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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: American Warehouse Systems, LLC

File: B-412543

Date: March 1, 2016

Michael J. Murphy, Esq., Morrison Sund PLLC, for the protester.
William D. Robinson, Esq., and Hayley Hoffman, Esq., Department of Justice,
Federal Bureau of Prisons, for the agency.
Noah B. Bleicher, Esq., and Nora K. Adkins, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's corrective action in response to an earlier protest is denied where the agency had a reasonable basis to issue a new solicitation rather than awarding the contract to the protester.

DECISION

American Warehouse Systems, LLC (AWS), of Blaine, Minnesota, protests the corrective action taken by the Department of Justice, Federal Prison Industries, Inc. (UNICOR),¹ in response to AWS's earlier protest of the award of a contract to Russco, of Santa Maria, California, under a request for quotations (RFQ) issued by UNICOR for a multi-level file storage system at the National Records Center in Lee's Summit, Missouri. AWS objects to the agency's decision to issue a new solicitation for the shelving and asserts that it should be awarded the contract under the original RFQ.

We deny the protest.

In June 2015, UNICOR issued an RFQ for the shelving system and provided vendors, including AWS, a revised RFQ on August 3. Contracting Officer's (CO) Statement at 1. The seven-page revised RFQ, which was unnumbered, included

¹ Federal Prison Industries, Inc., which operates under the trade name UNICOR, is a wholly-owned government corporation within the Department of Justice.

specifications and requirements for the shelving system and identified several line items that vendors were to separately quote, including a line item for the shelving components and a line item for the installation of the shelving. RFQ at 1-7. AWS submitted a quotation in response to the August RFQ. CO Statement at 1. Thereafter, UNICOR awarded two contracts: one to Russco for the shelving materials and another to AWS to install the shelving system. Id.

On October 1, AWS filed a protest with our Office challenging the contract award to Russco. Specifically, AWS asserted that it was improper for the agency to award separate installation and supply contracts under the RFQ. Protest (B-412209) at 5. In its view, AWS should have been awarded the contract (for both aspects of the RFQ) as the “sole responsive, responsible offeror capable of delivering and installing the [] complete catwalk shelving system . . . that meets or exceeds the Agency’s stated requirements.”² Id. at 7.

The agency took corrective action in response to AWS’s protest. Specifically, by letters of November 2 and 5, the agency reported that it intended to cancel the contracts awarded under the RFQ, amend the statement of work to accurately reflect the agency’s needs and requirements, and resolicit the requirement. Notice of Corrective Action at 1. Based on the agency’s corrective action, our Office dismissed as academic AWS’s protest. See American Warehouse Sys., B-412209, Nov. 9, 2015 (unpublished decision).

On December 4, UNICOR issued a new solicitation for the shelving system as a request for proposals (RFP) (RFP No. MT1411-16) pursuant to the commercial item acquisition procedures of Federal Acquisition Regulation (FAR) subpart 12.6. RFP at 1. The RFP expressly contemplates the award of one or two fixed-price contracts. Id. Pursuant to the RFP, one award (referred to as Package A) will be made for “design-layout and engineering and delivery of a catwalk/mezzanine system, lifts, and shelving units.” Id. The other award (Package B) will be for the “installation of the catwalk/mezzanine system, lifts, shelving units, and all other components of the two-tier shelving system.” Id. The RFP provides that offerors are permitted to bid on Package A, Package B, or both. Id. at 2.

In addition, the RFP includes separate statements of work (SOW) and proposal instructions for the two packages. Id. at 3-9. For Package A, the RFP requires offerors to submit for evaluation a draft “design-layout” and bid samples (to establish compatibility with UNICOR-provided shelving components.)³ Id. at 6-7. For Package B, the RFP instructs offerors to submit for review a draft installation

² The protester also complained that the award to Russco was improper because the company failed to attend a site visit. Protest (B-412209) at 6.

³ As provided in both solicitations, UNICOR will be providing certain sliding dividers, shelves, angle reinforcements, and sides and backs. See RFQ at 1; RFP at 4-5.

plan. Id. Further, unlike the August RFQ, the RFP lays out the basis for contract award(s), specifically providing for awards on a best-value basis based on technical, past performance, and price factors. Id. at 29.

On December 11, AWS filed the instant protest.

DISCUSSION

AWS challenges the agency's decision to issue a new solicitation for the shelving system. AWS contends that a different solicitation was unnecessary because, in its view, the requirements in the RFP are "the same in all material respects" to those solicited in the August RFQ. Protest at 2, 6. Therefore, AWS complains that it was improperly denied the contract for the supply and installation of the shelving system as solicited under the August RFQ. For the reasons discussed below, we conclude that the agency's corrective action is unobjectionable.

Contracting officers have broad discretion to take corrective action where the agency determines that such action is necessary to ensure a fair and impartial competition. See Domain Name Alliance Registry, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 8. As a general matter, the details of corrective action taken in response to a protest are within the sound discretion and judgment of the contracting agency. KNAPP Logistics Automation, Inc.--Protest & Costs, B-404887.2, B-404887.3, July 27, 2011, 2011 CPD ¶ 141 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. Networks Elec. Corp., B-290666.3, Sept. 30, 2002, 2002 CPD ¶ 173 at 3. It is not necessary for an agency to conclude that a protest is certain to be sustained before it may take corrective action; rather, where the agency has reasonable concerns that there were errors in the procurement, we view it as within the agency's discretion to take corrective action, even if the protest could be denied. See Bannum, Inc.--Protest and Recon., B-411074.2, B-411074.3, June 12, 2015, 2015 CPD ¶ 231 at 7.

In light of the broad discretion afforded to contracting agencies in taking corrective actions, we find reasonable the agency's decision to cancel its RFQ and resolicit its requirements under a new solicitation. Here, the agency submits numerous examples of aspects of its original procurement that necessitated change or clarification. As an initial matter, the agency explains that it determined that it was in UNICOR's best interest to act as the offeree (under a request for proposals) rather than the offeror (under a request for quotations) so that there would be no possibility for a rejection of the award. CO Statement at 3. Therefore, the agency decided to issue a new RFP rather than amend the August RFQ. See id.

Next, significantly, the contracting officer explains that the August RFQ did not clearly state how many awards were anticipated, which was a primary basis for AWS's initial protest. See id. The new RFP, on the other hand, expressly

contemplates up to two contracts, with one being for the shelving materials and the other being for the installation. See RFP at 2. In addition, the contracting officer notes that the August RFQ did not clearly explain either how quotations would be evaluated or the basis for award, whereas the RFP now lays out the evaluation factors and methodology. See id. at 29-31; CO Statement at 2.

The agency also significantly revised the proposal submission requirements. For instance, under the RFQ UNICOR had to rely on a vendor's representation that its shelving materials were compatible with the shelving components to be provided by UNICOR. See RFQ at 1. The agency, however, explains that because it ultimately is responsible for the complete shelving system at the National Records Center, that it should be the entity making the determination as to whether a company's materials are compatible. See CO Statement at 2. As a result, the solicitation now requires Package A offerors to submit samples of their "uprights," which UNICOR will evaluate for "form, fit and function." See RFP at 6-7, 29. Similarly, Package A offerors also now have to submit design-layout drawings for evaluation, which allows UNICOR to assess whether the anticipated design will maximize space and allows UNICOR to compare offerors' proposed designs. See id. at 6; CO Statement at 2.

Moreover, because UNICOR prefers that offerors plan the design of the shelving system, the RFP includes significant changes to the quantities of materials to be procured. In this respect, the RFQ had sought quotations for a specific amount and type of shelving based on the agency's design. See RFQ at 7. The agency points out, though, that the specific shelving components needed for an offeror's unique shelving layout will vary depending on the design. CO Statement at 2. The RFP, therefore, instructs offerors to propose only the materials required for the offeror's specific design. See RFP at 5-6, 32.

The agency also references changes with respect to the installation of the shelving. Specifically, the August RFQ did not require that vendors submit any information regarding how they intended to install the shelving. See RFQ at 1-7. To better determine an offeror's ability to meet project deadlines and to compare costs, the new RFP requires Package B offerors to submit an installation plan for evaluation. See CO Statement at 2; RFP at 8.

Thus, as highlighted above, the record does not support the protester's assertion that the agency is "simply re-soliciting the same scope of work" and should have, instead, awarded one contract to AWS under the August RFQ. See Protest at 3. In this regard, while the solicitation still contemplates the purchase and installation of a shelving system, the substantial changes outlined above--changes to the evaluation and award methodology, proposal submission requirements, and quantity of materials being procured--support the agency's decision to issue a new RFP for the procurement. Indeed, in a negotiated procurement such as this one, a contracting agency has broad discretion in deciding whether to cancel a solicitation, and need

only establish a reasonable basis for doing so. Applied Resources, Inc., B-400144.7, B-400144.8, July 31, 2009, 2009 CPD ¶ 161 at 2. A reasonable basis to cancel exists when, for example, an agency determines that a solicitation does not accurately reflect its needs, or where there is a material change in the services or supplies needed to satisfy the agency's requirements; in such cases, cancellation of the solicitation and issuance of a revised solicitation is appropriate. See Logistics Solutions Group, Inc., B-294604.7, B-294604.8, July 28, 2005, 2005 CPD ¶ 141 at 3; see also North Shore Med. Labs, Inc.; Advanced BioMedical Labs., LLC, B-311070, B-311070.2, Apr. 21, 2008, 2008 CPD ¶ 144 at 4 (finding cancellation of solicitation reasonable where solicitation included insufficient information to allow agency to properly assess offerors' technical capabilities or ensure that quality control inspections could be met).

Given the agency's well-reasoned rationale for the significant changes in the solicitation, we find unobjectionable the agency's decision to cancel the RFQ and resolicit its requirements under a new solicitation. AWS has not shown that the agency's actions are unreasonable or beyond the agency's discretion.

The protest is denied.

Susan A. Poling
General Counsel