



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Technical Professional Services, Inc.--Reconsideration

File: B-410640.2

Date: June 15, 2015

Frank S. Murray Jr., Esq., Foley & Lardner LLP, for the protester.
Bridget E. Grant, Esq., Department of Veterans Affairs, for the agency.
Brent Burris, Esq., and Edward Goldstein, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration of a prior decision, denying protest that agency improperly failed to solicit incumbent protester when issuing a Federal Supply Schedule order, is denied where the protester does not show that the prior decision contains errors of fact or law that warrant reversal or modification of the decision.

DECISION

Technical Professional Services, Inc. (TPS), a veteran-owned small business located in Wayland, Michigan, requests reconsideration of our decision in Technical Professional Services, Inc., B-410640, Jan. 20, 2015, 2015 CPD ¶ 48, in which we denied TPS's protest of the issuance of an order to HR Staff Management, Inc., dba Alpha Services, of Las Vegas, Nevada, pursuant to request for quotations (RFQ) No. VA777-14-Q-0169 issued by the Department of Veterans Affairs (VA) for administrative support services. The protester contends that our decision is based on an erroneous interpretation of the relevant procurement regulation and failed to account for evidence that the agency acted with improper bias or in bad faith towards the protester.

We deny the request for reconsideration.

BACKGROUND

The VA issued the RFQ on June 19, 2014, pursuant to Federal Acquisition Regulation (FAR) § 8.405-2, which governs the ordering procedures for Federal Supply Schedule (FSS) contracts requiring a statement of work. At the time the RFQ was issued, TPS was providing the incumbent administrative support services

to the VA under a prior FSS order. Protest at 3. Due to perceived issues with TPS's performance under its incumbent contract, the VA decided not to exercise the first option year of TPS's order and instead competed the follow-on requirement by sending the RFQ directly to 14 FSS contractors. Contracting Officer's (CO's) Statement at 1; Contract Specialist Statement, Jan. 7, 2015.¹

The VA received six quotations in response to the RFQ and issued the order to the vendor evaluated as having the lowest-priced, technically acceptable quote. CO's Statement at 1. After learning of the award, TPS timely filed a protest with our Office arguing that the agency should have solicited TPS as the incumbent provider. We denied that protest, finding that the VA did not act inconsistent with the ordering procedures of FAR § 8.405-2, by not providing TPS with the RFQ. Technical Prof'l Servs., Inc., supra, at 3. We also found that TPS failed to show that the agency's decision not to solicit the protester was motivated by improper bias or bad faith. Id. at 4.

DISCUSSION

TPS contends that our decision erred as a matter of law because our interpretation of the relevant FAR provision is inconsistent with the statute underlying that provision as well as prior decisions of this Office. Request for Reconsideration at 4-12. The protester further contends that our Office failed to consider evidence demonstrating that the VA acted with improper bias or in bad faith when it did not solicit TPS for the requirement at issue. Id. at 12-19.

To prevail on a request for reconsideration, the requesting party must show that our prior decision contains either errors of fact or law or presents information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.14(a). The repetition of arguments made during our consideration of the original protest and disagreement with our decision do not meet this standard. Veda, Inc.--Recon., B-278516.3, B-278516.4, July 8, 1998, 98-2 CPD ¶ 12 at 4. We have reviewed the protester's request and conclude that it does not provide a basis for us to reconsider our earlier decision.

As discussed in our underlying decision, section 863 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. 110-417, 122 Stat. 4356, 4547-48 (2008) (hereinafter the Act), mandated that the FAR be amended to "require enhanced competition" under multiple-award contracts. In this regard, the Act generally requires that all contractors holding a multiple-award contract be

¹ The record reflects that the work required under TPS's contract differed from that required under the RFQ to some extent, but that these differences were not the basis for the agency's decision not to solicit the protester. CO's Statement at 3; Contract Specialist Statement, Jan. 7, 2015.

provided with notice of, and an opportunity to compete for, any proposed orders under that contract. Id. at § 863(b)(2). The Act, however, provides an exception for contracts under the FSS program, allowing agencies to solicit fewer than all contractors holding a FSS contract if the solicitation is “provided to as many contractors as practicable.” Id. at § 863(b)(3)(A). In this regard, the Act further provides that if a solicitation is not provided to all FSS contract holders and quotes are not received from at least three qualified vendors, an agency may not make an award unless the contracting officer determines that no additional qualified contractors can be identified, despite reasonable efforts to do so. Id. at § 863(b)(3)(B).

In response to the Act, FAR § 8.405-2 was amended in 2011. In relevant part, for FSS orders exceeding the simplified acquisition threshold, section 8.405-2 was amended to provide as follows:

(iii) The ordering activity contracting officer shall--

(A) Post the RFQ on e-Buy to afford all schedule contractors offering the required services under the appropriate multiple-award schedule(s) an opportunity to submit a quote; or

(B) Provide the RFQ to as many schedule contractors as practicable, consistent with market research appropriate to the circumstances, to reasonably ensure that quotes will be received from at least three contractors that can fulfill the requirements. When fewer than three quotes are received from schedule contractors that can fulfill the requirements, the contracting officer shall prepare a written determination to explain that no additional contractors capable of fulfilling the requirements could be identified despite reasonable efforts to do so. The determination must clearly explain efforts made to obtain quotes from at least three schedule contractors.

FAR § 8.405-2(c)(3)(iii) (emphasis added); see 76 Fed. Reg. 14,548, 14,553 (March 16, 2011).

In resolving the underlying protest, we found that the language emphasized above did not require the VA to solicit the incumbent TPS; rather, the agency was only required to provide the RFQ to as many schedule contractors as necessary to reasonably ensure that at least three quotes would be received from vendors that could meet the agency’s requirements. Technical Prof'l Servs., Inc., supra, at 3. Thus, we found that the VA met the competition requirements of the regulation by sending the RFQ to 14 vendors and receiving 6 quotes in response. Id.

TPS contends that our interpretation of FAR § 8.405-2(c)(3)(iii) allows agencies to send an RFQ to fewer than as many schedule contractors as practicable, and as

such, is contrary to the language and purpose of the Act. Request for Reconsideration at 7-9. In this regard, TPS argues that in order to implement the Act's directive to solicit as many vendors as "practicable," the regulation must be interpreted as requiring an agency to solicit every vendor that the agency's market research identifies as capable of meeting its requirements, which in the instant matter would have included TPS as the incumbent. *Id.* at 6-9, 11. As noted in our underlying decision, however, TPS has not identified anything in the Act, its legislative history, or the implementing regulations, nor are we aware of anything, which compels this interpretation. To the contrary, the plain language of FAR § 8.405-2(c)(3)(iii) defines the number of vendors that is practicable to solicit as that which is necessary "to reasonably ensure that quotes will be received from at least three contractors that can fulfill the requirement." Furthermore, given the Act's emphasis on obtaining competition from at least three vendors, our reading of the regulation as requiring agencies to solicit as many vendors as reasonably necessary to ensure that the agency receives at least three quotes or otherwise establish that the agency cannot reasonably identify additional vendors, is consistent with the underlying purpose of the Act.

TPS also contends that our interpretation of the term "practicable" as used in FAR § 8.405-2(c)(3)(iii) is inconsistent with decisions of this Office interpreting similar language under FAR Part 13, Simplified Acquisition Procedures. Request for Reconsideration at 10-11. The protester notes that we have held that an agency does not "promote competition to the maximum extent practicable," as required by FAR § 13.104, where the agency deliberately fails to solicit a firm that has expressed interest in competing for a requirement and there is no reasonable basis to question the firm's ability to meet the agency's needs. *Id.* at 10 (citing, e.g., Solutions Lucid Group, LLC, B-400967, April 2, 2009, 2009 CPD ¶ 64 at 3-4). These decisions, however, are inapposite to the instant matter since FAR § 8.405-2(c)(3)(iii), unlike FAR § 13.104, does not direct agencies to obtain competition to the "maximum extent practicable." Rather, as discussed above, for proposed orders exceeding the simplified acquisition threshold, section 8.405-2(c)(3)(iii) directs agencies to solicit "as many contractors as practicable," with a practicable number of contractors being a number reasonably sufficient to ensure that the agency receives at least three quotes. Given that the regulation plainly sets forth the parameters of what is a practicable number of vendors to solicit, we decline to interpret the provision as requiring anything more.

Next, TPS argues that our Office failed to consider evidence demonstrating that the VA acted with improper bias or in bad faith when it did not solicit the protester. Request for Reconsideration at 12-19. In this regard, TPS focuses on an October 2, 2014 e-mail of the contracting officer responding to an inquiry from TPS about whether the VA would be exercising the first option year of TPS's contract. In this regard, the record reflected that the contracting officer replied that she needed to confer "with the customer to see if they are interested in exercising the option year." Protester's Exhibit 4, Oct. 2 E-mail Exchange. The protester points out that at the

time the contracting officer sent this message, the VA had already issued an order under the RFQ to replace TPS's contract. Request for Reconsideration at 13-14. Thus, TPS contends the contracting officer's statement was deliberately deceptive and demonstrated improper bias or bad faith on the part of the agency. Id. at 18.

We agree with the protester that the contracting officer's October 2 e-mail was misleading. The record shows that the decision not to exercise the option in the TPS contract, the decision not to solicit TPS, and the award to Alpha, predated this e-mail exchange by months. That said, we do not agree that this e-mail exchange establishes that the agency acted improperly when it decided--several months earlier--not to solicit the protester.

In this regard, the protester has offered no convincing rationale as to how the contracting officer's statement on October 2 regarding the option in TPS's contract, demonstrates that the agency was acting with improper bias or in bad faith in June when it decided not to solicit the protester. Career Innovations, B-404377.4, May 24, 2011, 2011 CPD ¶ 111 at 7-9 (“[G]overnment officials are presumed to act in good faith, and we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition.”). Furthermore, as discussed in our underlying decision, the VA identified TPS's inability to provide full staffing for several months under its incumbent contract as the reason the agency did not solicit the protester. Agency Report at 13; CO's Statement at 3. While TPS contends that the staffing issues were a direct result of the actions of the agency, it is undisputed that the contract was not fully staffed for three months and that the agency viewed this as a performance issue. CO's Statement at 3; Protester's Comments, Hoxworth Declaration at 1-2. On this record, we cannot say that the agency's decision not to provide the protester with the RFQ was motivated by improper bias or bad faith. See Tiger Enters., Inc., B-293951, July 26, 2004, 2004 CPD ¶ 141 at 3-4 n.1 (finding that agency's unreasonable past performance evaluation did not provide credible evidence of improper bias or bad faith).

The request for reconsideration is denied.

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General Counsel