



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Encompass Group, LLC

File: B-409975

Date: September 30, 2014

H. K. Tyler Jr., Encompass Group, LLC, for the protester.
Bridget E. Grant, Esq., Department of Veterans Affairs, for the agency.
Charles W. Morrow, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's decision to use the Federal Supply Schedule (FSS) program to meet its requirement for operating room towels is denied where the record shows the agency complied with the applicable Federal Acquisition Regulation provisions concerning competition and market research.

DECISION

Encompass Group, LLC, of Chicago, Illinois, protests the terms of request for quotations (RFQ) No. VA119-14-Q-0077, issued by the Department of Veterans Affairs (VA) to vendors under either the General Services Administration Federal Supply Schedule (FSS), or the VA FSS,¹ for operating room (OR) towels. Encompass contends that the VA unreasonably limited the competition to FSS vendors because: (1) the required items are not available on the FSS; (2) the agency did not consider whether products that comply with the Trade Agreements Act are available under the FSS; and (3) the solicitation does not address Food and Drug Administration regulations that the protester contends applies to the OR towels.

¹ The FSS provisions of Federal Acquisition Regulation (FAR) subpart 8.4 state that both GSA and the VA (through a delegation of authority by GSA) may direct and manage multiple award schedules. FAR §§ 8.401, 8.402(a). References to the FSS herein are to both the GSA and VA schedule programs, unless otherwise noted.

We deny the protest.

BACKGROUND

Prior to issuing the RFQ, the VA Veterans Health Administration, Textile Integrated Product Team, concluded that OR towels were suitable for standardization. Contracting Officer's (CO) Statement at 2. The agency sought to reduce costs by standardizing the product and sources of supply, while balancing the needs of medical professionals. Id. The RFQ is intended to establish a blanket purchase agreement (BPA) that would be mandatory for all VA medical center facilities to use when ordering OR towels. See RFQ at 4.

On August 13, 2013, the VA issued a request for information (RFI) on GSA's e-Buy website and on the federal government's FedBizOpps (Federal Business Opportunities) website, seeking information from vendors regarding the agency's OR towel requirements.² CO Statement at 2. 21 vendors responded to the RFI, including 18 vendors who stated that they have the capability to provide OR towels. Agency Report (AR), exh. 6, Market Research Report, at 2. Of the 18 vendors who represented that they have the capability to provide the OR towels, 17 are small businesses, and 1 is a large business; 6 of the small business vendors hold FSS contracts. Id. Additionally, of the 18 vendors who can provide the OR towels, 5 are manufacturers, 6 are vendors that use United States small business manufacturers, and 6 are vendors that use United States large business manufacturers. Id. On October 24, 2013, the VA invited 16 vendors to an agency-sponsored vendor day. Id. Based on this market research, the VA concluded that there were at least three small businesses manufacturers who held FSS contracts that could meet the requirements for OR towels. Id. at 4; AR at 3.

On June 16, 2014, the VA posted the RFQ on GSA e-Buy. The solicitation was sent to 51 vendors who hold GSA FSS contract No. 65IIA, special item Nos. A-33B and A-33C, or VA FSS contract No. 73, special item No. 852-7. CO Statement at 3; RFQ at 1. The RFQ was issued as a total small business set-aside, and anticipates the establishment of a single fixed-price BPA, for a base year and four 1-year options, with an estimated value of \$692,262. The selection decision was to be based on two evaluation factors: price and technical acceptability. Id. at 18.

DISCUSSION

Encompass challenges the propriety of limiting the competition to FSS vendors because, it contends: (1) no vendor has all of the required items on its FSS contract; (2) the agency did not adequately investigate whether products that

² The RFQ also sought information concerning OR blankets, which are not the subject of the RFQ or this protest.

comply with the Trade Agreements Act (TAA)³ are available under the FSS; and (3) the agency did not adequately investigate or include solicitation provisions to address Food and Drug Administration regulations that the protester contends applies to the OR towels.⁴ The protester argues that, based on these alleged errors, the agency should cancel the solicitation and conduct a full and open competition under FAR part 15 that is not limited to FSS vendors.⁵ For the reasons discussed below, we find that none of the protester's allegations have merit.

The FSS programs directed and managed by GSA and the VA give federal agencies a simplified process for obtaining commonly used commercial supplies and services. FAR § 8.402(a). In FSS buys, as in other procurements, the determination of what the agency needs, and which products or services meet those needs is within the agency's discretion; we will not sustain a protest in this area unless the determination lacks a reasonable basis. Draefer Safety, Inc., B-285366, B-285366.2, Aug. 23, 2000, 2000 CPD ¶ 139 at 4. Agencies may only place orders with a vendor whose schedule contract contains the goods or services

³ The TAA generally requires that end products be acquired from the U.S. or designated countries. 19 U.S.C. § 2512(a)(1)(A)

⁴ Encompass also argued that the RFQ is unduly restrictive of competition because it unreasonably required vendors to increase their inventory in order to meet the solicitation's requirement to provide delivery to all VA facilities within 10 days of receiving the BPA. See RFQ at 5. The VA provided a detailed response to the protester's allegation, detailing the agency's delivery needs, and further noting that the RFQ does not require delivery of requirements within 10 days of establishment of the BPA, but rather within 10 days of the issuance of an order. See AR at 4-6. The protester's comments on the agency report, however, did not address the agency's response. Where an agency provides a detailed response to a protester's allegations and the protester fails to rebut or otherwise substantively address the agency's arguments in its comments, the protester provides us with no basis to conclude that the agency's position with respect to the issue in question is unreasonable or improper. See Atmospheric Research Sys., Inc., B-240187, Oct. 26, 1990, 90-2 CPD ¶ 338 at 3; see also Israel Aircraft Indus., Ltd.-TAMAM Div., B-297691, Mar. 13, 2006, 2006 CPD ¶ 62 at 6-7. Therefore, we dismiss this allegation because we consider Encompass to have abandoned this protest ground.

⁵ Additionally, Encompass argued that the VA's decision to use the FSS program to satisfy its requirement did not satisfy full and open competition, as mandated by the Competition in Contracting Act of 1984. We previously dismissed this issue because an agency's decision to fulfill a requirement through the FSS program satisfies the requirement for full and open competition. See 41 U.S.C. § 152(e); FAR §§ 8.404(a), 6.102(d)(3); American Sys. Consulting, Inc., B-294644, Dec 13, 2004, 2004 CPD ¶ 247 at 3.

required to meet the agency's need under a solicitation. See Lockmasters Sec. Institute, Inc., B-299456, May 21, 2007, 2007 CPD ¶ 105 at 4.

When establishing a competitive BPA for supplies under the FSS that will exceed the simplified acquisition threshold, and where there is no requirement for a statement of work, the FAR requires an agency to: (1) issue an RFQ that includes a description of the supplies and the basis upon which the selection will be made; and (2) either (i) post the RFQ on the e-Buy website to afford all schedule contractors offering the required supplies or services an opportunity to submit a quote, or (ii) 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. See FAR § 8.405-3 (b)(ii)(A), (B).

Encompass first argues that there are no FSS vendors who can meet the RFQ requirements. The record here shows, however, that the VA complied with the applicable FAR provisions to solicit this requirement through the FSS program, including conducting reasonable market research. As noted above, the VA issued an RFI which led to the receipt of statements from numerous vendors, and also conducted a vendor day.⁶ Based on this research, the agency identified three small business manufacturers of OR towels with FSS contracts that could meet the agency's requirements for these items. See AR, exh. 6, Market Research Report, at 2-3. The record also reflects that the RFQ was posted on e-Buy, was sent to 51 vendors holding relevant schedule contracts, and included a description of the OR towels and the basis for the selection decision. See CO Statement at 3; RFQ at 6-7, 18-19. Thus, the record shows that the VA complied with the applicable regulation governing an agency's use of the FSS to satisfy its requirements.

Although the VA's response to the protest included the results of its market research, Encompass has not provided any basis to challenge the reasonableness of the agency's findings, aside from a general allegation that there are no FSS contractors who can meet the RFQ requirements. As noted above, the VA received expressions of interest from 21 vendors, 17 of which were small businesses who stated they were able to meet the requirements. The agency also found that three

⁶ Encompass also complains that it was not invited to the vendor day, despite responding to the RFI. The protester contends that these vendors were afforded a competitive advantage because they had the opportunity to add items to their FSS contracts prior to the agency issuing the RFQ. As discussed above, however, the VA issued a RFI which described its requirements in August 2013. The protester concedes that it received the RFI, and we therefore find no basis to conclude that it was denied an opportunity to compete on an unequal basis with these vendors with respect to any advanced knowledge of the agency's requirements.

small business manufacturers with FSS contracts were capable of meeting the requirements. See AR, exh. 6, Market Research Report, at 4-15. Since the protester has not shown that the agency's determinations were unreasonable, we find no basis to sustain the protest.

Encompass next asserts that the VA did not adequately investigate whether small business FSS vendors are capable of providing domestic end products that comply with the TAA. Because the RFQ is restricted to small businesses, the TAA does not apply to the supply of this product. FAR § 25.401(a)(1). However, because the RFQ is limited to small business vendors, the solicitation incorporates FAR clause 52.219-6, Notice of Total Small Business Set Aside, which requires the successful vendor to furnish only end items manufactured by small businesses in the United States or its outlying areas. RFQ at 11; FAR clause 52.219-6(d). As discussed above, the VA conducted market research which found that at least three small businesses who hold FSS contracts are manufacturers of the required items. See AR, exh. 6, Market Research Report, at 3. In light of the agency's reasonable market research, and the express requirements of the solicitation to provide only domestic end products, we find no basis to sustain the protest.

Finally, Encompass argues that the RFQ should have included a solicitation requirement that the vendor's manufacturing facility be certified by the Federal Drug Administration (FDA). In this regard, the protester asserts that the FDA classifies OR towels as medical devices, and that the FDA therefore requires the manufacturing facility for the towels to be certified by the FDA. See 21 C.F.R. § 880.5300(a).

The VA contends that the protester does not provide any basis to conclude that OR towels are medical devices, and further argues that the FDA does not list these items in the database which classifies medical devices. VA Supp. Response (Sept., 23, 2014). We agree.

The regulation cited by Encompass pertains to "medical absorbent fiber[s that are] made from cotton or synthetic fiber in the shape of a ball or a pad . . . used for applying medication to, or absorbing small amounts of body fluids from, a patient's body surface." 21 C.F.R. § 880.5300(a). This description does not match the technical requirements of the OR towels required under the solicitation, which must be "in the range of 16"-18"(inches) by 32"-36" (inches)." RFQ at 7. In any event, the protester has not shown that the VA was required under any procurement laws or regulations to include a solicitation provision requiring offerors to demonstrate

that the location for the manufacturing of medical devices is certified by the FDA.
On this record, we find no basis to sustain the protest.

The protest is denied.

Susan A. Poling
General Counsel