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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Renow, Incorporated

File: B-251055

Date: March 5, 1993

Oswald W. Hoffler, Jr., for the protester.
Barry Sugarman, for United States Trading Corporation, and John H. Burkholder, Esq., Crowell & Moring, for McKesson Drug Company, interested parties.
Michael Trovarelli, Esq., Defense Logistics Agency, for the agency.
Peter A. Iannicelli, Esq. and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that technical evaluation scheme in request for proposals for a "prime vendor" to purchase and distribute pharmaceuticals to member hospitals and clinics improperly favors large pharmaceutical wholesalers is denied where protester has not shown the evaluation scheme to be unreasonable, and where two most important technical evaluation factors, alleged by protester particularly to favor large businesses, are integrally related to the fundamental purpose of the contract, as set forth in the statement of work--to quickly deliver medically necessary drugs to hospitals and clinics.

2. Evaluation of offerors' proposed small and small disadvantaged business subcontracting plans rather than on the basis of prior history of subcontracting with small and small disadvantaged business is reasonable, because under the Federal Acquisition Regulation there is no legal requirement for a company to subcontract with small and small disadvantaged firms until it has been awarded a government contract incorporating the subcontracting plan set forth in its proposal.

3. Contracting officer's decision to solicit offers on an unrestricted basis, rather than through a small business set-aside, is not an abuse of discretion where: (1) the contracting officer made reasonable efforts to ascertain whether offers would be submitted from two or more responsible small business concerns capable of performing the work at fair market prices before determining that there

was no reasonable expectation of receiving such offers; and (2) the agency's small business specialist and a small business representative both concurred with the decision.

4. Protest that 20 percent of agency's requirements for pharmaceutical "prime vendors" for the entire country should be set aside for award under the Small Business Administration's 8(a) program is dismissed, where the protester has not made a showing of possible fraud or bad faith on the part of government officials or that regulations have been violated.

5. New and independent grounds of protest first raised in protester's comments on agency report must independently satisfy the timeliness requirements of Bid Protest Regulations, since Regulations do not contemplate the unwarranted piecemeal presentation or development of protest issues.

DECISION

Renow, Inc. protests request for proposals (RFP) No. DLA120-92-R-0671, issued by the Defense Personnel Support Center (DPSC), Defense Logistics Agency (DLA), for a "Prime Vendor" to supply pharmaceuticals to a number of medical facilities. Renow alleges that the RFP's evaluation criteria are "unfair and biased" against small pharmaceutical wholesale businesses. Renow requests that our Office recommend that the RFP be withdrawn as an unrestricted competition, that the requirement be resolicited as a total small business set-aside and that a region equal to 20 percent of the total volume of the country be set aside for procurement under the Small Business Administration's (SBA) 8(a) program. We deny the protest in part and dismiss it in part.

On September 16, 1992, DPSC issued the RFP as an unrestricted procurement soliciting offers to act as a prime vendor for 12 medical facilities (hospitals and clinics) in the Washington, D.C. area. The RFP was for a 1-year requirements contract, and contained options for four additional 1-year periods. The RFP stated that offers would be evaluated on the basis of technical factors and cost or price, with technical quality considered more important than cost or price, and stated that the medical facilities covered by this contract together previously had spent about $20 million per year on the pharmaceutical supplies covered by the contract. Notwithstanding Renow's protest, DPSC awarded a contract to McKesson Drug Company on January 16, 1993, on the basis that the need for pharmaceutical supplies was urgent and compelling.

Essentially, the prime vendor is authorized to distribute a large number of commercial pharmaceutical products for which DPSC has pricing agreements or indefinite delivery-type contracts with the manufacturers or their suppliers. Member hospitals and clinics will maintain very small inventories of commonly needed pharmaceuticals. When a hospital or clinic needs more drugs it will order them from the prime vendor. The prime vendor will purchase commercial drugs from various manufacturers and dealers at the prices set in their pricing agreements with DLA and will maintain sufficient inventory to meet the needs of the 12 member healthcare facilities.

Initially, Renow asserted that the RFP's technical evaluation criteria are biased in favor of large pharmaceutical wholesalers. Basically, Renow argued that the two most important technical evaluation factors--product availability and corporate experience--unfairly favor large firms that sell large volumes of pharmaceuticals on a wholesale basis.

Agencies enjoy broad discretion in the selection of evaluation factors, and we will not object to the use of a particular evaluation scheme as long as the criteria used reasonably relate to the agency's needs in choosing a contractor that will best serve the government's interests. See ETEK, Inc., 68 Comp. Gen. 537 (1989), 89-2 CPD ¶ 29; Hydro Research Science, Inc., B-230208, May 31, 1988, 88-1 CPD ¶ 517. We reviewed the RFP's technical evaluation scheme, as well as the RFP's instructions on preparing technical proposals, in light of the allegation that the technical evaluation factors favor large pharmaceutical wholesalers and found nothing improper in the RFP's evaluation scheme.

The RFP stated that award would be made to the responsible offeror whose offer conformed to the solicitation and was most advantageous to the government considering cost or price, technical quality and other factors. The RFP stated that technical quality was more important than cost or price, but as proposals approached equality in technical merit, evaluated cost or price would become more important.

The RFP's technical evaluation factors were: (1) product availability; (2) corporate experience; (3) systems and electronic data interchange; (4) socioeconomic considerations; and (5) customer support. The RFP stated that technical evaluation factors 1 and 2 were equal in importance and were more important than factor 3. Furthermore, factor 3 was considered more important than factor 4 which, in turn, was considered more important than factor 5.

The most important evaluation factors were product availability and corporate experience. According to the RFP, product availability concerned how offerors proposed to fill orders for medicines, what proportion of orders offerors would be able to fill, the offerors' delivery and ordering schedules, and the range and breadth of offerors' product lines. The corporate experience factor required offerors to state their previous performance experiences on similar projects which the agency could check against information provided from reliable sources to determine whether the representations made in the proposal were credible. Basically, both criteria were used to determine if offerors could do the job stated in their proposals and whether offerors could provide pharmaceuticals in accord with the statement of work. We believe that these factors are integrally related to the fundamental purpose of the contract, as set forth in the statement of work--to quickly deliver medically necessary drugs to hospitals and clinics. We think these are reasonable factors to consider and emphasize, given the contract's purpose, and there is no evidence that the evaluation factors actually were used to unfairly favor large firms.

In its initial protest letter, Renow also asserted that while the RFP requested data on how offerors would use small and small disadvantaged business concerns as subcontractors if awarded the contract, the RFP did not provide for evaluation of whether offerors successfully used small and small disadvantaged business concerns in the past.

There is no legal requirement that an agency include as an evaluation factor, an offeror's past performance in employing small and small disadvantaged firms as subcontractors. The Small Business Act, 15 U.S.C. § 637(d)(1) (1988), as implemented by the Federal Acquisition Regulation (FAR) § 19.702, requires that small businesses and small disadvantaged businesses shall have the maximum practicable opportunity to participate in performing government contracts. In implementing this requirement, FAR § 19.708 provides that, in RFPs such as this one, the FAR clause at § 52.219-9 be inserted which requires that firms furnish upon request of the contracting officer a small business and small disadvantaged business subcontracting plan which when accepted by the government is binding upon the contractor. This RFP required that the plan be furnished with proposals. The RFP also included socioeconomic considerations as an evaluation factor for award. Under this factor, an offeror's subcontracting plan was to be evaluated to assure that small businesses and small disadvantaged firms are afforded the opportunity to compete for subcontracts. The solicitation thus met FAR requirements to provide for subcontracting opportunities.

Renow also requested that our Office recommend that the requirement be resolicited as a total small business set-aside and that a region equal to 20 percent of the total volume of the country be set aside for procurement under the Small Business Administration's 8(a) program.

The decision whether to set aside a particular procurement for small business concerns is governed by FAR § 19.502-2 which provides that an acquisition is to be set aside exclusively for small business participation if the contracting officer determines that there is a reasonable expectation that offers will be submitted from at least two responsible small business concerns and that award will be made at a fair market price. Raven Servs. Corp., B-243911, Aug. 27, 1991, 91-2 CPD ¶ 203. Generally, we regard such a determination as a matter of business judgment within the contracting officer's discretion which we will not disturb absent a clear showing that it has been abused. Id. However, the agency must undertake reasonable efforts to ascertain whether it is likely to receive offers from at least two small businesses with the capabilities to perform the work, and we will review a protest to see whether the agency has done so. Id.

Here, DLA asserts that since there was no prior procurement history for prime vendor contracts at DPSC, the contracting officer: (1) examined the procurement histories for similar contracts awarded by the Department of Veterans Affairs (VA); (2) discussed the matter with VA officials as well as representatives of the pharmaceutical industry, and (3) received the concurrence of both the DPSC small business specialist and the SBA representative at DPSC before determining that there was not a reasonable expectation of receiving at least two offers from small businesses capable of doing the work at a reasonable price. As the protester has neither refuted the agency's assertion nor provided any evidence to the contrary, we cannot conclude that the contracting officer abused his discretion or that he did not make reasonable efforts to ascertain whether DPSC was likely to receive offers from at least two small businesses with the capabilities to perform the work at fair market prices.

Regarding the request that 20 percent of DLA's requirements for the entire country be set aside for award under the SBA's 8(a) program, the protest is dismissed. Section 8(a), 15 U.S.C. § 637(a) authorizes SBA to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. Because of the broad discretion afforded to SBA and the contracting agencies under the statute and implementing regulations, we do not review decisions to place or not to place a procurement under the 8(a) program absent a showing of possible fraud or

bad faith on the part of government officials or that regulations have been violated. See 4 C.F.R. § 21.3(m)(4) (1992); Morrison Constr. Servs., Inc., 70 Comp. Gen. 139 (1990), 90-2 CPD ¶ 499. Renow has made no such showing here.

In its comments on DLA's report, Renow for the first time asserts that the RFP's evaluation scheme was deficient because it did not disclose the actual weight to be accorded each factor in the technical evaluation and, therefore, the evaluators could abuse the evaluation process to assure award to large and non-minority businesses. Essentially, Renow is raising a new issue, alleging an impropriety in the solicitation.

Where a protester initially files a timely protest and later supplements it with a new and independent basis for protest, the later raised allegation must independently satisfy the timeliness requirements of our Bid Protest Regulations, since our Regulations do not contemplate the unwarranted piecemeal presentation or development of protest issues. See Remtech, Inc., B-240402.5, Jan. 4, 1991, 91-1 CPD ¶ 35. Protests based upon alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial proposals must be filed prior to that date to be timely. 4 C.F.R. § 21.2(a)(1) (1992). Here, the fact that the RFP did not contain the actual weights to be accorded each evaluation factor was apparent from reading the RFP, and the closing date for receipt of initial proposals was October 26, 1992. However, Renow did not raise this protest issue until it filed its comments on December 7. Therefore, this issue is untimely.

The protest is denied in part and dismissed in part.

James F. Hinchman
General Counsel