



Comptroller General
of the United States

159:310

Washington, D.C. 20548

Decision

Matter of: Talon Manufacturing Company, Inc.
File: B-257536
Date: October 14, 1994

G. Lindsay Simmons, Esq., Jackson & Kelly, for the protester.
James J. Jasinki and Jack Cordes, Esq., Department of Justice, Federal Bureau of Investigation, for the agency.
Susan K. McAuliffe, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Solicitation notice that award will be made to offeror whose proposal is most advantageous to the government, price and other factors considered, coupled with advice that evaluation factors are listed in descending order of importance, provides reasonably definite outline of evaluation scheme. Where solicitation does not state the relative weights of evaluation subfactors, the subfactors are understood to be of equal importance. Solicitation statement that past performance will not be point scored, but will be highly influential in determining relative merit of proposal (including credibility of proposal and capability of offeror), provides adequate information regarding consideration of past performance under evaluation scheme.

2. Protest that solicitation provisions specifying "desired" requirements for ammunition procurement are vague and ambiguous is denied where the stated preferences relate to explicit evaluation factors and the solicitation provides offerors sufficient detail to enable them to compete intelligently and on an equal basis.

3. Protest that solicitation requirement for offerors to be members of the Sporting Arms and Ammunition Manufacturers Institute, Inc. (SAAMI), or demonstrate by certification from independent laboratory that offered product complies with SAAMI specifications is unduly restrictive is denied where: compliance with SAAMI standards reasonably satisfies agency's concerns of ensuring a consistent high level of product safety, performance and quality assurance; requirement is reasonably related to the agency's minimum needs; and agency does not itself have capacity to perform

complete testing to confirm product compliance with all SAAMI specifications.

4. Protest challenging as unduly restrictive solicitation requirement for offeror to submit evidence of its manufacturing capability since solicitation only states a preference for the offeror's own manufactured product is denied where requirement is reasonably related to agency's bona fide concerns of offeror and product reliability, quality assurance, and ability to timely meet short delivery deadlines of potentially large-volume ammunition orders of law enforcement agencies.

5. Agency decision not to set aside a procurement for small business concerns is proper where the agency concluded, after consideration of relevant factors, including the procurement history and the relatively complex nature and large volume of the ammunition to be procured, and with the concurrence of the Small Business Administration, that it could not reasonably expect to receive proposals from at least two responsible small business offerors.

DECISION

Talon Manufacturing Company, Inc. protests the terms of request for proposals (RFP) No. 6548, issued by the Department of Justice, Federal Bureau of Investigations (FBI), for 9mm service and ball ammunition. Talon alleges that the evaluation criteria and "desired" requirements of the RFP are vague and ambiguous. The protester also contends that the requirement for offeror's membership in the Sporting Arms and Ammunition Manufacturers Institute, Inc. (SAAMI)¹ or independent laboratory certification of product compliance with SAAMI standards, and the requirement to provide evidence of offeror's manufacturing capabilities, are unduly restrictive of competition and exceed the agency's minimum needs. Talon further contends that the procurement should have been set aside for exclusive small business participation.

We deny the protest.

The RFP, issued on March 25, 1994, on an unrestricted basis, contemplates the award of a firm, fixed-price requirements-type contract for 1 base year with 4 option years. It is estimated that at least 5 million rounds of the 9mm service ammunition and 25 million rounds of the 9mm ball ammunition

¹SAAMI has established voluntary guidelines generally accepted by the ammunition industry to promote high quality and consistency in the manufacture and design of small firearms ammunition.

will be ordered under the contract. The contract, which anticipates ammunition orders from several federal law enforcement agencies in addition to the FBI, could include up to 50 million rounds each of the 9mm service and 9mm ball ammunition.

The RFP states that the government will award a contract to the responsible offeror whose offer conforming to the solicitation, is determined to be the most advantageous to the government, price and other factors considered. Section M.3 of the RFP sets forth the following critical technical evaluation factors for award, listed in descending order of importance, to be evaluated in accordance with the statement of work (section C of the RFP): contractor's capability (including resources, quality control, technical proposal, compliance with SAAMI specifications, proof of liability coverage, self-sufficiency, and innovative technology) and ammunition performance (including accuracy, terminal effectiveness, velocity, pressure, functioning, assimilability, quality inspection, and cleanliness).

Section M.4 states that the government will also evaluate the quality of the offerors' past performance to assess the credibility of the proposals and the relative capability of the offerors; the RFP states that although past performance "will not be scored," independently, the overall quality of the offeror's past performance (which is not listed as a critical factor) "will be highly influential in determining the relative merits of the offeror's proposal and in selecting the offeror whose proposal is considered most advantageous to the Government." Section M.5 states that price will be evaluated for realism and reasonableness.

Section C-3 of the RFP sets forth certain vendor requirements to be evaluated in accordance with the evaluation factors stated in section M. Section C-3.1 provides that "[t]he offeror must be capable of manufacturing the entire quantity of ammunition at the offeror's manufacturing facility within the required time frames." (In this regard, the self-sufficiency subfactor of the contractor capability evaluation factor in section M of the RFP states that "[t]he vendor shall provide documentary evidence of manufacturing capabilities, including the capability of manufacturing brass, primers, and projectiles used to assemble the ammunition.") Section C-3.2 requires, among other things, that the offeror submit with its technical proposal and ammunition test samples, information regarding prior similar experience, and a statement regarding active membership in SAAMI. Section 3-3.3 provides that "[a]ny offeror who is not an active SAAMI member must submit documentation provided by an independent laboratory confirming that the test samples comply with SAAMI specifications in all aspects." (Testing expenses are

to be paid by the manufacturer.) Section C-3.6 states that "[i]t is the desire of the FBI that the vendor of the ammunition be the manufacturer of the individual components of the round." (Amendment No. 3 to the RFP clarifies that the term "desires" (as used in section C-3.6, as well as section C-6.1 regarding the use of a certain type of propellant), reflects the FBI's preference for the offeror's manufacture of the components (or, under C-6.1, the referenced propellant) but does not bind the contractor to the use of components of his own manufacture (or the referenced propellant) so long as the RFP's specifications are otherwise met and the tested product is produced.)

Talon initially protests the adequacy of the RFP's technical evaluation factors for award and states that the RFP's references to "desired" requirements are vague and ambiguous since the agency's contemplated evaluation of those elements of the proposals is uncertain. In this regard, the protester questions the importance of these requirements and the relative weight given to these areas in the overall evaluation of proposals. Talon also questions the role of past performance in the evaluation since the RFP states that past performance will not be point scored, but will be highly influential in assessing the relative merits of the proposals. The protester contends that the RFP is flawed because it does not adequately advise offerors of the basis on which the evaluation will be conducted.

As a general rule, the contracting agency must give offerors sufficient detail in a solicitation to enable them to compete intelligently and on a relatively equal basis. C3, Inc., B-241983.2, Mar. 13, 1991, 91-1 CPD ¶ 279. A solicitation must clearly advise offerors of the broad scheme of scoring to be employed and give reasonably definite information concerning the relative importance of the evaluation factors in relation to each other. This does not mean, however, that the disclosure of the precise numerical weights to be used in the evaluation is required. North-East Imaging, Inc., B-256281, June 1, 1994, 94-1 CPD ¶ 332; A. J. Fowler Corp.; Reliable Trash Serv., Inc., B-233326; B-233326.2, Feb. 16, 1989, 89-1 CPD ¶ 166.

The FBI's listing of evaluation criteria in descending order of importance is unobjectionable. North-East Imaging, Inc., supra; General Exhibits, Inc., 56 Comp. Gen. 882 (1977), 77-2 CPD ¶ 101. Offerors are put on notice that the evaluation criteria listing reflects a reasonable downward progression of relative weights. Id. Since the relative weights of the stated subfactors are not disclosed in the RFP, the subfactors are understood to be of equal importance to each other. Martech USA, Inc., B-250284.2, Feb. 8, 1993, 93-1 CPD ¶ 110.

The challenged "desired" requirements of the RFP (which include the offeror's manufacturing capability and type of propellant as set forth in the statement of work) directly relate to stated evaluation subfactors for award (such as the resources and technical proposal subfactors of the contractor's capability evaluation factor). Since the RFP reasonably sets out the weight to be given each of the evaluation factors, the RFP reasonably provides all offerors a general basis for how their proposals will be evaluated in regard to the "desired" elements--a proposal meeting the stated agency preferences could receive additional credit within the weight allotted to the applicable evaluation subfactor. See C3, Inc., supra.

Further, we find without merit the protester's contention, that the RFP's provision for evaluation of past performance is inadequately defined. Section M reasonably states that the agency's evaluation of past performance is limited to its impact upon the credibility of the proposal and, upon comparative evaluation, to the relative merits of the proposal. In short, offerors are advised that, although not a critical technical evaluation area listed in section M.3, past performance is an element to be examined by the agency in evaluating proposals under the relevant section M.3 criteria, as weighted, and could provide a reasonable, distinguishing factor regarding the relative merits of the technically acceptable proposals being considered for award. In sum, in our view, the RFP language provides offerors with sufficient information relating to the evaluation factors, how the proposals will be evaluated, and the relative order of importance of the factors, and provides for a reasonable degree of agency discretion in subjectively assessing the relative merits of proposals on the basis of past performance.

Talon next protests as restrictive the RFP's requirement for SAAMI membership or independent laboratory certification of the offered product's compliance with SAAMI standards. The protester contends that the requirement is unduly restrictive and negatively impacts small businesses. Specifically, Talon contends that SAAMI membership (at a cost of approximately \$20,000) and independent laboratory testing are expensive and that the requirement is unnecessary since the government will be testing the ammunition for SAAMI compliance.

The agency asserts that the RFP's SAAMI compliance requirements reasonably ensure that the ammunition is manufactured to industry-accepted standards for consistent high-level performance; the agency also states that SAAMI standards also ensure compliance with the American National Standard Voluntary Industry Performance Standards, the accepted standard of performance in the ammunition

manufacturing industry. The FBI contends that independent laboratory testing is a less costly alternative (the agency states that the testing can be performed for as little as \$1,500) to SAAMI membership and will equally ensure adherence to industry-accepted manufacturing and performance standards. The FBI adds that it should not be an economic burden on an offeror to comply with the SAAMI requirements, since a firm's contention to the contrary would cause the agency to question the financial capability of the offeror to satisfy the large production requirements of the contemplated contract. The FBI reports that the SAAMI compliance requirements are not redundant of the testing contemplated by the agency since the RFP only provides for limited testing by the agency for accuracy, velocity, and pressure; the agency states that it does not have the capacity to test for the total SAAMI specification compliance required under the RFP.

In preparing a solicitation for supplies or services, a contracting agency must specify its needs and solicit offers in a manner designed to achieve full and open competition, and may include restrictive provisions or conditions only to the extent necessary to satisfy the agency's needs. Aegis Analytical Labs., Inc., B-252511, July 2, 1993, 93-2 CPD ¶ 4. Where a protester alleges that a requirement is unduly restrictive, we review the record to determine whether the requirement has been justified as necessary to satisfy the agency's minimum needs. RMS Indus., B-247233; B-247234, May 1, 1992, 92-1 CPD ¶ 412. The determination of the agency's minimum needs and the best method of accommodating them are primarily within the agency's discretion and, therefore, we will not question such a determination unless the record shows that it was without a reasonable basis. Id.

Our Office generally has not objected to a requirement that an item conform to a set of standards adopted by a nationally recognized organization in the field, or a requirement for independent laboratory certification that such standards are met. We have found that requirements for approval by specific organizations or a particular testing laboratory without recognition of equivalent approvals are unduly restrictive. Energy Sys. Maintenance, Inc., B-227357, Aug. 14, 1987, 87-2 CPD ¶ 158; see also James LaMantia, B-245287, Dec. 23, 1991, 91-2 CPD ¶ 574. The absence of an endorsement by a particular private organization should not automatically exclude offers that might otherwise equally meet a procuring agency's needs. Id.

Here, the agency reasonably determined that its minimum needs require that the offeror either maintain SAAMI membership or produce evidence of an independent

laboratory's confirmation that the offered product complies with SAAMI product standards. The record shows that a consistent high level of performance of the procured ammunition is necessary to ensure product quality, reliability, and safety for the law enforcement personnel using it in performance of their official duties. (The agency notes that the ammunition acquired is not for recreational use here but relates to the safety of its personnel in performance of often life threatening activities.) The agency and other prospective offerors have confirmed that SAAMI standards, voluntary guidelines agreed to by its members, represent accepted-industry standards for manufacture and production of high quality small firearms ammunition, including the 9mm ammunition to be procured under the RFP, and will help to ensure consistency in high level performance and product reliability.

In view of the interests of safety and product effectiveness, we have no reason to question the reasonableness of the RFP's requirement for general compliance with SAAMI standards. In this regard, the protester does not state that the standards established by SAAMI are excessive, but rather contends that the requirement for independent laboratory certification of SAAMI product compliance is restrictive due to the additional expense to be incurred by offerors. Since the testing expense for non-SAAMI members is minimal compared to the serious consequences of receiving ammunition which has not been fully tested for industry-accepted SAAMI compliance, and the agency's contemplated product testing under the RFP is limited because the agency does not have the capacity to perform full SAAMI compliance testing under the RFP, we conclude that the agency has reasonably justified as necessary its requirement for certification by an independent laboratory if the offeror has not adopted the SAAMI standards through membership in the organization.

Talon also protests as restrictive the requirement for the offeror to have the ability to manufacture the ammunition (including evaluation of the offeror's capability to manufacture brass, primers, and projectiles used to assemble the ammunition). Talon states that the manufacturing capabilities required by the RFP are restrictive because no small business has the capability to manufacture every component of the ammunition. Talon also contends that the requirement to demonstrate manufacturing capability exceeds the agency's minimum needs since the RFP contains only a preference, not a mandatory requirement, for provision of the offeror's own manufactured product under the contract.

The FBI reports that evaluation of the offeror's manufacturing capability under the RFP is critical to ensure a consistent high quality and level of product performance while also providing the benefits of self-sufficiency in manufacturing the major components of ammunition, without having to rely on another vendor to supply the required ammunition on potentially numerous, large volume orders with typically short delivery time frames. The agency agrees that there is no mandatory requirement under the RFP for the offeror to manufacture every component of the ammunition or to supply its own manufactured product. The stated preference for the offeror's manufactured product and the RFP's provision for the evaluation of manufacturing capability are necessary, according to the agency, to meet its minimum needs to reasonably ensure consistent ammunition performance and timely delivery of the critically needed ammunition.

In our view, there is nothing improper with the RFP's terms regarding manufacturing capability. The protested provisions relate to the evaluation of proposals. As a comparative technical evaluation factor, the RFP provision to provide "documentary evidence of manufacturing capabilities, including the capability of manufacturing brass, primers, and projectiles used to assemble the ammunition," is not an absolute minimum requirement to be met by the offeror, as the protester contends; rather, it provides a reasonable basis for the agency to evaluate the relative merits of the proposals. Given the agency's need to ensure, as best possible, timely delivery of high quality, high performance ammunition within potentially short time frames, the agency's stated "desire" that the offeror supply its own manufactured product, without having to rely on and monitor the production for the ammunition by a subcontracted manufacturer, is reasonable.

Even though the successful offeror may ultimately deliver another contractor's ammunition, it is reasonable that an offeror capable of manufacturing the product will be in a better, more knowledgeable position to oversee the efforts of such subcontractor to ensure product quality, performance and timely delivery. Accordingly, we deny the protest of the RFP's manufacturing capability provisions since they are reasonably related to the agency's needs.²

²Talon also challenges the RFP's requirements for the offeror to meet certain unidentified "special standards prerequisites" as vague and improper. The agency reports that this phrase was inadvertently inserted in the RFP but that since no special standards were identified in the solicitation, offerors should not have been prevented from

(continued...)

Finally, Talon protests that the procurement should have been set aside for exclusive small business participation since the agency should have expected that it would receive offers from at least two responsible small business concerns. The protester contends that the agency failed to exercise reasonable efforts to locate responsible small business concerns and therefore inadequately assessed whether the procurement should be set aside. Specifically, Talon objects that the agency limited its review of prior procurements to FBI ammunition procurements instead of looking at similar ammunition procurements of other agencies, unreasonably concluded that the requirement was too complex or voluminous for small business offerors to successfully perform, and unreasonably relied upon the Small Business Administration's (SBA) acquiescence instead of conducting further investigation of possible small business participation under the RFP if it were set aside for exclusive small business competition. Talon states in its comments on the agency report that the protester recently contacted the SBA and found out that approximately 70 small businesses are registered under the SBA's Procurement Automated Source System (PASS) as small firearms ammunition producers. Talon also states that it contacted some of these companies and solicited letters of interest from at least five small businesses (which letters are attached to its comments), in support of setting the RFP aside for exclusive small business competition.

The FBI explains that it determined not to set aside the procurement for small business concerns after a review of the agency's prior procurement history for the 9mm ammunition which showed minimal, if any, small business participation under prior 9mm solicitations (none of which had previously been set aside for small businesses), a finding that the volume and complexity of the requirement (including technical specifications exceeding the stringent standards established by SAAMI) raised concerns about the capability of small businesses to produce acceptable quality ammunition within potentially short time frames, and the SBA's acceptance of the agency's determination to issue the

²(...continued)

submitting proposals due to any confusion, as the protester contends, from the phrase's inclusion in the RFP. To the extent Talon states it interpreted the phrase to include compliance with SAAMI standards and manufacturing capability and protests these provisions, we have addressed the reasonableness of these RFP terms above. Since the RFP failed to identify any specific "special standards" to be met, Talon has not presented a valid basis of protest of the RFP's inadvertent inclusion of the phrase since the phrase has no practical effect upon the procurement.

RFP on an unrestricted basis. The agency determined that the RFP's provision mandating subcontracting opportunities for small business concerns adequately provided small businesses with business opportunities. In response to Talon's comments' inclusion of letters of interest from small businesses in setting the procurement aside, the FBI stated that it does not have direct access to the SBA's PASS system and expected SBA to conduct such review, if appropriate.

An acquisition of services is required to be set aside for exclusive small business participation if the contracting officer determines that there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns and that award will be made at fair market prices. Federal Acquisition Regulation (FAR) § 19.502-2(a). 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 of abuse. CardioMetrix, B-256407, May 27, 1994, 94-1 CPD ¶ 334; Raven Servs. Corp., B-243911, Aug. 27, 1991, 91-2 CPD ¶ 203; MVM, Inc. et al., B-237620, Mar. 13, 1990, 90-1 CPD ¶ 270. However, an agency must undertake reasonable efforts to ascertain whether there is a reasonable expectation that two or more responsible small business concerns will actually submit proposals. Stav. Inc., 69 Comp. Gen. 730 (1990), 90-2 CPD ¶ 248.

While the use of any particular method of assessing the availability of small business is not required in making such a determination, such factors as the government's estimate, the prior procurement history of the solicited requirements, the current market climate, and advice from the agency's small business specialist and technical personnel may all constitute adequate grounds for a contracting officer's decision not to set aside a procurement. FKW Inc., B-249189, Oct. 22, 1992, 92-2 CPD ¶ 270; Raven Servs. Corp., supra.

Talon places too much emphasis on the response to its own solicitation of small businesses listed in the SBA's PASS system. The regulations do not require the contracting officer to amend or cancel the solicitation after subsequently learning of interested, responsible small businesses, provided that he or she conducted a reasonable investigation regarding the possibility of two or more responsible small businesses competing for the procurement. Espey Mfg. & Electronics Corp., B-254383, Mar. 8, 1994, 94-1 CPD ¶ 180; State Management Servs., Inc., B-252312, June 21, 1993, 93-1 CPD ¶ 474. The critical issue is

whether or not the FBI performed a reasonable investigation of the small business availability to successfully perform the contract at a reasonable price. Here, we believe the agency acted reasonably.

The record shows that the contracting officer took the following steps in determining whether this requirement should be set aside for small businesses. Initially, the contracting officer contacted the agency's technical personnel and reviewed the procurement history of this requirement and found that prior ammunition procurements were conducted as unrestricted requirements and awarded to large businesses; small business participation was found to be minimal under prior ammunition procurements since the FBI did not receive at least two technically acceptable proposals from responsible small business concerns. In particular, the contracting officer reviewed, among other contracts, the most recent, relevant procurement for 9mm ammunition similar to that sought under the current RFP (that RFP, issued in 1990, sought a variety of different caliber ammunition); the single small business proposal received was rejected for failing to meet the quantity requirements of the procurement. Although the protester contends that the agency acted unreasonably in failing to contact other federal agencies that have also procured 9mm ammunition to determine small business availability, we do not believe the agency was obligated to do so in light of its own prior procurement history and the fact that small business interest in its 9mm (and other caliber) ammunition has historically been minimal, especially since the contracting officer also contacted agency technical personnel who confirmed the concern about small business interest and capability.

Specifically, the contracting officer met with agency technical personnel to examine the size and complexity of the procurement. The agency concluded that during the life of the contract, at least approximately 30 million rounds would be ordered, and that greater amounts potentially could be ordered by various other law enforcement agencies acquiring ammunition under the contract. The large volume of required ammunition contemplated under the contract gave the agency great concern about the ability of a small business to meet the typically short delivery time frames anticipated under the contract. The agency also considered the complexity of the production requirements; the RFP's specifications show that in certain areas, the FBI's technical specifications exceed generally accepted SAAMI standards such that, notwithstanding the protester's contrary suggestion, the ammunition to be procured is not necessarily a commercial type of product. Although the protester contends that this RFP does not contemplate an extremely large procurement and that small businesses can

produce the required quantities, Talon has not persuasively supported its position (the contract document submitted by the protester is for a different product and, as discussed above, the protester itself has alleged that the RFP's technical specifications and requirements are allegedly restrictive for small businesses).


In addition, the agency then contacted the SBA representative, the appropriate official charged with the responsibility of representing small business interests, see FAR § 19.402, providing notification of its determination that there was no reasonable expectation of receiving at least two small business proposals at reasonable prices. The cognizant SBA representative accepted the FBI's determination and informed the agency of his approval of the decision to issue the procurement on an unrestricted basis. The SBA's concurrence is generally given considerable weight in determining whether a contracting officer's decision was reasonable. Sunrise Int'l Group, Inc; Specialized Contract Servs., Inc., B-254875; B-254875.2, Jan. 25, 1994, 94-1; CPD ¶ 39.³

Based on the procurement history of this item, the nature and complexity of the item, including the potentially large volume of ammunition to be purchased within short delivery time frames in strict accordance with technical

³The record shows that at the request of an anonymous small business, the SBA contacted the contracting officer to question certain terms of the RFP (the protester states that SBA's concerns included the unrestricted status of the procurement; the FBI states that the SBA did not raise that concern with the agency, but instead had stated concerns about possible restrictive specifications included in the RFP). In any event, a meeting was scheduled between the SBA and FBI; however, the SBA representatives could not attend the meeting and instead informed the FBI that the SBA decided to accept the FBI's position and would no longer pursue any earlier concerns about the RFP. Although the protester continues to state that the SBA did not fully accept the FBI's determination not to set the procurement aside, the record does not support this position.

specifications which at times exceed industry (SAAMI) standards, and in light of the concurrence of the SBA representative, the contracting officer reasonably determined not to set aside this acquisition.

The protest is denied.

for 
Robert P. Murphy
Acting General Counsel