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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Solutions Lucid Group, LLC

File: B-400967

Date: April 2, 2009

Lyle Glover for the protester.

Elan Taylor, Esq., Defense Logistics Agency, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's decision not to solicit a quotation from the protester is sustained where the record shows that the agency knew that the protester was interested in competing and did not have a reasonable basis to question the protester's ability to perform.

DECISION

Solutions Lucid Group, LLC (SLG) of Oklahoma City, Oklahoma protests the issuance of a purchase order to Coordinated Defense Supply Systems of Clinton Township, Michigan under request for quotations (RFQ) No. SPM4A6-09-Q-0599, issued by the Defense Supply Center Richmond (DSCR) for 61,940 fluorescent lamp starters. The protester argues that the agency unreasonably excluded it from the competition for the order.

We sustain the protest.

BACKGROUND

The agency explains that the domestic manufacturing base for the fluorescent lamp starters, which are used on the Eagle F-15 aircraft to keep the lights inside the plane from flickering and distracting the pilot, has eroded in recent years; as a result, it has had difficulty in keeping up with the demand of the military services for the item, which is approximately 150,000 starters annually. The agency notes that the order at issue here was one of seven orders placed since December 2007. Three of the orders were issued to dealers of surplus material for very small quantities of the starters (500 in one case, 287 in another, and 190 in the third). A fourth purchase order, for

54,320 units, was issued to the protester on December 28, 2007; the order was cancelled on April 21, 2008, however, after the agency determined that the product that SLG had offered was manufactured in China and thus, contrary to the representation in SLG's quotation, was not a domestic end item. Similarly, a fifth purchase order, for 38,568 starters, was issued to another vendor, Phoenix Trading Company, on September 12, 2008, but was cancelled on October 8 after the agency determined that, despite the solicitation being issued as a small business set-aside, the vendor had quoted on a non-domestic item.¹

A sixth solicitation, an unrestricted request for proposals (RFP) contemplating the award of an indefinite-quantity contract for a base and 4 option years, was issued on February 27, 2008; the estimated annual quantity to be ordered under the contract was 230,892. The solicitation was amended three times, with a final closing date of December 4, 2008 (i.e., after issuance of the order here). The agency awarded a contract to Blond Lighting Fixture Supply Company on December 23 and issued its first order under the contract (for 195,040 starters) on January 12, 2009.²

The RFQ at issue in this protest was issued shortly after cancellation of the order issued to Phoenix in September 2008. The agency explains that its automated solicitation system generated an RFQ (No. SPM4A6-09-T-A164) on October 8, requesting a quantity of 61,932 starters, with a closing date of October 22. The acquisition specialist removed this solicitation from the automated system at 1 p.m. on October 8, however, because, according to the agency, she thought that she would be able to issue an order more quickly by processing the solicitation manually. One vendor, Remier Distributing, Inc., submitted a quotation through the automated system before the RFQ was removed from it.

After removing RFQ No. SPM4A6-09-T-A164 from the automated system, the acquisition specialist issued RFQ No. SPM4A6-09-Q-0599, the RFQ at issue here, which also solicited quotations for 61,932 starters. The solicitation stated that it was an urgent and compelling purchase and requested responses by October 21 (i.e., 1 day earlier than responses under the automatically-generated RFQ had been due). The RFQ identified three manufacturer part numbers in the item description: SLI Lighting Products Inc. P/N 31649, Bryant Electric P/N FS20, and Hubbell Inc. Wiring Device Div. P/N FS 20A.³ The agency reports that the acquisition specialist researched possible vendors to identify sources that would be able to meet the

¹ Where a solicitation is set aside for competition by small businesses, a small business submitting an offer in its own name agrees to furnish, in performing the contract, only end items manufactured or produced by small business concerns in the United States. Federal Acquisition Regulation (FAR) § 52.219-6(c).

² SLG has also protested this award to our Office (B-401128).

³ The same three part numbers had been identified in the automated solicitation.

agency's needs quickly. She identified one firm, Coordinated Defense, as a possible source because it had submitted a quotation in response to the RFQ that had resulted in issuance of the order to Phoenix. She also contacted Hubbell (one of the manufacturers whose part number was listed in the RFP), which directed her to its authorized dealer, Graybar. Despite the fact that, like Coordinated Defense, the protester had submitted a quotation in response to the RFQ that resulted in the order to Phoenix, the contracting officer did not contact it.

The agency received quotations from Graybar and Coordinated Defense in addition to the quotation that it had received under the automatically-generated solicitation from Remier. Graybar offered a product manufactured domestically by Hubbell. Coordinated Defense offered the product of SLI Lighting Products, Inc., which, according to the agency, is manufactured in Costa Rica. The agency issued a purchase order for 61,940 starters to Coordinated Defense on November 12.⁴ After filing an agency-level protest that was dismissed on December 19, SLG protested to our Office on December 29.

DISCUSSION

In response to SLG's protest of the agency's failure to solicit it, DSCR argues that it solicited competition to the extent required here. The agency maintains that because the acquisition at issue was conducted using simplified acquisition procedures, it was required to seek competition to the maximum extent practicable only, which it achieved by obtaining quotations from three vendors. The agency explains that it did not solicit SLG because the protester had never performed on a contract for the item and its previous contract history for the item was unfavorable. In the latter connection, the agency noted that SLG's only purchase order for the item had been cancelled because the protester had misrepresented the foreign product it was providing as a domestic end product. The agency further noted that SLG was not an identified manufacturing source for the item and that it had not submitted a proposal in response to the RFP for the multi-year contract.

In using simplified acquisition procedures, agencies are required to "promote competition to the maximum extent practicable." 10 U.S.C. § 2304(g)(3) (2006); FAR § 13.104. While this standard generally may be met through the solicitation of at least three sources, see FAR § 13.104(b); Omni Elevator Co., B-246393, Mar. 6, 1992, 92-1 CPD ¶ 264 at 2, an agency may not deliberately fail to solicit a responsible source that has expressed interest in competing without a reasonable basis for questioning the source's ability to meet the agency's needs. See Military Agency

⁴ The number of starters ordered (61,940) is slightly greater than the number for which quotations were solicited (61,932); while the agency has not furnished an explanation for the discrepancy, it does not appear to be of significance.

Servs. Pty., Ltd., B-290414 et al., Aug. 1, 2002, 2002 CPD ¶ 130 at 7-8; Bosco Contracting, Inc., B-270366, Mar. 4, 1996, 96-1 CPD ¶ 140 at 3-4.

We do not think that the agency has demonstrated that the acquisition specialist had a reasonable basis for failing to solicit the protester, a vendor she clearly knew to be interested in competing for orders for the item.⁵ The agency cites the protester's lack of prior performance in furnishing the item as a basis for the acquisition specialist's decision not to solicit the firm here, yet it appears from the record that the successful vendor likewise had not previously furnished the item; thus, we do not think that this provided a reasonable basis for distinguishing between the two vendors.⁶ The agency also cites the fact that the protester's single purchase order for the item was cancelled after it was determined that, contrary to the representation in its quotation, the protester did not intend to furnish a domestic end item. We fail to see how the protester's noncompliance with its obligation to furnish a domestic end item under its prior order furnishes a basis for questioning its ability to perform under this solicitation, however. The agency has not suggested that the firm is nonresponsible or otherwise ineligible to receive a contract. Further, the RFQ here is not set aside for small business; thus, FAR § 52.219-6(c), requiring small business offerors to furnish only domestic end items, is inapplicable, and the agency has not indicated any other basis for rejecting all non-domestic end items.

The fact that SLG was not listed as a manufacturing source of supply similarly fails to provide a reasonable basis for the agency's failure to solicit the protester. The RFQ did not require vendors to furnish items that they themselves had manufactured; moreover, neither the successful vendor under this RFQ nor the awardee under the multi-year RFP was listed as a manufacturing source in the solicitations that resulted in purchases from those firms. Also, the protester's failure to submit an offer in response to the multi-year RFP does not constitute a reasonable basis not to solicit it under the RFQ here. The RFP's closing date was approximately a month after the order under protest was issued, and thus the acquisition specialist

⁵ The acquisition specialist was clearly on notice of the protester's interest in competing here based on its participation in the two preceding related RFQs, *i.e.*, the RFQ resulting in the subsequently cancelled order to SLG and the RFQ resulting in the order to Phoenix. In addition, the protester submitted a proposal in response to an RFP for 285,595 units that was issued in late 2007 and cancelled in October 2008.

⁶ The protester alleged in its initial protest that Coordinated Defense had not previously furnished items in this Federal Supply Class, and the agency did not rebut the allegation in its report. In addition, the acquisition specialist's explanation of her decision to contact Coordinated Defense makes no mention of that firm having previously furnished the lamp starters; her explanation was that Coordinated Defense had furnished a quotation in response to the RFQ resulting in the order to Phoenix.

could not have been certain at the time she solicited quotations under this RFQ that the protester would not submit an offer in response to the RFP. Moreover, the RFP was for an estimated annual quantity approximately four times as large as the quantity solicited here, and thus provided a far less accurate gauge for measuring the protester's interest in competing for the quantity here than the prior RFQs.

In conclusion, we fail to see a reasonable basis in the record for the acquisition specialist's decision not to solicit a quotation from the protester, which she knew to be interested in competing to supply the fluorescent lamp starters and whose ability to furnish the items she did not have a reasonable basis to doubt. Accordingly, we sustain the protest.

The agency has reported to us that it has taken delivery of approximately half of the items ordered from Coordinated Defense under the RFQ here; the contractor is delinquent in delivering the other half. The agency states that, due to persistent problems with locating sources to manufacture the item, it currently is considering other ways to meet its needs, such as canceling the RFQ here and procuring an alternate item. We do not think that under the circumstances here it is appropriate to recommend canceling the remainder of the order. However, we recommend that if the agency decides to cancel the RFQ and resolicit, the agency at a minimum should consider SLG's viability as a source under the new procurement. We also recommend that the agency reimburse the protester for its cost of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2008). The protester's certified claim for costs, detailing the time spent and cost incurred, must be submitted to the agency within 60 days after receiving this decision.

The protest is sustained.

Gary L. Kepplinger
General Counsel