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Decision

Matter of: Marshall & Swift-Boeckh, LLC

File: B-407329; B-407329.2

Date: December 18, 2012

David T. Ralston Jr., Esq., and Frank S. Murray, Esq., Foley & Lardner LLP, for the protester.

Clinton L. Hubbard, Esq., for The Bluebook International, Inc., the intervenor.

Jonathan English, Esq., and Julie K. Cannati, Esq., Department of Housing and Urban Development, for the agency.

Christina Sklarew, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging an agency's decision to set aside an acquisition for small businesses is denied where the contracting officer had a reasonable expectation that the agency would receive quotations from at least two capable small businesses.

DECISION

Marshall & Swift-Boeckh LLC, of Milwaukee, Wisconsin, protests the terms of request for quotations (RFQ) No. DU100H-12-Q-0002, issued by the Department of Housing and Urban Development (HUD) for a cost-estimating software and related licenses and services for the Federal Housing Administration (FHA). Marshall, a large business concern, complains that the RFQ should not have been set aside for small businesses.

We deny the protest.

BACKGROUND

FHA administers the single family mortgage insurance program and insures approved lenders against the risk of loss on mortgages obtained with FHA financing. Real estate is conveyed to FHA from approved lenders following foreclosure and other reacquisition activities. FHA is required to maintain/repair and preserve the value of these properties until they are sold. The agency uses industry

standard cost estimating software to evaluate the costs of preservation and protection. Agency Report (AR) at 1-2.

The prior contract for the cost estimating software was awarded to The Bluebook International, Inc., a small business, on September 20, 2011.¹ AR, Tab 29, Bluebook Contract. This procurement was set aside for small businesses based upon the agency's determination from its market research that it could expect to receive quotations from two or more small businesses. AR, Tab 21, 2011 Market Research. In fact, the agency received quotations from 6 small businesses, including Bluebook, of which four were found acceptable. AR, Tab 26, 2011 Technical Evaluation, at 704.

In 2012, HUD again performed market research in preparation for issuing a new solicitation for the cost estimating software. See AR, Tab 31, 2012 Market Research. The agency found that there were four small businesses, including Bluebook, that were capable of satisfying the agency's requirements. Id. at 9. Specifically, the agency found that Bluebook was capable of satisfying all of the requirements, and that the other three small businesses were potentially capable of satisfying the requirements with "appropriate Team relationships and satisfying the minimum requirements while in compliance with FAR [clause] 52.219-14, Limitations on Subcontracting." Id. at 6, 9.

HUD issued the RFQ as a small business set-aside for the cost estimating software tool and associated training support. This protest followed.

DISCUSSION

Marshall makes numerous arguments challenging HUD's determination that it could reasonably expect to receive quotations from two or more capable small businesses. We have considered all of the protester's arguments, although we only address the primary ones, and find that none provide a basis to object to the agency's decision to set aside the RFQ for small businesses.

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

¹ Marshall was awarded 1-year contracts in 2009 and 2010 for the cost estimating software. See AR, Tab 3, Marshall Contract, Sept. 9, 2009; Tab 17, Marshall Contract, Sept. 17, 2010. Neither of these procurements were set aside for small businesses.

long as the agency undertakes reasonable efforts to locate responsible small business competitors. National Linen Serv., B-285458, Aug. 22, 2000, 2000 CPD ¶ 138 at 2. 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. 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. ViroMed Labs., B-298931, Dec. 20, 2006, 2007 CPD ¶ 4 at 3.

Marshall contends that, based upon its own familiarity with the competitive market for cost estimating database software, the contracting officer could not reasonably have determined that two responsible small businesses were capable of satisfying the RFP's requirement at fair market prices. In this regard, the protester argues that the agency's market research, and the procurement history, were not relevant or reliable because the RFQ contains new requirements that are unlikely to be satisfied by small businesses. Protest at 13-14. Specifically, Marshall argues that the RFQ now requires that the cost estimating service be internet-based and backed by an accurate and comprehensive proprietary database; and that it be available on a 24-hours per day, 7-days per week basis. Id.

HUD disagrees that these requirements are either new or indicate that the agency could not expect to receive quotations from two or more capable small businesses. The requirements that the system be "internet-based" and be backed by "an accurate and comprehensive proprietary database" were included in Bluebook's 2011 contract, AR, Tab 29, Bluebook Contract, at 3, apparently because this was offered by the small businesses in response to that solicitation.² Similarly, the requirement that the system be available continuously was promised by four of the small businesses in response to the solicitation, although this requirement was not incorporated in Bluebook's contract. AR at 8. We find that these requirements do not call into question the agency's market research that indicated that it could expect quotations from two or more small businesses.

² The agency also stated that the 2010 sources-sought notice described the system as "web-based." Further, with respect to the "proprietary database" requirement, HUD points out that the RFQ does not require, as Marshall insists, that the system be proprietary to the offeror, but only that it be proprietary--and that this is a requirement that small business quoters can easily meet. As HUD points out, each of the six firms that submitted quotations for the 2011 acquisition either teamed with a large business to provide the relevant software/database (some teamed with Marshall), or offered their own. AR at 7.

Marshall also argues that HUD's expectation that it would receive small business quotations based on subcontracting or teaming arrangements was unreasonable because its market research did not take into account various likely affiliation issues inherent in such arrangements, such as whether the quotations would comply with the RFQ's limitations on subcontracting clause or SBA's ostensible subcontractor rule. Protester's Comments and Supp. Protest at 7-21. Marshall argues, for example, that a contracting officer had an affirmative duty to ask the Small Business Administration whether these prospective teaming arrangements would violate the SBA's "ostensible subcontractor" rule. Id. at 19.

There is no merit to these arguments. Marshall 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 determinations of responsibility or decisions tantamount to determinations of responsibility with regard to prospective offerors; they need only make an informed business judgment that there are small businesses expected to submit offers that are capable of performing. ViroMed Labs., supra, at 3-4.

Marshall also contends that the agency's acceptance of quotations based upon a teaming arrangement where a small business proposes to use a subcontractor for the database service places too great a risk on HUD. This contention also has no merit. It is true that the agency recognized that such a teaming arrangement posed a potential performance risk, see AR, Tab 31, 2012 Market Research, at 7, but the agency did not find that this indicated it could not expect quotations from two or more capable small businesses.

In short, the record shows that HUD's expectation that it would receive two or more quotations from responsible small businesses at fair market prices was reasonable.

The protest is denied.

Susan A. Poling
General Counsel