



Decision

Matter of: AeroSage, LLC

File: B-414917

Date: October 17, 2017

David M. Snyder for the protester.
Howard M. Kaufer, Esq., Jared M. Miller, Esq., and Journey L. Beard, Esq., Defense Logistics Agency, for the agency.
Gabriel D. Soll, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging an agency's decision not to set aside a procurement for small businesses is denied where the agency's market research did not demonstrate that the agency was likely to receive proposals at fair market prices from at least two small businesses capable of performing the required services.

DECISION

AeroSage, LLC, a service-disabled veteran-owned small business of Tampa, Florida, protests the terms of request for proposals (RFP) No. SPE600-17-R-0220, issued by the Defense Logistics Agency (DLA) for the supply of fuels to various installations and facilities in the Northeastern region of the United States.¹ The protester argues that DLA improperly failed to set aside the entire procurement for exclusive small business participation, and that the agency improperly sought a waiver of the small business nonmanufacturer rule from the Small Business Administration (SBA) only for a portion, rather than all, of the solicitation's line items.

We deny the protest.

¹ RFP No. SPE600-17-R-0220 is a renumbered solicitation originally issued on December 16, 2016 as solicitation No. SPE600-17-R-0205.

BACKGROUND

DLA issued the RFP on June 21, 2017 as a combined synopsis/solicitation under the commercial item provisions of Federal Acquisition Regulation (FAR) part 12. RFP at 1, 56. The RFP seeks proposals to deliver various types of fuel to Department of Defense and civilian agency customers in the Customer Organized Group 2 (COG 2) program, which consists of locations in Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont. Agency Report (AR), at 2.² The RFP includes over 600 contract line item numbers (CLINs), each of which is for a type of fuel to be delivered to a specific location. Id. The agency assigned North American Industry Classification System (NAICS) code 324110 to the solicitation, which applies to petroleum refineries. AR, at 2; RFP at 1. The RFP states that the agency intends to award multiple fixed-price with economic price adjustment requirements contracts with an ordering period of three and one-half years. RFP at 3, 76. The total estimated value of all CLINs is \$265.5 million. AR at 1.

In October, 2016, DLA states that it conducted market research to determine the availability of small businesses to fulfill the requirement. Supp. AR, at 2. The agency issued a sources-sought notice seeking capability statements from small businesses that either manufacture or supply the specific fuels required in the States comprising the COG 2. Id. DLA received a single response, from a firm that did not represent whether it would supply fuel from a small business refinery. Id. After deliberating within the agency and conducting additional internet research, DLA concluded that it could not expect proposals from two or more small businesses capable of providing products manufactured by small business refineries at fair market prices. Id. at 3.

Based on the market research results, DLA issued the RFP as a partial set aside, reserving for service-disabled veteran-owned small businesses (SDVOSBs) only the CLINs for fuel delivery to the Department of Veterans Affairs (VA) locations. Id. at 2; RFP at 2. The agency states that it took this action in consideration of its customer-agency's obligations under the Veterans Benefits, Health Care, and Information Technology Act of 2006 (38 U.S.C. §§ 8127-8128), among other things. Supp. AR, at 2; Small Business Coordination Record, at 1. The solicitation includes an attachment showing the CLINs for VA deliveries that were set aside for SDVOSBs. RFP, Attachment III. DLA requested from the SBA a waiver of the small business nonmanufacturer rule exempting the CLINs for fuel delivery to the VA locations, which the SBA granted on May 18, 2017. See AR, Tab 7, Amended SBA Waiver.³

² DLA combined its legal memorandum and contracting officer's statement of facts into a single document.

³ This waiver amended an earlier waiver that had applied to the entire procurement. See AR, Tab 6, Request for Waiver of Nonmanufacturer Rule for VA Line Items; AR, at 3.

On July 10, 2017, prior to the initial July 14 date for receipt of proposals,⁴ AeroSage filed this protest.⁵

DISCUSSION

AeroSage raises two primary arguments regarding the solicitation's terms: (1) that the agency improperly failed to set aside all of the solicitation's CLINs for small businesses; and (2) that DLA failed to request from the SBA a waiver of the small business nonmanufacturer rule for all of the CLINs.⁶

Generally, under Federal Acquisition Regulation (FAR) § 19.502-2(b), a procurement with an anticipated dollar value of more than \$150,000 must be set aside for exclusive small business participation when there is a reasonable expectation that offers will be received from at least two responsible small business concerns, and that award will be made at a fair market price. This standard is commonly referred to as the "rule of two." The decision whether to set aside a procurement may be based on an analysis of factors such as the prior procurement history, the recommendations of appropriate small business specialists, and market surveys that include responses to sources-sought announcements or requests for information. Commonwealth Home Health Care, Inc., B-400163, July 24, 2008, 2008 CPD ¶ 140 at 3. The determination as to whether the rule of two is satisfied is a matter of business judgment within the contracting officer's discretion that we will not disturb absent a showing that it was unreasonable. Information Ventures, Inc., B-400604, Dec. 22, 2008, 2008 CPD ¶ 232 at 3.

⁴ On July 21, 2017, the Agency re-opened the competition and extended the due date for receipt of proposals until August 10, 2017. RFP, Amendment 003. The closing date was extended through two more amendments, ultimately requiring proposals to be submitted by August 14, at 4 p.m., Eastern time. RFP, Amendment 006.

⁵ DLA informed our Office that on or about September 22, 2017, the head of the contracting activity authorized the override of the statutory stay of awards, based on urgent and compelling circumstances. DLA email, Oct. 2, 2017.

⁶ Although AeroSage raises other collateral issues that we do not discuss, we have reviewed all of the protester's arguments and find that none provides a basis to sustain the protest. For example, the protester argues that the solicitation failed to provide adequate time and information to allow offerors to submit proposals. Protest at 1. In its comments on the agency report, however, the protester did not meaningfully address this issue; instead, the protester merely repeated its contention that the solicitation contained "insufficient time and information [...] for small businesses to complete offer requirements." Id.; Comments at 4. Because the agency report addressed this matter and the protester did not meaningfully respond in its comments, we dismiss this issue as abandoned. See Earth Res. Tech., Inc., B-403043.2, B-403043.3, Oct. 18, 2010, 2010 CPD ¶ 248 at 6.

The agency describes the procedures DLA followed to determine whether there were small business sources that could satisfy this requirement, and asserts that its market research was adequate to support the decision not to set aside the entire procurement for small businesses. Supp. AR at 2. DLA notes that its market research included issuing a sources-sought notice,⁷ holding internal meetings, and conducting internet research. Id. Relying on the results of this research, the agency stated that it did not have a reasonable expectation of receiving offers from any responsible small businesses that supply the products of small business refineries. Id. at 3. Lacking a reasonable expectation that two or more small businesses would respond to the solicitation, the agency determined not to set the procurement aside for small businesses. Id.⁸

DLA's decision not to set aside the entire procurement for small business competition is unobjectionable here. The record supports that the agency sought out small businesses that either manufacture the required fuels or supply fuels manufactured by small businesses. The acquisition strategy, based on the results of the market research, was coordinated with the agency's small business director and an SBA procurement center representative, both of whom concurred with the decision not to set the entire procurement aside for small business participation. See DD Form 2579, Small Business Coordination Record. The protester has not shown that it was unreasonable for the agency to conclude that the rule of two was not satisfied here. We therefore deny this ground of protest.

AeroSage also challenges the amended waiver of the nonmanufacturer rule issued by the SBA. The protester argues that the agency should not have sought to amend the earlier waiver, which exempted the entire procurement from the nonmanufacturer rule. Protest at 1.

Ordinarily, in order to qualify as a small business to provide manufactured products or other supply items for a procurement assigned a manufacturing NAICS code, an offeror must be the manufacturer or producer of the end item being procured. 13 C.F.R. § 121.406(a)(1). If the offeror does not manufacture or produce the item being purchased, the nonmanufacturer rule provides that the offer of a nonmanufacturer small business concern can be considered, provided, among other things, the small business offeror represents that it will supply the product of a domestic small business manufacturer or producer; or where a waiver of this requirement is granted by the SBA. 15 U.S.C. § 637(a)(17); 13 C.F.R. § 121.406(b).

⁷ AeroSage did not respond to the sources-sought notice. Supp. AR, at 2.

⁸ AeroSage did not directly refute the agency's response. Rather, AeroSage explained its understanding of the fuel distribution system as a reason to challenge an underlying assumption that informed the market research. See Supp. Comments, at 5-6.

Our Bid Protest Regulations require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. 4 C.F.R. §§ 21.1(c)(4), (f). These regulations contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. Id.

Here, the record shows that DLA sought, and was granted, a waiver of the nonmanufacturer rule for those CLINs that were set aside for SDVOSBs. See AR, Tab 6, Request for Waiver of Nonmanufacturer Rule for VA Line Items; AR, Tab 7, Amended SBA Waiver. As the remaining CLINs were not reserved for small businesses, the nonmanufacturer rule simply does not apply. We therefore dismiss this allegation for failing to state a valid basis of protest.

The protest is denied.

Susan A. Poling
General Counsel