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Decision

Matter of: InuTeq, LLC
File: B-411781
Date: October 21, 2015

Todd R. Overman, Esq., Richard W. Arnholt, Esq., Bryan R. King, Esq., Bass Berry & Sims PLC, for the protester.

D. Evelyn Lyon, Esq., and Wendy L. Bateman, Esq., National Aeronautics and Space Administration, for the agency.

Glenn G. Wolcott, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where solicitation for a task order under a federal supply schedule contract provided that offerors must verify that their electronically-posted size status certifications were current, accurate, and complete “as of the date of this offer,” and the agency responded to potential offerors’ questions regarding the impact of this language by stating that an offeror’s size status would be verified “when the proposal is submitted,” protester’s assertion that the task order solicitation did not seek recertification of offerors’ size status is denied.

DECISION

InuTeq, LLC, of Beltsville, Maryland, protests the terms of request for proposals (RFP) No. NNS15530376R, issued by the National Aeronautics and Space Administration (NASA) for a task order to provide information technology (IT) services at the John C. Stennis Space Center in Mississippi. InuTeq asserts that the initial solicitation did not require recertification of offerors’ size status and maintains that it was improper for the agency to subsequently require such recertification.

We deny the protest in part and dismiss it in part.

BACKGROUND

In September 2014, NASA posted a synopsis on the Federal Business Opportunities (FedBizOps) website, stating that it was planning to issue an RFP for IT services at the Stennis Space Center. Agency Report (AR), Tab 1.10, FedBizOps Synopsis, at 128-29.¹ The synopsis provided that the procurement would be solicited from vendors holding General Services Administration (GSA) federal supply schedule (FSS) No. 70 contracts and would be conducted as a total small business set-aside pursuant to North American Industry Classification System (NAICS) code 541512.² Id.

In December 2014, NASA selected 5 contractors holding GSA schedule 70 contracts, including InuTeq, and provided copies of the draft RFP (DRFP) for this procurement to those contractors.³ Section K of the DRFP contained the following provision from Federal Acquisition Regulation (FAR) § 52.204-8, stating:

The Offeror has completed the annual representations and certifications electronically via the SAM [System for Award Management]⁴ Web site After reviewing the SAM database information, **the Offeror verifies by submission of the offer that the representations and certifications currently posted electronically that apply to this solicitation as indicated in paragraph (c) of this provision have been entered or updated within the last 12 months, are current, accurate, complete, and applicable to this solicitation (including the business size standard applicable to the NAICS code referenced for this solicitation), as of the date of this offer and are incorporated in this offer by reference**

AR, Tab 2.02, DRFP, at 84 (emphasis added).

The agency established January 14 as the deadline for submission of questions regarding the DRFP and, on that date, received 119 questions from potential

¹ The agency report in this matter was submitted with Bates numbering. Our citations to page numbers in this decision refer to the applicable Bates numbers in the agency report.

² As of July 2014, the size standard for this NAICS code was \$27.5 million. AR, Contracting Officer's Statement, Aug. 10, 2015, at 5.

³ The agency states it also provided the DRFP to 25 other companies that requested it. AR, Contracting Officer's Statement, Aug. 10, 2015, at 7.

⁴ SAM is a government-wide database where contractors enter information required by the FAR, including small business size status representations.

offerors. AR, Contracting Officer's Statement, Aug. 10, 2015, at 7. On January 30 the agency sent answers to the questions to all of the contractors that had received a copy of the DRFP, including InuTeq. Id.

Among others, the following questions and agency responses were provided to InuTeq and the other potential offerors:

Q. Would NASA consider changing the representation [regarding small business size status] to be against a vendor's schedule 70 rather than SAM business size?

A. The business size will be verified by data found in SAM **when the proposal is submitted.**

* * * * *

Q. Please remove the requirement for offerors to annually re-represent their size status.

A. Annual representation language is specific to the FAR Clause 52-204-8 and **will not be modified for this solicitation.** FAR Clause 52.204-8(d) states that "The offeror has completed the annual representations and certifications electronically via the SAM website. . . ." It further states that ". . . **the offeror verifies by submission of the offer that the representations and certifications currently posted electronically that apply to this solicitation as indicated in paragraph (c) of this provision have been entered or updated within the last 12 months are current, accurate, complete and applicable to this solicitation (including the business size standard applicable to the NAICS code referenced for this solicitation), as of the date of this offer and are incorporated in this offer by reference. . . .**"

Q. Please consider modifying the request for small business representation to consider an offeror's long-term schedule 70 contract status instead. . . .

A. The business size will be verified by data found in SAM **when the proposal is submitted.**

AR, Tab 2.05, Questions and Answers for DRFP, at 412, 422 (all emphasis added).

On February 11, the agency issued the final RFP. Consistent with the agency's responses to offeror questions, none of the language regarding size status was changed. On or before March 18, InuTeq submitted its initial proposal. Contrary to the agency's responses to offerors' questions, InuTeq's proposal relied on the size certification it submitted in connection with its GSA schedule 70 contract as the

basis for meeting the solicitation's size requirements. InuTeq Comments on Agency Report, Aug. 21, 2015, at 2.

On March 27, nine days after submission of initial proposals, the agency issued RFP amendment 002, seeking to clarify the RFP's certification requirements, stating: "The purpose of this amendment is to explicitly request concerns to recertify their size status in response to this solicitation." AR, Tab 3.04, RFP amend. 002, at 412. InuTeq responded to this amendment, maintaining that it was eligible as a small business pursuant to its certification under its GSA schedule 70 contract. AR, Tab 4.01, InuTeq Email to NASA, at 2.

On May 5, the agency again contacted InuTeq regarding its size status, noting that InuTeq's reliance on its size status at the time it was awarded a GSA schedule 70 contract did not meet the solicitation requirements. AR, Tab 4.04, Clarification Letter, at 11. On May 7, InuTeq responded by asserting that the initial RFP did not require recertification, continuing to argue that the agency was required to accept InuTeq's size status as of the time it was awarded a GSA schedule 70 contract, and acknowledging that InuTeq could not have recertified its size status at the time initial proposals were submitted.⁵ AR, Tab 4.05, InuTec Response to Clarification Letter, at 13-14.

On May 21, NASA lost funding for a significant portion of the solicitation requirements, AR, Contracting Officer's Statement, Aug. 10, 2015, at 11; accordingly, the agency subsequently issued RFP amendment 003. That amendment revised the performance work statement, sought submission of revised proposals by July 15, and provided that only offerors that had recertified their size status would be eligible for award. AR, Tab 5.03, RFP Amend. 0003, at 8-10. On July 14, InuTec filed this protest.

DISCUSSION

InuTec first protests that the solicitation did not require offerors to certify their size status as of the date task order proposals were initially submitted. Protest at 2. Based on that assertion, InuTec maintains that NASA was precluded from subsequently amending the solicitation to require such certification. As discussed below, we reject InuTec's assertion that the solicitation did not seek recertification of offerors' size status at the time initial proposals were submitted. Further, since the record establishes that InuTec did not meet that requirement when it submitted its

⁵ Specifically, InuTeq stated: "InuTeq would not have expended significant personnel and financial resources preparing a proposal if the task order RFP had required a size recertification from the outset." AR, Tab 4.05, InuTeq Response to Clarification Letter, at 14.

initial proposal, we do not further address its complaints regarding the agency's subsequent actions in this matter.

With regard to long-term multiple-award contracts, including GSA schedule contracts, a contracting officer has the discretion to request recertification of offerors' small business size status in connection with the issuance of task orders. 13 C.F.R. § 121.404(a)(1)(i); Enterprise Information Services, Inc., B-403028, Sept. 10, 2010, 2010 CPD ¶ 213 at 3-4. In issuing its regulations regarding small business size determinations under multiple-award long-term contracts, the Small Business Administration (SBA) has specifically stated:

Allowing procuring agencies to request size certifications in connection with particular orders is consistent with the purposes of the Small Business Act (procurements meant for small businesses should be awarded to small businesses) The final rule gives contracting officers the discretion to request size certifications for individual orders, but does not require them to do so. . . .

71 Fed. Reg. 66434, 66438 (2006).

With regard to the solicitation language a procuring agency must use to request recertification, the SBA's Office of Hearings and Appeals (OHA) has recognized that it is unnecessary to use the words "certify" or "recertify." Rather, the OHA has considered whether the solicitation was "reasonably understood as a request to recertify at the task order level." Size Appeal of: Metters Industries, Inc., SBA No. SIZ-5456 at 9, 10 (2013). In this regard, the OHA has concluded that SBA's primary concern in drafting the applicable regulations was to ensure that "procurements meant for small business should be awarded to small businesses," further noting that "[i]n light of this objective, the drafters likely would not have intended that a task order set aside for small businesses should be awarded to a firm that is currently large, merely because the recertification request may have been drafted with less than perfect clarity." Id. at 10; cf. Size Appeal of: Reliasource, SBA No. SIZ-5536 (2014); Size Appeal of: Safety and Ecology Corp., SBA No. SIZ-5177 (2010) (inclusion of mandatory FAR clauses is insufficient to constitute a request for recertification).

Here, in addition to including the FAR clause requiring offerors to verify that their prior size status certifications were current, accurate, and complete "as of the date of this offer," the agency responded to offerors' requests that the agency permit reliance on the offerors' prior certifications under their respective GSA schedule 70 contracts. The agency rejected these requests, reiterating that "business size will be verified by data found in SAM **when the proposal is submitted.**" AR, Tab 2.05, Questions and Answers for DRFP, at 412, 422 (emphasis added). Likewise, in responding to a request to remove the requirement for offerors to make annual representations regarding their size status, the agency expressly referenced the

portion of the mandatory FAR clause quoted above, and stated that the clause “will not be modified for this solicitation.” AR, Tab 2.05, Questions and Answers for DRFP, at 422.

On this record, we conclude that the solicitation was reasonably understood to require recertification at the time initial task order proposals were submitted. Accordingly, we reject InuTec’s assertion that the terms of the initial solicitation did not seek recertification of its size status at the time it submitted its initial proposal, and its protest in this regard is denied.

InuTec’s protest also challenges the agency’s subsequent solicitation amendments, arguing, among other things, that the agency could not properly require recertification after submission of initial proposals.

Based on our conclusion that the initial solicitation did, in fact, seek recertification, and, since the record establishes that InuTec did not meet this requirement at the time it submitted its initial task order proposal, we conclude that InuTec’s proposal failed to comply with a material solicitation requirement and could not be properly considered for award. See, e.g., Blocacor, LDA, B-282122.3, Aug. 2, 1999, 99-2 CPD ¶ 25 at 2 n.1; New Zealand Fence Systems; Department of the Interior-- Request for Advance Decision, B-257460, Sept. 12, 1994, 94-2 CPD ¶ 101 at 1-3. On this record, InuTec is not an interested party to further challenge the agency’s actions in this procurement, and its additional complaints regarding the agency’s actions and the solicitation’s requirements are dismissed.

The protest is denied in part and dismissed in part.

Susan A. Poling
General Counsel