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Decision

Matter of: Point Blank Enterprises, Inc. d/b/a Protective Products Enterprises

File: B-409940.3

Date: November 26, 2014

Paul A. Debolt, Esq., and James Y. Boland, Esq., Venable LLP, for the protester. Debra J. Talley, Esq., and David H. Scott, Esq., Department of the Army; and Sam Q. Le, Esq., Small Business Administration, for the agencies. Matthew T. Crosby, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Allegation that agency unreasonably cancelled solicitation following protest against withdrawal of solicitation's small business set-aside status is denied where record reflects that market research conducted after cancellation showed initial market research underpinning set-aside withdrawal decision to be incomplete.
 2. Allegation that agency's reissuance of solicitation as small business set-aside would be improper is dismissed where record reflects that agency has not yet made set-aside determination or reissued solicitation.
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DECISION

Point Blank Enterprises, Inc. d/b/a Protective Products Enterprises (PBE), of Pompano Beach, Florida, protests the cancellation of request for proposals (RFP) No. W91CRB-14-R-0015 issued by the Department of the Army, Army Contracting Command, for ultra low visibility concealable body armor systems. PBE asserts that the agency unreasonably decided to cancel the solicitation as part of corrective action taken in response to a prior protest challenging the agency's determination to remove the solicitation's small business set-aside provision. PBE also asserts that it would be improper for the agency to reissue the solicitation as a small business set-aside.

We deny the protest in part and dismiss it in part.

BACKGROUND

The agency originally issued the solicitation on April 11, 2014, as a total small business set-aside. RFP at 1, 33. The solicitation contemplated the award of up to three fixed-price, indefinite-delivery/indefinite-quantity contracts with ordering periods of three years. Id. at 1.

Because the solicitation was issued as a total small business set-aside, it incorporated the clauses at Federal Acquisition Regulation §§ 52.219-6, Notice of Total Small Business Set-Aside (Nov. 2011), and 52.219-14, Limitations on Subcontracting (Nov. 2011). RFP at 33. The solicitation also incorporated a statement of work, which described the body armor system being procured as consisting of three components: an outer carrier; hard armor inserts; and soft armor inserts. Id. at 8.

On May 9, the agency received three questions from industry, asking whether purchasing the hard armor component from an other-than small business would violate the Limitations on Subcontracting clause. Agency Report (AR), Tab 9, RFP Questions and Answers, at 3-4. Because of these questions, an agency assistant product manager for soldier protective equipment analyzed the separate costs of the three components of the system. AR, Tab 11b, Updated Independent Government Cost Estimate, ¶¶ 3. This analysis showed that the hard armor component represented approximately 75 percent of the system's cost. Id. ¶ 5.

The agency's market research showed only one small business as being capable of producing the hard armor component of the system. AR, Tab 11a, Updated Market Research Report, ¶ 5. Based on that, and the finding that the hard armor component represented approximately 75 percent of the system's cost, the contracting officer concluded that only one small business could comply with the Limitations on Subcontracting clause. Tab 11, Withdrawal of Set-Aside Memorandum, ¶¶ 3.b - 3.d. From this, she decided that there was not an expectation of receiving offers from at least two responsible small businesses, and, therefore, the requirement should not be competed as a small business set-aside, but, rather, on an unrestricted basis. Id. ¶¶ 3.e, 4.

On June 5, the agency notified industry of its intent to withdraw the solicitation's set-aside status. AR, Tab 10, Notice of Set-Aside Withdrawal, at 1. On June 16, Atlantic Diving Supply, Inc. d/b/a ADS, Inc. (ADS) filed a protest with our Office challenging the agency's decision to withdraw the solicitation's set-aside status.

On June 19, the agency amended the solicitation to remove the set-aside provisions. RFP, amend. No. 0004, at 1. On June 30, the agency further amended the solicitation by extending its closing date to July 18. RFP, amend. No. 0005, at 1. By that date, PBE, an other-than small business under the solicitation's size standard, submitted a proposal. Protest at 4.

On July 16, the agency filed a report with our Office in response to ADS's protest. The report was filed by an Army headquarters attorney (the "headquarters attorney"). The combined contracting officer's statement and memorandum of law (COS/ML) accompanying the report was signed by a separate Army attorney (the "local attorney") and the contracting officer. AR, Tab 18, ADS Protest COS/ML, at 9.

On July 25, ADS filed comments on the agency report that included supplemental protest claims. AR, Tab 16, ADS Comments, at 6-7. After reviewing the comments, the GAO attorney handling the protest scheduled a conference call to discuss the supplemental agency report. AR, Tab 24, GAO E-Mail to Parties (Aug. 7, 2014), ¶ 1. The call took place on August 8. The headquarters attorney participated in the call for the agency, but the contracting officer and local attorney did not.

During the call, the GAO attorney established an August 20 due date for the supplemental agency report. AR, Tab 23, GAO E-Mail to Parties (Aug. 8, 2014) ¶ 3. He requested that in addition to addressing the supplemental protest claims, the report also address two areas of the record where the agency's decision-making process was unclear. Id. ¶¶ 4-5. Finally, he requested that the agency provide a document that was referenced in the set-aside withdrawal memorandum, but was not included in the agency report. Id. ¶ 8.

At no time during the call did the GAO attorney indicate that he was engaging in outcome prediction, or any other form of alternative dispute resolution used by our Office. Further, at no time during the call did the GAO attorney offer any opinion regarding the likely outcome of the protest.

Shortly after the August 8 teleconference, the GAO attorney sent an e-mail to the parties that summarized the call. AR, Tab 23, GAO E-Mail to Parties. Nothing in the e-mail referenced or suggested anything about the likely outcome of the protest. See id. The e-mail closed with an instruction to contact the GAO attorney if there were any "questions or concerns." Id. ¶ 9.

On August 11, a series of intra-agency communications resulted in a decision to take corrective action. See AR, Tab 19, Agency E-Mails, at 1-3. The communications included an e-mail sent at 3:44 p.m. from the headquarters attorney to the local attorney stating that "[t]he GAO believes that this should be setaside [sic] for small businesses." Id. at 2. Later, at 4:55 p.m., the headquarters attorney wrote an e-mail to the contracting officer and the local attorney stating "I need to file something with GAO in the next 30 minutes. Please send me confirmation of the proposed corrective action . . ." Id. at 1. At 6:33 p.m., the contracting officer responded with an e-mail stating "I concur with corrective action." Id.

On August 12, the agency notified our Office that it intended to take corrective action consisting of cancelling the solicitation and reissuing it as a total small business set-aside. See Atlantic Diving Supply, Inc. d/b/a ADS, Inc., B-409940, B-409940.2 (Aug. 18, 2014), at 1. Because the agency's corrective action granted the relief requested by ADS, we dismissed the protest as academic. Id. at 1-2.

Also on August 12, the agency canceled the solicitation. RFP, amend. No. 0008, at 1. On August 13, the contracting officer informed PBE via letter that as a result of ADS's protest, the solicitation "is being cancelled in its entirety and will be reissued as a 100% small business set-aside." Protest, exh. A, Agency Ltr. to PBE, at 1.

After the agency decided to cancel the solicitation, another agency assistant product manager for soldier protective equipment conducted additional market research on small business hard armor manufacturers. AR, Tab 17, Updated Market Research Rep. Through this research, the agency identified two additional small business concerns capable of producing the system's hard armor component.¹ Id. ¶¶ 2-4.

On August 21, PBE filed a protest with our Office challenging the agency's corrective action. To date, the contracting officer has not formally made a new decision about whether the solicitation will be set aside, and the solicitation has not been reissued. COS/LM at 9.

DISCUSSION

PBE asserts that the corrective action was unreasonable because it was based on the contracting officer's erroneous belief that our Office had conducted outcome prediction favoring ADS. Protester's Comments at 8, 19-21. PBE further asserts that the corrective action was unreasonable because it allegedly was not based on a reasoned assessment of the merits of ADS's protest, but, rather, was taken as a pretext to avoid our Office's resolution of that protest.² Id.

Contracting officers in negotiated procurements have broad discretion to take corrective action where the agency determines that such action is necessary to ensure a fair and impartial competition. Major Contracting Servs., Inc., B-400737.2,

¹ The Defense Contract Management Agency agreed with the agency's capability assessment. AR, Tab 17, Updated Market Research Rep., ¶¶ 3-4.

² PBE raises a number of other arguments, many of which address the merits of ADS's supplemental protest claims. E.g., Protester's Comments at 9-17. We have considered all of PBE's arguments, and we conclude, based on the record and the current posture of this procurement, that none provides a basis on which to sustain the protest.

Dec. 17, 2008, 2008 CPD ¶ 230 at 2; Main Bldg. Maint., Inc., B-279191.3, Aug. 5, 1998, 98-2 CPD ¶ 47 at 3. We generally will not object to the specific corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. Major Contracting Servs., Inc., supra; Main Bldg. Maint., Inc., supra.

Where, as here, a protester has alleged that an agency's rationale for cancellation of a solicitation is pretextual, that is, the agency's actual motivation is to avoid awarding a contract on a competitive basis or to avoid resolving a protest, we will closely examine the bases for the agency's actions. Superlative Techs., Inc., B-310489, B-310489.2, Jan. 4, 2008, 2008 CPD ¶ 12 at 7; Gonzales-McCaulley Inv. Group, Inc., B-299936.2, Nov. 5, 2007, 2007 CPD ¶ 192 at 5. Notwithstanding such scrutiny, and even if it can be shown that pretext may have in part motivated the cancellation of the solicitation, the reasonableness standard applicable to cancellation of a solicitation remains unchanged. e-Management Consultants, Inc.; Centech Group, Inc., B-400585.2, B-400585.3, Feb. 3, 2009, 2009 CPD ¶ 39 at 5; Dr. Robert J. Telepak, B-247681, June 29, 1992, 92-2 CPD ¶ 4 at 4. Further, 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. VSE Corp., B-290452.2, Apr. 11, 2005, 2005 CPD ¶ 111 at 6; Knight's Armament Co., B-299469, April 7, 2007, 2007 CPD ¶ 85 at 4.

In a memorandum to the file drafted one week after PBE filed its protest, the contracting officer states that the contracting office team was "prepared to provide a response to the GAO requested supplemental report due by 20 Aug 14," but that on August 11, the headquarters attorney communicated that "GAO was ready to rule against us unless we pursued corrective action." AR, Tab 20, Contracting Officer Memorandum to File (Aug. 28, 2014), ¶ 4. The contracting officer also states that the headquarters attorney required the contracting office team "to respond by [close of business] on 11 Aug 14 on the decision to take corrective action to re-solicit on a total set-aside basis." Id. Finally, the contracting officer states that "[u]nder these conditions," she sent the e-mail at 6:33 p.m. on August 11 "concurring with corrective action." Id. ¶ 5.

These statements are consistent with the contemporaneous intra-agency e-mails discussed above. See AR, Tab 22, Agency E-Mails (Aug. 11, 2014), at 1-2. Thus, it appears from the record that at the time that the contracting officer decided to take corrective action, her sole basis for doing so was her belief that our Office had informed the headquarters attorney through outcome prediction that the protest

would be sustained. This belief, however, was not based in fact.³ Rather, it was based on incorrect information provided by the headquarters attorney.⁴ Since the sole basis for the contracting officer's decision to take corrective action was incorrect information provided to her by the headquarters attorney, we cannot conclude that the decision to take corrective action was reasonable at the time that it was made. Nevertheless, for the reasons discussed below, we believe it is not appropriate to sustain this protest.

The record reflects that around the time of the corrective action decision, the agency conducted additional market research relating to whether the decision to withdraw the set-aside was reasonable. See AR, Tab 17, Updated Market Research Rep. In this regard, the record reflects that the agency conducted a second round of market research, and it concluded from that research that there were two additional small businesses capable of producing the system's hard armor component (bringing the total number of capable small business hard armor manufacturers to three). Id. ¶¶ 3-4. As discussed above, the basis for the agency's previous decision to withdraw the set-aside was the belief that there was only one small business concern capable of producing the hard armor component. See AR, Tab 11, Withdrawal of Set-Aside Memorandum, ¶¶ 3.b - 3.d. Thus, the record reflects that as part its corrective action, the agency initiated a review into whether there was an error in the procurement--namely, whether the market research underlying the decision to withdraw the set-aside was inaccurate.

³ As discussed above, our Office did not provide outcome prediction during the August 8 call. Rather, the GAO attorney conducted the call to schedule and discuss the content of the supplemental report, as shown in the e-mails he sent to the parties both before and after the call. AR, Tab 23, GAO E-Mail to Parties (Aug. 7, 2014), ¶ 1; AR, Tab 24, GAO E-Mail to Parties (Aug. 8, 2014), ¶¶ 1-8.

⁴ As stated above, the headquarters attorney characterized the August 8 call as outcome prediction to her colleagues. Even assuming, for the sake of argument, that there was some basis for her to infer that outcome prediction had occurred, the GAO attorney's subsequent e-mail summarizing the call put her on notice that outcome prediction had not occurred. In this regard, the e-mail contained nothing to suggest that outcome prediction had occurred, much less that there was an August 11 deadline for corrective action. See AR, Tab 23, GAO E-Mail to Parties, ¶¶ 1-9. Further, it instructed that if there were any "questions or concerns," the GAO attorney should be contacted. Id. ¶ 9. Finally, the GAO attorney's pre- and post-call e-mails plainly reflect that GAO required additional development of the record, showing that at the time of the call, an outcome prediction would have been impossible to provide. See National Opinion Research Ctr.--Costs, B-289044.3, Mar. 6, 2002, 2002 CPD ¶ 55 at 3 (GAO will not provide outcome prediction unless there is "high degree of confidence" regarding outcome); Millar Elevator Serv. Co.--Costs, B-284870.3, Aug. 3, 2000 CPD ¶ 126 at 3 (same).

While the communication that apparently formed the basis of the contracting officer's initial decision to take corrective action was not accurate, we conclude it would not be appropriate to sustain this protest because the record shows that after deciding to take corrective action, the agency investigated a possible error concerning its set-aside decision, and that the results of that investigation raise questions about the decision in that regard. Further, as stated above, the contracting officer has not yet made a decision about whether this procurement should be set aside, and the solicitation has not been reissued.⁵ COS/LM at 9. Under these circumstances, it is appropriate to deny PBE's protest and let the agency's analysis of whether this procurement should be set-aside run its course.

Separately, PBE advances a number of arguments as to why a decision by the agency to reissue the solicitation as a set-aside would be unreasonable. Protest at 4-8; Protester's Comments at 9-17. For example, PBE argues that the agency may not "retroactively" set aside the solicitation based on information that it learned after soliciting proposals on an unrestricted basis. Protester's Comments at 9, 13-15. Further, according to PBE, because the agency did not have a reasonable expectation that it would receive offers from at least two responsible small businesses at the time it withdrew the set-aside, any subsequent decision to reissue it as a set-aside is unreasonable (regardless of whether the decision to reissue it as a set-aside is based on new information suggesting two or more offers will be received from responsible small businesses). Id.

We need not resolve these arguments because they are premature. As explained above, the contracting officer has not yet made a decision regarding whether the solicitation will be set aside. COS/LM at 9. Indeed, at present, the solicitation is not open, and its terms--if and when it is reissued--are unknown. Protests that merely anticipate prejudicial agency action are speculative and premature. See Platinum Servs. Inc., B-402718.2, B-402923, Aug. 27, 2010, 2010 CPD ¶ 201 at 4 (dismissing allegation regarding solicitation terms as premature where agency had

⁵ We recognize that the contracting officer's August 13 letter to PBE stated the solicitation "will be reissued as a 100% small business set-aside." Protest, exh. A, Agency Ltr. to PBE, at 1. To date, however, this has not occurred.

not yet issued solicitation); Tri-Ex Tower Corp., B-245877, Jan. 22, 1992, 92-1 CPD ¶ 100 at 3 (same). Accordingly, we dismiss PBE's allegations regarding the propriety of reissuing the solicitation as a set-aside.⁶

The protest is denied in part and dismissed in part.

Susan A. Poling
General Counsel

⁶ Our Office invited the Small Business Administration (SBA) to submit comments on the agency's report. SBA did so. In its comments, SBA states that with regard to the corrective action, the agency "justifiably canceled its solicitation to conduct additional market research and reevaluate its set-aside decision." SBA Comments at 3. With regard PBE's allegations about reissuance of the solicitation, SBA agrees that until the solicitation is reissued, such allegations are premature. See id. at 2