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Decision

Matter of: Diversity Marketing and Communications, LLC

File: B-412196.2

Date: March 9, 2016

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DIGEST

Solicitation requirement that limited the agency's experience evaluation to prime contractor experience does not unduly restrict competition where the record demonstrates that the requirement is reasonably related to the agency's needs.

DECISION

Diversity Marketing and Communications, LLC, a woman-owned small business of Florham Park, New Jersey, protests the terms of request for quotations (RFQ) No. SSA-RFQ-15-0240, issued by the Social Security Administration (SSA), for marketing and public relations support in the management of national public information campaigns. The protester argues that the terms of the solicitation are overly restrictive and favor the incumbent contractor.

We deny the protest.

BACKGROUND

The RFQ was issued on May 13, 2015 as a small business set-aside, and was limited to holders of Federal Supply Schedule (FSS) contracts pursuant to the procedures of Federal Acquisition Regulation (FAR) subpart 8.4. The solicitation sought to obtain a marketing and public relations support service provider for the development, execution, and multi-channel distribution of public education communications that target diverse audiences and enable SSA to meet its public education objectives.

The RFQ anticipated the establishment of a single blanket purchase agreement (BPA) for a 5-year period, under which fixed-price orders would be placed. RFQ amend. 1, at 43-44. The RFQ contemplated award on a best-value basis considering the following evaluation factors (listed in descending order of importance): technical approach, experience, past performance, and price. Id. at 44.

The agency received quotations from several firms, including Diversity, by the May 29 closing date. Following an evaluation, the agency concluded that Diversity's quotation represented the best value, and the agency established a BPA with Diversity on September 21.

After receiving notice of the award, Crosby Marketing Communications, Inc., the incumbent contractor, filed a protest with our Office. In response, the agency took corrective action by canceling the BPA, amending the RFQ, and soliciting revised quotations from the vendors that responded initially. Our Office subsequently dismissed the protest. Crosby Mktg. Commc'ns, Inc., B-412196, Oct. 27, 2015 (unpublished decision).

On November 24, the agency issued an amendment to the RFQ which revised the solicitation's instruction and evaluation sections, and provided a new pricing schedule and statement of work (SOW). RFQ amend. 1, at 1. The amendment also provided for a revised period of performance and set the deadline for receipt of quotations as December 8. Id.

With regard to the experience evaluation factor, the amended RFQ instructed vendors to provide a list of at least three projects demonstrating that the company "has continuously and successfully provided marketing and public relations services in the past three years." Id. at 41. The solicitation provided that the agency's evaluation of a vendor's experience would consider the extent to which the vendor can demonstrate recent and relevant experience in work similar to the agency's requirements in terms of size, scope, and complexity, with particular emphasis on experience providing marketing and public relations services. Id. at 44. The solicitation additionally advised that the agency would not consider the experience of proposed subcontractors when evaluating contractor experience. Id. at 45.

With regard to the past performance evaluation factor, the solicitation instructed vendors to submit a past performance questionnaire for each reference listed under the experience factor. Id. at 43. The RFQ provided that the agency would evaluate the questionnaires and other available information to measure the vendor's performance and customer satisfaction. Id. at 45. The agency's evaluation of a vendor's past performance would consider the quality of services, timeliness of performance, and business relations. Id.

On December 1, vendors submitted various questions and requests to the agency regarding the revised solicitation, and the agency responded in an amendment posted on December 3. RFQ amend. 2. In response to a vendor request that the agency consider subcontractor or teaming partner experience as part of its evaluation, the agency stated that it would not consider such experience and explained “due to the high visibility of this work it is vital that the prime contractor have the experience.” Id. at 10. In response to a request that the agency extend the deadline for quotations as “[r]eferences now have less than one week to complete the [past performance] questionnaire,” the agency stated that it would not extend the deadline. Id. at 9. The agency explained that vendors could rely upon the past performance questionnaires previously submitted and were not required to submit new questionnaires. Id. The agency provided revised questionnaires, which updated the contracting officer’s contact information and due date, with the amendment. Id. at 9.

Prior to the December 8 closing time, Diversity filed this protest.

DISCUSSION

Diversity challenges the terms of the amended solicitation.¹ Diversity maintains that the evaluation of prime contractor experience unduly restricts competition, as it has prevented Diversity from submitting a quotation in response to the revised RFQ. Specifically, Diversity asserts this requirement restricts it from competing because it must rely upon its subcontractors to demonstrate experience with the SOW’s new focus on internet media.²

The agency asserts that the goal of this experience evaluation was to determine whether the prime contractor has the necessary experience to perform the contract. The agency explains that “the work contemplated by this contract involves managing the public face of the Agency in a wide range of highly visible marketing efforts,” and thus, “the prime contractor, who will be directly answerable on these projects, must have adequate experience in this type of work.” Agency Legal Memorandum at 10. Given the high visibility of the work, the agency states that it

¹ We have considered all of the protester’s arguments and find that none provides a basis to sustain the protest. We discuss the protester’s principal arguments below.

² The revised SOW informed vendors that the agency “anticipates that over 70 percent of the call orders under this BPA will be related to the Internet media component.” RFQ amend. 1, SOW, at 2. The initial SOW did not specify a proportion of internet media call orders and instead listed the requirement for internet media communications at the end of a list of various other types of communications (broadcast television, cable television, radio, and print and online publication). RFQ, SOW, at 5-8.

has a clear business need to reduce its risk by ensuring that the agency has a direct contract with a firm that has experience performing projects of similar size, scope, and complexity to the work being performed here.

In FSS buys, as in other procurements, a contracting agency has the discretion to determine its needs and the best method to accommodate them. 41 U.S.C. §§ 3306(a)(1)(A), (2)(B); Boehringer Ingelheim Pharm., Inc., B-294944.3, B-295430, Feb. 2, 2005, 2005 CPD ¶ 32 at 4. Where a protester challenges a solicitation provision as unduly restrictive of competition, the procuring agency must establish that the provision is reasonably necessary to meet the agency's needs. HK Consulting, Inc., B-408443, Sept. 18, 2013, 2013 CPD ¶ 224 at 2. We examine the adequacy of the agency's justification for a restrictive solicitation provision to ensure that it is rational and can withstand logical scrutiny. See SML Innovations, B-402667.2, Oct. 28, 2010, 2010 CPD ¶ 254 at 2. The determination of a contracting agency's needs, including the selection of evaluation criteria, is primarily within the agency's discretion and we will not object to the use of particular evaluation criteria so long as they reasonably relate to the agency's needs in choosing a contractor that will best serve the government's interests. HK Consulting, Inc., *supra*.

Here, we think the record supports the agency's position that the prime contractor experience restriction is reasonably related to its needs. In this regard, the agency claims it needs to limit the risk of unsuccessful performance with respect to its high-visibility project, and as we have concluded in similar circumstances, the agency's desire to reduce the risk of unsuccessful performance can be rationally achieved by restricting consideration of experience and past performance to the firms contractually obligated to meet the agency's requirements. Valor Constr. Mgmt., LLC, B-405365, Oct. 24, 2011, 2011 CPD ¶ 226 at 3 (agency's decision not to consider team member's experience and past performance was not unduly restrictive of competition); see Emax Fin. & Real Estate Advisory Servs., LLC, B-408260, July 25, 2013, 2013 CPD ¶ 180 at 6 (agency's concern with limiting risk of unsuccessful performance by favoring experience of firms that will be in privity with the government reasonably relates to agency's needs in choosing a contractor that will best serve its interests with respect to a complex project). Given this, we find nothing improper about the RFQ provision that restricts the agency's evaluation of experience to the prime contractor. While the protester contends that it cannot compete under the amended RFQ, the fact that a requirement may be burdensome, or even impossible for a particular firm, does not make it objectionable if it meets the agency's needs.³ Advanced Commc'n Cabling, Inc., B-410898.2, Mar. 25, 2015, 2015 CPD ¶ 113 at 6-7.

³ To the extent the protester alleges that the agency's restriction on subcontractor experience is made in bad faith, government officials are presumed to act in good faith, and a protester's contention that contracting officials are motivated by bias or
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The protester also challenges the terms of the solicitation with regard to the response time permitted for the submission of past performance questionnaires. Diversity contends that the five calendar days (two business days) provided was unreasonably short and unduly restricts competition.

Subpart 8.4 of the FAR does not require that vendors be permitted a specific minimum amount of time to respond to an RFQ (including submitting past performance questionnaires). Instead, agencies must provide a reasonable and sufficient amount of time for vendor responses; what is reasonable and sufficient depends on the facts and circumstances of each case. See Impact Res. Techs., B-407259.2, Dec. 4, 2012, 2012 CPD ¶ 335 at 2-3; Warden Assocs., Inc., B-291440, B-291440.2, Dec. 27, 2002, 2002 CPD ¶ 223 at 2-3 (finding 3 days to respond to RFQ was reasonable).

On the record before us here, we do not find that the agency's actions were unreasonable. While we recognize that providing vendors with two business days for questionnaires to be filled out and returned leaves vendors little time, the vendors were aware of the revised SOW and RFQ beginning November 24. The questionnaires that were received on December 3 only modified the contracting officer's contact information and date on which the questionnaires were due. Moreover, the amended RFQ did not require the submission of new questionnaires; rather, the agency stated that vendors could choose to update their questionnaires at their own discretion. Thus, we find that the vendors had sufficient time to contact references and respond promptly to the agency's requirement. Indeed, the agency received past performance questionnaires from two vendors prior to the RFQ's deadline. See Contracting Officer's Statement/Legal Memorandum at 6. Given this, we have no basis to conclude that the agency's deadline was unreasonable or insufficient to provide the required responses.

The protester also argues that the solicitation improperly favors the incumbent, because "[u]ntil recently, the incumbent was too large to be a certified-small business," and Diversity is thus required to compete against the incumbent which has large business experience. Protester's Comments at 12. Diversity's argument appears to be no more than a complaint that Crosby Marketing may have some advantage as the incumbent contractor. However, it is well settled that an offeror may possess unique information, advantages, and capabilities due to its prior

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bad faith must be supported by convincing proof; we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Career Innovations, LLC, B-404377.4, May 24, 2011, 2011 CPD ¶ 111 at 7-8. Apart from Diversity's unsupported allegation, Diversity has provided no evidence, and there is none in the record, showing bad faith here.

experience under a government contract, including performance as the incumbent contractor. Our Office has held that the government is not required to equalize competition to compensate for such an advantage, unless there is evidence of preferential treatment or other improper action. See United Facility Servs. Corp. d/b/a EASTCO Building Servs., B-408749.2, Jan. 17, 2014, 2014 CPD ¶ 35 at 5 n.6. There is no evidence of such preferential treatment here.

The protest is denied.

Susan A. Poling
General Counsel