



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: The University of Montana

File: B-410432

Date: December 22, 2014

Chelsey Porter, The University of Montana, for the protester.
Michael J. Noble, Esq., General Services Administration, for the agency.
Brent Burris, Esq., and Edward Goldstein, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest challenging inclusion of solicitation provision in General Services Administration Schedule 738 II, requiring all offerors, other than small businesses, to submit small business subcontracting plans with initial offers, is denied where provision was included in accordance with applicable regulations.

DECISION

The University of Montana, of Missoula, Montana, protests the terms of solicitation No. TFTP-GC-017382-B, issued by the General Services Administration (GSA), Federal Acquisition Service, for language services. The protester argues that the solicitation is defective because it includes a provision requiring all offerors, other than small business concerns, to submit a small business subcontracting plan with their proposals, which, according to the protester, is inconsistent with applicable regulations and customary commercial practice.

We deny the protest.

BACKGROUND

The solicitation, issued on an unrestricted basis, seeks proposals for the award of an unlimited number of indefinite-delivery/indefinite-quantity (IDIQ) contracts under GSA Schedule 738 II, which covers a wide range of commercial language services including translation, interpretation, linguistic analysis, and assistance for the visual and hearing impaired. Contracting Officer Statement of Facts (CO Statement) at 1. Originally issued on July 1, 1999, the solicitation does not have a closing date and is thus continuously open for offerors to submit proposals. *Id.* GSA periodically

updates the solicitation, with the most recent update issued on May 5, 2014. Id. As of September 29, 2014, 144 contractors, 41 of which are other than small businesses, hold active schedule contracts under GSA Schedule 738 II. Id.

As relevant to this protest, the solicitation incorporates by reference General Services Administration Regulation (GSAR) clause 552.219-72, Preparation, Submission, and Negotiation of Subcontracting Plans, which requires offerors, other than small businesses, to submit a small business subcontracting plan with their initial offer and provides details regarding the information offerors are to include in their plans.¹ Solicitation at vi. The solicitation also includes Federal Acquisition Regulation (FAR) clause 52.219-9, Alternate II, Small Business Subcontracting Plan, which likewise requires all offerors, other than small businesses, to submit a small business subcontracting plan with their initial offer.² Solicitation at 11.

According to the protester, it intended to submit a proposal under the solicitation, however, it has not done so because as a university, it does not subcontract for the performance of the language services that it would be proposing to perform. The University of Montana filed the subject protest with this Office on September 22, 2014.

DISCUSSION

The protester challenges the blanket provision in the solicitation requiring offerors to submit small business subcontracting plans with their initial proposals as set forth in GSAR clause 552.219-72. The University of Montana contends that FAR § 19.705-2, titled “Determining the need for a subcontracting plan,” requires a contracting officer to ascertain, for each offeror, whether subcontracting possibilities exist before directing the offeror to submit a small business subcontracting plan. According to the protester, however, the requirement under FAR § 19.705-2 to make an offeror-by-offeror determination regarding the need for a small business subcontracting plan is contradicted and nullified by the inclusion of GSAR clause 552.219-72, which requires all offerors to submit a small business subcontracting plan with their initial offers. Id. at 4-5. The University of Montana also argues that the requirement for a small business subcontracting plan is improper because it is inconsistent with customary commercial practice. Id. at 5-6. As discussed more

¹ The solicitation specifically advised offerors that nonprofit organizations and educational institutions were subject to the requirement to submit a small business contracting plan. Solicitation at vi.

² The Alternate II version of FAR § 52.219-9 requires offerors to submit a small business subcontracting plan with their initial proposal, whereas the standard version of the clause requires offerors to submit the plan when requested by the contracting officer.

fully below, we deny the protest because the protester's arguments are premised on a fundamentally erroneous understanding of the applicable regulations. In short, FAR § 19.705-2 does not contemplate an offeror-by-offeror determination regarding the need for a small business subcontracting plan, as the protester contends. Rather, the FAR provides that a contracting officer must determine--prior to the issuance of the solicitation--whether offerors are to submit a small business subcontracting plan.

Turning to the protester's first argument, FAR § 19.702(a)(1) provides, with exceptions not relevant here, that if a solicitation is expected to result in a contract valued in excess of \$650,000, with subcontracting possibilities, the solicitation shall require the apparently successful offeror to submit a small business subcontracting plan prior to award. This section of the FAR further provides that if an offeror fails to negotiate a plan acceptable to the government within the time limit prescribed by the contracting officer, that offeror will be ineligible for award. FAR § 19.702(a)(1).

In determining whether subcontracting opportunities exist, FAR § 19.705-2(b)(1), the provision on which the protester's argument rests, directs contracting officers to consider "relevant factors such as . . . [w]hether firms engaged in the business of furnishing the types of items to be acquired customarily contract for performance of part of the work or maintain sufficient in-house capability to perform the work." FAR § 19.705-2(b)(1).³

Where a contracting officer has concluded, using the factors set forth under FAR § 19.705-2, that a solicitation is for the award of a proposed contract which will provide subcontracting possibilities and is expected to exceed \$650,000, FAR § 19.708(b)(1) provides for the inclusion of FAR clause 52.219-9, Small Business Subcontracting Plan, in the solicitation. This clause requires an apparently successful offeror to submit an acceptable small business subcontracting plan in order to receive a contract award.⁴ Operating in tandem with the FAR, GSAR

³ In addition to the considerations under FAR § 19.705-2(d), the corresponding GSAR provision, section 519.705-2(c), generally provides that requiring subcontracting plans with initial offers "may be appropriate for multiple award schedules where GSA may have responsibilities for negotiating commercial plans." A commercial plan is a type of small business subcontracting plan provided for under FAR Subpart 19.7 that can be submitted for use in more than one government contract once it is negotiated and approved by a contracting officer. See FAR §§ 19.701, 19.704(d).

⁴ Regarding the question of when in the procurement process offerors must submit their small business subcontracting plans, the FAR provides contracting officers with the discretion to require plans with initial offers or prior to award. See FAR § 19.705-2(d). In making this decision, contracting officers are to "consider the integrity of the competitive process, the goal of affording maximum practicable

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§ 519.708-70(b) also provides for the inclusion of GSAR clause 552.219-72 in solicitations requiring the submission of a subcontracting plan with initial offers. In this regard, GSAR clause 552.219-72, like FAR clause 52.219-9, requires an apparently successfully offeror to submit an acceptable small business subcontracting plan in order to receive a contract award, and provides further guidance on the type of information that should be included in the plan.

In sum, pursuant to the regulations outlined above, when a GSA contracting officer expects a solicitation to result in the award of a contract that will be valued in excess of \$650,000 and provide subcontracting opportunities, the contracting officer is required to include FAR clause 52.219-9 in the solicitation, and must also include GSAR clause 552.219-72, if the subcontracting plans are to be submitted with initial proposals. As noted above, both FAR clause 52.219-9 and GSAR clause 552.219-72 require an apparently successfully offeror to submit an acceptable small business subcontracting plan in order to receive a contract award. As such, it is apparent from this regulatory framework that the inclusion of these clauses is predicated on a contracting officer first making a determination, as outlined under FAR § 19.705-2, that subcontracting possibilities for the proposed contract exist. Thus, notwithstanding the protester's assertions to the contrary, FAR § 19.705-2 does not contemplate a contracting officer making a determination of the need for a subcontracting plan on an offeror-by-offeror basis after proposals have been submitted; rather, the subcontracting plan determination is made prior to issuance of the solicitation. Accordingly, there is no basis for the protester's conclusion that the disputed GSAR clause 552.219-72 is inconsistent with the rules set forth in the FAR.

Moreover, as a general matter, we have no basis to conclude that the agency acted unreasonably under the applicable regulations when it required offerors to submit small business subcontracting plans. The solicitation contemplates the award of an unlimited number of contracts under a GSA Schedule to firms of all sizes, located throughout the United States. The solicitation can also reasonably be expected to lead to contracts with values in excess of \$650,000 where the maximum order value for each of the various types of services contemplated under the schedule is \$1 million.⁵ Solicitation at 3-6. Although particular offerors, such as the protester,

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opportunity for small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns to participate, and the burden placed on offerors." FAR § 19.705-2(d).

⁵ The protester does not challenge GSA's determination that the contracts to be awarded under the solicitation were expected to exceed the applicable dollar threshold of \$650,000.

may determine that subcontracting possibilities are not appropriate given their business practices, the agency did not act unreasonably in requiring offerors to submit an acceptable plan as a condition of award.⁶

The University of Montana's second argument--that requiring offerors, other than small businesses, to submit subcontracting plans is inconsistent with customary commercial practice and therefore improper--similarly is premised on a misunderstanding of the applicable regulations. In procurements involving the acquisition of commercial items, FAR § 12.301(a) requires that contracts "shall, to the maximum extent practicable, include only those clauses (1) [r]equired to implement provisions of law or executive orders applicable to the acquisition of commercial items; or (2) [d]etermined to be consistent with customary commercial practice."

In the instant solicitation, the requirement that offerors submit a small business subcontracting plan is contained, as noted above, in both GSAR clause 552.219-72 and FAR clause 52.219-9, which implement a statute that is applicable to the acquisition of commercial items.⁷ See FAR § 12.301(b)(4) (requiring the use of FAR § 52.212-5, Contract Terms and Conditions Required to implement Statutes or Executive Orders, in solicitations for the acquisition of commercial items); FAR § 52.212-5 (requiring the contracting officer to include 52.219-9 or any of its alternate

⁶ To the extent that the University of Montana argues that its proposal will be rejected as unacceptable if its small business subcontracting plan provides that no subcontracting possibilities exist, this argument is premature. As noted above, the University of Montana has yet to submit a proposal under the solicitation. Further, GSA has stated that it would not necessarily reject a small business subcontracting plan that provides that no subcontracting possibilities exist. CO Statement at 2. Indeed, the GSAR provides procedures that address the award of a contract after receipt of offers if the contracting officer determines that an apparently successful offeror's proposal has no subcontracting opportunities. See GSAR § 519.705-2(d).

⁷ FAR clause 52.219-9 implements the provisions of the Small Business Act (15 U.S.C. § 637(d)). See FAR § 19.702(a)(1).

versions, when appropriate). Thus, regardless of whether the requirements of FAR clause 52.219-9 (or any identical requirements reiterated in GSAR clause 552.219-72) are consistent with customary commercial practice, the clause is required to be included in commercial items solicitations if, as the GSA reasonably determined here, it is applicable.

The protest is denied.

Susan A. Poling
General Counsel