



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Outdoor Venture Corporation; Applied Companies

File: B-299675; B-299676

Date: July 19, 2007

David J. Taylor, Esq., William J. Spriggs, Esq., and Stephanie J. Dawson, Esq., Spriggs & Hollingsworth, for the protesters.

Jeffrey I. Kessler, Esq., and Glenda J. Collins, Esq., U.S. Army Materiel Command, for the agency.

Linda C. Glass, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contention that a consolidated procurement violates the bundling provisions of the Small Business Act, 15 U.S.C. § 631(j)(3) (2000), is denied where the record shows that all of the requirements covered by the solicitation were already being procured as a single system.

2. Protest that agency's bundling of requirements violated the Competition in Contracting Act of 1984, 10 U.S.C. § 2305(a)(1) (2000), as amended, is denied where the agency has established in the record that its consolidated approach is needed to satisfy its needs, and the protester has not shown that the approach will not provide the benefits claimed, or is unreasonable.

DECISION

Outdoor Venture Corporation and Applied Companies protest the terms of request for proposals No. W31P4Q-07-R-0052, issued by the U.S. Army Aviation and Missile Command anticipating the award of an indefinite-delivery/indefinite-quantity (ID/IQ) task order contract for the Standardized Integrated Command Post System Family of Trailer Mounted Support Systems (SICPS/TMSS) in support of the U.S. Army's Tactical Operations Centers. The protesters argue that the SICPS/TMSS solicitation is improperly bundled and that DHS Systems LLC (DHS), the incumbent, has an unfair competitive advantage in this procurement.

We deny the protest.

BACKGROUND

The RFP, issued on an unrestricted basis on March 16, 2007, contemplates the award of an ID/IQ, fixed-priced contract for medium and large trailer-tent systems for a base period and four additional 1-year ordering periods. The TMSS is described as a turnkey system and is being obtained as a non-developmental item /commercial-off-the shelf solution which is comprised of a controlled-environment tent, an environmental control unit (ECU), and an auxiliary power unit for the ECU and a trailer. RFP § 1.0. The TMSS provides for workspace, power distribution, lighting, heating and cooling, tables, lightweight/integrated flooring, and a common grounding system for the staffs of all battlefield functional areas. Contracting Officer's (CO) Supplemental Statement at 2.

In 2005, the SICPS/TMSS was procured for the Army through a Defense Logistics Agency (DLA) ID/IQ contract awarded to DHS through full and open competition. CO's Statement at 3. The Army states that it purchased all its requirements for the SICPS/TMSS from the DLA contract which were delivered fully integrated. While the DLA ID/IQ contract is still available to fulfill additional SICPS/TMSS requirements, the Army has decided to establish a separate contract for the system since the agency's projected requirements exceed the maximum ordering quantity under the DLA contract. Id. at 2.

The protesters argue that this solicitation violates the Federal Acquisition Regulation (FAR) and the Small Business Act by improperly bundling requirements previously awarded to small businesses; that the solicitation is unduly restrictive; and that DHS, the incumbent, has an unfair competitive advantage. The protesters state that they cannot submit a proposal under the solicitation because they are not able to provide all of the required products. Outdoor can provide the tents and Applied can provide the ECUs.

BUNDLING

The protesters first contend that this requirement violates the bundling restrictions under the Small Business Act, and that the agency failed to conduct appropriate market research to show that the bundling was necessary; failed to reasonably justify the bundling of requirements; and failed to timely notify the Small Business Administration (SBA) of its decision to bundle the requirements and provide a statement regarding its justification for bundling.

In response, the agency explains that the TMSS routinely has been purchased as a packaged system under the earlier DLA contract. The agency further explains that the TMSS components cannot be purchased separately in a cost effective manner but rather, must be procured as an integrated package. The agency states that its market research consisted of reviewing vendors' literature, pamphlets, specifications, and face-to-face briefings/meetings, as well as observing and discussing vendors'

evolving capabilities and products at exhibitions, symposiums, and trade shows. The agency also argues that any challenge to bundling in this solicitation is untimely.¹

The Small Business Reauthorization Act of 1997, Pub. L. No. 105-135 (1997), 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. § 6319 (j)(3) (2000). Bundling, for purposes of the Act means “consolidating 2 or more requirements for goods or services previously provided or performed under separate smaller contracts that is likely to be unsuitable for award to a small-business concern.” 15 U.S.C. § 632(o)(2); see FAR § 2.101. “Separate smaller contract . . . means 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.

Our review of the record here shows that the SICPS/TMSS is currently being purchased as a packaged system under a DLA contract with DHS, and that the system has not been provided under separate smaller contracts. Further, the record shows that the SBA and the Small and Disadvantaged Business Utilization Specialist agreed that this requirement was not suitable for award to 1 or more small business concerns. Accordingly there is no “consolidation” of two or more requirements in this procurement as contemplated by the Small Business Act and the Small Business Act requirements pertaining to bundling are therefore not applicable here.

The protesters also argue that this solicitation represents an improperly bundled or total package procurement in violation of the Competition in Contracting Act of 1984 (CICA). 10 U.S.C. § 2305 (a)(1) (2000). The protesters maintain that the Army has consolidated these requirements for no reason other than convenience, which, the protesters argue is not a sufficient rationale for bundling. The reach of the restrictions against total package or bundled procurements in CICA is broader than the reach of restrictions against bundling under the Small Business Act, Phoenix Scientific Corp., B-286817, Feb. 22, 2001, 2001 CPD ¶ 24 at 9-10. Specifically, CICA generally requires that solicitations include specifications which permit full and open competition and contain restrictive provisions and conditions only to the extent

¹ We disagree with the agency’s contention that the bundling issue should be dismissed as untimely because it was raised more than 10 days after the protesters knew, from a January 9, 2007 synopsis, that this requirement was being pursued as a unified system. This issue involves a solicitation impropriety, that is, the allegation that the solicitation improperly and unnecessarily bundled separate and distinct requirements. Protests based upon alleged improprieties in a solicitation which are apparent prior to the closing time for receipt of proposals must be filed prior to the closing time. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2007). Here, the protests were filed on April 13 and 16 prior to the amended closing date of May 1; therefore this issue was timely raised.

necessary to satisfy the needs of the agency. See 10 U.S.C. §§ 2305(a)(1)(A), (B). Because procurements conducted on a bundled or total package basis can restrict competition, we will sustain a challenge to the use of such an approach where it is not necessary to satisfy the agency's needs. Better Serv., B-265751.2, Jan. 18, 1996, 96-1 CPD ¶ 90 at 2. The determination of a contracting agency's needs and the best method for accommodating them are matters primarily within the agency's discretion. Specialty Diving, Inc., B-285939, Oct. 16, 2000, 2000 CPD ¶ 169 at 3. Of particular relevance here, where a requirement relates to national defense or human safety, an agency has discretion to define the solicitation requirements to achieve not just reasonable results, but the highest possible reliability and effectiveness. Tucson Mobilephone, Inc., B-250389, Jan. 29, 1993, 93-1 CPD ¶ 79 at 5, aff'd, B-250389.2, June 21, 1993, 93-1 CPD ¶ 472.

The Army states that the SICPS/TMSS is a mission critical system. CO's Rebuttal Comments at 1- 3. It is currently fielded for troops in Iraq and Afghanistan to provide a quick and easy way to establish temporary battlefield communication centers. Military commanders use these centers to issue instructions and warn soldiers of approaching dangers. Moreover, the agency explains that untested, unsafe, or incompatible systems could cause delays and risks. As a result, the Army contends it needs to be certain these items will perform as a system, rather than as a collection of separate parts.

While the protesters disagree with the Army's need for the proven integration and compatibility of these systems, we think the agency has met its burden of showing a reasonable need for buying these items as a total system. We also see nothing unreasonable in the Army's rejection of the protesters' contention that the agency could enter into a separate integration contract. The Army responds that having a separate contract for an additional company to integrate all the separate components would not be time or cost effective, and that the Army would run the risk of not being able to procure enough systems in the event of a surge requirement.

RESTRICTIVE SPECIFICATIONS

The protesters argue that the solicitation is unduly restrictive of competition because it (1) unnecessarily consolidates these requirements; (2) does not provide enough information to permit potential offerors to submit a responsive offer; and (3) does not provide enough time for potential awardees to meet the government's requirements for delivery of the first shipment.

With respect to the protesters' argument that the "bundling" of this requirement was unduly restrictive of competition, as explained above, the agency's determination to procure the requirement as a total system does not violate either the Small Business Act, or the Competition in Contracting Act restrictions. Regarding the argument that the solicitation did not provide enough information to permit potential offerors to submit responsive offers, the protesters now acknowledge that additional

information provided by the agency through amendments to the solicitation has addressed this concern.² Protesters' Comments at 16.

Further, concerning the protesters' argument that the time allowed for the submission of proposals and the delivery schedule are such that only DHS, the incumbent, can meet these deadlines, we note first that contracting agencies are required by statute to allow a minimum 30-day response period for all but a limited number of procurements. See 15 U.S.C. § 637(e)(3)(B). Here, since more than 30 days response time was provided, we have no basis to object to the procurement on this basis alone. American Contract Servs., Inc., B-231903, Nov. 2, 1988, 88-2 CPD ¶ 432 at 4. Since the proposal preparation time is not per se improper, we look to whether the preparation time is otherwise unreasonable, or precludes full and open competition. See Control Data Corp., B-235737, Oct. 4, 1989, 89-2 CPD ¶ 304 at 4.

This procurement was for non-developmental commercial items and was initially synopsisized on January 9, 2007. The Army received [DELETED] offers in response to the solicitation. In addition, the record shows that the protesters' request for an extension of time to submit a proposal due to the Easter holiday was not granted by the agency, and that the protester never subsequently requested any additional extension. We see nothing in this record that leads us to conclude that the response time in the solicitation was in any way unreasonable, or that it resulted in a failure to meet the CICA requirement for full and open competition.

Turning to the related contention that the delivery schedule essentially guarantees award to DHS and precludes small businesses from competing, we again disagree. When a protester challenges a solicitation's delivery schedule as unduly restrictive of competition, the burden initially is on the procuring agency to establish prima facie support for its contention that the restriction is reasonably related to meet its minimum needs. Once the agency establishes support for the challenged solicitation terms, the burden shifts to the protester to show that they are clearly unreasonable. Microwave Radio Corp., B-227962, Sept. 21, 1987, 87-2 CPD ¶ 288 at 2.

The agency responds that since the SICPS/TMSS is needed in the field as soon as possible and since the system is comprised of commercial items, it was determined that a delivery requirement of 90 days after award was reasonable and not overly restrictive. Further, the agency points out that it received [DELETED] proposals that did not take exception to the 90-day delivery schedule. In its response to the agency's report, the protesters merely repeat their argument that the 90-day delivery schedule can only be met by DHS, the incumbent, and notes that the 90-day delivery

² Although in subsequent submissions, the protesters provided specific examples of alleged inadequate specifications, the record shows that the solicitation, as amended, adequately described the agency's requirement.

schedule is not necessary since the agency is capable of purchasing the system through the DLA contract.

We find that the agency provided sufficient support for the short delivery schedule, and that the protesters have not met their burden of showing that the agency's requirements are unreasonable.

Unfair Competitive Advantage

The protesters argue that DHS, the incumbent, has an unfair competitive advantage from its involvement in developing the TMSS system. The protesters assert that only DHS possesses access to certain information pertinent to the solicitation, which it gained through its work and relationship with the Army under the current contract, and contend that the firm was involved in the Army's preparation of the contract specifications.

Given our conclusions on the other issues raised by these protesters, we think neither is an interested party to pursue this complaint at this juncture. Under the bid protest provisions of the CICA, 31 U.S.C. §§ 3551-3556 (2000 & Supp. IV 2004), only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective supplier whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a). Determining whether a party is interested involves consideration of a variety of factors, including the nature of the issues raised, the benefit of relief sought by the protester, and the party's status in relation to the procurement. Four Winds Servs., Inc., B-280714, Aug. 28, 1998, 98-2 CPD ¶ 57 at 2. As explained above, we have concluded that the solicitation was not improperly bundled, that the specifications were not restrictive and that the proposal due date and delivery schedule were reasonable. Given that the protesters have specifically stated that they are not able to submit a proposal for all of the work covered by this solicitation--and are also not able to team with other potential suppliers to provide the work, given the time restraints for submitting offers and beginning deliveries--the protesters are not interested parties to challenge any unfair competitive advantage held, in their view, by DHS. Protest at 3 and 4.

The protest is denied.

Gary L. Kepplinger
General Counsel