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Decision

Matter of: Swank Healthcare

File: B-407367

Date: December 12, 2012

William M. Weisberg, Esq., and Liana W. Yung, Esq., Bryan Cave LLP, for the protester.

Jo Spence, Esq., Department of Veterans Affairs, for the agency.

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DIGEST

Protest challenging an agency's small business set-aside decision under a procurement conducted pursuant to the Federal Supply Schedule procedures of Federal Acquisition Regulation Subpart 8.4 is denied where the protester does not show that the agency violated any law or regulation.

DECISION

Swank Healthcare, of St. Louis, Missouri, protests the terms of request for quotations (RFQ) No. VA777-12-Q-0257, issued by the Department of Veterans Affairs (VA) for commercial off-the-shelf online courses. Swank, a large business concern, complains that the RFQ should not have been set aside for small businesses.

We deny the protest.

BACKGROUND

The RFQ, issued under the Federal Supply Schedule (FSS) procedures of Federal Acquisition Regulation (FAR) Subpart 8.4 as a small business set-side, sought a minimum of 500 commercial off-the-shelf clinical online courses for 100,000 Veterans Health Administration healthcare providers and staff covering multiple

clinical disciplines.¹ RFQ at 5. The RFQ provided for the award of a fixed-price contract for a base year and 2 option years. Id. at 8. Vendors were informed that award would be made on a lowest-priced, technically acceptable basis, considering technical capability, past performance, and price. Id. at 25-26. Price was to be evaluated for reasonableness and realism.

In determining to set aside the RFQ for small businesses, the VA conducted market research and identified five small business concerns holding FSS contracts. VA Dismissal Request, exhib. 2, Acquisition Plan, at 5-6. The VA reviewed each small business concern's technical and subject matter expertise and sample client list and concluded that they could perform the requirement. For example, one firm represented that it had expertise in online medical education and included the VA among its clients, while another firm with expertise in audio and visual instructional materials included the American Association of Critical Care Nurses among its clients. Id. at 5.

The agency issued the RFQ to these five small business concerns, and received quotations from two of them. Agency Report at 1, 3.

This protest followed.

DISCUSSION

Interested Party

As an initial matter, the VA requested that we dismiss Swank's protest, arguing that Swank was not an interested party to challenge the agency's decision to set aside this procurement for small business, because Swank is a large business and therefore not eligible for award. VA Dismissal Request at 2. Under our Bid Protest Regulations, an interested party is "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract." 4 C.F.R. § 21.0(a)(1) (2012). Swank is an interested party to challenge the agency's decision to set aside the procurement for small businesses, because if we were to sustain the protest, the protester would be permitted to compete for award.²

¹ The estimated value of this acquisition is \$4.4 million. VA Dismissal Request, exhib. 2, Acquisition Plan, at 1.

² Although not argued by the VA, it is not clear that a complaint objecting to an agency's decision to set aside a FSS procurement for small business concerns states a valid basis for protest. As we otherwise find the protest has no merit, we do not address this argument

Set-Aside Decision

Swank argues that the requirement here is too large and complex for a small business to successfully perform, and that the agency did not properly document the basis for the set-aside determination. Protest at 3; Comments at 2-3.

The FAR provides that, although the preference programs of FAR Part 19 are generally not applicable to procurements under the FSS procedures of FAR Subpart 8.4, an agency may, in its discretion, set aside orders for any of the small business concerns identified in FAR § 19.000(a)(3).³ See FAR § 8.405-5(a). Here, the record shows that the VA exercised this discretion to set aside the RFQ for small businesses, after identifying five small business concerns holding FSS contracts that could perform this work. Moreover, the VA received quotations from two apparently responsible small businesses in response to the RFQ. See York Int'l Corp., B-244748, Sept. 30, 1991, 91-2 CPD ¶ 282 at 7 (receipt of offers from small businesses supports an agency's determination to set aside a procurement for small businesses). Although Swank disagrees with the agency's decision to set aside this FSS procurement for small businesses, it does not show that the agency violated any law or regulation in doing so.

Swank also complains that the VA did not verify each small business concerns' ability to meet all of the requirements of the solicitation prior to making its set-aside decision. Comments at 2-3. There is no merit to this complaint. Agencies are not required to make actual determinations of responsibility or decisions tantamount to determinations of responsibility in determining whether to set aside a procurement. See, e.g., Ceradyne, Inc., B-402281, Feb. 17, 2010, 2010 CPD ¶ 70 at 4.

The protest is denied.

Susan A. Poling
General Counsel

³ Swank also generally complains that the VA did not consider whether all of the requirements of FAR Part 19 are met. See Comments at 2. This does not state a valid basis for protest, given that the requirements of FAR Part 19 generally do not apply to orders under FSS contracts. See FAR §§ 8.404(a), 8.405-5(a). In any event, Swank does not identify which FAR Part 19 requirements it contends are applicable here.