



Decision

Matter of: Warrior Service Company

File: B-417574

Date: August 19, 2019

Frank V. Reilly, Esq., for the protester.

Tyler W. Brown, Esq., Department of Veterans Affairs, for the agency.

Michael P. Grogan, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the terms of a solicitation is denied where the agency reasonably classified the procurement in accordance with the terms of the solicitation and allowed a reasonable amount of time for the submissions of quotations in accordance with applicable procurement law and regulation.
 2. Protest challenging an alleged ambiguity in the solicitation is denied where the protester's interpretation is not reasonable.
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DECISION

Warrior Service Company (Warrior), a small business of Valley Stream, New York, protests the terms of request for quotations (RFQ) No. 36C26319Q0585, issued by the Department of Veteran Affairs (VA), for the procurement of five Hill-Rom brand LIKO overhead lift systems and related supplies and services. Warrior argues that the VA improperly classified the procurement on the Federal Business Opportunities (FBO) website and provided vendors with an unreasonable amount of time to respond to the RFQ, which together, prevented it from finding the RFQ and submitting a timely quotation. Warrior also argues that the terms of the RFQ are ambiguous.

We deny the protest.

BACKGROUND

On May 8, 2019, the VA issued the subject RFQ as a small business set-aside pursuant to the commercial items and simplified acquisition procedures contained in Federal Acquisition Regulation (FAR) parts 12 and 13. Contracting Officer's Statement (COS)

at 1-2; Supp. COS at 1; Agency Report (AR), Tab 3, RFQ at 1. The RFQ contemplated the award of a fixed-price contract for five Hill-Rom brand LIKO overhead lift systems, installation, and related supplies and services, at the Nebraska Western Iowa VA Health Care System in Omaha, Nebraska. RFQ at 1, 4-9. The RFQ provided that award would be made to the lowest-priced technically acceptable vendor, where technical capability would be used to determine technical acceptability.¹ RFQ at 34. In accordance with the simplified acquisition requirements in FAR § 13.106-1, the VA prepared, and included with the RFQ, a justification to procure, on a brand name only basis, Hill-Rom LIKO lift systems. AR, Tab 4, Justification, at 1.

Quotations were due on May 14 at 4:00 pm Central Time, providing potential vendors with approximately seven days to respond to the solicitation.² RFQ at 1. Warrior filed this protest with our Office on May 14, prior to the deadline for the submission of quotations.

DISCUSSION

Warrior challenges the terms of the solicitation, arguing that the VA misclassified the solicitation as a procurement for the manufacture of goods, instead of a procurement of services, and that the VA did not give potential vendors a reasonable amount of time to prepare a quotation. Protest at 1-2. The protester also contends that the solicitation is ambiguous, arguing that while the RFQ seeks quotations, the agency's justification "indicates that an awardee has already been selected, making the acceptance of offers impossible and the Solicitation unnecessary." *Id.* at 3. While we do not address each protest ground and argument raised by the protester, we have reviewed them all and find that none provide a basis to sustain the protest.

Classification of the Procurement

Warrior first alleges that it was unable to find the solicitation on the FBO website because the agency improperly classified the procurement.³ Protest at 1. The RFQ was classified as a solicitation for supplies under code 65, "Medical, dental & veterinary equipment & supplies."⁴ See posting for RFQ No. 36C26319Q0585, available at fbo.gov (last visited

¹ While the solicitation includes, in the statement of work, specifications for the products and related services being solicited, the RFQ does not include information concerning how technical capability would be evaluated.

² The RFQ was issued at 9:04 am Central Time on May 8, giving potential vendors six full days and the majority of a seventh day to respond.

³ The FAR requires agencies to use one of the procurement classification codes identified at the FBO website to identify services or supplies in its notices on FBO. See FAR § 5.207(e).

⁴ The RFQ was further classified under North American Industry Classification System (NAICS) codes 339 "Miscellaneous Manufacturing" and 339112 "Surgical and Medical
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August 9, 2019). Warrior argues that the procurement is for the “furnishing of products, installation and related training, which are services.” Protest at 2. While the protester does not specify under what classification code the agency should have classified the solicitation, it argues that the agency should have classified this procurement as a service rather than a supply because of the inclusion of the training and installation components, and because the requirement for Hill-Rom products indicated that the agency “was clearly not seeking another supplier/manufacturer.”⁵ Protest at 1-2; Comments at 2. In response, the VA contends that the solicitation was properly classified as a procurement of supplies because the bulk of the cost of the procurement was for the lifts, themselves, and not the related services. COS at 3.

The responsibility for determining the appropriate classification code of a procurement rests with the contracting officer, and classification determinations necessarily involve some degree of judgment on the part of the contracting officer. Kendall Healthcare Prods. Co., B-289381, Feb. 19, 2002, 2002 CPD ¶ 42 at 4. Our Office will not overturn such a determination unless it is shown to be unreasonable. Price Waterhouse, B-239525, Aug. 31, 1990, 90-2 CPD ¶ 192 at 4.

Here, we find reasonable the agency’s classification of the solicitation as a procurement of supplies. While there are ancillary installation and training components associated with the procurement of the overhead lifts, we find reasonable the agency’s determination that this installation and training is incidental to the procurement of the lifts and is not the primary component of the acquisition. In this regard, the solicitation states that the awardee will install the lifts and will provide VA personnel training “to educate them on proper operation and maintenance for the lift system equipment.” RFQ at 9, 14. Since these services are not recurring in nature, but instead, are provided as an upfront service in order for the VA to properly use the lifts, we find that the agency reasonably classified this RFQ as a procurement of supplies. This protest ground is denied.

Response Time

Warrior next alleges that it was unable to submit a quotation because the agency did not allow a reasonable amount of time for vendors to respond to the solicitation. Protest at 1. In this regard, the protester argues that the agency’s decision to provide nearly seven days to respond to the solicitation was unreasonable, given the complexity, commerciality, availability, and urgency of this particular procurement. Id. at 2.

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Instrument Manufacturing.” See posting for RFQ No. 36C26319Q0585, available at fbo.gov (last visited August 9, 2019).

⁵ To the extent that the protester challenges the agency’s designation of the NAICS code as a manufacturing NAICS code, we dismiss this protest ground. A challenge to the NAICS code determination is a matter for resolution by the Small Business Administration, which has exclusive authority over NAICS code determination appeals and is not a matter for consideration by our Office. 4 C.F.R. § 21.5(b)(1).

The Competition in Contracting Act of 1984 generally requires contracting agencies to obtain full and open competition through the use of competitive procedures, the dual purpose of which is to ensure that a procurement is open to all responsible sources and to provide the government with the opportunity to receive fair and reasonable prices. 41 U.S.C. § 3301(a). Agencies generally must allow at least 30 days from the date of issuance of the RFQ for the receipt of quotations. FAR § 5.203(c). However, an agency may allow fewer than 30 days to respond to a solicitation where the agency is acquiring commercial items or the procurement is below the simplified acquisition threshold. Id.; FAR § 5.203(b). In these instances, the contracting officer should afford potential vendors a reasonable opportunity to respond considering the circumstances of the acquisition, such as the complexity, commerciality, availability, and urgency of the individual acquisition. Id. Agencies need only establish a solicitation response time that will afford potential vendors a reasonable opportunity to respond to each proposed contract action for the acquisition of commercial items. GIBBCO LLC, B-401890, Dec. 14, 2009, 2009 CPD ¶ 255 at 3.

The agency responds that the RFQ was issued for the procurement of commercial items and as such, the VA may allow for fewer than 30 days for potential vendors to respond to the solicitation. Supp. COS at 1; Supp. Memorandum of Law at 1. The agency argues, and the record supports, that it did consider the complexity, commerciality, and availability of the items to be procured in setting the response time. Supp. COS at 1-2. In this regard, the VA's market research identified at least six small businesses that could readily meet its requirement to provide Hill-Rom LIKO lift systems and the associated supplies and services. Id. at 1. Moreover, because the agency's procurement was for a brand name commercial off the shelf item, whether a vendor could provide the item should have been readily apparent. Id. In short, we find reasonable the agency's determination that nearly seven days was a reasonable amount of time to respond to this solicitation considering the complexity, commerciality, and availability of the items to be procured.⁶ This protest ground is denied.

⁶ The protester argues that the solicitation's response time was unreasonable because the agency's "short time frame was based on Hill Rom's decision to limit competition and to exclude all [service-disabled veteran-owned small businesses]." Comments at 1. In this regard, Warrior contends that "Hill-Rom has already pre-selected potential awardees" and that at least six vendors "became pre-qualified in advance by Hill-Rom for award." Id. As such, the protester argues that "[b]ecause the potential awardees were already pre-approved by the agency and Hill Rom prior to the advertisement, these potential awardees were improperly given more time than the Protestor to pursue this opportunity." Id. at 2. The record does not support the protester's conclusions. The agency did not pre-select or pre-approve any vendor or otherwise limit competition, except as expressly provided in the justification, namely, to those vendors who could supply Hill-Rom LIKO overhead lifts. To the extent the protester is challenging Hill-Rom's selection of which small businesses it authorizes as distributors, such a protest allegation is outside of our bid protest jurisdiction. See 31 U.S.C. §§ 3551-3557.

Solicitation Ambiguity

The protester also argues that the solicitation is unclear and ambiguous. Protest at 3. Warrior contends that the agency's justification for brand name lifts is at odds with the terms of the RFQ because "the [justification] indicates that an awardee has already been selected, making the acceptance of offers impossible and the Solicitation unnecessary." *Id.* Where a dispute exists as to a solicitation's actual requirements, we will first examine the plain language of the solicitation. Sikorsky Aircraft Corp., B-416027, B-416027.2, May 22, 2018, 2018 CPD ¶ 177 at 11. Where there is a disagreement over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions; to be reasonable, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. Crew Training Int'l, Inc., B-414126, Feb. 7, 2017, 2017 CPD ¶ 53 at 4.

Here, we find that no ambiguity exists. While the VA's justification--which was included as an attachment with the RFQ--provides that it is seeking Hill-Rom brand LIKO overhead lifts, it does not state that it is directing award to a specified vendor. Instead, the justification merely provides that the agency is seeking vendors to supply brand name products, in this case, Hill-Rom LIKO overhead lifts. In short, because the justification does not indicate that an awardee has been selected, we fundamentally disagree with the protester's contention concerning any ambiguity; Warrior's protest ground is denied.⁷

The protest is denied.

Thomas H. Armstrong
General Counsel

⁷ To the extent that Warrior is challenging the agency's decision to limit competition to vendors who can supply Hill-Rom LIKO overhead lifts, or the extent to which service-disabled veteran-owned small businesses are excluded from competition, we dismiss these protest grounds. Such arguments, raised for the first time in Warrior's comments on the agency's report, constitute piecemeal presentation of issues because Warrior could have raised these arguments in its initial protest. The timeliness requirements of our Bid Protest Regulations do not contemplate the piecemeal presentation or development of protest issues. See Battelle Memorial Institute, B-278673, Feb. 27, 1998, 98-1 CPD ¶ 107 at 24 n.32; 4 C.F.R. § 21.2(a)(1). These protest grounds are dismissed.