U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548
Comptroller General
of the United States

Decision

Matter of: AeroSage, LLC

File: B-416381

Date: August 23, 2018

David M. Snyder, AeroSage, LLC, for the protester.
Matthew Vasquez, Esq., and Christopher S. Colby, Esq., Defense Logistics Agency; and Sam Q. Le, Esq., Small Business Adminstration, for the agencies.
Young S. Lee, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that agency improperly bundled requirements is dismissed where the protester has not shown that it was precluded from competing for the requirements.

2. Protest challenging the agency's decision not to set aside certain line items for small businesses is sustained where the market research to determine whether two or more small businesses would likely submit offers was based on incomplete information.

3. Protest challenging various terms of the solicitation as overly restrictive or unreasonable is dismissed where the protester does not explain how the challenged terms prejudice its ability to submit a proposal or otherwise restrict competition.

4. Protest asserting that the agency did not provide sufficient time for offerors to submit proposals is denied where the agency demonstrated that the time allotted was reasonable.

DECISION

AeroSage LLC, of Tampa, Florida, a service-disabled veteran-owned small business (SDVOSB), protests various terms of request for proposals (RFP) No. SPE605-18-R-0218, which was issued by the Defense Logistics Agency (DLA) for delivery of fuel products to locations throughout New England. The protester raises numerous challenges to the terms of the solicitation.

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

BACKGROUND

DLA issued the RFP on May 1, 2018, in accordance with the commercial item acquisition procedures of Federal Acquisition Regulation (FAR) part 12 and the simplified acquisition procedures of FAR part 13.[1] RFP, at 3. The solicitation seeks proposals for the delivery of fuel to locations in Connecticut, Rhode Island, Vermont, Maine, and Massachusetts. Id. at 5-6. The agency assigned North American Industry Classification System (NAICS) code 324110 to the solicitation, which applies to petroleum refineries. Id. at 1. The solicitation includes 10 contract line item numbers (CLINs), each of which is for fuel to be delivered to a specific location. Id. at 5-6. Vendors are permitted to submit proposals on a by-CLIN basis, and the RFP anticipates the award of fixed-price indefinite-delivery requirements contracts with economic price adjustments. Id. 3, 6-13, 89. The resulting period of performance begins with contract award, and ends on March 31, 2021. Id. at 3. As relevant here, the RFP states that all line items will be awarded on a CLIN basis to the offeror(s) submitting the lowest-priced, technically acceptable offer. Id. at 3.

Proposals were due by May 15, 2018. Id. at 1, 3. On May 15, prior to the time set for receipt of proposals, AeroSage filed this protest challenging various terms of the solicitation.

DISCUSSION

The protester raises numerous challenges to the terms of the solicitation, including that DLA improperly bundled requirements, failed to set aside the solicitation for small business concerns, included overly restrictive solicitation terms, provided inaccurate estimates for the amount of fuel to be acquired, and did not allow enough time for offerors to respond to the solicitation. For the reasons that follow, we dismiss the protest in part, sustain the protest in part, and deny it in part.

Bundling

The protester argues that DLA unlawfully bundled requirements. Protest at 2. Specifically, the protester asserts that the RFP improperly combines requirements that have been, or are being, performed through "separate small" contracts. Id. In response, the agency denies that its solicitation bundles requirements because the RFP "provides that DLA Energy will evaluate 'offers on a line item-by-line item basis.'" DLA Req. for Dismissal at 2. Moreover, DLA explains that "[e]ach line item will be evaluated and awarded independently from all other line items." Id.

[1] The solicitation was initially issued as a request for quotations (RFQ). RFP at 1. On May 15, 2018, DLA issued an amendment changing the solicitation method to a RFP. RFP amend. 0003 at 1. We note that the solicitation contains multiple provisions confirming that DLA intended to issue the solicitation as an RFP, and not a RFQ. RFP at 3, 90, 92.

The Competition in Contracting Act (CICA) generally requires that solicitations permit full and open competition and contain restrictive provisions only to the extent necessary to satisfy the procuring agency's needs. 10 U.S.C. § 2305(a)(1). An allegation of improper bundling under CICA reflects a claim that a contract combines separate requirements beyond what is necessary to meet the agency's needs, thereby limiting competition by excluding offerors that can only perform a portion of the requirement. See e.g., Manus Med. LLC, B-412331, Jan. 21, 2016, 2016 CPD ¶ 49 at 5; Major Contracting Servs., Inc., B-406980, Oct. 10, 2012, 2012 CPD ¶ 288 at 3-4.

Similarly, the Small Business Act provides that "each Federal agency, to the maximum extent practicable, shall . . . avoid unnecessary and unjustified bundling of contract requirements that precludes small business participation in procurements as prime contractors." 15 U.S.C. § 631(j)(3). The Small Business Act defines bundling of contract requirements as "consolidating 2 or more procurement requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract that is likely to be unsuitable for award to a small-business concern[.]" 15 U.S.C. § 632(o)(2); see also FAR § 2.101.

Here, we agree with the agency's conclusion that its decision to place these requirements under one solicitation does not constitute improper bundling because the protester, a small business concern, has not been precluded from competing. To the contrary, the protester submitted a proposal responding to the solicitation's requirements, asserting that it is capable of performing. On this record, the protester's assertion that the solicitation improperly bundles requirements fails to state a valid basis of protest. Bid Protest Regulations, 4 C.F.R. §§ 21.1(c)(4), (f); 21.5(f); Navarre Corp., B-414505.4, Jan. 4, 2018, 2018 CPD ¶ 15 at 4 n.3 (GAO will not consider bundling allegations where small business protesters represent that they are capable of performing the allegedly bundled requirements); see also, Manus Med. LLC, supra, at 5-6. Accordingly, this protest ground is dismissed.[2] AeroSage, LLC; SageCare, Inc., B-416279, July 16, 2018, 2018 CPD ¶ 243, at 3.

Set-Aside Decision

The protester also challenges the agency's decision not to set aside the procurement for small business concerns. Protest at 2. Specifically, AeroSage contends that the Small Business Act requires acquisitions below $150,000 to be reserved for small businesses. Id.; FAR § 19.502-2(a). The protester further contends that any "individual purchase orders" issued under the resulting contract would not exceed $150,000 "due

[2] Additionally, given that the solicitation permits the agency to award contracts on a by-CLIN basis, the protester further fails to establish factually that any requirements are bundled. AeroSage, LLC; SageCare, Inc., B-415267 et al., Dec. 13, 2017, 2017 CPD ¶ 383 at 3 n.4 (consolidation of requirements does not constitute bundling where an agency is permitted to award contracts on a by-CLIN basis).

to tank sizes"--referring to the protester's belief that the volume of fuel was limited by the tank storage capacities at those sites. Id. Accordingly, AeroSage argues that the CLINs should be set aside for small business concerns.

Interested Party

As an initial matter, DLA contends that, if it were to set aside the procurement for small business concerns, as the protester argues, any resulting solicitation would be subject to the Small Business Administration's (SBA) nonmanufacturer rule. Agency Req. for Dismissal at 3. As set forth in more detail below, the nonmanufacturer rule would require AeroSage to offer the product of a small business refinery. As a result, because the protester does not represent that it would offer the product of a small business refinery,[3] DLA argues that AeroSage is not an interested party to challenge the agency's set-aside decision.

In response, AeroSage argues that the SBA's nonmanufacturer rule does not apply here because each CLIN would fall under the exception to the nonmanufacturer rule based on the CLIN's dollar value. See Protester's Response to SBA's Supp. Comments at 4.[4]

Ordinarily, in order to qualify as a small business concern to provide manufactured products or other supply items for a procurement assigned a manufacturing or supply NAICS code, an offeror must be the manufacturer or producer of the end item being procured. 13 C.F.R. § 121.406(a)(1). If the offeror does not manufacture the item being purchased, the nonmanufacturer rule requires that the small business concern represent that it will supply the product of a domestic small business manufacturer or processor, or that a waiver of this requirement is granted by the SBA. 15 U.S.C. § 637(a)(17); 13 C.F.R. § 121.406(b).

Whether the nonmanufacturer rule should be included in a procurement set aside for small businesses primarily depends on the NAICS code assigned to the procurement by the procuring agency. See BlueStar Energy Sols., B-405690, Dec. 12, 2011, 2011 CPD ¶ 275 at 3. In this regard, "[t]he nonmanufacturer rule applies only to procurements that have been assigned a manufacturing or supply NAICS code." 13 C.F.R. § 121.406(b)(3); see FAR § 19.303(a)(2) ("A concern that submits an offer or quote for a contract where the NAICS code assigned to the contract is one for supplies, and furnishes a product it did not itself manufacture or produce, is categorized as a

[3] In fact, the protester argues that no such refineries exist. Protest at 2.

[4] At our Office's request, the SBA provided its views with regard to how the estimated value of the acquisition should be determined for the purposes of applying the exception to the nonmanufacturer rule.

nonmanufacturer and deemed small if it meets the requirements of [the nonmanufacturer rule].").[5]

As noted above, the agency assigned NAICS code 324110, Petroleum Refineries, to the solicitation. RFP at 1. NAICS code 324110 falls under the subsector for petroleum and coal products manufacturing. 13 C.F.R. § 121.201. The nonmanufacturer rule therefore applies under this NAICS code. Id.; FAR § 19.102(f)(1). See AeroSage, LLC, SBA No. SIZ-5820, Mar. 23, 2017, 2017 SBA LEXIS 29 (concluding that the nonmanufacturer rule, as applied to NAICS code 324110, requires a prospective small business offeror that is not a refinery to offer the product of one or more small business refineries).

Relevant to the issue at hand, the SBA has concluded that its nonmanufacturer rule does not apply to small business set-aside acquisitions with an estimated value between the micro-purchase threshold and the simplified acquisition threshold. 13 C.F.R. § 121.406(d). The micro-purchase threshold is currently $3,500, while the simplified acquisition threshold is currently $150,000. See FAR 2.101.

The agency concedes that 2 of the 10 CLINs (0004 and 0009) under this solicitation are estimated to be valued at between $3,500 and $150,000. DLA Response to SBA's Comments at 4. Regardless, DLA contends that it is the estimated value of all the CLINs in the aggregate, not the value of the individual CLINs or delivery orders, which controls for the purpose of determining whether the nonmanufacturer rule applies here. DLA argues that because the estimated aggregated value of all 10 CLINs well exceeds the $150,000 threshold, the exception to the nonmanufacturing rule does not apply. To support its position, DLA relies upon a decision from SBA's Office of Hearings and Appeals (OHA), which interpreted a prior version of 13 C.F.R. § 121.406(d) and concluded that the dollar thresholds listed in the regulation apply "to procurements as a whole, not individual orders or contracts."[6] Memorandum of Law at 4 (citing AeroSage,

[5] Questions regarding an agency's designation of a NAICS code are a matter for resolution by the SBA, which has exclusive authority over NAICS code determination appeals. See 13 C.F.R. § 121.1102; FAR § 19.303(c). Because an agency's choice of a NAICS code is a matter for review by the SBA, this is not a matter for consideration by our Office. 4 C.F.R. § 21.5(b); BlueStar Energy Sols., supra, at 3-4.

[6] As further authority for its position, DLA cites our recent decision AeroSage, LLC; SageCare, Inc., supra, where we found that AeroSage was not an interested party to bring this exact same challenge because DLA established that the value of each individual CLIN under that solicitation was valued at over $150,000. Id. at 5. Unlike the facts of that protest, 2 of the 10 CLINs under the RFP being protested here have an estimated value of between $3,500 and $150,000. The agency's reliance on our prior decision is misplaced because, in analyzing the SBA's OHA decision, we expressly noted:

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LLC, SBA No. SIZ-5820, Mar. 23, 2017, 2017 SBA LEXIS 29 at *17; Hardie's Fruit & Vegetable Co. South, LP, SBA No. SIZ-5347, May 8, 2012, 2012 SBA LEXIS 24).

SBA explains that the OHA decisions that DLA relies upon do "not reflect the current regulatory directive to apply the nonmanufacturer rule at the order level or at the contract level."[7] SBA Comments at 1. SBA's comments also make it clear that a small business set-aside procurement is exempt from the nonmanufacturer rule if the resulting contract will have a value between the micro-purchase threshold and the simplified acquisition threshold.[8] Id.; SBA Supp. Comments at 3. Based on its interpretation of its own regulations, SBA concludes that "[t]he nonmanufacturer rule would not apply to small business set-aside line items whose value is between the micropurchase threshold and the simplified acquisition threshold." SBA Supp. Comments at 3. Moreover, SBA explains that based on the structure of the solicitation being protested here, "each line item is subject to the traditional Rule of Two [analysis] in FAR section 19.502-2."[9] Id.

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> What is less clear from the SBA decision is whether, under the terms of the solicitation here, where vendors are permitted to submit quotations on a by-CLIN basis and the agency is permitted to award contracts on a by-CLIN basis, the relevant value is the estimated value of the procurement as a whole, i.e., the total estimated value of all seven CLINs, or the estimated value of each CLIN. In any event, we need not resolve this issue because, as the agency points out, both protesters proposed prices for the individual CLINs and for the procurement as a whole that exceed $150,000.

Id. at 5. Although we did not address the issue in our prior decision, we do so now.

[7] SBA also explains that DLA's reliance on AeroSage, LLC, SBA No. SIZ-5820, Mar. 23, 2017, 2017 SBA LEXIS 29, is misplaced because that decision addressed an older version of the regulation, the acquisition at issue there was a set-aside for SDVOSB concerns, and the decision involved a firm that submitted offers only in response to SDVOSB set-aside line items. SBA Supp. Comments at 2. Furthermore, with regard to the changes that were made to SBA's regulations, SBA's comments make clear that on May 31, 2016, SBA changed the dollar value of the exception to the nonmanufacturer rule by regulatory amendment, increasing it from $25,000 to $150,000, while also clarifying that the exception should be calculated using the value of the resulting contract, and not the total value of the acquisition. Id. at 1 (citing 81 Fed. Reg. 34243, 34254 (May 31, 2016).

[8] SBA's comments note that this exemption "does not apply to the 8(a), HUBZone, service-disabled veteran-owned small business concern (SDVO SBC), or women-owned small business programs." SBA Comments at 1.

[9] Generally, under FAR § 19.502-2(b), a procurement with an anticipated dollar value of more than $150,000 must be set aside for exclusive small business participation when

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Although DLA raises various arguments to challenge SBA's interpretation of its own regulations, none establish that SBA's interpretation is unreasonable. For example, DLA argues that the language in the exception to the nonmanufacturer rule applies to "acquisitions" rather than to any individual "contracts" the agency might award under the acquisition.[10] As a result, DLA argues that our Office should conclude that the plain language of the exception indicates that the exception applies to the aggregate value of the acquisition, rather than to the value of any individual CLIN that might be awarded. Agency Response to SBA's Supplemental Comments at 2-3.

As an initial matter, DLA's contentions about how to apply the SBA's rules on using nonmanufacturers are inconsistent with its contentions about how to apply the SBA's rules on bundling. In essence, DLA wants to have it both ways -- i.e. it wants to look to the individual CLIN values to interpret SBA's bundling rules, but look to the value of all the CLINs combined to interpret SBA's nonmanufacturer rule. We find DLA's conflicting contentions unpersuasive.

Instead, we accord great weight to the SBA's interpretation of its own regulations, unless the interpretation is unreasonable. See B&D Consulting, Inc., B-413310 et al., Sept. 30, 2016, 2016 CPD ¶ 280 at 5 n.5. As such, we defer to SBA's interpretation of its own regulation because we find the interpretation to be reasonable.[11] See B&D Consulting, Inc., B-413310 et al., Sept. 30, 2016, 2016 CPD ¶ 280 at 5 n.5. Based on SBA's comments, we conclude that the nonmanufacturing rule does not apply to CLINs 0004 and 0009. Accordingly, we find that AeroSage is an interested party to challenge the agency's failure to consider whether CLINs 0004 and 0009--which are valued between $3,500 and $150,000--should have been set-aside for small businesses.

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there is a reasonable expectation that offers will be received from at least two responsible small business concerns, and that award will be made at a fair market price. This standard is commonly referred to as the "rule of two." Commonwealth Home Health Care, Inc., B-400163, July 24, 2008, 2008 CPD ¶ 140 at 2-3.

[10] DLA concedes that "it is a possibility that each line item will result in the award of a separate contract." Agency Supp. Comments at 4.

[11] DLA also asserts that each line item should not be considered a separate contract because it is possible that multiple line items could be awarded to one offeror. DLA Response to SBA's Supp. Comments at 4. As discussed above, we find the agency's position unavailing because, under the terms of the RFP, it is also possible that the 10 CLINs will result in the award of 10 separate contracts. Id.

Contracting Officer's Determination

Next, DLA argues that to the extent we find that AeroSage is an interested party to challenge the agency's decision not to set aside certain CLINs under the solicitation, we should deny this protest allegation because DLA appropriately concluded that there was no reasonable expectation that offers would be obtained from at least two small business concerns, offering products at a fair and reasonable price. The agency also asserts that we should deny this challenge because the SBA's procurement center representative (PCR) concurred with DLA's decision not to set aside the procurement. Agency's Response to SBA's Supp. Comments at 5. In support of its contentions, DLA provided our Office with a copy of the small business coordination record which described the market research performed by the agency, and which was signed by the local SBA PCR. DD Form 2579 at 2.

Acquisitions of supplies or services with an anticipated dollar value exceeding $3,500, but not over $150,000 are automatically reserved exclusively for small business concerns unless the contracting officer determines there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery. FAR § 19.502-2(a). The provisions of section 19.202-2 of the FAR generally require contracting officers, before issuing solicitations, to make "every reasonable effort to find additional small business concerns" and to maximize small business participation.

As a general matter, we regard such a determination as a matter of business judgment within the contracting officer's discretion that we will not disturb absent a clear showing that it was unreasonable. See Neal R. Gross & Co., Inc., B-240924.2, Jan. 17, 1991, 91-1 CPD ¶ 53 at 2. In this regard, we have found unreasonable the determination to issue a solicitation on an unrestricted basis where that determination is based upon outdated or incomplete information. McSwain & Assocs., Inc. et. al., B-271071 et al., May 20, 1996, 96-1 CPD ¶ 255 at 2-4; DNO Inc., B-406256, B-406256.2, Mar. 22, 2012, 2012 CPD ¶ 136 at 4; Information Ventures, Inc., B-279924, Aug. 7, 1998, 98-2 CPD ¶ 37 at 3. The use of any particular method of assessing the availability of small businesses is not required, and measures such as prior procurement history, market surveys and/or 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. American Imaging Servs., Inc., B-246124.2, Feb. 13, 1992, 92-1 CPD ¶ 188 at 3. Nonetheless, the assessment must be based on sufficient facts so as to establish its reasonableness. Safety Storage, Inc., supra.

Based on our review of the contemporaneous record, we sustain this protest allegation because the agency's determination not to set aside CLINs 0004 and 0009 was based on incomplete information. In this regard, we reviewed DLA's small business coordination record, and confirmed that the agency's market research failed to consider the fact that CLINs 0004 and 0009 were valued at between $3,500 and $150,000. DD Form 2579 at 1-8. Rather, as set forth above, the agency used the aggregated estimated value of all 10 CLINs to support its determination that it was not necessary to

set aside any of the CLINs under the RFP for small businesses. Id. at 1. Using the aggregated estimated value of all 10 CLINs, which was well over $150,000, DLA determined that "[p]ursuant to FAR 19.502-2(c), this procurement does not meet the criteria for a total small business set-aside because, in accordance with the non-manufacturer rule, any concern proposing to furnish a product that it did not itself manufacture must furnish the product of a small business manufacturer." Id. at 3. Based on the agency's belief that the nonmanufacturing rule applied to all 10 CLINs, DLA went on to conclude that there was "no reasonable expectation that offers [would] be obtained from at least two (2) small business concerns offering products, at a fair and reasonable price, of small refineries for these line items." Id.

As discussed above, we defer to SBA's conclusion that "[t]he nonmanufacturer rule would not apply to small business set-aside line items whose value is between the micropurchase threshold and the simplified acquisition threshold," and that each contract line item under this solicitation is "subject to the traditional Rule of Two [analysis] in FAR section 19.502-2." SBA Supp. Comments at 3. Accordingly, the contemporaneous record establishes that DLA failed to apply this information to its small business set aside determination. In this regard, the contracting officer's determination that the nonmanufacturer rule did not apply to any of the CLINs, and subsequent decision to not set aside CLINs 0004 and 0009 for small businesses, was based on incomplete information, and so we sustain this protest allegation. DNO Inc., supra.

Prejudice

Finally, related to AeroSage's challenge to the set-aside decision, our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. Armorworks Enters., LLC, B-400394.3, Mar. 31, 2009, 2009 CPD ¶ 79 at 3; Cogent Sys., Inc., B-295990.4, B-295990.5, Oct. 6, 2005, 2005 CPD ¶ 179 at 10. In the context of a protest challenging the terms of a solicitation, competitive prejudice occurs where the challenged terms place the protester at a competitive disadvantage or otherwise affect the protester's ability to compete. Pond Sec. Group Italia JV-Costs, B-400149.2, Mar. 19, 2009, 2009 CPD ¶ 61 at 4; Crane & Co., Inc., B-297398, Jan. 18, 2006, 2006 CPD ¶ 22 at 9.

AeroSage generally claims that the agency's failure to set-aside the RFP's CLINs for small businesses makes it more difficult for the protester and other small businesses to compete against larger companies. Protester's Response to SBA's Supp. Comments at 5. We agree. Further, we find that AeroSage was prejudiced by the agency's failure to consider complete information when making its decision to not set aside CLINs 0004 and 0009 for small businesses. In this regard, had the agency set aside these two line items for small businesses, AeroSage may have offered different prices. Additionally, the pool of potential offerors under the competition might have included other small businesses if these CLINs were initially advertised as such. Accordingly, we cannot

conclude that there was no prejudice here.[12] A reasonable possibility of prejudice is a sufficient basis for sustaining a protest. See CWTSatoTravel, B-404479.2, Apr. 22, 2011, 2011 CPD ¶ 87 at 14.

Solicitation Requirements

Next, the protester challenges various (alleged) solicitation requirements. For example, AeroSage argues that the RFP improperly requires vendors to identify the refineries from which they intend to source fuel. Protest at 2. In this respect, the solicitation provides that a vendor "shall provide a list of the names and addresses of the small business refineries where it intends to source all fuel types being solicited, if applicable." RFP at 4. The protester alleges that this requirement is "impossible" because "[t]here are no small refineries, domestic or foreign[.]" Protest at 2. The protester also alleges that it was improper for DLA to allegedly include a requirement for certificates of analysis.[13]

We dismiss these protest grounds as factually and legally insufficient. Contrary to the protester's assertions, the RFP does not require offerors to source fuel from small business refineries, or require that offerors provide certificates of analysis to be eligible for award.[14] For this reason, this allegation fails to state a valid basis of protest. 4 C.F.R. §§ 21.1(c)(4), (f); 21.5(f); AeroSage, LLC; SageCare, Inc., supra at 6.

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[12] DLA's assertion that AeroSage cannot establish prejudice was based on source selection sensitive information the agency redacted from its pleadings. AeroSage was unable to respond to the agency's position because it was provided the redacted versions--as the firm was not represented by counsel, and accordingly no protective order was issued for this protest. As a result, while we have reviewed the agency's arguments in camera, we are unable to fully address the agency's arguments in this public decision because of the pre-award nature of this protest. Nonetheless, we conclude that DLA's prejudice argument fails to address the possibility that the protester may have offered different pricing if AeroSage had known that CLINs 0004 and 0009 were to be exclusively set aside for small businesses. DLA Response to SBA's Comments at 4.

[13] The protester does not define the term "certificates of analysis." Protest at 1-5. In addition, the agency states that the solicitation "contains no such requirement." Agency Req. for Dismissal at 3. Nonetheless, the agency offers that AeroSage appears to be complaining about an administrative requirement in CLIN 0001, where the awardee of that contract line item must include a certification within 10 days of the delivery of the fuel. RFP at 6. The certification requires the following: "(1) NAME OF OIL SUPPLIE[]R (2) TYPE OF FUEL (3) API GRAVITY OF FUEL (4) WEIGHT PERCENT OF SULFUR (5) METHOD USED TO DETERMINE SULFUR CONTENT." Id.

[14] The agency explains that "[o]ne line item has a contract performance requirement that the fuel oil supplier certify to certain fuel properties in the shipping receipt." DLA Req. for Dismissal at 3. However, the certificate of analysis is not part of the RFP evaluation

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Inaccurate Annual Estimated Quantities

The protester further alleges that the total estimated quantities of fuel products listed in the RFP are grossly inaccurate and that, as a result, the government has failed to comply with "the annual estimate, minimum quantities, and requirement estimated direction" in 41 C.F.R. § 101-26.602. Protest at 2. In this regard, the protester argues that because the estimated quantities are inaccurate, the "procurement of gasoline and fuel oils is improper[.]" Id.

As relevant here, the regulation cited by AeroSage provides instructions to requiring activities regarding the submission of fuel requirements to DLA. 41 C.F.R. §§ 101-26.602, 101-26.602-3. In particular, subsection 101-26.602-3(a)(1) states that estimated annual fuel requirements that are less than 10,000 gallons shall not be submitted to DLA unless the requiring activity does not have the authority or capability to procure locally. See Bluehorse, B-412494, B-412494.2, Feb. 26, 2016, 2016 CPD ¶ 64 at 5.

Other than to allege that the annual estimated quantities are "false," the protester does not set forth a clear statement of how exactly DLA has violated this provision of the regulations. See generally, Protest at 2. Even assuming that the protester is alleging that the fuel requirement should not have been submitted to DLA, the protester does not explain how DLA's conduct of the procurement prejudices its ability to submit a proposal or otherwise restricts competition. Consequently, we dismiss this ground for failure to state a valid basis of protest. 4 C.F.R. §§ 21.1(c)(4), (f); 21.5(f).

Additionally, to the extent that AeroSage is challenging the reasonableness of the underlying estimates of the fuel being purchased under the solicitation, we find no basis to sustain this protest ground. Where estimates are provided in a solicitation, there is no requirement that they be absolutely correct; rather the estimates must be based on the best information available and present a reasonably accurate representation of the agency's anticipated needs. ARAMARK Servs., Inc., B-282232.2, June 18, 1999, 99-1 CPD ¶ 110 at 5.

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criteria. Id. Our prior decisions make clear that these types of solicitation provisions establish performance requirements that must be satisfied by the awardee during contract performance; and as such, offerors are not required to satisfy them prior to award. See McLaurin Gen. Maint., Inc., B-411443.2, B-411443.3, Jan. 14, 2016, 2016 CPD ¶ 41 at 9. Accordingly, this protest ground is also dismissed because it raises a matter of contract administration, which are matters within the discretion of the contracting agency and for review by a cognizant board of contract appeals or the Court of Federal Claims and not for review by our Office. 4 C.F.R. § 21.5(a).

Our review of the record confirms that the agency's estimates are based on historical data, such as quantities and prices from prior purchase requests, along with the contracting officer's (CO) personal knowledge of the market. CO Decl., July 19, 2018, at 1. Information from prior purchase requests included projections of product requirements based on the prior three-year sales history and anticipated market conditions, and the CO's personal knowledge was based on the CO's experience with processing one-time buys for fuel. Id. Accordingly, we find that the estimates for the fuel being procured were based on the best information available and present a reasonably accurate representation of the agency's anticipated needs. ARAMARK Servs., Inc., supra.

Response Time

Finally, the protester contends that the agency did not provide an adequate amount of time to allow offerors to submit proposals in response to the solicitation. Protest at 3. AeroSage asserts that small businesses are unable to propose their best prices because the solicitation does not provide for enough time to compile the information necessary to respond to the RFP. Id.

Agencies generally must allow at least 30 days from the date of issuance of the solicitation for the receipt of offers. FAR § 5.203(c). However, an agency may allow fewer than 30 days to respond to a solicitation where, as here, it is acquiring commercial items. Id.; FAR § 12.205(c). When acquiring commercial items, the contracting officer should afford potential offerors a reasonable opportunity to respond considering the circumstances of the acquisition, such as the complexity, commerciality, availability, and urgency of the individual acquisition. FAR § 5.203(b); Richen Mgmt., LLC, B-410903, Mar. 10, 2015, 2015 CPD ¶ 105 at 2.

Under the circumstances here, we find no basis to object to the timeframe allotted under the solicitation for offerors to submit their proposals. As set forth above, the solicitation was issued on May 1, 2018, and offers were due by May 15, thereby establishing a 15-day response time. RFP at 1. The solicitation was issued for fuel in accordance with the commercial item acquisition procedures of FAR part 12. RFP at 6-.13. Thus, the agency could allow fewer than 30 days to respond to the RFP, but was required to provide offerors a reasonable opportunity under the circumstances of the acquisition to prepare and submit proposals. FAR §§ 5.203(b), 12.205(c). In support of the 15-day response time for offers, the agency provided examples of three other solicitations where DLA provided potential offerors 12 to 17 days to respond to the solicitation. Additional Agency Development at 2. DLA also confirmed that it received multiple offers in response to the solicitation, and asserts that this provides additional evidence to demonstrate that the 15-day time period was more than adequate.

Given the commercial nature of the supplies being purchased, and the prior history confirming that DLA has routinely issued these types of procurements with response times between 12 to 17 days, we find no basis to question the agency's conclusion that the proposal response period was consistent with the FAR's requirements. Indeed, the

reasonableness of the response time provided to offerors is supported by the fact that the agency received multiple offers by the RFP's closing date. Accordingly, we deny this protest allegation. See Richen Mgmt., LLC, supra at 3.

RECOMMENDATION

We recommend that DLA determine whether CLINs 0004 and 0009 should be set aside exclusively for small businesses in a manner consistent with our decision. Based on the results of DLA's determination, the agency should conduct acquisitions for those two CLINs accordingly. We also recommend that the agency reimburse the protester its costs associated with filing and pursuing the protest, including reasonable attorneys' fees, if any.[15] 4 C.F.R. § 21.8(d)(1). The protester's certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after the receipt of this decision. 4 C.F.R. § 21.8(f).

The protest is dismissed in part, sustained in part, and denied in part.

Thomas H. Armstrong
General Counsel

[15] We note that the protester was not represented by counsel in this protest.