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Decision

Matter of: Manus Medical LLC

File: B-412331

Date: January 21, 2016

James S. Phillips, Esq., and James S. DeSordo, Esq., Argus Legal LLC, for the protester.

Barton B. Evans, Esq., Department of Veterans Affairs, for the agency.

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DIGEST

1. Protest that procurement should be set aside for service-disabled veteran-owned small businesses is denied where agency's market research established that there are not two small businesses that manufacture the products sought.
 2. Protest that agency improperly bundled requirements is denied where protester has not shown that it was precluded from competing for the requirements or that the requirements are unsuitable for award to small businesses.
 3. Protest that solicitation is unduly restrictive is denied where protester has not identified any solicitation provision that overstates the agency's needs and has affirmatively represented that it can perform all of the solicitation requirements.
 4. Protest that potential offerors have organizational conflicts of interest is premature where no source selection decision has been made.
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DECISION

Manus Medical LLC, of Richmond, Virginia, protests the terms of request for proposal (RFP) No. VA240C-15-R-0022, issued by the Department of Veterans

Affairs (VA) to obtain custom sterile procedure packs¹ for VA medical centers within the VA's Central Region Service Area Office (SAO Central).² Manus, a service-disabled veteran-owned small business (SDVOSB), protests that the procurement should be set aside for SDVOSBs; that the requirements are improperly bundled; that the solicitation is unduly restrictive of competition; and that some offerors have organizational conflicts of interest.

We deny the protest in part and dismiss it in part.

BACKGROUND

In August 2015, the VA issued RFP No. VA240C-15-R-0022 as an unrestricted solicitation, posting it to the Federal Business Opportunities (FedBizOpps) website at that time.³ The solicitation contemplates the award of a single, indefinite-delivery indefinite-quantity (IDIQ) contract for a 12-month base period and four 12-month option periods.⁴ Among other things, the solicitation provides that:

The Contractor shall provide all labor, materials, transportation, equipment and supervision, in compliance with federal, state and local regulations, to provide a Custom Sterile Procedure Pack program for the Central Region Veterans Health Administration Medical Facilities No two medical facilities are identical and therefore have unique clinical needs, as well as

¹ A custom sterile procedure pack is "a collection of consumables assembled in a single sterile pack to perform a specific surgical or intervention procedure." Agency Report (AR), exh. 12, Market Research Report, at 1.

² This region covers veterans in seven different veterans integrated service networks (VISNs) and includes over 40 VA medical centers within 20 states. See AR, Statement of Relevant Facts, at 5.

³ Until 2013, custom sterile procedure packs were obtained under federal supply schedule contracts established by the VA. The authority to order from these contracts expired in 2013; thereafter, multiple short-term sole-source contracts were awarded to meet the VA's needs until the longer-term competitive contract contemplated by this solicitation could be awarded.

⁴ Delivery orders will subsequently be issued under the IDIQ contract. The total estimated value of the contract for the 5-year performance period is [redacted]. AR, Statement of Relevant Facts, at 3.

unique infrastructures and administrative processes and procedures. . . .
The packs shall be available for distribution by the Medical Surgical Prime Vendor (MSPV)⁵ or by direct purchase, at the discretion of the local facility.

RFP at 11.

As amended, the solicitation established October 14 as the closing date. On October 13, Manus filed this protest with our Office, challenging the terms of the solicitation. Thereafter, Manus timely submitted its proposal responding to the solicitation requirements.

DISCUSSION

Manus protests that the procurement should be conducted as an SDVOSB set-aside; that the agency's requirements are improperly bundled; that the solicitation is unduly restrictive of competition; and that some potential offerors have organizational conflicts of interest. As discussed below, none of Manus's complaints provides a basis for sustaining the protest.

Set-Aside

Manus first protests that the procurement should be set aside for SDVOSBs based on Manus's assertion that "at least two SDVOSBs have expressed an interest in submitting offers." Protest at 11. Although Manus does not assert that it, or any other small business, actually manufactures the products sought, it asserts that, based on "established distribution relationships with large manufacturers of the custom packs . . . small and veteran owned businesses are . . . clearly able to perform all requirements." Protester's Comments on AR, Nov. 23, 2015, at 7.

An acquisition for the type of goods and services sought here, with an anticipated dollar value of more than \$150,000, must be set aside for small business concerns if the agency determines there is a reasonable expectation that offers will be submitted by two or more small businesses that are offering products manufactured by small business concerns. Federal Acquisition Regulation (FAR) §§ 19.502- 2(b), (c). In this regard, our Office will review a protest of an agency determination not to set aside a procurement to determine whether a contracting officer has undertaken reasonable efforts to ascertain the availability of capable small businesses. See,

⁵ The solicitation explained that an MSPV "is the VA's primary means of medical and surgical supply distribution," elaborating that "[t]he VA facilities realize a number of benefits from utilizing a single ordering and distribution prime vendor, including reduced administrative burden, inventory cost, and ordering efficiency." RFP at 10. Finally, the solicitation stated that "[t]he current MSPV vendors for the Central Region VA Medical Facilities are Cardinal Health and Kreislers." Id.

e.g., McSwain & Assocs., Inc. et al., B-271071 et al., May 20, 1996, 96-1 CPD ¶ 255 at 2.

Here, the record shows that the agency conducted extensive market research to determine whether there was a reasonable expectation that two or more small businesses possessed the capability to manufacture the products sought. See AR, exh. 9, Contracting Officer's Statement, at 4-14; exh. 12, Market Research Report, at 3-18. Among other things, the agency issued a request for information, conducted industry days, and performed various internet searches. Id. Based on its research, the agency determined there were several small businesses, including Manus, that are distributors of custom sterile surgery packs, but that the products being distributed are manufactured by large businesses. Specifically, the agency's market research established--and Manus does not dispute--that only one of the small businesses (a company other than Manus) manufactures any portion of the products sought by this procurement. Id. Based on this research, the agency concluded there was not a reasonable expectation that offers would be submitted by two or more small businesses offering products manufactured by small business concerns. Accordingly, the agency determined that a small-business set-aside was not appropriate.

Manus does not dispute the agency's conclusion that there are not two small businesses that manufacture the products sought for this procurement. Rather, as noted above, Manus's assertion that the procurement should be set aside is based on the "established distribution relationships" between various small businesses and large business manufacturers of the surgical packs. See Protest at 11; Protester's Comments on AR, Nov. 23, 2015, at 7. More specifically, Manus asserts that the agency was "obligated" to seek a waiver of the rule that products be manufactured by small businesses. Protester's Comments on AR, Nov. 23, 2015, at 7-10. We disagree.

The FAR provides that, in a specific solicitation, a contracting officer "may request a waiver" of the requirement that products acquired under small business set-asides be manufactured by small businesses. FAR § 19.102(f)(5). However, this provision is discretionary, and nothing in the protest record provides a basis for our Office to conclude that the agency's decision not to seek a waiver of the manufacturing requirements was improper. Accordingly, Manus's protest that the solicitation should have been set aside for SDVOSBs is denied.

Bundling

Next, Manus protests that the solicitation, as written (which permits offerors to provide products they do not manufacture), "improperly bundles together requirements[,] benefitting large offerors." Protest at 9-10. Manus asserts that such "bundling" is contrary to the provisions of the Competition in Contracting Act (CICA) and the Small Business Act. Id.

The agency responds that Manus's assertion regarding improper bundling is inconsistent with its assertion that the entire procurement should be set aside for SDVOSBs; inconsistent with its assertion that small businesses "are clearly able to perform all [solicitation] requirements," Protester's Comments on AR, Nov. 23, 2015, at 7; and inconsistent with the representations in the proposal Manus submitted, asserting its capability to perform all the solicitation requirements. The agency further notes that proposals were submitted by [redacted] other small business offerors (which, like Manus, apparently offered products manufactured by large businesses). AR, exh. 9, Contracting Officer's Statement, at 9-11.

CICA generally requires that solicitations permit full and open competition and contain restrictive provisions only to the extent necessary to satisfy the procuring agency's needs. See 41 U.S.C. § 3306(a)(2)(B). An allegation of improper bundling under CICA reflects a claim that a contract combines separate requirements beyond what is necessary to meet the agency's needs, thereby limiting the competition by excluding offerors that can only perform a portion of the requirement. See, e.g., Teximara, Inc., B-293221.2, July 9, 2004, 2004 CPD ¶ 151 at 6-9; Phoenix Scientific Corp., B-286817, Feb. 22, 2001, 2001 CPD ¶ 24 at 5. Similarly, the Small Business Act provides that federal agencies "to the maximum extent practical shall . . . avoid unnecessary and unjustified bundling of contract requirements that precludes small business participation in procurements as prime contractors." 15 U.S.C. § 631(j)(3).

Here, as the agency points out, the consolidation of requirements in this solicitation does not constitute bundling since Manus, a small business, has not been precluded from competing. To the contrary, Manus has submitted a proposal responding to the solicitation requirements, asserting that it is capable of performing all of those requirements. Further, as discussed above, Manus has maintained that the solicitation requirements should be set aside for performance by SDVOSBs, thus demonstrating its position that small businesses are fully capable of performing the solicitation requirements. Finally, the agency states that proposals have been submitted by [redacted] other small business offerors. AR, exh. 9, Contracting Officer's Statement, at 10-11. On this record, Manus's assertion that the solicitation improperly bundles requirements fails to state a valid basis of protest.⁶ 4. C.F.R.

⁶ Manus also asserts that the allegedly "bundled" requirements provide an unfair advantage for an MSPV, such as Cardinal Health, in that the solicitation will "lead to one company [an MSPV], having control of the manufactured end-items because they actually make them; control the assembly of those items into an individual pack; and also control the distribution of those same packs." Protester's Comments, Nov. 23, 2015, at 16. Manus summarizes that "[t]he MSPV would then exercise complete control and have perfect visibility of this product line from the end item component, component price, assembly, pack pricing, requirements,

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§ 21.5(f); see JXM, Inc., B-402643, June 25, 2010, 2010 CPD ¶ 158 at 6-7; Future Solutions, Inc., B-293194, Feb. 11, 2004, 2004 CPD ¶ 39 at 6-7 (GAO will not consider bundling allegations where small business protesters represent that they are capable of performing the allegedly bundled requirements). Accordingly, this protest ground is dismissed.

Overly Restrictive Requirements

Next, Manus protests that the solicitation contains “an unnecessary requirement” that is “unduly restrictive of competition.” Protest at 9. However, nothing in Manus’s protest identifies any particular solicitation provision it believes to be unduly restrictive. At most, in asserting that MSPVs have organizational conflicts of interest (OCIs), Manus complains that the “requirement that the successful awardee be able to meet with all VAMCs within SAO Central within 30 days of award and resolve questions regarding the content of all surgical packs to be delivered to those VAMCs” favors MSPVs. Protest at 14-15.

In response, the agency first notes that the solicitation does not contain the requirement described by Manus. Rather, the solicitation provides that the awardee must submit an implementation plan within 30 days after award notification and begin full contract performance within 120 days after award. RFP at 11-12. The agency further notes that nothing in Manus’s protest submissions asserts that these or any other solicitation provisions overstate the agency’s needs, nor has Manus identified any alternative, less restrictive, provisions it believes the agency should use. Agency Motion to Dismiss, Oct. 27, 2015, at 10. Finally, the agency points out that Manus does not assert that it is unable to meet the 30-day requirement for submission of an implementation plan or the 120-day requirement to begin full contract performance. To the contrary, the proposal Manus submitted takes no exception to these requirements.

Our Bid Protest Regulations require “a detailed statement of the legal and factual grounds of protest and provide for dismissal of any protest that fails to comply with these requirements. 4 C.F.R. § 21.1(c)(4). This regulation contemplates a statement sufficient to apprise the procuring agency of the specific aspects of the

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distribution, distribution fee, to billing,” complaining that “[a]ny other manufacturer or supplier that is not an MSPV or component manufacturer is disadvantaged in this procurement in the extreme.” Id. Notwithstanding its complaints, Manus provides no basis for our Office to conclude that Manus’s perception of its relative “disadvantage” constitutes a basis for sustaining its protest. Rather, Manus’s various assertions appear to reflect nothing more than Manus’s dissatisfaction with competing against an entity that, in Manus’s perception, is better able to meet the agency’s needs.

procurement to which the protester objects. Additionally, we have held that a prospective offeror is not an interested party to challenge a specification as unduly restrictive in cases where it can meet the requirement set forth in the solicitation, as such a challenge would be, in essence, on behalf of other potential suppliers who are economically affected by the specification's allegedly restrictive nature. See, e.g., Government & Military Certification Sys., Inc., B-409420, Apr. 2, 2014, 2014 CPD ¶ 116 at 4; Westinghouse Elec. Corp., B-224449, Oct. 27, 1986, 86-2 CPD ¶ 479 at 3.

Here, Manus's protest fails to meet the threshold requirements for consideration. First, as the agency notes, Manus's protest fails to accurately describe any particular solicitation provision it believes is overly restrictive and, even construing the protest in a light most favorable to Manus, the protest fails to address how a 30-day requirement for submission of an implementation plan overstates the agency's needs, nor has it identified any particular less-restrictive alternative. Further, Manus has affirmatively represented that it is able to perform all of the solicitation requirements. On this record, we find no basis to further consider Manus's assertion that the solicitation contains unduly restrictive requirements.

Organizational Conflict of Interest

Finally, Manus asserts that offerors that are currently MSPVs have OCIs and should be precluded from participating in the competition. Specifically, Manus asserts that: "Cardinal Health 200 is an MSPV which is currently supplying custom packs to VAMCs within VA VISN [veterans integrated service network] 12 and possibly other VA [medical centers] within SAO Central and which has indicated an intention to submit an offer respon[ding] to the RFP." Protest at 13. Manus asserts that, in its role as an MSPV, Cardinal Health stocks, delivers, and processes invoices for the incumbent surgical pack providers and, based on those activities, Manus complains that Cardinal Health has an OCI based on its allegedly unequal access to information.

The agency responds that Manus's allegations regarding alleged OCIs are premature since no award has been made at this time. We agree.

A protester's allegation that another firm has a conflict of interest is generally premature when filed before an award has been made. REEP, Inc., B-290688, Sept. 20, 2002, 2002 CPD ¶ 158 at 1-2. This conclusion reflects the underlying principle that a protester is charged with knowledge of the basis for protest only at the point where the agency conveys to the protester the agency's intent to follow a course of action adverse to the protester's interests. CDR Enterprises, Inc., B-293557, Mar. 26, 2004, 2004 CPD ¶ 46 at 3. In the context of an alleged

organizational conflict of interest, that point typically is when the protester is notified of the agency's selection decision.⁷

Here, the protest was filed before any offers had been submitted. Further, we understand that no source selection decision has been made at this time. On this record, Manus's assertions regarding alleged OCIs are premature, and will not be further considered.⁸

The protest is denied in part and dismissed in part.

Susan A. Poling
General Counsel

⁷ There are exceptions to this rule that we do not view as applicable to the facts presented here. See, e.g., Raydar & Associates, Inc., B-401447, Sept. 1, 2009, 2009 CPD ¶ 180 at 3; Honeywell Tech. Solutions, Inc., B-400771, B-400771.2, Jan. 27, 2009 CPD ¶ 49 at 6-7.

⁸ In the event the agency subsequently makes award to an MSPV, Manus may timely file a protest challenging that award and may include assertions regarding alleged OCIs, if otherwise consistent with our Bid Protest Regulations.