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# Decision

**Matter of:** Synchronix Information Strategies, LLC

**File:** B-414068.4

**Date:** September 8, 2017

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David S. Cohen, Esq., Laurel A. Hockey, Esq., Daniel Strouse, Esq., and John J. O'Brien, Esq., Cohen Mohr LLP, for the protester. Christine Simpson, Esq., Department of Health and Human Services; John W. Klein, Esq., and Meagan K. Guerzon, Esq., Small Business Administration, for the agencies. Peter D. Verchinski, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Protest asserting that an agency is required to cancel a solicitation set aside for small businesses is denied where the protester does not show that the agency's failure to cancel the solicitation violates any law or regulation.

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## DECISION

Synchronix Information Strategies, LLC, of Wilmington, Delaware, protests the terms of request for proposals (RFP) No. 16-223-SOL-00073, issued by the Department of Health and Human Services, Food and Drug Administration (FDA), as a small business set-aside for software licenses, maintenance and support, and other activities associated with implementing the Electronic Common Technical Document (eCTD) validation and review software. Synchronix primarily alleges that the agency should cancel the solicitation because, while the procurement was being conducted, the protester's size status changed from small to other than small, such that the agency no longer has a reasonable expectation of receiving offers from two small business concerns.

We deny the protest.

## BACKGROUND

The FDA issued the RFP on July 1, 2016, as a combined synopsis/solicitation under the commercial item provisions of Federal Acquisition Regulation (FAR) subpart 12.6. The RFP seeks to award a fixed-priced contract for a base year and four 1-year option

periods for customized, commercial off-the-shelf software. RFP at 3. The agency initially procured this software under a cooperative research and development agreement between the FDA and the firm GlobalSubmit, and then GlobalSubmit provided maintenance and support for approximately 12 years on a sole-source basis. Contracting Officer's (CO) Statement at 2.

Prior to issuing the solicitation here, the FDA issued a sources sought notice/request for information (RFI) on the FedBizOpps website. The notice, published on March 24, 2016, requested information from businesses regarding their interest in, and capability of, meeting the FDA's statement of work for this procurement. Id. at 1; RFI at 1. The notice explained that, based on the responses received, the FDA would evaluate the appropriateness of a small business set-aside. Id. The agency subsequently received three responses from small businesses by the notice's April 14 deadline. CO Statement at 1.

The agency's technical team evaluated the responses from the small businesses. Id. at 2. The CO concluded, based on the technical team's evaluation and a review of the sources sought responses, that there was a reasonable expectation that offers would be obtained from at least two responsible small businesses, and that award could be made at a fair market price. Id.

The agency issued the RFP as a small business set-aside, and the agency received two responses, one from GlobalSubmit and one from Lorenz International, by the August 10 closing date. Id. The agency conducted an evaluation of the proposals and concluded that Lorenz offered the best value to the agency. The FDA made award to Lorenz on September 30, and GlobalSubmit subsequently protested the award to our Office. In response, the agency notified our Office of its intent to take corrective action on December 6. On December 8, our Office dismissed GlobalSubmit's protest as academic. GlobalSubmit, Inc., B-414068 et al., Dec. 8, 2016 (unpublished decision).

On April 25, 2017, the agency sent a letter to the offerors requesting that they submit "a new full proposal" by May 15, 2017. Agency Report (AR), Tab 2, at 13. The agency's letter explained that the agency's evaluation of proposals would "be based solely upon the newly-submitted information which is to include **all certifications, technical and business information** required by the solicitation . . . ." <sup>1</sup> Id.

Following this letter, GlobalSubmit requested that the agency remove the language requiring offerors to resubmit certifications. In this regard, GlobalSubmit explained that, at the time of the original proposal, the firm qualified as a small business, but would no longer qualify for re-certification as a small business. <sup>2</sup> AR, Tab 2, GlobalSubmit Email

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<sup>1</sup> The letter also explained that the agency was modifying the solicitation to remove the "management approach/plan" evaluation factor. Id.

<sup>2</sup> Synchronix explains that the firm has "purchased substantially all of GlobalSubmit's assets, including the assets used for GlobalSubmit's incumbent FDA contract that would  
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to Agency, Apr. 27, 2017. The agency did not remove the requirement to resubmit certifications.

This protest was subsequently timely filed at GAO by Synchrogenix.

## DISCUSSION

Synchrogenix asserts that the agency must cancel the RFP.<sup>3</sup> The firm argues that the agency no longer has a reasonable expectation that it will receive two offers from small businesses, and thus the agency is required to withdraw the set-aside. The protester further argues that continuing with the procurement here, where the agency can expect to receive only one offer, constitutes an improper sole-source to Lorenz. While we do not specifically discuss each of the protester's arguments, we have considered all of them and find that none provides a basis to sustain the protest.<sup>4</sup>

Under Federal Acquisition Regulation (FAR) § 19.502-2(b) (commonly referred to as the "rule of two" requirement), a procurement with an anticipated dollar value of more than \$150,000, must be set aside for exclusive small business participation when there is a

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also be provided under this protested procurement." Protest at 4. The protester further explains that Synchrogenix "is a large business and its purchase of substantially all of GlobalSubmit's assets rendered the two companies affiliated as of March 14, 2017." Id.

<sup>3</sup> Synchrogenix's protest also argues that the agency cannot make award to Lorenz because the firm's software "poses considerable risk" and therefore the software "should be technically unacceptable for this requirement." Protest at 7. However, as the agency has not yet conducted its evaluation of Lorenz's proposal and made an award, we found such a challenge to be premature. Accordingly, prior to the agency's submission of its report, our Office dismissed this protest ground

<sup>4</sup> The protester also argues that the agency has, in effect, restarted the procurement. In support, the protester points out that even the agency's own internal memorandum states that the government was "restarting the competition due to the many protest grounds, changes in the composition of the evaluation panel and [the] passage of many months since proposals were submitted." Comments at 3 (quoting AR, Tab 3, Memo to File Reason for Requesting Certification and Continuing with Solicitation FINAL, at 1-2). Given that the agency has moved the procurement "back to the starting block," Synchrogenix argues the agency is required to determine whether there is still a reasonable expectation that offers will be received from two or more small businesses. Comments at 3. We disagree. Here, while the agency viewed the passage of time, and other changes as reason to seek new proposals, including new certifications, there is nothing indicating--nor does the protester argue--that the underlying statement of work or requirements being procured here have meaningfully changed, nor has the agency cancelled the solicitation and issued a new solicitation. Under these circumstances, we find that there is no requirement that the agency revisit its set-aside decision.

reasonable expectation that offers will be received from at least two responsible small business concerns, and award will be made at a fair market price. In assessing the availability of small business concerns, the FAR requires that the contracting officer must “[b]efore issuing solicitations, make every reasonable effort to find additional small business concerns . . . .” FAR § 19.202-2(a).

As a preliminary matter, we note that the protester is not challenging the agency’s initial decision to issue the solicitation as a set-aside for small businesses. Rather, the protester is contending that under the facts here--where “full new proposals” are requested and where the agency knows that its request for new proposals will not result in offers from two small businesses--the agency cannot continue the procurement as a small business set-aside. However, the protester points to no statute or regulation that requires such a result. In a comment submitted to our Office, the Small Business Administration (SBA) explains, and we agree, that

[t]here is no requirement in the Small Business Act, the FAR, or SBA regulations, that an agency must redo its market research regarding the “rule of two” prior to requesting revised or newly submitted proposals during the course of a procurement or altogether cancel the solicitation if it becomes aware that only one responsible small business offer will be received in response to an amended solicitation.

SBA Comments at 4.<sup>5</sup> While the protester asserts that changed circumstances should result in a requirement that the agency revisit its determination, there is nothing that requires the agency to do so. In this regard, the “rule of two” anticipates a prospective determination made prior to the issuance of a solicitation. Once the solicitation has been issued, and the agency has properly complied with the FAR’s “rule of two,” the agency is not required to revisit this determination during the course of a procurement.<sup>6</sup>

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<sup>5</sup> We solicited the views of SBA in connection with this case. SBA’s view is consistent with this decision.

<sup>6</sup> Indeed, our Office has found that the fact that only one small business actually submits an offer does not render unreasonable the contracting officer’s decision to set aside the procurement, since the reasonableness of the decision is determined as of the time the decision was made. See White Storage & Retrieval Sys., Inc., B-256952, July 20, 1994, 94-2 CPD ¶ 35 at 4. While Synchrogenix argues that the facts here compel a different outcome--because here the agency knows that only one proposal will be received in response to its request for new proposals, in contrast to a procurement where the agency does not know it will receive only one proposal in response to an initial solicitation--we disagree. As the SBA advised in response to this protest, there is no requirement in law or regulation that an agency must revisit its determination under these circumstances.

The SBA further explains that it is not uncommon that an agency becomes aware, over the course of the procurement, that it will receive only one revised offer from a small business concern. Id. at 5. For example, small business offerors may drop out of a competition for a variety of reasons, including losing a size protest, failing to be placed in a competitive range, or as the result of a GAO protest, such that there is only one responsible small business offeror remaining. Id. at 4-5. In such circumstances, the agency may make award to that firm, provided award will be made at a fair market price. We find no reason to conclude that, just because the agency is aware that only one offeror will be submitted in response to the solicitation, the agency is required to cancel the set-aside.

The protester also argues that the agency's actions have resulted in a de facto sole-source procurement. In this regard, the protester alleges that the agency knew before the due date of proposals that there would be only one responsive proposal, and yet the agency intends to proceed with the procurement, which, according to the protester, constitutes an improper sole source. We disagree. In essence the protester is asserting that the solicitation should be cancelled and new proposals should be solicited on an unrestricted basis because the agency is aware that only one proposal will be received; however, as explained above, the agency's market research was conducted prior to the issuance of the solicitation, and the agency concluded it had a reasonable expectation that offerors would be received from two or more small businesses. The fact that, during the course of the procurement, one of the two small business offerors is no longer capable of submitting a revised proposal, does not mean the procurement should be viewed as a de facto sole-source procurement.

We deny the protest.

Susan A. Poling  
General Counsel