



Decision

Matter of: Vox Optima, LLC

File: B-400451

Date: November 12, 2008

Darrell M. Allen, Esq., for the protester.
Robert McMullen, Esq., Department of the Navy, for the agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly bundled acquisition is denied where record shows solicitation is for a new requirement, so that agency has not combined two or more smaller requirements that previously had been acquired from small businesses.
 2. Protest that agency improperly failed to set aside a portion of its requirement for exclusive small business participation is denied where record shows agency fully considered partial set-aside but was unable to identify any small business concerns that could perform full spectrum of tasks contemplated by solicitation, and protester has not rebutted agency's position.
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DECISION

Vox Optima, LLC, of Tijeras, New Mexico, protests the terms of request for proposals (RFP) No. N00189-08-R-Z051, issued by the Department of the Navy, Fleet Industrial Supply Command, for worldwide public communications and media support services. Vox asserts that the solicitation impermissibly bundles several requirements that could be performed by small businesses.

We deny the protest.

The RFP contemplates the award of multiple indefinite-delivery, indefinite-quantity (IDIQ) contracts on a cost-plus-fixed-fee basis, for a base year, with four 1-year options to perform a spectrum of public relations services on a worldwide basis for the office of the Navy Chief of Information (CHINFO). The RFP contemplates acquiring professional services in the areas of communication integration and strategy, media relations, community outreach/relations, visual information systems

and imagery marketing, public affairs professional and community development, capabilities integration development, communications information environment management and training, and public information materials development and production. RFP at 14. The agency estimates that the total level-of-effort for all years will be approximately 754,600 staff hours, starting with a 23,100 staff hour effort in the base year, and a gradually increasing level-of-effort throughout the option years. RFP at 9-10.

Although the RFP was issued on a full and open competitive basis, it nonetheless includes a small business subcontracting goal of 15 percent of the value of the contract, and advises that North American Industry Classification System code 541820 applies, with a size standard of \$6.5 million. Agency Report (AR) exh. 2. The RFP includes three evaluation factors--corporate experience, past performance (equal in importance), and socio-economic plan (significantly less important than the other two criteria individually). RFP at 62. For corporate experience, the solicitation requires that offerors demonstrate that they have performed, individually or in the aggregate, up to 5 contracts worth at least \$5 million or that required 40,000 billable hours of public affairs work.¹

Vox argues that the RFP impermissibly bundles several separate requirements that could be performed by small businesses if the agency solicited them separately. According to the protester, it has been providing services to CHINFO in the areas of speechwriting and executive communications for the agency's senior personnel, long-term strategic communications planning and time and event-based tactical planning, large-scale trade show planning, custom publishing, writing and editing, video and multimedia production, and internal and external program promotion. The protester asserts that these services are being solicited under sections 2.1, 2.3 and 5.3 of the RFP's performance work statement, but are impermissibly bundled with a host of other services. Vox, a service-disabled, veteran-owned small business, concludes that, since it previously provided these services, it is improper under the requirements of the Small Business Act for the agency to bundle these requirements with the other requirements of the RFP. (The protester also maintains that there are three other small business contracts for work that is subsumed under the current solicitation.)

The agency responds that this is a new requirement for which it has not previously contracted, either with a small or a large business. In this connection, the agency notes that, although it has acquired certain limited services from the protester, it did

¹ As originally issued, the RFP required offerors to demonstrate that they had a single reference showing that they had provided a minimum of \$5 million or 40,000 billable hours of public affairs work annually. RFP at 56. The agency later relaxed this requirement, allowing offerors to demonstrate this level of experience through an aggregate of up to five contracts. AR, exh. 8, at 6.

so through a task order issued against a contract held by a different concern, the Cynergy Group of Baltimore, with which the protester has a subcontract. The agency also points out that the contract with Cynergy was entered into between the company and another Naval procuring activity, the Naval Sea Systems Command (NAVSEA). Moreover, according to the agency, while the solicitation includes a variety of individual tasks that might be required, the overarching requirement is for integrated use of the individual tasks together in connection with the agency's overall requirement, which is for integrated, and at times worldwide, public affairs campaigns.

We find no merit to this aspect of Vox's protest. The Small Business Reauthorization Act of 1997, Pub. L. No. 105-135, 111 Stat. 2592, 2617-20 (1997), amended the Small Business Act and provided that, "to the maximum extent practicable," each agency shall "avoid unnecessary and unjustified bundling of contract requirements that precludes small business participation in procurements as prime contractors." 15 U.S.C. § 631(j)(3) (2000). Bundling, for purposes of the Small Business Act, as amended, means "consolidating 2 or more requirements for goods or services previously provided or performed under separate smaller contracts 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); see Federal Acquisition Regulation (FAR) § 2.101, "separate smaller contract" is defined as "a contract that has been performed by 1 or more small business concerns or was suitable for award to 1 or more small business concerns." 15 U.S.C. § 632(o)(3); see FAR § 2.101.

The record does not support the protester's assertion that the agency has bundled two or more requirements that previously have been acquired from small businesses under smaller, separate contracts. Two of the contract actions identified by the protester--Cynergy's task order under its NAVSEA contract, under which Vox performed as a subcontractor, and work performed by a second subcontractor under that same task order²--were under a contract executed by an entirely different activity (NAVSEA), and the protester has submitted no evidence to show that the NAVSEA contract is for requirements similar to the requirements being solicited for CHINFO under the current RFP. Accordingly there is no basis for us to find that the earlier work performed by Vox and the other Cynergy subcontractor constituted

² As to the second Cynergy subcontractor, Vox has submitted an invoice prepared by that concern that the protester maintains was submitted to CHINFO in connection with an earlier, sole-source, contract performed by that concern. Vox has produced no evidence beyond this invoice (such as a copy of the alleged sole-source contract) to show that, in fact, the agency actually entered into a separate contract with the second subcontractor, and concedes, moreover, that the work performed by the second subcontractor is included under the Cynergy task order.

separate, smaller contracts previously entered into by CHINFO with small businesses. AR, exh. 15.³

The third contract action identified by the protester is a contract that was entered into between a Department of Defense contracting activity (as opposed to CHINFO) and was for performance of computer programming work, as opposed to public affairs work. Agency Letter, Sept. 25, 2008, attach. 3-7. As with the task order discussed above, this is a contract with a different contracting activity for work not contemplated under the current solicitation, and it therefore cannot be characterized as a smaller, separate contract entered into by CHINFO for services included under the subject RFP. Finally, Vox has identified a request for quotations that currently is being competed that requires the preparation and publication of a DVD that the agency must submit to Congress. However, this cannot be said to be an earlier, smaller, contract previously entered into by the contracting activity, inasmuch as it is a solicitation for a future requirement.

In sum, we conclude that the current solicitation does not combine two or more smaller requirements for which the agency had previously entered into contracts with small businesses. Accordingly, the RFP is not inconsistent with the Small Business Act requirements regarding bundling. See USA Info. Sys., Inc., B-291417, Dec. 30, 2002, 2002 CPD ¶ 224 at 3.⁴

Vox asserts that the agency should issue the RFP as a partial small business set-aside. According to the protester, since the solicitation contemplates the award of multiple IDIQ contracts, the requirement is necessarily severable into two or more lots, and thus is suitable for a partial set-aside.

We find no merit to this aspect of Vox's protest. Under FAR § 19.502-3, in relevant part, a portion of an acquisition must be set aside for exclusive small business participation when a total set-aside is not appropriate, the requirement is severable into two or more economic production runs or reasonable lots, and it is expected that one or more small business concerns will have the technical competence and

³ Since we conclude that the work at issue under Vox's and the other subcontractor's task orders was not work previously contracted for by CHINFO under separate, smaller contracts with small businesses, we need not decide the question of whether prior, smaller, subcontracts--as opposed to prime contracts--are contemplated under the statute's coverage.

⁴ We point out as well that, in response to a congressional inquiry prior to the filing of the current protest, the Small Business Administration (SBA) informally reviewed the agency's actions and concluded that the RFP did not amount to bundling in contravention of the requirements of the Small Business Act. AR, exh. 11.

productive capacity to satisfy the set-aside portion of the requirement at a fair market price. The determination as to whether a particular acquisition should be partially set aside is left to the discretion of the contracting officer, provided the determination is reasonable. Digital Sys. Group, Inc., B-258262.2, Jan. 20, 1995, 95-1 CPD ¶ 30 at 7.

Here, the record shows that the agency conducted market research in considering whether to set aside a portion of the requirement, but was unable to identify any small business concerns that could perform the full spectrum of tasks contemplated in connection with the requirement for full-service public affairs services on a worldwide basis. AR, exh. 3, at 2-3. The agency further explains that the various tasks contemplated under the RFP cannot be performed separately because of the interrelationship of the tasks:

While the Performance Work Statement lists a variety of individual tasks to be performed at CHINFO and other commands, each of those tasks [has] an interrelationship with the others. In many cases these will be directly connected. For example, cross-functional meetings may be required to develop a communication strategy and a communication plan for a community outreach campaign. In the execution of that campaign, it will be important to produce informational materials, monitor the news media, synchronize events, align the message internally, embark distinguished visitors or media on ships, conduct flyovers, market photos and video, post information on a web site, involve a national organization such as the American Legion or Navy League, and make use of the Navy Public Affairs web portal p-a-Net as a collaborative tool in the development of an assessment of the campaign, etc.

AR, exh. 16, at 1.

In response to the agency's position, the protester does little more than repeat the underlying premise of its argument, namely, that because this is a multiple award IDIQ solicitation, the work necessarily must be severable into two or more lots. While this perhaps is true insofar as the agency's various public affairs campaigns is concerned--that is, the work could be divided on a per-campaign basis--Vox has failed to rebut the agency's position that, within the context of a single public affairs campaign, there is not a small business capable of performing in an integrated fashion the full spectrum of tasks that might be necessary. Vox does not assert, much less demonstrate, that it is capable of performing all of the tasks that might be necessary to properly perform one of the agency's public affairs campaigns; indeed, it concedes in its initial protest that the work under its subcontract with Cynergy is confined to tasks enumerated in sections 2 and 5.1.2 of the performance work statement. Under the circumstances, we find that the agency has reasonably demonstrated that its requirement is for integrated, full-spectrum public affairs services, and that it reasonably determined not to set aside a portion of the work

under the subject RFP for small businesses because there are no firms capable of performing the full-spectrum services required by the agency.

In its initial protest, Vox argued that the solicitation's corporate experience requirement unduly limited competition because it called for offerors to have at least one reference showing that the firm had performed a contract for at least \$5 million or 40,000 annual billable hours in public affairs work. In responding to the protest, the agency advised our Office that the RFP had been amended so that firms could demonstrate the required level of experience by showing that they had up to five references which, individually or in the aggregate, satisfied the \$5 million/40,000 billable hour requirement.

In responding to the agency report, the protester does not maintain that the revised corporate experience requirement is unduly restrictive, but asserts only that the RFP as amended is not clear. While the agency could perhaps have drafted the amendment differently, we find that, as issued, it adequately conveys the revised corporate experience requirement. The amendment provides as follows:

To demonstrate its corporate experience, the offeror shall identify up to five (5) of its most relevant contracts or efforts within the past five (5) years, and provide any other information the offeror considers relevant to the requirements of the solicitation. . . . The references will be evaluated in the aggregate in order to allow offerors who may not have the entire scope, magnitude and complexity of the requirement under one individual contract to still be considered acceptable if experience with the full scope, magnitude and complexity of the requirement can be demonstrated within the allotted number of references as described above.

AR, exh. 8, at 6. It is clear from this provision, as revised, that the experience requirement may be met by aggregating an offeror's relevant contracts. This adequately responds to the protester's argument that the requirement as originally stated was restrictive.⁵

⁵ In its initial protest, Vox asserted that the RFP included information in the performance work statement that was proprietary to the firm. The agency responded to this aspect of the protest in its report, and in its comments responding to the agency report, Vox made no further mention of this aspect of its protest. Thereafter, the agency submitted a supplemental report to our Office in which it maintained that any aspect of Vox's protest relating to the agency's use of the firm's allegedly proprietary information should be considered abandoned. In responding to the agency's supplemental report, the protester stated, without elaboration, that it had not abandoned any aspect of its protest. We dismiss this aspect of Vox's protest as abandoned, since the firm's initial comments did not respond to the agency's rebuttal on this issue. To the extent that Vox's supplemental filing makes mention of
(continued...)

The protest is denied.

Gary L. Kepplinger
General Counsel

(...continued)

its earlier, abandoned, assertion, it does not provide a substantive response to the agency's position and, in any case, is untimely. See Israel Aircraft Indus., Ltd.-- TAMAM Div., B-297691, Mar. 13, 2006, 2006 CPD ¶ 62 at 6-7.