



**United States Government Accountability Office
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Decision

Matter of: Technical Professional Services, Inc.

File: B-410640

Date: January 20, 2015

Frank S. Murray Jr., Esq., Foley & Lardner LLP, for the protester.
Bridget E. Grant, Esq., Department of Veterans Affairs, for the agency.
Frank Maguire, Esq., and David A. Ashen, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest challenging failure to solicit incumbent contractor for issuance of a Federal Supply Schedule order is denied where applicable regulation does not require solicitation of the incumbent and record does not indicate that agency decision not to solicit incumbent resulted from bad faith.

DECISION

Technical Professional Services, Inc. (TPS), of Wayland, Michigan, protests the Department of Veterans Affairs' (VA) issuance of an order to HR Staff Management, Inc., dba Alpha Services, of Las Vegas, Nevada, under request for quotations (RFQ) No. VA777-14-Q-0169, for administrative support services. The protester challenges the agency's failure to solicit it for this requirement, arguing that, as the incumbent, it was entitled to be solicited.

We deny the protest.

BACKGROUND

TPS is the incumbent contractor under a Federal Supply Schedule (FSS) order for these services. Based on perceived performance issues with TPS and changes in the agency's requirements, the VA decided not to exercise the option in TPS's incumbent contract and decided instead to recompetes the requirement with a new performance work statement, with changed locations, tasks, and deliverables. Contracting Officer Statement (COS) at 3; see Comments at 3. The resulting acquisition was conducted pursuant to Federal Acquisition Regulation (FAR) § 8.405-2, which governs ordering procedures under FSS contracts for services

requiring a statement of work. The RFQ was issued on June 19, 2014, with a July 2 closing date for receipt of quotations. RFQ at 1.

The RFQ was not publicized on the Federal Business Opportunities (FedBizOpps) or the General Services Administration e-Buy websites. Rather, the agency sent the RFQ to 14 vendors holding contracts under FSS schedule No. 736, Temporary Administrative and Professional staffing. COS at 1. The agency contract specialist advises that the agency “randomly selected” fourteen vendors that the agency found met its requirements. Statement of Contract Specialist, Jan. 7, 2015. The protester, which holds an FSS contract under schedule 736, was not sent an RFQ.

The VA received six timely quotations. COS at 1. After evaluation of quotations, Alpha Services was determined to be the lowest-priced (\$393,000), technically acceptable vendor, resulting in an order being issued to Alpha Services on August 12. COS at 1; see Agency Report (AR), Exh. 8, LPTA Award Determination; AR, Exh. 7, Notice of Award to Awardee. The award was not publicized on FedBizOpps, but instead was posted on the Federal Procurement Data System (FPDS) website. AR, Tab 10, FPDS Posting. This protest was filed on October 10 after TPS learned of the new order from Alpha Services’ employees.

DISCUSSION

TPS asserts that, as it was the incumbent for this requirement, the agency acted improperly in not furnishing it a copy of the solicitation. As noted by the protester, section 863 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, 122 Stat. 4356, 4547-48 (2008), mandated the issuance of regulations in the FAR “to require enhanced competition in the purchase of property and services by all executive agencies pursuant to multiple award contracts.” Id. In addition, while the statute permits notice to fewer than all contract holders under multiple award contracts, it requires that such notice be “provided to as many contractors as practicable.” Id. at § 863(b)(3)(A).

As relevant here, the FAR was amended pursuant to the Act to provide that, in the case as here of a proposed FSS order for services exceeding the simplified acquisition threshold:

(iii) The ordering activity contracting officer shall--

(A) Post the RFQ on e-Buy to afford all schedule contractors offering the required services under the appropriate multiple-award schedule(s) an opportunity to submit a quote; or

(B) Provide the RFQ to as many schedule contractors as practicable, consistent with market research appropriate to the circumstances, to reasonably ensure that quotes will be

received from at least three contractors that can fulfill the requirements. When fewer than three quotes are received from schedule contractors that can fulfill the requirements, the contracting officer shall prepare a written determination to explain that no additional contractors capable of fulfilling the requirements could be identified despite reasonable efforts to do so. The determination must clearly explain efforts made to obtain quotes from at least three schedule contractors.

FAR § 8.405-2(c)(3)(iii); see 76 Fed. Reg. 14548, 14550, 14553 (Mar. 16, 2011). TPS argues that, given the Act's emphasis on enhancing competition for the award of orders placed under multiple-award contracts, the VA "had an affirmative duty under procurement law and regulation to solicit an offer from TPS *unless* the agency could establish that doing so was somehow not practicable." Comments at 10 (emphasis in original).

Our Office, however, has previously rejected the position that agencies are required to solicit the incumbent FSS contractor. See Allmond & Co., B-298946, Jan. 9, 2007, 2007 CPD ¶ 8 at 2 (the applicable statute and regulations simply do not require an agency to solicit the incumbent FSS contractor); Lockmasters Security Institute, Inc., B-299456, May 21, 2007, 2007 CPD ¶ 105 at 3 (under the FSS, a vendor has no legal expectation or entitlement to be one of those vendors solicited merely because it was the incumbent). Although, as noted by the protester, these cases predate the change made in the FAR pursuant to the Act, resulting in the current FAR § 8.405-2(c)(3)(iii) quoted above, TPS points to nothing in the statute, the legislative history, or in the implementing regulations, nor are we aware of anything, which specifically mandates soliciting the incumbent FSS contractor. Thus, we are aware of no violation of procurement law or regulation to be found solely from an agency's decision not to solicit its incumbent FSS contractor.

In addition, TPS's contention, in essence, is that for those situations where an agency is not electing to post an RFQ on e-Buy (FAR § 8.405-2(c)(3)(iii)(A)), providing the RFQ to as many schedule contractors as "practicable" should translate to a requirement that the incumbent schedule contractor must be solicited. We disagree. The word "practicable" in the regulation is followed by an explanatory clause. Specifically, an agency that elects not to post on e-Buy its FSS solicitation (valued above the simplified acquisition threshold) is required to solicit "as many schedule contractors as practicable, consistent with market research appropriate to the circumstances, to reasonably ensure that quotes will be received from at least three contractors that can fulfill the requirements." FAR § 8.405-2(c)(3)(iii)(B) (emphasis added). Here, the record shows that the agency solicited 14 vendors and received 6 quotations. Accordingly, the agency met the competition requirements of the regulation.

Finally, the protester points out, consistent with the record, that the VA's failure to solicit TPS was deliberate, based on performance issues on the incumbent contract. Comments at 2, 10, 18; see Statement of Contract Specialist, Jan. 7, 2015; AR at 13. While we find troubling, in the circumstances of this protest, the agency's decision to deliberately not solicit its incumbent for these services, we are not prepared to conclude that the agency acted in bad faith here.¹ See, e.g., Career Innovations, LLC, B-404377.4, May 24, 2011, 2011 CPD ¶ 111 at 7-9 (government officials are presumed to act in good faith, and a protester's contention that procurement officials are motivated by bias or bad faith must be supported by convincing proof). Here, the VA and TPS had been involved in an ongoing dispute with regard to staffing and payments under TPS's contract, resulting from the fact that, for three months, TPS had performed with fewer personnel than required under the contract. See AR at 13; COS at 3; Comments at 22-23; Hoxworth Declaration. Given these circumstances, we find no bad faith in the agency's action in not soliciting TPS for the new order.

The protest is denied.

Susan A. Poling
General Counsel

¹ For the record, we note that, had the incumbent been aware of, and requested, a copy of the RFQ, the agency would have been required to provide it. FAR § 8.405-2(c)(4) ("The ordering agency shall provide a copy of the RFQ (including the statement of work and the evaluation criteria) to any schedule contractor who requests a copy of it").