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Decision

Matter of: American Custom Meats, LLC

File: B-409564

Date: June 12, 2014

Michael J. Gardner, Esq., Erik M. Ideta, Esq., and Jennifer Mouchet Hall, Esq., Troutman Sanders LLP, for the protester.

Katherine B. McCulloch, Esq., Defense Logistics Agency; and John W. Klein, Esq., and Laura Foster, Esq., Small Business Administration, for the agencies.

Cherie J. Owen, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that solicitation improperly bundles requirements in violation of the Small Business Act is denied, where the requirements consolidated under this procurement do not violate the terms of the Act--i.e., the requirements were not previously provided under separate, smaller contracts that were suitable for award to small business concerns--and the Small Business Administration (SBA) agrees that the procurement does not improperly bundle requirements.

2. Protest that lot for various types of ground beef and primal cuts, one of three lots in the solicitation, must be set aside for small businesses (as were the other two lots) is denied, where the agency's market research led it to reasonably conclude that there are not two or more capable small businesses that could provide the agency's requirements in this regard, and the SBA agrees that the agency was not required to set aside the lot.

DECISION

American Custom Meats, LLC, of Tracy, California, protests the terms of request for proposals (RFP) No. SPE300-13-R-1014, issued by the Defense Logistics Agency (DLA), for various beef products in support of prime vendor contracts. ACM asserts that the entire procurement should have been set aside for small businesses, that the agency improperly bundled the requirements, and that the RFP's evaluation criteria are vague.

We deny the protest.

BACKGROUND

DLA Troop Support is a field activity of DLA which supplies food, clothing, medicine and medical supplies, construction supplies and equipment, and supply-related services to the military worldwide. DLA contracts with multiple prime vendors who source and supply a full line of food items for specific geographic regions to the military. Currently, DLA does not purchase its beef requirements for customers outside the continental United States (OCONUS) directly from beef suppliers. Instead, these items are purchased through 13 separate regional OCONUS prime vendor contracts. The prime vendors purchase beef from various suppliers, with the prices for some of these products set through the use of voluntary manufacturer pricing agreements which establish prices. These agreements, however, do not guarantee sales, and prime vendors are not required to source from manufacturer pricing agreement holders. Agency Report (AR) at 2.

In April 2013, the agency decided to restructure the procurement methods it uses to obtain beef products by awarding one central contract for beef. AR, Tab 8, Memorandum Re: Benefits of Central Beef Contract, at 4. The agency determined that restructuring the way it buys beef into one central contract with a guaranteed minimum order value would incentivize manufacturers to offer significantly lower prices due to quantity price breaks. Id. Initially, since the agency found that there was no small business capable of satisfying all of the agency's beef requirements, the agency contemplated acquiring all of its beef requirements through one award. Id.; Contracting Officer's Statement at 3. However, after conducting market research, the agency decided to restructure the procurement into two lots to allow small businesses to compete for a portion of the requirements. Based on this research, and with approval from the Small Business Administration (SBA), the agency initially issued the RFP with one lot comprising 72% of the requirement as a partial set-aside for small businesses, and a second lot comprising the remaining 28% as unrestricted. However, based on additional market research and information gathered at a pre-proposal conference, and after further consultation with SBA, the contracting officer amended the RFP, restructuring the requirement into the current configuration of three lots, two of which are set aside for small businesses.

The RFP now contemplates the award of three separate, fixed-price, indefinite-delivery/indefinite-quantity (IDIQ) contracts for the supply of beef items for a period of 3 years. The contracts are to be awarded by lot, with Lots 1 and 3 set aside for small businesses, and Lot 2 unrestricted. Lot 1, with a maximum value of approximately \$91 million, covers 28 beef items; Lot 2, valued at approximately \$158 million, covers 16 beef items, including ground beef and primal cuts; and

Lot 3, with a maximum value of approximately \$157 million, covers 23 beef items.¹ The successful contractors will act as suppliers of all the products listed in their respective lots to all DLA Troop Support prime vendors for OCONUS customers; the prime vendors will be authorized to order beef products directly from the awardees at the prices established in the contracts.

Proposals are to be evaluated on a lowest-priced, technically acceptable basis. Technical acceptability is to be determined based on whether an offeror took “no exceptions to the terms and conditions for all items found in the Schedule of Items in the solicitation”; according to the solicitation, by “submitting a proposal with no exceptions,” an offeror confirms that it “possess[ed] the necessary facilities, equipment, technical skills and capacity to successfully provide all items required” by the RFP. RFP at 46. Pricing is required for all items found in the RFP’s schedule of items, with the total price to be calculated by multiplying the estimated quantities in the schedule by the unit prices. Id.

Prior to the closing time for receipt of proposals, ACM filed this protest with our Office challenging the terms of the solicitation.

DISCUSSION

ACM asserts that the RFP impermissibly restricts competition by improperly bundling separate smaller contracts into a single contract in violation of the Small Business Act, 15 U.S.C. § 631 (2006). In the alternative, ACM asserts that the agency unreasonably determined not to set aside Lot 2 for small businesses and that the solicitation’s evaluation criteria are overly vague. As discussed below, we find each of these arguments to be without merit.

Bundling of Requirements

As an initial matter, ACM argues that the solicitation constitutes impermissible bundling under the Small Business Act, 15 U.S.C. § 631, in that the agency is bundling the work performed under 27 different manufacturer pricing agreements, 15 of which are currently with small businesses, into one contract for each lot. Protest at 12.

The Small Business Act, as amended, states that, “to the maximum extent practicable,” each agency shall “avoid unnecessary and unjustified bundling of contract requirements that precludes small business participation in procurements

¹ Cuts of beef are first divided into primal cuts, pieces of meat initially separated from the carcass during butchering. Each primal cut is then reduced into subprimal cuts; individual portions derived from subprimal cuts are referred to as fabricated cuts. AR at 5 n.9.

as prime contractors.” 15 U.S.C. § 631(j)(3) (2013). Bundling, for purposes of the Small Business Act, means “consolidating 2 or more procurement requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract that is likely to be unsuitable for award to a small-business concern.” 15 U.S.C. § 632(o)(2); see Federal Acquisition Regulation (FAR) § 2.101. The term “separate smaller contract” is defined as “a contract that has been performed by 1 or more small business concerns or was suitable for award to 1 or more small business concerns.” 15 U.S.C. § 632(o)(3); FAR § 2.101.

ACM argues that the manufacturer pricing agreements that DLA established with various beef manufacturers, several of which are small businesses, constituted the “separate smaller contracts” under the Small Business Act; thus, according to the protester, the solicitation bundles several procurement requirements that were previously provided under smaller contracts by a small business. Protest at 7-8. However, we agree with the agency that the Lot 2 requirements do not constitute bundling, as defined by the Small Business Act. As relevant here, the term “separate smaller contract” is defined as “a contract that . . . was suitable for award to 1 or more small business concerns.” 15 U.S.C. § 632(o)(3); FAR § 2.101. Here, however, DLA previously satisfied its requirements for ground beef and primal cuts through contracts with multiple prime vendors, which are not small businesses, AR at 8, 12; under the RFP, the beef items will be extracted from the prime vendor contracts, and the prime vendors will be directed to place beef item orders under the appropriate contract to be awarded under the RFP. Thus, combining items from several prime vendor contracts into one contract does not result in a contract that has previously been performed by one or more small business concerns or was suitable for award to one or more small business concerns.² Star Food Service, Inc., B-408535, Nov. 1, 2013, 2013 CPD ¶ 246 at 3 (no improper bundling under

² In addition, we note that both SBA and DLA reject ACM’s argument that the manufacturer pricing agreements constituted “contracts” with small businesses. In this regard, SBA generally adopts the FAR definition of “contract,” which defines a “contract” to mean, in relevant part, “a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them.” FAR § 2.101; 13 C.F.R. § 125.1(d). As set forth above, the manufacturer pricing agreements (MPA) were agreements established with beef manufacturers that established prices at which the prime vendors could purchase beef products, but these agreements did not guarantee sales. AR at 2, 12. In this regard, the terms of the manufacturer pricing agreements stated the following:

[The agency] gives no guarantee that any quantities will be purchased under the MPA The issuance of a MPA in no way binds [the agency] to purchase any of the products listed in the MPA.

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Small Business Act where requirement for chicken parts was previously provided by prime vendors and not under separate smaller contracts that were suitable for award to small business concerns).³ In these circumstances, we find that ACM has furnished no basis for concluding that the solicitation constitutes impermissible bundling under the Small Business Act.

Set-aside Determination

ACM also challenges the agency's decision not to set aside Lot 2 for small business concerns. Specifically, ACM asserts that there was a reasonable expectation that the agency would receive offers from two or more small businesses, and that therefore, the agency was required to set aside Lot 2. Protest at 7.

Under Federal Acquisition Regulation (FAR) § 19.502-2(b), a procurement with an anticipated dollar value of more than \$150,000, such as the one here, 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 fair market prices. The use of any particular method of assessing the availability of small businesses is not required so long as the agency undertakes reasonable efforts to locate responsible small business competitors. Marshall & Swift-Boeckh, LLC, B-407329, B-407329.2, Dec. 18, 2012, 2013 CPD ¶ 10 at 2-3. 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. SAB Co., B-283883, Jan. 20, 2000, 2000 CPD ¶ 58 at 1-2; PR Newswire, B-279216, Apr. 23, 1998, 98-1 CPD ¶ 118 at 2. In particular, the contracting officer must make

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AR, Tab 3, MPA, at 4; see Star Food Service, Inc., supra, at 2, n.1 ("Manufacturer pricing agreements are agreements between DLA and suppliers that set prices, but do not guarantee that a minimum quantity will be purchased from the supplier by the prime vendors"). Thus, DLA asserts that, given the absence of any guarantee of purchases from the supplier by the prime vendors, the manufacturer pricing agreements lack the requisite mutuality of consideration required for an enforceable contract. See, e.g., Crewzers Fire Crew Transport, Inc. v. U.S., 741 F.3d 1380, 1382 (Fed. Cir. 2014) (to be valid and enforceable, a contract must have, among other things, consideration to ensure mutuality of obligation).

³ In response to the protest, we sought the views of the Small Business Administration (SBA) on whether the solicitation constituted a bundling of requirements under the Small Business Act. In response, SBA concluded that the statutory and regulatory limitations on consolidation and bundling were inapplicable here. SBA Comments at 3-5.

reasonable efforts to ascertain whether it is likely that offers will be received from at least two small businesses capable of performing the work. DNO Inc., B-406256, B-406256.2, Mar. 22, 2012, 2012 CPD ¶ 136 at 4. Because a decision whether to set aside a procurement is a matter of business judgment within the contracting officer's discretion, our review generally is limited to ascertaining whether that official abused his or her discretion. Family Entertainment Servs., Inc., B-401693, B-401693.2, Oct. 20, 2009, 2009 CPD ¶ 204 at 3; ViroMed Labs., B-298931, Dec. 20, 2006, 2007 CPD ¶ 4 at 3.

As discussed below, the agency acted reasonably in considering whether to set aside Lot 2 for small businesses. First, the agency began by reviewing its prior procurement history (including 51 different suppliers) to determine the historical sourcing of beef items. AR, Tab 6, Beef OCONUS Sales by Manufacturer and Distributor, at 2-7. The agency also used manufacturer pricing agreements and National Allowance and Pricing Agreements (NAPA) to identify and contact several potential small business suppliers of beef products to determine their ability to fulfill the agency's needs. AR, Tab 16, Small Business Market Research Summary, at 2-4; Contracting Officer's Supp. Declaration at 3. In addition, the agency sent market survey questionnaires to potential small business suppliers to determine their capability. Supp. Contracting Officer's Declaration at 3. The agency also considered information it gathered at a pre-proposal conference, as well as Dun & Bradstreet reports for potential small business suppliers. Id. at 3. Further, the agency contacted several small businesses via telephone to inquire regarding their interest in participating in the acquisition. Id. at 4. Based on the above market research, the agency initially identified three small businesses that could be potential suppliers for Lot 2: ACM, [DELETED], and [DELETED]. AR at 10; AR, Tab 15, Beef Product List Based on Customer Survey, at 2.

With regard to ACM, however, the agency's market research indicated that the firm had only 7 employees; limited credit (\$100,000); and a "Portfolio Comparison" risk rating from Dun & Bradstreet of "High Risk" when compared to all businesses within the same model segment. AR, Tab 13, Dun & Bradstreet Report on ACM, at 2-3. In addition, the Dun & Bradstreet report indicated that ACM is a packaged frozen food merchant wholesaler (rather than a manufacturer or processor), and the agency found no record of ACM having made sales of beef items to DLA Troop Support. Id. at 3; Contracting Officer's Statement at 3-4. Based on this information, the contracting officer determined that ACM would not be capable of performing the solicitation's requirements for Lot 2, valued at approximately \$158 million, and covering 16 beef items, including ground beef and primal cuts. ACM has not shown this determination to be unreasonable.

With regard to [DELETED], the agency's market research indicated that the firm did not have the capability to provide all of the items required under Lot 2. While [DELETED] responded to the contracting officer's inquiry with an item list that included [DELETED] (but not 85% lean ground beef, as required by the solicitation),

there were no ground beef items on [DELETED]'s National Allowance and Pricing Agreement with DLA Troop Support, and [DELETED] did not currently sell ground beef to DLA Troop Support. Also, there were no ground beef items on [DELETED]'s commercial product list. AR at 10; AR, Tab 25, [DELETED] Market Research, Subtabs A1, A2, & A3. As a result, the contracting officer concluded that [DELETED] would not be capable of performing the solicitation's requirements for Lot 2. ACM has not shown this determination to be unreasonable.

With regard to [DELETED], although the firm's answers to survey questions indicated that it had [DELETED] beef processing plants, currently supplied beef to six prime vendors, and frequently competed with large meat processing businesses, AR, Tab 25, Small Business Market Surveys, [DELETED], Subtab B, at 2-3, the agency also noted that [DELETED]'s ground beef sales for 2013 were only \$[DELETED]. Contracting Officer's Declaration at 2. In addition, the Dun & Bradstreet report for [DELETED] indicated that the firm was a merchant and a wholesaler, rather than a manufacturer/processor, and with regard to small business status, the report stated, "N/A." *Id.* at 2-3; AR, Tab 24, Dun & Bradstreet Reports, [DELETED], at 3. While the record is unclear whether, notwithstanding the limited ground beef sales and "N/A" indication regarding small business size status, the agency ultimately determined [DELETED] to be a small business capable of performing the requirements of the solicitation for Lot 2, it is clear that the agency concluded that there were not at least two small businesses capable of performing the required work.

In its comments on the agency report, the protester notes that the agency identified several other small businesses during its market research. ACM contends that the agency improperly ignored these businesses in determining that there were not two or more capable small businesses likely to submit offers. Comments at 5-6. However, in each case, the record leads our Office to conclude that the agency reasonably found that the business in question was not a capable small business likely to submit an offer in response to Lot 2. For example, with regard to [DELETED], the agency determined that the firm was not capable of supplying all of the beef products under Lot 2, and the firm did not participate in the pre-proposal conference or respond to the survey sent to it by the agency. Supp. AR at 11. With regard to [DELETED], the agency found that [DELETED] is a large business with 1,500 employees. *Id.* With regard to [DELETED], the agency noted that the company indicated during a telephone call with the contracting officer that it was not interested in participating in the acquisition. Supp. Contracting Officer's Declaration at 3. Finally, with regard to [DELETED], when the agency asked what products the company would be interested in supplying, [DELETED] replied that it was interested in supplying [DELETED], [DELETED], [DELETED], and [DELETED], only some of the 16 beef items in Lot 2. AR, Tab 25, Small Business Market Surveys, [DELETED] Market Research, at 2. Therefore, we find the agency reasonably

concluded that none of these additional companies represented capable small businesses that would likely submit an offer in response to Lot 2.⁴

Given the agency's conclusion that ACM and [DELETED] were not capable of satisfying the solicitation's requirements, and that none of the other identified companies were capable small businesses likely to submit an offer, even if the agency did consider [DELETED] to be a capable small business, the agency reasonably determined that there were not two or more small businesses capable of performing the requirements of Lot 2. Moreover, we note that the agency received approval from both the DLA Troop Support Small Business specialist and the SBA representative to compete the requirements of Lot 2 on an unrestricted basis. AR at 5; AR, Tab 20, Small Business Coordination Record, at 2; see also American Medical Equipment Co., B-407113, B-407113.2 Nov. 8, 2012, 2013 CPD ¶ 51 at 7 ("we give great weight to the fact that the contracting officer's determination was made with the concurrence of the small business program manager").⁵ Therefore, we find that the contracting officer here satisfied her duty to make reasonable efforts to ascertain whether it was likely that offers will be received from at least two small businesses capable of performing the work, and reasonably concluded that it was not.⁶ In view of the foregoing considerations, we have no basis to question the agency's judgment not to set aside the requirement for Lot 2.

⁴ The protester attempts to discredit the agency's market research by noting that the agency received offers from [DELETED] small businesses. Supp. Comments at 2-4. ACM, however, has made no showing that the agency should have anticipated the small business responses when determining whether to set aside Lot 2. See Hotel Contracting Servs., Inc., B-401807, B-401807.2, Nov. 25, 2009, 2009 CPD ¶ 243 at 7 ("[t]he determination to set a procurement aside is prospective not retrospective"). Moreover, the agency notes that the offers have not yet been finally evaluated to determine whether they are acceptable, and [DELETED]. Supp. AR at 4-5.

⁵ In response to the protest, we sought the views of the Small Business Administration (SBA) on whether Lot 2 should have been set aside for small businesses. In response, SBA concluded that the contracting officer did not act improperly in competing Lot 2's requirements on an unrestricted basis. SBA Comments at 2-3.

⁶ ACM also contends that, to the extent that the Dun & Bradstreet report indicated that ACM was not capable of satisfying the agency's requirements under Lot 2, the agency should have requested a certificate of competency from the SBA. We find no merit to this argument. In this regard, the protester confuses the standard for determining whether an agency may accept on its face a small business's self-certification when its offer is being considered for award, and whether there is a reasonable expectation that two or more offers will be submitted by capable small businesses. In making set-aside decisions, agencies need not make either actual
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Evaluation Criteria

Finally, ACM protests that the solicitation is overly vague as to how technical acceptability will be evaluated. Specifically, the protester complains that the solicitation states only that, to be technically acceptable, an offer must take no exception to the requirements of the solicitation. In this regard, ACM contends that, without additional subfactors or evaluation criteria relating to technical acceptability, “an offeror is without any ability to gauge whether its proposal is acceptable.” Protest at 15.

Solicitations must contain sufficient information to enable offerors to compete intelligently and on a relatively equal basis. See RMS Indus., B-248678, Aug. 14, 1992, 92-2 CPD ¶ 109. The determination of the agency’s minimum needs and the best method of accommodating them are primarily within the agency’s discretion, and therefore, we will not question such a determination unless the record clearly shows that it was without a reasonable basis. Isratex, Inc., B-253691, Oct. 13, 1993, 93-2 CPD ¶ 221 at 3. Once the agency has determined its needs, it must select plans, drawings, specifications, standards, or purchase descriptions that state only the government’s actual minimum needs and describe the supplies and/or services in a manner designed to promote full and open competition. Id.

Here, the solicitation indicates that technical acceptability is to be determined based on whether an offeror takes no exceptions to the terms and conditions for all items found in the schedule of items in the solicitation. RFP at 46. According to the solicitation, by submitting a proposal with no exceptions, offerors are confirming that they possess the necessary facilities, equipment, technical skills and capacity to successfully provide all items required by the RFP. Id. In this regard, the solicitation contains a product list of 21 different required beef products, with specifications for each product. For example, with regard to item 1, the RFP requires the following:

Beef loin, bottom sirloin butt, tri-tip, boneless, defatted, raw, frozen,
US Select Grade, maximum 15% solution, maximum average surface

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determinations of responsibility or decisions tantamount to determinations of responsibility with regard to prospective offerors; they need only make an informed business judgment about whether there are small businesses expected to submit offers that are capable of performing. Marshall & Swift-Boeckh, LLC, supra, at 4. We find that the agency’s efforts here met that standard.

fat 0.25 inch, 3-5 pounds each, NAMP 185D, 1/40 pound average case.

AR, Tab 1, Attachment 1, Schedule of Supplies, at 1.

The RFP provides a similar level of detail for each of the 21 required beef products. Attachment 1, Schedule of Supplies, at at 1-10. The solicitation also details several other requirements, including, for example, that the contractor must: (1) submit monthly reports which include, at a minimum, the date of order, item, quantity, the prime vendor who placed the order and date shipped; (2) maintain a Food Defense/Product Protection Plan; (3) maintain a pest management program in accordance with a provided checklist; (4) use USDA Food Safety and Inspection Service mandated label(s) and ensure that the specification for each item contains the product name, line, nutrition facts, safe handling instructions, net weight, and ingredients statement; and (5) ensure that products are produced and processed in a federally inspected establishment, are accurately marked and/or labeled, and meet all USDA Food Safety and Inspection Service regulatory requirements, including microbiological testing requirements. RFP at 9-10. The solicitation also sets forth detailed requirements regarding the shelf-life and storage temperature of products, packaging and marking, and palletization of products. *Id.* at 10-11. In order to be technically acceptable, offerors are required to meet all of these requirements by taking no exception to any of the terms in the solicitation. We find that this solicitation provided sufficient information to permit offerors to compete intelligently, and on a relatively equal basis, and that the solicitation is not overly vague. Therefore, we deny this protest ground.

The protest is denied.

Susan A. Poling
General Counsel