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Decision

Matter of: Colonial Press International, Inc.

File: B-418718

Date: July 10, 2020

Anthony W. Hawks, Esq., Law Offices of Anthony Hawks, for the protester.
Craig D. Barrett, Esq., Government Publishing Office, for the agency.
Todd C. Culliton, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the solicitation contained an unduly restrictive production schedule is denied where, as the agency explained, the schedule was rationally based on a statutory mandate.

DECISION

Colonial Press International, Inc., of Miami, Florida, protests the terms of an unnumbered invitation for bids (IFB) issued by the Government Publishing Office (GPO) for printing services. Colonial Press alleges that the solicitation's production schedule is unduly restrictive of competition.

We deny the protest.

BACKGROUND

On May 4, 2020, the GPO issued the IFB to procure printed copies of the Medicare handbook, *Medicare and You*,¹ to be provided over a 1-year base period and four 1-year option periods.² Agency Report (AR), Tab 6, IFB at 1, 12. The handbook would

¹ The *Medicare and You* handbook provides information about the Medicare program and available Medicare plans. See *Medicare and You*, available at <http://www.medicare.gov/medicare-and-you>.

² GPO issued the solicitation as a requisition for the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS). IFB at 1. GPO has

be printed in 63 different regional, national, and language versions with an estimated production schedule consisting of between 275,000 and 375,000 copies per month. *Id.* The IFB advised that the agency may order up to three months' worth of copies in a single order. *Id.* at 13, 24. All orders, including combined orders, must be printed and distributed in accordance with an 18 workday (18-day) schedule. *Id.* at 24-25. Bid opening was scheduled for May 8.

DISCUSSION

On May 7, Colonial Press filed this protest, arguing that applying the 18-day production schedule to combined monthly orders constitutes an unduly restrictive solicitation term.³ Protest at 4. According to Colonial Press, the schedule restricts competition because it increases storage costs since the contractor will be required to maintain a stock of paper and materials in the event that the agency wishes to place a combined order. *Id.* Similarly, Colonial Press argues that the schedule unreasonably requires the contractor to set aside sufficient manpower and printing press time to fill a combined order, which results in additional overhead costs and loss of other business opportunities. *Id.*

Government procurement officials who are familiar with the conditions under which services have been used in the past, and how they are to be used in the future, are generally in the best position to know the government's actual needs, and therefore, are best able to draft appropriate specifications. See, e.g., *Nick Chorak Mowing*, B-280011.2, Oct. 1, 1998, 98-2 CPD ¶ 82 at 3-4. Where a protester challenges a specification as unduly restrictive of competition (*i.e.*, a term that limits competition by including a requirement that exceeds the needs of the government), the burden is on the procuring agency to establish *prima facie* support for its position that the restriction imposed is necessary to meet its needs. *Fry Communications, Inc.*, B-220451, Mar. 18, 1986, 86-1 CPD ¶ 265 at 3; *NCS Techs., Inc.*, B-403435, Nov. 8, 2010, 2010 CPD ¶ 218 at 3. GAO will examine the adequacy of the agency's justification for a restrictive solicitation provision to ensure that it is rational and can withstand logical scrutiny. *Id.*; *accord Israel Aerospace Indus.*, B-417681, Aug. 16, 2019, 2019 CPD ¶ 292 at 2-3. Once the agency establishes support for the provision, the burden shifts to the protester to show that the requirement is clearly unreasonable. *WKF Friedman Enters.*, B-410827, Feb. 23, 2015, 2015 CPD ¶ 81 at 2.

Here, as the procuring agency, GPO explains that CMS is required to provide eligible persons with the Medicare handbook no later than 30 days before the beginning of the

distinct authority to provide and procure printing services on behalf of the federal government. 44 U.S.C. §§ 501-502.

³ During the pendency of this protest, the agency notified our Office of its intention to override the automatic stay provision of section 3553 of title 31 of the United States Code. Agency Letter to GAO, May 27, 2020. GPO explained that the printing services could not be delayed due to urgent and compelling circumstances. *Id.*

enrollment period. Contracting Officer's Statement of Facts (COS) at 3; AR, Tab 2, Emails Between GPO and CMS at 2; see *also* 42 U.S.C. § 1395w-21(d)(2)(B)(i).⁴ The agency explains that the 18-day production schedule for combined orders ensures that CMS will be able to deliver the handbooks in accordance with the statutory timeline. COS at 3-4; Memorandum of Law (MOL) at 1-2. The agency further explains that the production schedule is important because a person must receive the handbook in a timely manner prior to the beginning of the initial enrollment period in order to make an informed decision when selecting a plan; if a person misses the initial enrollment period, then he or she will not be eligible to enroll in a plan until the annual fall enrollment period. AR, Tab 2, Emails Between GPO and CMS at 2.

Thus, we conclude that the agency has established that the production schedule does not exceed CMS' needs because the 18-day production schedule is designed to ensure that CMS is able to provide the handbooks to an eligible member of the general public prior to his or her initial enrollment period. See *W.P. Tax and Accounting Grp.*, B-411806, B-411807, Oct. 7, 2015, 2015 CPD ¶ 312 at 3 (agency established that an allegedly restrictive solicitation requirement did not exceed its needs by showing that the requirement was necessary for the agency to comply with federal law). The protester also argues that the 18-day production schedule does not reflect the agency's actual needs because CMS has failed to comply with the statutory requirement for the past 22 months. The protester's argument is misplaced. Whether the agency previously complied with the statutory requirement does not alter the agency's existing and continuing duty. Comments at 3-4; Response to Agency's Notice of Override at 2-4; see *also Star Dynamic Corp.*, B-248919.3, B-250459, Jan. 26, 1993, 93-1 CPD ¶ 63 at 4 (agency's action under a previous solicitation does not affect a later solicitation because each solicitation is independent and must stand on its own). Accordingly, we deny this protest allegation.

The protester also asserts that, even if compliance with the federal statute is a legitimate need of the agency, then the IFB should "bifurcate" the production schedule. Comments at 4. The protester asserts that the IFB should allow the contractor to print "fixed" pages (*i.e.*, pages common to all versions) in advance and "variable" pages (*i.e.*, pages specific to a particular version) after receiving an order. Comments at 4-5. Although the protester's assertion appears to make the production more cost-efficient, it fails to demonstrate that the production schedule lacks a rational basis because it does not alter the fact that the production schedule is designed to meet the agency's mandate. Furthermore, we note that the agency, not the protester, is responsible for determining the best method to meet its needs. MOL at 1-2; see *Nick Chorak Mowing, supra; Blue Origin Florida, LLC*, B-417839, Nov. 18, 2019, 2019 CPD ¶ 388 at 6.

⁴ 42 U.S.C. § 1395w-21(d)(2)(B)(i) provides the following:

To the extent practicable, the Secretary shall, not later than 30 days before the beginning of the initial Medicare+Choice enrollment period for an individual . . . , mail to the individual the information described in subparagraph (A).

Additionally, the fact that the protester may not find it economical to compete due to higher storage and manpower costs under the agency's desired production schedule does not render the agency's actions unreasonable. See MOL at 2-3; *cf. Instrument Specialists, Inc.*, B-279714, July 14, 1998, 98-2 CPD ¶ 18 at 2 (denying protester's complaint regarding the length of the contract because whether the shorter length made performance uneconomical for the protester does not show that the solicitation term was unduly restrictive). Accordingly, we deny this protest allegation.

The protest is denied.

Thomas H. Armstrong
General Counsel