2011

Jon M. Casadont, Esq., for the protester.
Richard R. Butterworth, Jr., Esq., General Services Administration; and Sam Q. Le, Esq., Small Business Administration, for the agencies.
Katherine I. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that a procurement violates the bundling provisions of the Small Business Act is denied where the record shows that all of the requirements covered by the solicitation were already being procured as a single procurement.
 2. GAO will not review a procuring agency's choice of the North American Industry Classification System code to be applied to a procurement because this is a matter for review exclusively by the Small Business Administration.
-

DECISION

BlueStar Energy Solutions, of Chicago, Illinois, protest the terms of request for proposals (RFP) No. GS-00P-11-BSD-0832, issued by the General Services Administration (GSA) Energy Division. This RFP contemplated the award of two contracts—one to be acquired under full and open competition and the other set aside for small business concerns—to supply electricity to a number of Federal facilities located in Illinois. The protester argues that the GSA improperly bundled the requirements included in the non-restricted portion of the solicitation, and improperly included the “non-manufacturer rule” in the set-aside portion of the solicitation.

We deny the protest.

BACKGROUND

The RFP, issued on August 17, 2011, contemplates the award of two contracts to supply electric power to seven federal accounts in Illinois. These accounts are currently consolidated under a single contract being performed by Pepco Energy Services, Inc. Six of the accounts included in the RFP are to be procured using full and open competition. The seventh account, for the Hines Veterans Administration Hospital, has been set aside for small business concerns. The agency intends to make awards based on the technically acceptable proposal(s) that will result in the lowest overall price for the accounts included in the solicitation. RFP at 25.

BUNDLING

BlueStar first contends that the full and open portion of the procurement improperly bundles six federal accounts in violation of the Small Business Act, 15 U.S.C. § 631(j)(3) (2009).

The Small Business Act requires that “federal agencies, to the maximum extent practicable, shall avoid unnecessary and unjustified bundling of contract requirements that precludes small business participation in procurements as prime contractors.” *Id.* In addition, the Act defines bundling as follows:

bundling of contract requirements means consolidating 2 or more procurement requirements for goods or services previously provided or performed under separate smaller contracts [that is, contracts being performed by a small business concern or suitable for award to a small business concern] into a solicitation of offers for a single contract that is likely to be unsuitable for award to a small business concern.

15 U.S.C. § 632(o)(2)(3); see Federal Acquisition Regulation (FAR) § 2.101.

The agency explains that the seven accounts in the current solicitation have been included in a single contract requirement “since electric deregulation began in the ComEd service territory 7 to 8 years ago.” Contracting Officer’s Statement at 1. Thus, we agree with GSA that this solicitation did not constitute “bundling,” as defined by the Small Business Act, because GSA has not consolidated separate smaller contracts into a single contract.¹ See Outdoor Venture Corp.; Applied Cos., B-299675, B-299676, July 19, 2007, 2007 CPD ¶ 138 at 3 (no bundling where all requirements already procured as a single system). While BlueStar argues that the bundling rules should be applicable because these requirements should not have been consolidated in the Pepco contract, this provides no basis to challenge the current solicitation, which did not consolidate separate small contracts.

¹ We solicited the views of the Small Business Administration (SBA), which agrees that there is no evidence of bundling here.

NON-MANUFACTURER RULE

BlueStar also argues that the set-aside portion of the solicitation should not incorporate the clause implementing the non-manufacturer rule. The non-manufacturer rule provides that the offer of a non-manufacturer small business concern under a small business set-aside for “any procurement contract for the supply of a product” can be considered, provided, among other things, that the small business concern represents that it will supply the product of a domestic small business manufacturer or processor, or that a waiver of this requirement is granted by the SBA. 15 U.S.C. § 637(a)(17); see also 13 C.F.R. § 121.406 (2011).

Whether the non-manufacturer rule should be included in a procurement set aside for small businesses primarily depends on the North American Industry Classification System (NAICS) code assigned to the procurement by the procuring agency.² See B&B Med. Servs., Inc.; Rotech Healthcare, Inc., B-404241, B-404241.2, Jan. 19, 2011, 2011 CPD ¶ 24 at 7; Eagle Home Med. Corp., B-402387, Mar. 29, 2010, 2010 CPD ¶ 82 at 4-6. The NAICS code assigned by GSA to this procurement was 221112, Fossil Fuel Electric Power Generation. GSA states, and the SBA agrees, that this is the most accurate NAICS code for procurements for electricity as a commodity to which the non-manufacturer rule would be applicable. GSA Report at 2; SBA Report at 2. Thus, the RFP includes the non-manufacturer rule for the set-aside portion, and requires that offerors who are not manufacturers of the end product, provide a supply commitment letter from a small business manufacturer or producer for size determination purposes. RFP at 22.

BlueStar argues that the non-manufacturer rule should not be included here because this solicitation actually involves the provision of services rather than a product or commodity. In this regard, the protester argues that for this RFP the agency improperly designated NAICS code No. 221112, Fossil Fuel Electric Power Generation, which involves the acquisition of power supply as a commodity, instead of NAICS code 221122, Electric Power Distribution, which involves the provision of services. Protester’s Comments at 2-3. Thus, BlueStar is essentially challenging the NAICS code that GSA incorporated into the solicitation.

However, questions regarding an agency’s designation of a NAICS code is a matter for resolution by the SBA, which has exclusive authority over NAICS code determination appeals. See FAR § 19.303(c); 13 C.F.R. § 121.1102. Because an agency’s choice of a NAICS code is a matter for review by the SBA, not our Office,

² The NAICS code scheme is used by the federal government to identify and classify specific categories of business activity that represent the lines of business a firm conducts. See FAR § 19.102; Rochester Optical Mfg. Co., B-292247, B-292247.2, Aug. 6, 2003, 2003 CPD ¶ 138 at 2 n.2.

this is not a matter for consideration by our Office. Bid Protest Regulations, 4 C.F.R. § 21.5(b); Expeditions Int'l Travel Agency, B-252510, June 28, 1993, 93-1 CPD ¶ 497 at 4.³

The protest is denied.

Lynn H. Gibson
General Counsel

³ BlueStar references a letter it received from the SBA concerning the applicability of the non-manufacturer rule for NAICS code 221122, Electric Power Distribution, which is considered to be for services rather than products. As noted by the SBA, the guidance in that letter is inapplicable to the present solicitation covered by NAICS code 221112, Fossil Fuel Electric Power Generation.