Decision

Matter of: JRS Staffing Services

File: B-410098; B-410098.2; B-410098.3; B-410098.4; B-410098.5; B-410100; B-410100.2; B-410100.3; B-410100.4; B-410100.5; B-410101; B-410101.2; B-410101.3; B-410101.4; B-410101.5

Date: October 22, 2014

Jacqueline R. Sims, for the protester.
Lt. Col. Roger G. Palmer, Esq., United States Marine Corps, for the agency.
Evan D. Wesser, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protests challenging a provision in commercial item solicitations as contrary to customary commercial practice are denied where the protester does not show that the provision is inconsistent with customary commercial practice, and where the provision is reasonably related to ensuring compliance with a mandatory legal requirement.

2. Protests challenging a solicitation provision as unduly restrictive of competition are denied where the agency has articulated reasonable bases for imposing the requirement.

DECISION

JRS Staffing Services, of Lawrenceville, Georgia, a small business, protests the terms of request for quotations (RFQ) Nos. M67001-14-T-1188 (RFQ 1188), M67001-14-T-1191 (RFQ 1191), and M67001-14-T-1192 (RFQ 1192) (collectively, the RFQs), which were issued by the United States Marine Corps. The protester argues that the RFQs, which were issued for religious education and music services, contain terms that are inconsistent with customary commercial practice and unduly restrictive of competition.

We dismiss in part and deny in part the protests.
BACKGROUND

On June 13, 2014, the Marine Corps issued three small business set-aside RFQs, each of which anticipates the award of an indefinite-delivery, indefinite-quantity (IDIQ) contract for religious education and music services at Marine Corps Air Station, New River, North Carolina. RFQ 1188 is for a Protestant Director of Religious Education. RFQ 1188 at 4. RFQ 1191 is for a Catholic Director of Religious Education. RFQ 1191 at 3. RFQ 1192 is for a Chapel Music Director. RFQ 1192 at 4. All three RFQs state that the solicitations and resulting contracts will utilize simplified acquisition procedures, in accordance with Federal Acquisition Regulation (FAR) part 13.0 and FAR subpart 16.5. RFQ 1188 at 4; RFQ 1191 at 3; RFQ 1192 at 4. Furthermore, the RFQs contemplate that the services being acquired are commercial items in accordance with FAR part 12. See RFQ 1188 at 23; RFQ 1191 at 24; RFQ 1192 at 23.

On July 16, JRS filed three pre-award protests with our Office challenging various terms of the RFQs, and filed supplemental protests on August 22, September 2, and September 12, respectively. First, JRS alleged that the RFQs included ambiguous or inadequate specifications. Second, JRS alleged that the RFQs, which are for commercial item services, included provisions that were inconsistent with customary commercial practice in violation of the commercial item provisions of FAR § 12.301(a). Third, JRS alleged that the RFQs contained requirements that were unduly restrictive of competition. Based on the commonality of issues across the RFQs, we granted the Marine Corps’ request to consolidate the protests.

During the protests, the Marine Corps voluntarily took corrective action to address several of JRS’s arguments. In addition, the GAO attorney assigned to the protests conducted an “outcome prediction” alternative dispute resolution (ADR) conference and informed the parties in a detailed discussion that, in his view, our Office was likely to sustain in part and deny in part the protests. In response to the ADR, the agency voluntarily took further corrective action, and the protester withdrew certain aspects of its protests. On October 3, JRS filed a fourth supplemental protest challenging the agency’s corrective action taken in response to the ADR. On October 9, the Marine Corps notified our Office that it would modify the corrective action. We dismiss those protest grounds addressed by the agency through voluntary corrective action or voluntarily withdrawn by the protester, as the corrective action and withdrawal render those protest grounds academic. See e.g., Dyna-Air Eng’g Corp., B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132. Notwithstanding the predicted outcome, however, JRS elected not to withdraw two protest grounds, which we address herein.1

1 On October 9, JRS filed a Request for Protest Costs pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2014), asserting its entitlement to recover its protest costs based on the Marine Corps’ decision to take corrective action in (continued...
DISCUSSION

JRS argues that the RFQs each contain a provision requiring advanced notice and approval for the permanent substitution of personnel that is inconsistent with customary commercial practice. The protester also argues that the RFQs each contain a provision requiring the contractor to maintain and furnish proof of automobile liability insurance that is unduly restrictive of competition. For the reasons discussed below, we find no basis to sustain the protests.

Inconsistent With Customary Commercial Practice

JRS first argues that the RFQs, which are for commercial item services, include a provision relating to the permanent substitution of personnel that is inconsistent with customary commercial practice in violation of FAR § 12.301(a), and that the agency’s use of the provision is not supported by adequate market research. For the reasons discussed below, we find that the protester does not clearly demonstrate that the provision is inconsistent with customary commercial practice, and that the protested requirements are reasonably related to ensuring compliance with applicable statutory requirements, and therefore deny the protests.

In procurements involving the acquisition of commercial items, FAR § 12.301(a) requires that contracts “shall, to the maximum extent practicable, include only those clauses (1) [r]equired to implement provisions of law or executive orders applicable to the acquisition of commercial items; or (2) [d]etermined to be consistent with customary commercial practice.” In establishing acquisitions for commercial items, FAR § 10.002(b) requires market research by the acquiring agency to address, among other things, customary practices regarding the provision of the commercial items. Id.; Northrop Grumman Technical Servs., Inc., B-406523, June 22, 2012, 2012 CPD ¶ 197 at 14-15. Consistent with this approach, FAR § 12.302(c) bars the tailoring of solicitations for commercial items in a manner inconsistent with customary commercial practice unless a waiver is approved in accordance with agency procedures.

The RFQs each include a notice and approval requirement for the permanent substitution of contractor personnel, as follows:

Should it become necessary for the contractor or the contractor’s employee to leave the position covered by this contract, a

(...continued)
response to the ADR. Our Office has docketed the request as B-410098.6, B-410100.6, and B-410101.6, and will address it in a subsequent decision.
permanent substitution must be made. Official notice of pending departure must be given at least 90 days in advance of leaving. The Contractor must find and provide a qualified person to take over the duties required by this contract. The new person to perform the work must meet all qualifications in the contract and be approved by both the Command Chaplain and the Contracting Officer at least 30 days prior to the end of performance by the original contractor or contractor’s employee. The new contractor or contractor’s employee must also be capable of being qualified to work on a government contract. Failure to adhere to this requirement will result in a default termination and negative performance rating.

RFQ 1188, Statement of Work (SOW) at ¶ 5.5.2; RFQ 1191, SOW at ¶ 5.5.2; RFQ 1192, SOW at 7.  

As an initial matter, although JRS alleges that the advanced notice and approval provision is inconsistent with customary commercial practice, JRS’s protests failed to identify the customary commercial practice for substitution of personnel, and, thus, how the agency’s provision is inconsistent with customary commercial practice. Pursuant to FAR § 12.302(c)(2), an agency cannot tailor any clause or otherwise include any additional terms or conditions in a solicitation or contract for commercial items in a manner that is inconsistent with customary commercial practice for the item being acquired unless a waiver is approved in accordance agency procedures. A protester asserting that a provision is contrary to customary commercial practice, and thus a waiver was required, bears the initial burden of alleging how the provision is contrary to customary commercial practice. See 4 C.F.R. § 21.1(c)(4) (requiring a protest to set forth a detailed statement of the legal and factual grounds of protest).

Here, JRS’s initial protests included only a perfunctory assertion that the agency did not “conduct any market research to determine whether the notice terms are consistent with commercial practices.” See, e.g., Protest (B-410098) at 11. In its comments, the protester asserts that the advanced notice and approval provision is not required to implement provisions of law or executive orders applicable to the acquisition of commercial items, and are inconsistent with customary commercial practice, as demonstrated by the fact that neither a current JRS contract with the Marine Corps for similar services nor other agency contracts for similar services  

\[\text{\footnotesize 2 The RFQs also each include a provision pertaining to temporary substitutions of personnel, including in emergency situations. See, e.g., RFQ 1188, SOW at ¶ 5.5.1; RFQ 1191, SOW at ¶ 5.5.1; RFQ 1192, SOW at 7; RFQ 1191 Mod. 2 at Q&A 3.}\]
identified by the protester include similar advance notice provisions. See Protester’s Comments (Aug. 22, 2014) at 12. 3

In any event, the Marine Corps asserts that, because contractor personnel performing under the contracts will be required to successfully complete a Federal Bureau of Investigation (FBI) background check pursuant to 42 U.S.C. § 13041,4 the required advanced notice and approval time periods are reasonable in order to ensure compliance with applicable federal law. See Agency Legal Memorandum (Aug. 15, 2014) at 9-10.

Although 41 U.S.C. § 1906 and FAR § 12.503 exempt commercial item procurements from the application of certain federal procurement-related laws, and FAR §§ 12.301 and 12.302 restrict the usage of additional FAR clauses or terms and conditions beyond those set forth in FAR clause 52.212-4 and FAR clause 52.212-5, none of these authorities state that a contractor performing a commercial items contract is exempt from all other applicable laws and regulations. Indeed, FAR clause 52.212-4(q), which was incorporated into the RFQs, requires a contractor under a commercial items contract to “comply with all applicable Federal,

3 In addition to challenging the advanced notice and approval provision as being inconsistent with customary commercial practice, JRS also initially challenged certain insurance requirements as being inconsistent with customary commercial practice. See, e.g., Protest (B-410098) at 5-8; Email from Ms. Sims (Sept. 29, 2014) (withdrawing protest allegation). In connection with that argument, JRS submitted a “Survey of Churches, Places of Worship & Industry,” which summarized the “market research” conducted by the protester concerning churches and other religious-based organizations. See, e.g., Protest (B-410098) at Attachment B, Part 2. The protester represented that none of the surveyed churches or organizations utilized, or were aware of others utilizing, third-party entities to provide religious education or music services on a commercial basis. See, e.g., id. The agency’s market research similarly determined “that there were no service vendors who only provide religious services employees.” AR, Tab B, CO’s Statement of Facts at ¶ 9. Although the record raises a question regarding whether the religious education and music services being acquired in the challenged procurements are in fact “commercial services,” our Office need not address the question in resolving the protests.

4 In relevant part, 42 U.S.C. § 13041(a)(1) requires that “[e]ach agency of the Federal Government, and every facility operated by the Federal Government (or operated under contract with the Federal Government), that hires (or contracts for hire) individuals involved with the provision to children under the age of 18 of child care services shall assure that all existing and newly-hired employees undergo a criminal history background check.”
State and local laws, executive orders, rules and regulations applicable to its performance under [the] contract.” Cf. 41 U.S.C. § 3307(a)(1) (“Unless otherwise specifically provided, all other provisions in [Title 41, Subtitle I, Division C of the U.S. Code] apply to the procurement of commercial items.”).

Here, JRS does not dispute that the awardees will be subject to the requirements of 42 U.S.C. § 13041 to complete FBI background checks for all personnel working on the contracts. The Marine Corps submitted evidence demonstrating that successful completion of an FBI background investigation could take a substantial period of time, thus necessitating the need for adequate advanced notice and approval before substituting personnel. See Agency Report (AR), Tab DD, FBI website page titled “Submitting an Identity History Summary Request to the FBI,” at 1-2 (providing that the anticipated processing time was 30 calendar days, but indicating that an applicant should not contact the FBI regarding the status of a check prior to six weeks). Although the time periods chosen by the agency are not mandated by law, to the extent the agency imposed terms and conditions that are reasonably related to ensuring compliance with an applicable statutory requirement, we do not find that the limitations on “tailoring” of clauses in commercial item contracts are applicable here.

Therefore, because the challenged advanced notice and approval requirement is reasonably related to ensuring compliance with mandatory statutory requirements, we deny the protests.

Unduly Restrictive Term

JRS next alleges that the RFQs each contain a requirement regarding automobile liability insurance that is unduly restrictive of competition. As discussed below, we do not find that the provision challenged by JRS is unduly restrictive of competition or is otherwise objectionable.

Where a protester challenges a specification or requirement as unduly restrictive of competition, the procuring agency has the responsibility of establishing that the specification or requirement is reasonably necessary to meet the agency’s needs. See, e.g., Northrop Grumman Technical Servs., Inc., supra, at 8. Our Office will examine the adequacy of the agency’s justification for a restrictive solicitation provision to ensure that it is rational and can withstand logical scrutiny. Id. A

An updated version of the same webpage provides that, effective September 7, 2014, the processing time is now expected to be “approximately 12 weeks” due to technical issues involving the migration to a new background check system. See http://www.fbi.gov/about-us/cjis/identity-history-summary-checks/identity-history-summary-checks (last visited on Oct. 8, 2014).
protester’s mere disagreement with the agency’s judgment concerning the agency’s needs and how to accommodate them does not show that the agency’s judgment is unreasonable. Id. Furthermore, the fact that a requirement may be burdensome or even impossible for a particular firm to meet does not make it objectionable if the requirement properly reflects the agency’s needs. Y&K Maint., Inc., B-405310.2, Oct. 17, 2011, 2011 CPD ¶ 239 at 5.

JRS asserts that the RFQs’ requirement that offerors maintain and furnish proof of automobile liability insurance is unduly restrictive of competition because an offeror not proposing to utilize a contractor- or government-owned vehicle in the performance of the contracts allegedly cannot acquire the requisite insurance. See Protest at 9. The protester also contends that the insurance requirements exceed the agency’s needs because FAR clause 52.212-4(q) already requires the contractor to comply with all applicable law, and North Carolina law requires the owner or operator of the vehicle to maintain automobile liability insurance, so it is unnecessary for the offeror (in addition to the owner or operator of the vehicle) to also maintain insurance. See id. at 10; Protester’s Comments (Aug. 22, 2014) at 9-10. The Marine Corps responds that because the awardee’s employees will need to utilize privately-owned vehicles in the performance of the contracts due to the lack of available public transportation, the separate insurance requirement for the awardee is reasonable to address the potential exposure to liability and litigation expenses for both the government and awardee. See, e.g., AR, Tab B, CO’s Statement of Facts, at ¶ 9; Agency Legal Memorandum (Aug. 5, 2014) at ¶¶ 19, 22.

We find that the Marine Corps here has articulated reasonable bases for requiring the contractor to furnish automobile liability insurance. Ensuring that the individuals who come into contact with and that may be harmed by the contractor in the performance of the contracts have sufficient recourse, and protecting the agency from potential liability, are reasonable objectives justifying the imposition of the requirement. In this regard, requiring the awardee, as opposed to an employee or independent contractor of the awardee, to carry and furnish proof of insurance is consistent with the privity of contract between the awardee and the government. Furthermore, the fact that obtaining the insurance may be burdensome or even impossible for the protester is insufficient to demonstrate that the requirement is unduly restrictive of competition. See, e.g., Y&K Maint., Inc., supra.

Therefore, because we find that the Marine Corps has articulated reasonable bases for the imposition of the automobile liability insurance requirement, we deny this aspect of JRS’s protest.

The protests are dismissed in part and denied in part.

Susan A. Poling
General Counsel