



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Symvionics, Inc.

File: B-408505

Date: September 19, 2013

Harold S. Gault, Symvionics, Inc., for the protester.
Alexander T. Bakos, Esq., J. Brett Swanson, Esq., and Chauncey C. Williams, Esq.,
National Aeronautics and Space Administration, for the agency.
Heather Weiner, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the solicitation's evaluation scheme as biased in favor of offerors with existing government-approved purchasing systems is denied where the RFP's evaluation criteria do not improperly favor offerors in the manner alleged or otherwise reflect bias or bad faith.

DECISION

Symvionics, Inc., of Arcadia, California, protests the terms of request for proposals (RFP) No. NND12374119R, issued by the National Aeronautics and Space Administration (NASA), for research facilities and engineering support services at NASA's Dryden Flight Research Center. The protester argues that the solicitation contains an improper preference for offerors that have a government-approved purchasing system.

We deny the protest.

BACKGROUND

On May 3, 2013, NASA issued the solicitation seeking research facilities and engineering support services at NASA's Dryden Flight Research Center. RFP, Performance Work Statement (PWS) at 5. The procurement is a small-business set-aside under North American Industry Classification System (NAICS) Code 541513, Computer Facilities Management Services, with a small business size standard of \$25.5 million in annual revenue. RFP at 1. The solicitation anticipates the award of a cost-plus award-fee contract for a base year with three

1-year options, one 8-month option, and one 4-month option. Id. at 3, 72. The estimated value of the procurement is between \$50 million and \$100 million. Contracting Officer's Statement (CO Statement) ¶ 1.01.

The RFP advises that proposals will be evaluated using a best value approach, based on three evaluation factors: mission suitability, cost, and past performance. RFP § M.2. For purposes of award, the mission suitability and past performance factors, when combined, are significantly more important than cost. RFP § M.4. As relevant here, the mission suitability factor consists of four subfactors: management approach, technical approach, safety and health, and phase-in/phase-out. Id.

Under the management approach subfactor, the solicitation advises that proposals will be assessed based on an offeror's proposed overall management approach and capability to perform the PWS requirements, and includes the evaluation of nine specific areas, including evidence of the offeror's government-approved purchasing system or plan for implementing a system for government approval. RFP § M.3.A.

The RFP explains that "[a] Government-approved purchasing system is a critical requirement of the . . . contract" and that a contractor's ability to have an approved purchasing system will have "a significant impact on the contractor's ability to perform the PWS." RFP at 32. For offerors without an approved system at the time of award,¹ the RFP requires submission of the offeror's system for government approval within 90 days, stating:

The Contractor's Purchasing System shall be submitted to the Government for approval, in accordance with FAR 44.3, within **ninety (90) days** after the contract effective date. The Contractor Purchasing System Review (CPSR) shall review and evaluate the contractor's purchasing system as specified in FAR 44.403.

RFP § H.12 (emphasis in original).

To evaluate compliance with this requirement, the solicitation requires offerors to submit sufficient details to allow the government to evaluate the "[e]xistence of a Government approved purchasing system or [the offeror's] plan and approach to

¹ For offerors with an existing approved system at the time of award, the solicitation requires that they submit "a certificate reflecting existence of an Approved Purchasing System" and advises that "[i]n accordance with [Federal Acquisition Regulation] FAR 44.302(b), the Administrati[ve] Contracting Officer shall determine whether a supplemental review of the purchasing system is necessary, at least every three years." RFP § H.13.

establish and implement a Government approved purchasing system within ninety (90) days after the contract effective date.”² RFP § L.16(B)(9).

Under the RFP’s evaluation criteria, an existing government-approved purchasing system will be evaluated as a strength. RFP § M.3.A(9). For those offerors that do not have an approved system, the RFP states that plans for establishing an approved system will be evaluated based on soundness of approach and realism of achieving that approach within a specified timeframe, as follows:

Evidence of a Government-approved Contractor’s purchasing system will be evaluated as a strength. The plan and approach of establishing and implementing an approved purchasing [system] will be evaluated on the soundness of the approach and the realism of achieving the approach within ninety (90) days after the contract effective date.

Id.

With regard to this RFP requirement, a prospective offeror submitted a question that expressed concern about a small business’s ability to pass a formal contractor purchasing system review (CPSR), conducted by the Defense Contract Management Agency (DCMA) within 90 days after contract award, based on the requirements of FAR 44.302.³ RFP amend. 0009, Q&A, Q1 (June 25, 2013). The

² Initially, the solicitation limited the competition to offerors that could provide evidence of a government-approved purchasing system at the time of proposal submission. Agency Report (AR), Tab 3, Questions and Answers (Q&A) (June 6, 2013), Q30. However, in response to a question about this limitation, NASA revised the RFP’s requirement to permit offerors without an existing approved system to compete, stating: “The Government will modify the RFP under Sections H, L & M for offerors to provide an appendix with evidence of a Government approved purchasing system OR the offeror’s plan and approach of establishing a Government Approved purchasing system within 90 days of contract award.” Id., Q&A, R30 (June 6, 2013).

³ For example, FAR § 44.302 states that the “[administrative contracting officer (ACO)] shall determine the need for a CPSR based on, but not limited to, the past performance of the contractor, and the volume, complexity and dollar value of subcontracts,” and that the ACO shall perform a review to determine if a CPSR is needed if a contractor’s sales to the Government are expected to exceed \$25 million during the next 12 months. As discussed below, the protester asserts that, because the small business size standard for this procurement is \$25.5 million in annual revenue, any small business that does not exceed this size threshold will likely have less than \$25 million of Government sales, and therefore, will be unlikely to qualify for a CPSR by DCMA.

agency explained that DCMA approval would not be required here because, pursuant to NASA FAR Supplement (NFS) 1844.302-71, NASA may approve purchasing systems. Id., Q&A, R1 (June 25, 2013). The agency also specified that contractors were to submit their purchasing systems to NASA for approval. Id. Specifically, the agency advised: “This government approval is not limited exclusively to DCMA . . . Pursuant to Clause H.12, if the successful offeror does not have a Government-Approved Purchasing System at proposal submission, the contractor must submit their Purchasing System to the Government (NASA) for approval within 90 days after the contract effective date.” Id. As the agency notes, NFS 1844.302-71 states that “[i]f a NASA activity is the cognizant contract administration office . . . then a CPSR should be conducted by NASA personnel,” and that for the instant contract effort, NASA’s Dryden Flight Research Center is the cognizant contract administration office and has not delegated contract administration to DCMA. CO Statement ¶ 3.05.

On July 2, Symvionics filed this protest. On July 9, the closing date for receipt of proposals, NASA received multiple proposals from small businesses that complied with the RFP’s requirement concerning the government-approved purchasing system. Id. ¶ 1.04. The protester did not submit a proposal. Id.

DISCUSSION

Symvionics argues that the solicitation’s management approach evaluation scheme is flawed because it favors offerors that have existing government-approved purchasing systems at the time of proposal submission over those that do not. As discussed below, we find that the RFP’s evaluation criteria do not improperly favor offerors with approved systems in the manner alleged by the protester.

As a general rule, solicitations must contain sufficient information to allow offerors to compete intelligently and on an equal basis. Tennier Indus., Inc., B-299624, July 12, 2007, 2007 CPD ¶ 129 at 2. However, there is no legal requirement that a solicitation contain such detail as to completely eliminate all risk or remove all uncertainty from the mind of every prospective offeror. Braswell Servs. Group, Inc., B-276694, July 15, 1997, 97-2 CPD ¶ 18 at 2-3. Moreover, an agency is not required to procure its requirements in a manner that neutralizes the competitive advantages some firms may have by virtue of their own particular circumstances. CHE Consulting, Inc.; Digital Techs., Inc., B-284110 et al., Feb. 18, 2000, 2000 CPD ¶ 51 at 8. In interpreting solicitation terms, we will read the solicitation as a whole and in a manner that gives effect to all of its provisions. AMS Group, B-299369, Apr. 12, 2007, 2007 CPD ¶ 72 at 3.

As discussed above, the management approach factor states that, for offerors that do not have an existing government-approved purchasing system, NASA will consider the realism of an offeror’s plan to establish and implement its system within 90 days of contract award. Symvionics asserts that the management

approach factor criteria are “fundamentally biased” against offerors without an existing government-approved purchasing system because the realism of an offeror’s plan is dependent on the government’s approval of the offeror’s purchasing system within 90 days. In this regard, the protester contends that the solicitation does not specifically commit the agency to review a successful contractor’s proposed purchasing system within the 90-day postaward period. The protester argues that, in the absence of such a commitment, these offerors will be competitively disadvantaged because “without the Agency’s commitment and schedule to conduct a Contractor Purchasing System Review (CPSR) to support achieving an approved purchasing system within 90 [days after award], any bidder’s plan to do so is pure speculation and is of questionable realism.”⁴ Protester’s Comments (Aug. 23, 2013) at 3. Furthermore, the protester contends that “there is nothing an offeror can do to make a CPSR happen” because such a review “requires Government action, and the timing is at the discretion of the Government.” Protester’s Comments (Aug. 9, 2013) at 3.

Symvionics therefore argues that the agency may conclude during its evaluation of proposals that it has no obligation to conduct a review of a successful contractor’s proposed purchasing system within 90 days of award, and for this reason the agency could unfavorably evaluate all offerors without an existing government-approved system. Protester’s Comments (Aug. 9, 2013) at 7. We view the protester’s argument as, in essence, alleging that the agency is improperly biased in favor of existing government-approved systems, and that the government will act in bad faith by refusing to fairly consider the proposals of offerors without an existing system. As discussed below, we find no merit to the protester’s arguments.

Government officials are presumed to act in good faith and a protester’s claim that an agency official was motivated by bias or bad faith must be supported by convincing proof. Brian X. Scott, B-310970, B-310970.2, Mar. 26, 2008, 2008 CPD

⁴ The protester does not argue that the RFP’s requirement for a government-approved purchasing system is unduly restrictive of competition or challenge the reasonableness of this requirement itself. See Protester’s Comments (Aug. 9, 2013) at 6 (“[T]he issue is not ‘establishing and implementing a purchasing system,’ but rather passing an uncommitted and unscheduled CPSR within ninety days after contract award.”); id. at 5 (requesting that the agency either eliminate the RFP’s requirement or include in the RFP a commitment by the agency “to a specific schedule to conduct a CPSR whereby any small business offeror has a realistic opportunity to achieve a Government approved purchasing system within 90 [days after contract award.]”); Protester’s Comments (Aug. 23, 2013) at 3 (“Agency’s Reply does not address . . . why [it] has neither committed to conduct a CPSR, nor provided a schedule for a CPSR that would satisfy the ninety (90) day requirements of clauses H.12 and M.3.A.9.”).

¶ 59 at 4. Our Office will not attribute prejudicial motives to procurement officials on the basis of inference or supposition. Id.

Here the record does not support Symvionics' claims of bias or bad faith. As discussed above, Symvionics' primary argument is that the solicitation improperly favors approved offerors because it permits NASA to evaluate non-approved offerors under the evaluation scheme as unrealistic on the premise that the agency will not even attempt to review the plans within 90 days. However, while the RFP's evaluation criteria allow the agency to evaluate the realism of an unapproved offeror's plan for submitting and obtaining approval of its purchasing system within 90 days, there is no indication on the face of the solicitation that the government intends to conduct its evaluation in bad faith by refusing to consider offers without an approved system. To the contrary, the record demonstrates that the agency revised the initial solicitation to include the challenged evaluation provision, along with the underlying requirement, to permit offerors that lack government-approved purchasing systems, such as the protester, to compete in the procurement. RFP, amend. 0008; see CO Statement ¶ 3.05; AR at 10.

Symvionics also notes that under FAR § 44.302, an agency must consider whether a contractor's sales to the Government exceed \$25 million in determining whether a CPSR is needed. Protest at 4-5. Specifically, because the small business size standard for this procurement is \$25.5 million in annual revenue, the protester asserts that "any small business that meets the \$25.5M size criteria will have substantially less than \$25 million of Government sales," and therefore, will be unlikely to be considered by DCMA for a CPSR. Protest at 4.

NASA disagrees that its ability to conduct purchasing system reviews is restricted by FAR § 44.302 as the protester suggests. AR at 11. The agency points out that under NFS 1844.302-71, NASA itself has authority to approve purchasing systems, and that the solicitation directs offerors to submit their purchasing systems to NASA for approval. RFP amend. 0009, Q&A, Q1; AR at 11. The contracting officer also explains that NASA, as the contract administrator for this effort, has discretion in determining when a CPSR is appropriate. CO Statement ¶ 3.05.

Additionally, the protester's reliance on the language in FAR § 44.302 as support for its contention that the government will not likely review the non-approved offerors' purchasing systems within 90 days erroneously characterizes the listed \$25 million dollar value as establishing a strict and inflexible threshold for the agency's determination of when a CPSR is warranted. In this regard, the dollar value is only one of the factors listed for consideration and the amount may be raised or lowered "if it is considered to be in the Government's best interest." FAR § 44.302. As the contracting officer explains, NASA historically has been the contract administrator for this effort and intends to retain contract administration of the awarded contract, and as such, has discretion in determining when a CPSR is appropriate. CO Statement ¶ 3.05.

In sum, there is no merit to the protester's argument that the RFP contains an improper preference in the source selection process for offerors that already have a government-approved purchasing system or that the agency's actions were motivated by bias or bad faith. The protester's allegations are based on nothing more than mere speculation. On this record, we find no basis to sustain the protest.

The protest is denied.

Susan A. Poling
General Counsel