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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Sea Box, Inc.

File: B-409969

Date: September 24, 2014

Robert A. Farber, Esq., Sea Box, Inc., for the protester.
John P. Patkus, Esq., Defense Logistics Agency, 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 agency's decision not to set aside the procurement for small business concerns is denied where the agency reasonably based its decision on market research, including responses to a sources sought notice and pre-award surveys, indicating that the agency was not likely to receive proposals from at least two small businesses.

DECISION

Sea Box, Inc., of East Riverton, New Jersey, protests the decision of the Defense Logistics Agency (DLA), Troop Support, to issue request for proposals (RFQ) No. SPE8ED-14-Q-0527, for the acquisition of TRICON type II shipping containers, on an unrestricted basis. Sea Box contends that the requirement should be set aside for small business concerns.

We deny the protest.

On June 17, 2014, DLA published a sources sought notice on the Federal Business Opportunities website (www.fedbizopps.gov), in which it announced its intent to procure the manufacture and delivery of TRICON containers. Agency Report (AR), Tab 4, Sources Sought Notice, at 1. The notice requested that responsible, interested sources submit a response demonstrating their capabilities and qualifications data, including "the ability to manufacture these containers." *Id.* at 2.

Seven business concerns responded to the sources sought notice, including Sea Box. Contracting Officer (CO) Statement at 2. The contracting officer reviewed the information in these responses, as well as information provided in pre-award

surveys conducted by the Defense Contract Management Agency (DCMA) for each of the seven business concerns, to assess whether any of the business concerns were small business manufacturers of TRICON containers. Id. After reviewing this information, the contracting officer concluded that “there are no known domestic Small Business manufacturers of TRICON Containers.” AR, Tab 2, Small Business Coordination Record, at 2. Based on this conclusion, the contracting officer recommended that the acquisition be conducted on the basis of full and open competition. Id. Both the agency small business specialist and the local district office of the Small Business Administration (SBA) concurred in the recommendation. Id.

On June 19, DLA issued the RFQ on an unrestricted basis for the acquisition of 226 TRICON type II containers. RFQ at 1. Sea Box filed this protest challenging the agency’s decision not to set-aside the solicitation for small business concerns, prior to the RFQ’s closing date of June 23.

DISCUSSION

Sea Box argues that DLA should have set aside the acquisition for exclusive small business participation, rather than issuing an unrestricted solicitation. Specifically, Sea Box contends that the agency unreasonably relied on a SBA size determination in concluding that Sea Box and another potential offeror were not small business manufacturers of TRICONS, and therefore, that the agency was unlikely to obtain offers from at least two small business concerns. For the reasons discussed below, we find that the contracting officer’s decision to issue the solicitation on an unrestricted basis was reasonable.

Under Federal Acquisition Regulation (FAR) § 19.502-2(b), a procurement with an anticipated dollar value of more than \$150,000 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 award will be made at a fair market price. While the use of any particular method of assessing the availability of small businesses is not required, the agency must undertake reasonable efforts to locate responsible small business competitors. ViroMed Labs., B-298931, Dec. 20, 2006, 2007 CPD ¶ 4 at 3-4. Because a decision whether to set aside a procurement is a matter of business judgment within the contracting officer’s discretion, our review is limited to determining whether that official abused his or her discretion. Vox Optima, LLC, B-400451, Nov. 12, 2008, 2008 CPD ¶ 212 at 5.

As discussed above, the contracting officer conducted a market survey to assess whether there were any small business manufacturers of TRICON containers. In this regard, the contracting officer published a sources sought notice and received responses from seven business concerns. CO Statement at 2. In addition, the contracting officer obtained pre-award surveys that had been conducted by DCMA

for each of the same seven business concerns that responded to the sources sought notice. Id.

The contracting officer evaluated the information in the responses and pre-award surveys, and concluded that “there are no known domestic Small Business manufacturers of TRICON Containers.” AR, Tab 2, Small Business Coordination Record, at 2. Specifically, the contracting officer found that all seven of the business concerns “perform essentially the same assembly process” on the TRICON containers of “welding and painting manufactured components from an overseas source.” Id. In making this determination, the contracting officer compared the processes used by the seven business concerns to that of Harding Construction International, which was discussed in a recent size determination issued by the Small Business Administration (SBA) that considered whether a concern was a manufacturer of TRICON containers. Id. (citing SBA Size Determination, Case No. 6-2014-031 (Feb. 4, 2014)).¹ The contracting officer summarized the SBA’s rationale regarding the company in SBA’s size determination as follows:

The concern acquired the manufactured components (corrugated steel sides, roof, swing doors, heavy steel floor, etc.) from a single overseas source and assembled them into the TRICONS by welding and painting. SBA pointed out that, in order to be considered a manufacturer, a concern must, with its own facilities, perform the primary activity of transforming substances into the manufactured end item, so that it possesses characteristics it did not have before, and that a firm that performs only “minimal operations” (such as merely unpacking, modifying, on-site assembly, installing, and integrating components) upon the end item does not qualify as a manufacturer. The SBA concluded . . . that the overseas source of the components, rather than the domestic assembler, was the “manufacturer” of the TRICONS.

¹ Prior to the issuance of this SBA size determination, DLA issued at least eight solicitations for TRICONS, as total small business set-asides, based on the agency’s belief that at least two small businesses qualified as manufacturers of the TRICONS. CO Statement at 5; AR, Tab 21, DLA List of Small Business Set-Aside Orders. On December 16, 2013, Sea Box filed a protest with SBA concerning the award of a set-aside contract for TRICONS to W&K Containers, Inc., which had proposed to provide containers supplied by Harding. As a result of the SBA size decision, the contracting officer states: “[DLA] learned in February 2014 that SBA considered the welding and painting assembly process not to be manufacturing. Accordingly, because market research showed small businesses all performed essentially the same welding and painting assembly process, subsequent acquisitions have been unrestricted.” CO Statement at 5.

Id.

Based on the SBA's reasoning, as well as the agency's knowledge of the industry from its market research, the contracting officer concluded that none of the seven business concerns would qualify as small business manufacturers of TRICONS, and therefore, determined not to set aside the requirement for TRICON containers for small business. Id.

Sea Box first argues that it was unreasonable for the contracting officer to rely on the SBA's size determination in concluding that none of the seven business concerns qualify as small business manufacturers of TRICON containers because that specific size determination is not binding on other entities or on other procurements. Protester's Comments at 14 (citing SBA's standard operating procedure document, dated June 17, 2009). We, however, find no merit to this argument. While the SBA's size determination may not be binding on other procurements or entities, the SBA decision provides guidance from an authoritative source regarding the requirements necessary for a concern to qualify as a small business manufacturer of TRICONS.

For example, as discussed above, the SBA's size determination in Sea Box's prior size protest explains that, "in order to be considered a manufacturer, a concern must, with its own facilities, perform the primary activity of transforming substances into the manufactured end item, so that it possesses characteristics it did not have before," and that "[a] firm that performs only 'minimal operations' upon an end item"--such as merely unpacking, modifying, on-site assembly, installing, and integrating components--does not qualify as a manufacturer. AR, Tab 19, SBA Size Determination, Case No. 6-2014-031 (Feb. 4, 2014), at 5. Specific to TRICON containers, the SBA determination explains that Harding's primary activities of "welding them together and painting" the components (steel sides, roof, swing doors, and heavy steel floor) constituted assembly of the components, not manufacture of the components. Id. at 4. We find no basis to conclude that it was unreasonable for the contracting officer to consider this rationale in assessing whether the seven business concerns qualify as manufacturers of TRICONS.

Next, the record shows that the Navy reasonably concluded that the seven small businesses that responded to the sources sought notice used the same assembly process as Harding.² AR, Tab 2, Small Business Coordination Record, at 2. Sea Box does not specifically challenge the agency's evaluation of six of these firms. The protester argues, however, that the contracting officer unreasonably assessed the qualifications of one of the other respondents to the agency's sources sought notice, Maloy Mobile Storage, Inc., arguing: "Upon information and belief, [the

² A protective order was not issued in this protest, but our Office was provided a complete copy of the record for our in-camera review.

DCMA] survey [for Maloy] will similarly reveal that Maloy was conclusively determined to be a manufacturer of TRICONS.” Protest at 9. Based on our review of the record, however, we find that the DCMA survey supports the contracting officer’s assessment that Maloy would not qualify as a small business manufacturer of TRICONS. AR, Tab 13, DCMA Pre-Award Survey, at 4. Accordingly, we find nothing unreasonable regarding the contracting officer’s conclusion regarding Maloy.

Finally, the protester argues that the contracting officer incorrectly concluded that Sea Box’s assembly process is similar to the one addressed in the SBA’s size determination, and therefore, unreasonably found that Sea Box would not qualify as a small business manufacturer of TRICONS. We need not address this argument because, as discussed above, the contracting officer reasonably found that none of the other business concerns that responded to the sources sought notice would qualify as small business manufacturers of TRICON containers. For this reason, even if Sea Box is viewed as a small business for purposes of supplying TRICONS, it cannot show that two or more responsible small businesses could provide these containers at a reasonable price. See FAR § 19.502-2(b).

In sum, Sea Box has not demonstrated that the contracting officer abused his discretion in concluding that offers from at least two capable small business manufacturers of TRICONS could not be expected in response to the solicitation.

The protest is denied.

Susan A. Poling
General Counsel