



Decision

Matter of: Kingdomware Technologies, Inc.

File: B-405533.2

Date: November 10, 2011

LaTonya Barton, Kingdomware Technologies, Inc. for the protester.
Jeffrey C. Morhardt, Esq., Todd Davis, Esq., and Liviya Piccione-Sand, Esq.,
Department of Education, for the agency.
Matthew T. Crosby, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Set-aside provisions of Federal Acquisition Regulation (FAR) part 19, including those related to set-asides for service-disabled, veteran-owned small businesses, do not apply to competitions among Federal Supply Schedule vendors conducted according to FAR part 8 procedures.

DECISION

Kingdomware Technologies, Inc., of Waldorf, Maryland, protests the terms of request for quotations (RFQ) No. RFQ597680, issued to vendors holding General Services Administration (GSA) Federal Supply Schedule (FSS) contracts by the Department of Education, Federal Student Aid (FSA), for an emergency notification subscription service. Kingdomware, which is a service-disabled, veteran-owned small business (SDVOSB), asserts that the competition should be limited SDVOSBs. Kingdomware also asserts that the solicitation is defective in other respects, including its requirement for a social media emergency notification capability.

We deny the protest.

BACKGROUND

The agency originally issued the solicitation on July 5, 2011 pursuant to GSA FSS procedures, as set forth at Federal Acquisition Regulation (FAR) subpart 8.4, to vendors holding GSA FSS contracts under Schedule 70, Information Technology Equipment, Software, and Services. The solicitation requested quotes for a specific, brand-name emergency notification services platform. This led Kingdomware to file

a protest with our Office in which Kingdomware argued that the agency should remove the brand-name requirement. In response to that protest, the agency took corrective action, and our Office dismissed the protest as academic. Kingdomware Techs., B-405324, July 25, 2011.

The agency subsequently issued a revised solicitation, again pursuant to GSA FSS procedures, that omitted the brand-name requirement. The revised solicitation again was issued to vendors holding GSA FSS contracts under Schedule 70, although the solicitation included an errant reference to a separate GSA schedule known as MOBIS.¹ RFQ at 1; Contracting Officer's Statement ¶ 17. The revised solicitation contemplates the issuance of a single delivery order against the successful vendor's Schedule 70 contract. RFQ at 1. Under the contemplated delivery order, the successful vendor is to provide an emergency notification service with the ability to both notify and receive responses from agency employees. Statement of Work (SOW) at 1; Contracting Officer's Statement ¶ 12. The modes of communication through which the emergency notifications and responses are to occur include telephone, cellular telephone, business and personal e-mail, and, as relevant to this protest, "Instant messenger, Facebook, Twitter or such other social media formats." SOW at 1.

The solicitation sets forth four evaluation factors, one of which is "Small Business (Go/No-Go Factor)." RFQ at 3. The solicitation does not in any way indicate that the competition is limited to SDVOSBs.

Prior to the date set in the solicitation for receipt of quotations, Kingdomware filed this protest with our Office.

DISCUSSION

Kingdomware contends that the agency failed to determine whether this acquisition was suitable for an SDVOSB set-aside and, as a result, the agency improperly competed the requirement on an "unrestricted" basis. Protest at 1, 6; Comments at 4-5. In this regard, Kingdomware argues that the agency failed to comply with FAR § 19.502-2(b), which generally requires that an agency set aside acquisitions with an anticipated dollar value of more than \$150,000 for small businesses where there is a reasonable expectation of receiving fair market prices from at least two small business concerns.² In support of its position that the solicitation should have

¹ MOBIS is GSA Schedule 874, Mission Oriented Business and Integrated Services. The errant reference to MOBIS appeared in the solicitation as follows: "FSA is seeking the services of a contractor with [GSA] MOBIS 70 Schedule" RFQ at 1.

² The agency estimates the value of the contemplated delivery order to be between \$125,000 and \$250,000 for a base year and four 1-year options. Contracting Officer's Statement ¶ 4.

been set aside for SDVOSBs, Kingdomware also relies on FAR § 19.1405, which generally provides that an agency may set aside acquisitions for SDVOSBs when there is a reasonable expectation that offers will be received from at least two SDVOSBs and award will be made at a fair market price. Protest at 1, 6; Comments at 4-5. Kingdomware asserts that it provided the agency with information indicating that numerous SDVOSBs could provide the required emergency notification service. Protest at 5; Comments at 8, 10, 12.

The regulations that implement small business programs and the GSA FSS program expressly anticipate and exclude FSS purchases from the set-aside requirements in FAR part 19. In particular, FAR § 8.404(a) and FAR § 38.101(e)—both of which pertain to FSS purchasing—provide that FAR part 19 does not apply to orders placed against FSS contracts. Similarly, FAR § 19.502-1(b), which pertains to small business set-aside requirements, also provides that FAR part 19 set-aside requirements do not apply to FSS purchases. In sum, the FAR part 19 regulations on which Kingdomware’s protest is predicated do not impose a requirement on agencies to first evaluate whether a solicitation should be set-aside for small businesses—or SDVOSBs—before purchasing the goods or services through the FSS program. Edmond Computer Co.; Edmond Sci. Co., B-402863, B-402864, Aug. 25, 2010, 2010 CPD ¶ 200 at 2-3; Future Solutions, Inc., B-293194, Feb. 11, 2004, 2004 CPD ¶ 39 at 3. Accordingly, it was not improper for the agency here not to set this requirement aside for SDVOSBs, and Kingdomware’s arguments to the contrary provide no basis on which to sustain the protest.³

Kingdomware asserts that the solicitation is defective in two other respects. First, Kingdomware objects to the solicitation’s reference to the MOBIS schedule. Protest at 6. Second, Kingdomware objects to the requirement that the emergency notification service include a capability to notify and receive responses through social media, such as Instant Messenger, Facebook, and Twitter. Protest at 7. Kingdomware contends that this requirement amounts to a government endorsement of the use of social media by federal employees during work, and that such a requirement is unnecessary because emergency notifications and responses “could [occur] directly through the emergency notification solution.” Id.

With respect to the solicitation’s reference to MOBIS, the agency responds that the reference was an error. Contracting Officer’s Statement ¶ 17. The agency, however,

³ We observe that although Kingdomware alleges that the agency improperly competed the requirement on an “unrestricted” basis, the record indicates that the agency intends the solicitation to be set aside for small businesses. In particular, and as discussed above, the solicitation includes a “Small Business (Go/No-Go[])” evaluation factor. RFQ at 3. The agency asserts that the solicitation was restricted to small businesses by virtue of the inclusion of this evaluation factor. Contracting Officer’s Statement ¶ 3.

maintains that the error did not prejudice Kingdomware because the solicitation was sent only to vendors that hold GSA Schedule 70 contracts—including Kingdomware—and because the agency received no vendor questions regarding the reference. Id.; Memorandum of Law at 4-5. With respect to the solicitation’s social media notification capability requirement, the agency responds that the requirement reflects the agency’s need to quickly alert staff as to a potential emergency in a broad range of formats. Contracting Officer’s Statement ¶ 15. The social media format is necessary, the agency explains, in the event that problems arise with other communication formats, such as when cellular telephone service is disrupted or overloaded. Id. ¶¶ 15, 16. The agency further explains that the social media notification capability is useful for reaching employees when they are not in the workplace. Id. ¶ 16.

Kingdomware in its comments on the agency report did not rebut the agency’s responses regarding the MOBIS reference or the social media notification capability requirement. Consequently, we consider these protest grounds to be abandoned.⁴ Washington-Harris Group, B-401794, B-401794.2, Nov. 16, 2009, 2009 CPD ¶ 230 at 5 n.3; Strategic Res., Inc., B-287398, B-287398.2, June 18, 2001, 2001 CPD ¶ 131 at 10-11.

The protest is denied.

Lynn H. Gibson
General Counsel

⁴ In its comments on the agency report, Kingdomware states that the solicitation’s reference to MOBIS “almost” caused Kingdomware not to respond to the solicitation. Comments at 6. Kingdomware’s comments also attached—without any accompanying discussion—an article that discusses the mixed progress of federal agencies in developing and implementing social media policies and procedures. Id. attach. 10. Even assuming for the sake of argument that these portions of Kingdomware’s comments qualify as rebuttals to the agency’s positions, we conclude that based on the record here, there is no merit to Kingdomware’s contentions.