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Decision

Matter of: North Shore Medical Labs, Inc.; Advanced BioMedical Laboratories, LLC

File: B-311070; B-311070.2

Date: April 21, 2008

Adam W. Downs, Esq., Welby, Brady & Greenblatt, LLP, for North Shore Medical Labs, Inc.; and Pamela J. Mazza, Esq., Philip M. Dearborn, Esq., Gunjan R. Talati, Esq., Desiree Lomer-Clarke, Esq., and Isaias Alba IV, Esq., PilieroMazza PLLC, for Advanced BioMedical Laboratories, LLC, the protesters.
Capt. Charles D. Halverson, Department of the Army, for the agency.
Katherine I. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests against cancellation of solicitation are denied where agency reasonably determined that the solicitation did not adequately set forth the agency's needs and that enhanced competition could result from a change in the requirements.

DECISION

North Shore Medical Labs, Inc. (NSML) and Advanced Biomedical Laboratories, LLC, (ABML) protests the cancellation of request for proposals (RFP) No. W81K04-07-R-0019, a small business set-aside issued by the Department of the Army, for laboratory services. The protesters contend that the agency lacks a reasonable basis for the cancellation and that the agency should instead have amended the solicitation, held discussions and requested revised proposals.

We deny the protests.

This RFP is for a contractor to provide testing services for the detection of antibodies that work against the Human Immunodeficiency Virus (HIV) for various military organizations. These services have been provided by a large business since 1997. Based upon market research, the agency decided that this requirement could be set aside for small business concerns. A solicitation for these services, set aside for small business concerns, was issued, but was ultimately cancelled on March 27,

2007.¹ This RFP, also set aside for small business concerns, was issued on August 18.

The RFP provided for the award of a indefinite-delivery/indefinite-quantity (ID/IQ) contract, under which fixed-price task orders would be issued to the awardee for a base 1-year period with four 1-year options. The statement of work (SOW) allowed for a 90-day transition period during which the awardee and the incumbent would phase-in/phase-out respectively. RFP at 24.

Determination of the most advantageous proposal was to be based on six evaluation factors: (1) technical capability, (2) quality control, (3) management capability and experience, (4) past and present performance, (5) financial capability, and (6) price/cost. Factors (1), (3) and (5) were equal in importance and their combined weight was greater than the combined weight of the equally weighted factors (2) and (4). The combined weight of the non-price/cost factors was more important than price/cost. The first three factors each had four subfactors. RFP at 164. As relevant to this protest, subfactor (1B), standard operating procedures (SOP) manual, required the offeror to “provide a comprehensive SOP manual that specifically delineate[s] the contractor’s plan of action for providing services required by this contract, which establishes and explains its methodology for how it proposes to accomplish each function of the SOW requirements,” and subfactor (2B), inspection techniques, required the offeror to “provide a description of its current quality control plan and describe what measures and controls will be taken to ensure that quality control inspections are met.” RFP at 155-56. The RFP advised that the adjectival ratings of “excellent,” “good,” “satisfactory,” “marginal,” and “unsatisfactory” would be used in the evaluation of the technical proposals. RFP at 162-63. The RFP further provided that to receive consideration for award, a rating of satisfactory must be achieved in all factors, and that in order for a factor to be considered satisfactory or above, all subfactors within the factor must be rated at least satisfactory or above. RFP at 162.

The agency received four proposals by the September 28 due date for the receipt of proposals. The agency only evaluated three of the proposals because one of the proposals did not comply with the proposal submission instructions. Agency Report (AR) at 6. The source selection evaluation board (SSEB)² convened and during the course of its deliberations determined that all three proposals were unsatisfactory because they provided insufficient information to indicate that these offerors could satisfy the agency’s requirements.

¹ A protest to our Office of this set-aside decision was denied in ViroMed Labs., B-298931, Dec. 20, 2006, 2006 CPD ¶ 4.

² Each member of the SSEB was affiliated with a directorate that required the testing services outlined in the solicitation.

The SSEB also determined that the solicitation was inadequate, in that it did not request the documentation necessary for the SSEB to properly determine if the offerors met the agency's needs. Specifically with regard to subfactor (1B), SOP manual, it appeared, based upon the proposals submitted, that the offerors used the term "SOP" in a different manner from the Army, and that the SOPs that the offerors submitted did not have enough information for the SSEB to properly assess the potential offeror's technical capabilities for satisfying the agency's requirements.³ With regard to subfactor (2B), inspection techniques, the evaluation disclosed that this subfactor did not include all of the elements that were necessary to ensure that quality control inspections could be met. Additionally, the evaluators noted that some offerors did not have adequate personnel or adequate space to perform the services, as required by the solicitation, if only 90 days were allotted for transition, and that 120 to 180 days would be required to ensure the agency's requirements could be satisfied.

The agency explored whether it was feasible or proper to amend the RFP to address these concerns, or whether it should cancel the RFP and resolicit. The contracting officer determined that because no proposals were satisfactory, in part because of the deficient RFP, and because "there was a significant probability that more offerors would have responded to the solicitation had they known that the transition period would be 120 days or 180 days rather than 90 days," the RFP would have to be substantially changed to address these concerns, and "more offerors will submit proposals to the Army's subsequent Solicitation and that the current offerors will be in a better position to submit proposals that are technically acceptable." Contracting Officer's Statement at 3-4.

On January 4, 2008, the agency issued amendment 8 to the RFP, which stated "[t]his solicitation has been cancelled in its entirety due to changes in the requirement." NSML then protested to our Office, and ABML filed an agency-level protest, and after the agency denied that protest, protested to our Office.

Federal Acquisition Regulation (FAR) § 15.305(b) provides, with regard to competitive negotiated acquisitions, "[t]he source selection authority may reject all proposals received in response to a solicitation, if doing so is in the best interest of the Government." We have consistently recognized that an agency has broad authority to decide whether to cancel a solicitation issued under competitive negotiated procedures, and to do so need only establish a reasonable basis. We have

³ For example, according to the agency, subfactor 1(B) did not require offerors to provide adequate documentation to demonstrate a full understanding of how the offerors would report Enzyme Linked Immunosorbent Assay test results to the Government HIV Diagnostic and Reference Laboratory and/or a plan of action for performing services under this requirement. Contracting Officer's Statement at 2.

recognized that a reasonable basis for cancellation exists and cancellation is appropriate when a solicitation does not accurately reflect the agency's requirements, particularly where cancellation of the solicitation and the issuance of a revised solicitation would present the potential for increased competition. If a reasonable basis exists to cancel a solicitation, an agency may cancel the solicitation regardless of when the information first surfaces or should have been known, even if the solicitation is not canceled until after proposals have been submitted and evaluated, or even if discovered during the course of a protest. SEI Group, Inc., B-299108, Feb. 6, 2007, 2007 CPD ¶ 35 at 3; VSE Corp., B-290452.2, Apr. 11, 2005, 2005 CPD ¶ 111 at 6.

Here, the contracting officer's decision to cancel this RFP was reasonable. First, the agency determined that the solicitation did not adequately meet its needs. As explained above, the SSEB determined that the solicitation had major omissions and ambiguities that would require substantial changes to correct. Specifically regarding subfactor (1B), because of omissions in the RFP, the SOPs that offerors submitted did not have enough information for the SSEB to properly assess the potential offerors' technical capabilities. Subfactor (2B) was found not to encompass all elements that were necessary to ensure that quality control inspections could be met. Where, as here, a solicitation no longer accurately reflects an agency's requirements, and resolicitation could result in increased competition, cancellation of the solicitation is appropriate. See Global Solutions Network, Inc., B-289342.4, Mar. 26, 2002, 2002 CPD ¶ 64 at 3.

Moreover, the contracting officer also determined that it did not appear that some of the present offerors had the capability to satisfy the 90-day transition requirement, and the agency reasonably believed that an increase in the period for the new awardee to transition to providing the required services from 90 days to 120 days, or possibly 180 days, could potentially result in increased competition. An agency may cancel a solicitation where it materially overstates the agency's requirements and there is a potential enhanced competition if the requirements are relaxed. Labatt Food Serv., Inc., B-259900, May 3, 1995, 95-1 CPD ¶ 229 at 3-4. Here, while the protesters assert that there is no likelihood of additional competition, the record shows that five small business firms attended the pre-proposal conference under the predecessor solicitation, yet only three proposals were ultimately evaluated.⁴ Thus, based on the record, the contracting officer had a reasonable belief that more small businesses could submit satisfactory proposals if the requirement was revised to include a longer transition period.

⁴ As stated above, one firm did not submit a proposal and another firm submitted a proposal, which was not evaluated by the agency because it did not comply with the proposal submission instructions.

Under the circumstances, particularly given that none of the proposals received were satisfactory, the agency acted reasonably in canceling rather than amending the RFP to make material changes in the solicitation requirements and in order to possibly obtain more competition.

The protesters argue that the agency cancellation was a pretext to avoid further competition among small business offerors and to continue the contract with the incumbent, a large business. The record does not support the protesters' speculation. Indeed, the contracting officer has clearly expressed her intention to issue the new solicitation as a small business set-aside. Supp. AR, attach. 1, Declaration of Contracting Officer (Mar. 26, 2008). Until the contracting officer issues a new solicitation or extends the incumbent's contract, any assertion that the Army is not going to set this procurement aside for small businesses is premature.⁵ Ystueta Inc., B-296628.4, Feb. 27, 2006, 2006 CPD ¶ 46 at 2.

The protests are denied.

Gary L. Kepplinger
General Counsel

⁵ The protesters cite VSE Corp.; Johnson Controls World Servs., Inc., B-290542.3 et al., May 23, 2005, 2005 CPD ¶ 103, and New Breed Leasing Corp., B-274201, B-274202, Nov. 26, 1996, 96-2 CPD ¶ 202, for the proposition that the cancellation was improper because it was merely a pretext to keep the incumbent, a large business, performing the services, or was the result of the agency's failure to engage in advance planning. We disagree with the protesters' application of these cases to this protest. Unlike those cases, the protesters here have not specifically challenged the sole source extension of the incumbent contract, but only the cancellation of this solicitation.