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Decision

Matter of: Training, Rehabilitation & Development Institute, Inc.

File: B-417265

Date: May 3, 2019

John C. Dulske, Esq., and Bryan Kost, Esq., Dykema Gossett PLLC, for the protester. Garry L. Brewer, Esq., Department of the Army, and Timi Nickerson Kenealy, Esq., and Kasia Dourney, Esq., U.S. AbilityOne Commission, for the agencies. John Sorrenti, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging that award of a contract for the purchase and installation of washing machines and dryers violated the Javits-Wagner-O'Day Act is denied where the protester has not shown that it is the mandatory source for the installation of the purchased washers and dryers, and therefore has not met its burden to show that the agency violated applicable statutes and regulations.

DECISION

Training, Rehabilitation & Development Institute, Inc. (TRDI) of San Antonio, Texas, protests the decision of the Department of the Army, Corps of Engineers (Corps), to award a contract to Pierce Commercial Laundry Distributors LLC (Pierce) for the purchase and installation of clothes washing machines and dryers at Fort Hood, Texas. TRDI alleges that the award of the contract violated the Javits-Wagner-O'Day (JWOD) Act and its implementation under the AbilityOne program.¹ TRDI contends that pursuant to the JWOD Act and its implementing regulations, TRDI is the mandatory

¹ The AbilityOne program seeks to provide employment opportunities to people who are blind or have significant disabilities. The program is administered by the AbilityOne Commission, the operating name for the Committee for Purchase From People Who Are Blind or Severely Disabled, which was established pursuant to the JWOD Act. After receiving the agency report responding to the protest, GAO requested input on the protest from the AbilityOne Commission; the protester and agency then filed submissions addressing the Commission's input.

source for installation of washers and dryers at Fort Hood, and that inclusion of the installation services in Pierce's contract violated the JWOD Act.

We deny the protest.

BACKGROUND

Summary of the JWOD Act and Implementing Regulations

The JWOD Act and its implementing regulations seek to "increase employment and training opportunities for persons who are blind or have other severe disabilities through the purchase of commodities and services from qualified nonprofit agencies employing persons who are blind or have other severe disabilities."² 41 C.F.R. § 51-1.1(a). The Act established a "Committee for Purchase from People Who Are Blind or Severely Disabled," which is now called the U.S. AbilityOne Commission. The AbilityOne Commission is required to "maintain and publish . . . a procurement list [which] shall include . . . products and services determined by the Committee to be suitable for the Federal Government to procure." 41 U.S.C. § 8503(a); see also 41 C.F.R. § 51-2.2(b). The JWOD Act further requires that:

[a]n entity of the Federal Government intending to procure a product or service on the procurement list . . . shall procure the product or service from a qualified nonprofit agency for the blind or a qualified nonprofit agency for other severely disabled

41 U.S.C. § 8504(a).

The implementing regulations encourage contracting activities to assist the AbilityOne Commission to identify suitable commodities and services that can be added to the procurement list. 41 C.F.R. § 51-5.1(a). Contracting activities provide the AbilityOne Commission with information necessary to help the Commission determine whether a commodity or service is suitable to be added to the procurement list. Id. § 51-5.1(b). For services, this information may include a statement of work (SOW) explaining the services to be provided. Id. When the AbilityOne Commission adds a new product or service to the procurement list, it must publish in the Federal Register a notice announcing the new addition. 41 C.F.R. § 51.2-3.

Chronology of Relevant Events

In February 2003, the Fort Hood Contracting Command awarded TRDI contract No. DABK-15-03-C-0001 for "washer/dryer services." Protester Brief, exh. 2, at 22. The performance work statement (PWS) defined the scope of work for this contract as follows:

² The JWOD Act is codified at 41 U.S.C. §§ 8501-8506.

The contractor shall provide everything necessary to provide:

(1) high efficiency clothes washing machines as specified in the [c]ontract and related washer services, and

(2) a variety of clothes drying machines as specific in the [c]ontract and related dryer services.

* * * * *

The [c]ontractor shall provide [c]ontract services to include . . . direct work such as providing machines, removing, storing, adding, and relocating machines, performing preventive maintenance, repairing and/or replacing machines, and performing project work in accordance with [c]ontract standards.

Protester Brief, exh. 2, TRDI 2003 Contract, PWS § C.1.1, at 26. The contract stated that the government would not provide any government-furnished property or services, but that TRDI “may perform maintenance and repair work of installed machines in the laundromats and other facilities where machines are installed.” Id., PWS § C.3, at 32.

In June 2003, the AbilityOne Commission added to the procurement list for services “Installation Support Services” at Fort Hood, and identified TRDI as the qualified AbilityOne nonprofit agency to provide those services. 68 Fed. Reg. 35,379 (June 13, 2003). The Federal Register entry included a price of \$713,900 for the services, but did not define the scope of work for Installation Support Services. When it filed this protest, TRDI provided a number of documents that appeared to be related to the addition of Installation Support Services to the procurement list. See Protest, exh. A. Among those documents was an undated SOW for “washer/dryer maintenance and repair and leasing service.” Id. at 28. The SOW stated that the contractor “shall be responsible for the delivery, installation, cleaning, maintenance, repair, removal, and relocation of contractor furnished washers and dryers.” Id. However, the SOW also stated that the work would be performed at Air Force Base Lackland Training Annex, Wilford Hall Medical Center, and Kelly Field Annex; Fort Hood was not identified as a location where services would be provided. Id. The record does not make clear the relevance of this SOW to the Installation Support Services listed on the procurement list.³

³ On April 18, 2019, GAO held a conference call with the parties during which it asked about the origin of this SOW and its relation to the addition of Installation Support Services to the procurement list. During that call, neither the agency nor the protester was able to provide a conclusive statement regarding the origin of this SOW or its significance, if any, to the addition of Installation Support Services to the procurement list.

In 2013, the Fort Hood Contracting Command entered into contract No. W91152-13-C-0033 with TRDI, under which TRDI would lease washers and dryers to Fort Hood and provide a variety of services for the machines. See Agency Report (AR), Tab 17, TRDI 2013 Contract. The contract noted that the unit price “represents the cost for lease and maintenance services . . . per month per machine.” Id., § B, at 4. The PWS stated that TRDI would provide washer and dryer equipment for use at Fort Hood, and that TRDI:

shall provide personnel, management, and any other items and services not government furnished, necessary to perform the washer /dryer services. Services include all management, supplies, equipment, parts, labor, tools and any other items needed at any respective time to phase-in, phase-out, furnish, initially install and eventually uninstall, relocate, remove, replace, maintain, or repair leased washers and dryers at Fort Hood, Texas. The [c]ontractor shall install machines, perform preventive maintenance on machines & laundry rooms and perform all necessary repairs to keep machines operational.

Id., PWS §§ 1.2, 1.4, at 48-49. The PWS further required that TRDI would “furnish all supplies, equipment, facilities and services required to perform work under this contract.”⁴ Id., § 4.1, at 59. TRDI performed this contract until December 31, 2018.

In January 2019, the Fort Hood Contracting Command awarded TRDI a six-month contract for washer and dryer services, contract No. W91151-19-P-0031. Under this contract, TRDI also is required to “provide[] washer and dryer equipment for use . . . at Fort Hood” and:

provide personnel, management, and any other items and services not government furnished, necessary to perform the washer /dryer services. Services include all management, supplies, equipment, parts, labor, install and uninstall, relocate, remove, replace, maintain, or repair washers and dryers at Fort Hood, Texas. The [c]ontractor shall install machines, perform preventive maintenance on machines & laundry rooms and perform all necessary repairs to keep machines operational.

AR, Tab 19, PWS §§ 1.2, 1.4, at 16. As with the 2013 contract, the 2019 contract also required TRDI to “furnish all supplies, equipment, facilities and services required to perform work under this contract.” Id., § 4.1, at 26.

⁴ The PWS stated that the only government furnished items or services were utilities, drawings and maps, and locations to store equipment. See AR, Tab 17, TRDI 2013 Contract, PWS Part 3, at 58.

On August 21, 2018, the Corps issued Request for Quotations (RFQ) No. W912DY-18-T-0290 to five companies, including Pierce, as a small business set-aside for the purchase of washers and dryers for Fort Hood. Contracting Officer's Report at 1; see also AR, Tab 3a, RFQ. The RFQ stated that the successful contractor would provide various types of washing machines and clothes dryers, and:

shall provide all necessary materials, equipment, labor, supervision, and management to: (1) coordinate delivery; (2) load and unload; (3) place/install in designated rooms; (4) assemble items as required; (5) secure and store, as designated; and (6) properly dispose of all associated packaging/crating materials.

AR, Tab 3a, RFQ at 35-39.⁵

In September 2018, the Corps awarded a contract to Pierce for the purchase and installation of washers and dryers.⁶ See AR, Tab 13, Pierce Contract. The contract contained the same description of work that was included in the RFQ. See id., SOW § 1.1, at 32. On January 10, 2019, TRDI observed another contractor installing washers and dryers at Fort Hood. Protester's Comments at 7. On January 18, 2019, TRDI filed a protest with the agency, arguing that the installation of washers and dryers by another contractor was improper. Protest at 4. On January 22, 2019, TRDI observed the continued installation of washers and dryers at Fort Hood by another contractor and interpreted this as adverse agency action in response to its agency-level protest. Id. On January 25, 2019, TRDI timely filed this protest with our Office.

DISCUSSION

In its protest, TRDI asserts that the installation services included in Pierce's contract are within the scope of the Installation Support Services on the procurement list and therefore, TRDI is the mandatory source to provide these services under the JWOD Act and implementing regulations. The agency argues that the contract awarded to Pierce was for the purchase of supplies, not services, and that installing the washers and dryers were "ancillary services" to the purchase of the machines. The agency further contends that it did not need to use TRDI for the installation of these machines because TRDI's "AbilityOne service contract with Fort Hood was for the installation and maintenance of washers and dryers it leased," which is a service distinct from the purchase and installation of washers and dryers awarded to Pierce.⁷

⁵ Citation to RFQ page numbers are to the PDF page number.

⁶ The contract was awarded as an order against Pierce's General Services Administration schedule contract.

⁷ The agency also argues that TRDI's protest is untimely under 4 C.F.R. § 21.2 of our Bid Protest regulations and should be dismissed because TRDI "became aware or should have become aware that a contract must have been awarded to another

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The protester has the burden of showing that the agency's procurement actions are improper. EA Eng'g, Sci., & Tech., Inc., B-411967.2 et al., Apr. 5, 2016, 2016 CPD ¶ 106 at 8. Here, TRDI contends that the inclusion of installation services in the contract awarded to Pierce was improper because TRDI is the mandatory source for these services as the qualified AbilityOne nonprofit agency pursuant to the JWOD Act and its implementing regulations. To prevail here, TRDI must establish that the installation services included in Pierce's contract fall within the scope of work for Installation Support Services as listed on the procurement list, for which TRDI is the mandatory source. Based on the record before us, we conclude that TRDI has not met this burden.

In supplemental briefing, GAO asked the parties to specifically address the scope of work for Installation Support Services as that term is defined on the procurement list, and whether that scope of work encompasses the installation services included in Pierce's contract. The protester first argues that the AbilityOne Commission clearly relied on TRDI's 2003 contract with Fort Hood when adding Installation Support Services to the procurement list because the price included in the June 2003 Federal Register notice adding Installation Support Services to the list corresponded with the price for the base year of TRDI's 2003 contract. Protester Br. at 5-6. In TRDI's view, this indicates that the scope of work from the 2003 contract represents the scope of work for Installation Support Services. TRDI further asserts that its 2003 contract "was all-encompassing and required TRDI to provide a myriad of services, including installation and relocation services on all washers and dryers at Ft. Hood regardless of where the equipment was located on base or who owned the equipment." Id. at 4-5. As such, TRDI argues, the scope of Installation Support Services from the procurement list for services at Fort Hood "includes, but is not limited to, the installation of all washers and dryers at every location on the base" which would include the installation services in Pierce's contract. Id. at 6-7.

The protester has not provided any legal authority that supports its position regarding the scope of work of Installation Support Services as listed on the procurement list. In addition, the protester has not conclusively shown that the scope of work for the 2003 contract was intended to define the scope of work for Installation Support Services as that term is defined on the procurement list. In short, although the regulations

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contractor" when TRDI received an email from Fort Hood on December 4, 2018, that requested TRDI remove washers and dryers from certain locations at Fort Hood. Memorandum of Law at 5-6; see also AR, Tab 14, Email dated Dec. 4, 2018 from Fort Hood to TRDI. We disagree. The email directed TRDI to perform services that it was already under contract to perform--i.e., removal of washers and dryers--and said nothing about the award of a new contract for the purchase and installation of new washers and dryers. Therefore, the email did not put TRDI on notice that the agency had awarded such a contract to another contractor.

contemplate the provision of an SOW to the AbilityOne Commission when it determines whether to add a new service to the procurement list, the protester has not been able to identify an SOW that conclusively defines the scope of work for Installation Support Services here.⁸

Furthermore, the work that TRDI has been performing at Fort Hood after Installation Support Services were added to the procurement list appears to be meaningfully different from the work required by the contract awarded to Pierce. As noted above, TRDI's 2013 contract required TRDI to provide all services and equipment necessary to lease and maintain washers and dryers at Fort Hood, and provide a variety of services, including installation, for "leased washers and dryers." AR, Tab 17, TRDI 2013 Contract, at 4; SOW § 1.4, at 49. TRDI's 2019 contract similarly required TRDI to "furnish all supplies, equipment, facilities and services required to perform work under this contract." Id., SOW §§ 4.1, 4.4.1, 4.4.2, at 26. The 2019 contract also appears to contemplate that all related services, including installation, would be specific to the machines that TRDI provided.⁹ See id., SOW § 1.4, at 16.

In contrast, Pierce's contract requires Pierce to sell a certain number of washers and dryers to the agency, at which point the agency would own the washers and dryers. Moreover, rather than requiring Pierce to provide a variety of services for these machines, the contract required only that Pierce deliver and install the machines, after which Pierce's obligation under the contract would be fulfilled. See AR, Tab 13, Pierce Contract, SOW § 1.1, at 32. On this record, we conclude that the Installation Support Services work that TRDI has been performing at Fort Hood is distinct from the work required by Pierce's contract. Thus, based on the facts and arguments presented to us in this case, we conclude that the protester has not shown that the installation services

⁸ For its part, the Corps contends that the SOW included in exhibit A of TRDI's protest defines the scope of work for Installation Support Services, and that the work encompassed the installation only of washers and dryers leased by TRDI to Fort Hood, and not the installation of government-purchased washers and dryers. Agency Br. at 1-2. As noted above, this SOW identified other performance locations (Lackland, Wilford Hall, Kelley Field), but did not mention Fort Hood. In short, the Corps also has not shown that this undated SOW was intended to define the scope of work for Installation Support Services on the procurement list. However, because we conclude that TRDI has not met its burden to show that the agency's procurement action was improper, we need not address the Corps' argument regarding whether exhibit A from TRDI's protest defines the scope of work for Installation Support Services from the procurement list.

⁹ TRDI's 2003 contract--awarded prior to the addition of Installation Support Services to the procurement list--also appears to be specific to leased washers and dryers. In fact, with respect to machines that were already installed at Fort Hood, the PWS identified maintenance and repair work, but not installation services. Protester Brief, exh. 2, TRDI 2003 Contract, PWS § C.3, at 32.

in Pierce's contract are within the scope of work for Installation Support Services as listed on the procurement list, and therefore TRDI has not shown that it is the mandatory source to provide these services. Accordingly, TRDI has not shown that the agency violated JWOD Act and its implementing regulations when it included the installation services on the contract awarded to Pierce.

The protest is denied.

Thomas H. Armstrong
General Counsel