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Decision

Matter of: Sourcelinq, LLC

File: B-417279.2

Date: June 17, 2019

H. Todd Whay, Esq., Baker, Cronogue, Tolle & Werfel, LLP, for the protester.
Jonathan A. Hardage, Esq., and Tara W. Yaldou, Esq., Department of the Army, for the agency.

Paula A. Williams, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's decision to issue solicitation for commercial fitness equipment as a small business set-aside is denied where record adequately supported agency's business judgment that offers would be received from at least two such firms and that award would be made at a fair market price.

DECISION

Sourcelinq, LLC, a small business located in Boca Raton, Florida, protests the terms of request for proposals (RFP) No. W56HZV-19-R-0028, issued as a small business set-aside by the Department of the Army, for commercial combat fitness test equipment. Sourcelinq argues that the agency's decision to issue the solicitation as a small business set-aside is improperly based on an inadequate and unreasonable market survey and analysis.

We deny the protest.

BACKGROUND

The Army combat fitness test (ACFT) is a six-event fitness test designed to measure muscular strength, muscular endurance, power, flexibility, coordination, speed, agility, cardiovascular endurance, balance, and reaction time of soldiers in all Army units. Prior to issuing the RFP, in 2018, the agency awarded two test pilot contracts through the Small Business Administration's (SBA) 8(a) program to determine the feasibility of procuring necessary ACFT equipment for all active duty and reserve components of the Army worldwide. Contracting Officer Statement/Agency Legal Memorandum at 9;

Agency Report (AR) exh. 4, Market Research Report at 1, 12-13 (Nov. 29, 2018). Because of the significant quantity of ACFT equipment required to meet the needs of the entire Army, the contracting officer concluded that the requirement could not be met solely through the 8(a) program. Id.

The agency then solicited capability statements from interested parties by posting a sources sought notice on the Federal Business Opportunities (FBO) website. AR exh. 3, Sources Sought Notice (Oct. 26, 2018). After posting the sources sought notice, the contracting officer conducted online research for small businesses under North American Industry Classification System (NAICS) code 339920, (Sporting and Athletic Goods Manufacturing), by accessing several internet databases, including the SBA's Dynamic Small Business website, and the General Services Administration's (GSA) website, to identify and encourage firms to submit a response to the sources sought notice. Contracting Officer Statement/Agency Legal Memorandum at 6-7.

The agency received and reviewed a total of 18 responses; 14 were from confirmed small businesses, including two small businesses participating in the 8(a) program. Of the 18 respondents, 13 provided a production and delivery schedule, with 8 of the 13 respondents demonstrating domestic manufacturing capabilities. Id. at 8 n.2. The agency followed up by requesting additional production and delivery capabilities data from each of the 18 respondents. Id. at 7; AR exh. 3.C, Email to Respondents (Nov. 14, 2018). In a presolicitation notice posted November 20, 2018 on the FBO website, the agency identified 13 companies that participated in the market survey that chose to be identified and noted, among other things, that the "market research determined that there [are] capacity limitations with manufacturing components. Subcontracting opportunities are expected." Presolicitation Notice at 1.

The contracting officer prepared a market research report documenting the results of the procurement history review, the online research of relevant databases, the sources sought notice, and subsequent communications with the interested parties. AR exh. 4, Market Research Report (Nov. 29, 2018). Based on the results of the market research, the contracting officer concluded that there were several small businesses capable of producing commercial exercise equipment. Of these, the contracting officer identified three small businesses, [DELETED] as having the capability to manufacture and/or purchase fitness equipment in sufficient quantities to meet all requirements as requested in the sources sought notice. Id.; exh. 5, SBA Coordination Record at 3 (Dec. 13, 2018). The agency decided that issuing the RFP as a small business set-aside was appropriate and obtained the concurrence of the SBA's procurement representative based on the market research information obtained by the agency. Contracting Officer Statement/Agency Legal Memorandum at 9; Id. exh. 5, SBA Coordination Record at 2 (Dec. 13, 2018).

The Army issued the RFP on December 28, 2018, and amended it 9 times before the due date for receipt of proposals.¹ The RFP provides for award of up to two, fixed-price indefinite-delivery, indefinite-quantity (IDIQ) contracts, each with a 3-year ordering period for delivery of commercial ACFT equipment sets. RFP at 7. If two awards are made, the minimum quantity for each IDIQ contract will be 18,304 equipment sets, with a maximum quantity of 31,696 equipment sets. Id. at 15. If only one award is made, the minimum quantity will be 36,608 equipment sets, with a maximum quantity of 50,000 equipment sets. Id. The ACFT set includes the following 11 types of fitness equipment: hex bar, 10-pound bumper plate, 15-pound bumper plate, 25-pound bumper plate, 35-pound bumper plate, 45-pound bumper plate, barbell collar, nylon sled with pull strap, 10-pound medicine ball, kettlebells, and metric tape measure. Id. The solicitation requires the contractor to package each ACFT equipment set in a single shipping container and shipped to Army units worldwide. Id. at 18.

The solicitation provides for award on a lowest-priced, technically acceptable basis, considering two factors, technical and price.² Id. at 68. The RFP requires offerors to complete a price evaluation worksheet that includes separate contract line item numbers (CLIN) for the 11 types of fitness equipment, as well as CLIN 12, for packaging/crating the fitness equipment. RFP attach 1, Price Evaluation Worksheet. For CLINs 1-11, offerors are to indicate on the price evaluation worksheet if the offered items are either domestic, foreign exempt, foreign non-exempt, or some combination thereof, the country of origin, and the name of the manufacturer. Id.

Of relevance to the protest, the solicitation incorporates Defense Federal Acquisition Regulation Supplement (DFARS) clause 252.225-7001, Buy American and Balance of Payments Program – Basic, see RFP at 26, providing a preference for domestic materials and products. The RFP also includes DFARS clause 252.225-7002-1, Qualifying Country Sources as Subcontractors, see id., implementing the Berry Amendment, which generally restricts the Department of Defense’s expenditures for certain articles and items, including specialty metals, (such as the solicited measuring tape) to domestically-produced products. A waiver to the Berry Amendment may be granted when a domestic non-availability determination is made that the needed item cannot be acquired when needed in a satisfactory quality and sufficient quantity in the United States. See 10 U.S.C. § 2533b. The RFP also incorporates Federal Acquisition Regulation (FAR) clause 52.219-14, the nonmanufacturer rule, see RFP at 28, which allows a small business to supply products it did not manufacture as long as those products are supplied by a domestic small business manufacturer or processor, unless a waiver is issued by the SBA.

¹ Unless otherwise specified, references herein are to the version of the RFP posted as exhibit 7 of the agency report. The procurement was assigned NAICS code 339920 (Sporting and Athletic Goods Manufacturing).

² The estimated contract value is [DELETED]. See AR exh. 4A, Revised Market Research Report at 1 (Feb. 11, 2019).

Initial Protest and Corrective Action

The Army received 11 proposals, including one from Sourcelinq, by the February 4, 2019 closing date. Contracting Officer Statement/Agency Legal Memorandum at 14. On February 4, prior to the time set for receipt of proposals, Sourcelinq filed a protest with our Office challenging various terms of the solicitation, which our Office docketed as B-417279. In its initial protest, Sourcelinq alleged the following: (1) the solicitation included conflicting and ambiguous terms regarding the width of the bumper plates; (2) the bumper plate width specifications were unduly restrictive and deviated from customary commercial practices; (3) the agency provided inadequate time to respond to the changed specifications; (4) the agency's market research and analysis were unreasonable; (5) the solicitation included defective, misleading and ambiguous terms; (6) the agency unreasonably failed to seek a waiver of the nonmanufacturer rule for this procurement; and (7) the agency failed to include past performance as an evaluation factor. Initial Protest at 10-19 (B-417279).

In response, the Army informed our Office that it intended to take corrective action. The agency stated that it intended to review its market research, to amend the RFP to resolve any potential ambiguities, to provide for evaluation of the 11 types of fitness equipment as commercial off-the-shelf end products, and to extend the due date for response to the amended RFP. Notice of Corrective Action at 2 (B-417279). Based on the Army's intended corrective action, we dismissed the protest as academic. Sourcelinq, LLC, B-417279, Feb. 19, 2019 (unpublished decision).

To implement its proposed corrective action, the agency reviewed its original market research and concluded that it was still valid. The agency conducted additional market research by reviewing the 11 proposals received in response to the solicitation of which 10 proposals were submitted by small business offerors under the applicable NAICS code. The contracting officer concluded that the set-aside for small businesses was still appropriate; that waiver of the nonmanufacturer rule and waiver of the Buy American Act requirements was not required; and that a domestic non-availability determination under the Berry Amendment was not necessary. Contracting Officer Statement/Agency Legal Memorandum at 14; AR exh. 4A, Revised Market Research Report (Feb. 11, 2019).

On February 22, the Army issued RFP amendment No. 10, along with a cover letter, and updated industry questions and answers to the 11 offerors that had originally submitted proposals. Among other things, the amendment requires the ACFT equipment to be packaged as a set comprised of 11 types of fitness equipment, each of which will be evaluated as a separate commercial off-the-shelf end product.³ Cover Letter amend. 10.

³ The original RFP required delivery of a kit comprised of 11 types of commercial fitness equipment. Contracting Officer Statement/Agency Legal Memorandum at 14 n.9.

Sourcelinq and the other 10 original offerors, submitted revised proposals by the March 11 due date.⁴ Contracting Officer Statement/Agency Legal Memorandum at 15. Sourcelinq filed this second protest on March 11, challenging the terms of amendment No. 10 to the RFP.

DISCUSSION

Sourcelinq alleges that the agency's market research and analysis were flawed and that the agency's decision to set aside the procurement for small businesses based on that allegedly flawed market research was unreasonable. The protester also alleges that the price evaluation worksheet is defective. For the reasons discussed below, we conclude that none of the protester's arguments individually or collectively demonstrate that the agency's set-aside decision was unreasonable or otherwise improper. We therefore find no basis to sustain the protest.⁵

Sourcelinq contends that the agency's decision to issue the solicitation as a set aside is improper because the record does not establish that the contracting officer adequately supported his determination that two or more small businesses has the capability to perform the agency's requirements. Protest at 9-10. More specifically, the protester alleges that the agency did not properly research nor analyze the available domestic manufacturing capability of small businesses relative to the scope of this [DELETED] procurement. According to the protester, there is no domestic manufacturer of the solicited medicine balls, kettlebells, or the measuring tape and that domestic manufacturer for the solicited bumper plates and the solicited sled is nonexistent and/or "severely inadequate" to satisfy the agency's requirements. Id. at 10.

As to the firms identified as participants in the agency's market survey, Sourcelinq asserts that none has the physical manufacturing facilities, the necessary manufacturing

⁴ The agency subsequently issued amendment No. 11 which updated the maximum quantity of equipment sets under different award scenarios, clarified the height and diameter dimensions for the 40-pound kettlebell, and added FAR clause 52.246-2, Inspection of Supplies – Fixed Price. RFP amend. No. 11 at 2.

⁵ The protester also alleges that the agency impermissibly failed to seek waivers of the nonmanufacturer rule, the Buy American Act, and the Berry Amendment for this procurement, and, alternatively, that the agency impermissibly included the cost of packaging/crating in calculating an offeror's total evaluated price for purposes of the Buy American Act. We dismiss these challenges since the Army, in its agency report, provided substantive responses to these specific protest grounds; however, in its comments on the agency report, Sourcelinq did not refute or substantively address any of the agency's numerous arguments. Compare Contracting Officer Statement/Agency Legal Memorandum at 23-38, 40-42, with Protester's Comments at 5 n.6. Accordingly, we deem these protest allegations abandoned. 4 C.F.R. § 21.3(i)(3); The Oryza Grp., LLC, B 416719; B-416719.2, Nov. 26, 2018, 2018 CPD ¶ 407 at 3 n.3.

equipment and training, compliant fitness equipment, nor required revenue to produce the required fitness equipment in sufficient quantities within the RFP's stated delivery schedule. Id.; Protester's Comments at 3-5. Absent such capabilities, the protester contends that offerors will be required to meet the government's requirements through non-domestic sourced equipment, and, as a consequence, the firms cannot qualify as small businesses due to the application of the nonmanufacturer rule. For these reasons, the protester contends that the agency does not have a reasonable basis to conclude that it would receive proposals from two or more small businesses.

The Army argues that it conducted extensive market research and reviewed the information derived therefrom, which formed the basis for its business judgment that the standards for a small business set-aside have been met. In particular, the agency points to the scope of its market research which included internet searches of the SBA's Dynamic Small Business database, the GSA's database, the review of two prior contracts for the same fitness equipment, and the agency's review of the capabilities narratives provided by multiple small business in response to the sources sought notice, including two firms that asserted the ability to perform the contract requirements within the specified delivery schedule. The agency explains that it sent more specific questions and request for additional production and delivery capability data to all firms that responded to the sources sought notice and analyzed the information provided by these sources as to their capability and experience to meet the RFP requirements. Contracting Officer Statement/Agency Legal Memorandum at 19. Finally, according to the agency, the contracting officer's review of the actual proposals received substantiated his findings that there were multiple small business offerors with the capability to perform the solicited work.

We first address the standard for set-aside determinations. The small business "Rule of Two" describes a regulatory policy set forth in the FAR to implement provisions in the Small Business Act requiring that small businesses receive a "fair proportion of the total purchases and contracts for property and services for the Government." 15 U.S.C. § 644(a)(1). Contracting agencies must review acquisitions and conduct market research to determine whether they should be set aside for small business participation. FAR § 19.501(c). The Rule of Two requires agencies to set aside for small businesses an acquisition valued over \$150,000 if market research shows there is a reasonable expectation of receiving fair market offers from at least two responsible small business concerns capable of performing the solicited work. FAR § 19.502-2(b).

Moreover, as relevant here, in order to qualify as a small business concern to provide manufactured products, an offeror must either be the manufacturer or producer of the end item being procured, or, if it does not manufacture the items being purchased, the offeror must comply with what is known as the nonmanufacturer rule. 13 C.F.R. § 121.406(a). The rule provides that an offer from a nonmanufacturer small business concern can be considered provided that the small business concern represents 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 or not the nonmanufacturer rule applies to a set-aside

procurement primarily depends on the NAICS code assigned to the procurement by the agency, as the rule only applies if a manufacturing code was assigned. Tom Smith Fire Equip. Co., Inc., B-414349, May 15, 2017, 2017 CPD ¶ 148 at 4-5.

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 showing that it was unreasonable. Guardian Moving & Storage Co., Inc., B-410171, Nov. 6, 2014, 2014 CPD ¶ 334 at 3; Marshall & Swift-Boeckh, LLC, B-407329; B-407329.2, Dec. 18, 2012, 2013 CPD ¶ 10 at 3. A contracting officer must make reasonable efforts to ascertain whether it is likely that offers will be received from at least two small businesses capable of performing the solicited work. Safety Storage, Inc., B-280851, Oct. 29, 1998, 98-2 CPD ¶ 102 at 3. While there is no required method of assessing the availability of capable small businesses, the assessment must be based on sufficient facts so as to establish its reasonableness. Tom Smith Fire Equip. Co., Inc., *supra* at 4.

The decision whether to set aside a procurement may be based on an analysis of factors such as prior procurement history, market surveys that include responses to sources sought synopses or requests for information, the recommendations from the agency's small business specialists and technical personnel. Commonwealth Home Health Care, Inc., B-400163, July 24, 2008, 2008 CPD ¶ 140 at 3; American Imaging Servs., Inc., B-246124.2, Feb. 13, 1992, 92-1 CPD ¶ 188 at 3. We will not question an agency's set aside determination where the record shows that the evidence before the contracting officer was adequate to support the reasonableness of the conclusion that small business competition reasonably could be expected.

Here, our review of the record confirms that the contracting officer exercised reasonable business judgment in deciding to set aside this RFP for small businesses. As stated previously, the results of the market research provided the contracting officer with specific capability statements by multiple small businesses asserting their ability to meet the agency's requirements, as well as information derived from the agency's award of two 8(a) contracts for the same requirements. For example, the record shows that the contracting officer had received signed letters from [DELETED], indicating its ability to produce and deliver the solicited medicine balls; from [DELETED], attesting to its ability to produce and deliver the solicited kettlebells; and from [DELETED], indicating its ability to produce and deliver the solicited sleds. See AR exh. 6, Manufacturers' Letters.

As to the production of bumper plates, the agency reports that the contracting officer had information that four companies could manufacture bumper plates domestically— [DELETED] and [DELETED]. During the market research process, the record shows that the contracting officer had spoken extensively with representatives of [DELETED] and concluded that neither company, on its own, could meet the agency's requirement for bumper plates and that neither company seemed to have a solution to fulfill the requirements. The agency reports that the contracting officer contacted [DELETED]

and [DELETED] to request updated production schedule worksheets to determine their production and delivery capability for 18,304 sets as well as 40,000 sets.⁶ Based on the updated production schedules received, the contracting officer concluded that both companies, [DELETED] and [DELETED] could produce and deliver the solicited bumper plates. See Contracting Officer Statement/Agency Legal Memorandum at 10-11.

While the protester identifies numerous differences between the capabilities of its competitors and the precise requirements of this RFP, and between the two prior test pilot contracts and this RFP, these differences do not undermine the reasonableness of the contracting officer's judgment. The legal standard for our review of such a decision requires business judgment about a reasonable likelihood of small business competition, and thus recognizes that a contracting officer may set aside a solicitation even where a skeptical competitor can identify contrasting information that could arguably justify rejecting the set-aside, and holding a full and open competition instead. See, e.g., Encompass Grp. LLC, B-296602, B-296617, Aug. 10, 2005, 2005 CPD ¶ 159 at 4 (protest denied where record supported small business set-asides notwithstanding protester's allegation that market research was insufficient).

In our view, the record provides adequate support for the reasonableness of the conclusion that small business competition reasonably could be expected. See Med-South, Inc., B-401214, May 20, 2009, 2009 CPD ¶ 112 at 2-3 (denying protest challenging small business set-aside of home oxygen services where record adequately supported contracting officer's business judgment). Although the protester disagrees with the contracting officer's judgments, the agency's expectations appear to have been more than adequately borne out by the initial competitive responses to the RFP. Specifically, the record shows that the contracting officer reviewed the 11 proposals received in response to the initial RFP as part of the agency's updated market research and found that one domestic manufacturer, [DELETED] could produce and deliver the medicine balls; and that three domestic manufacturers, [DELETED] and [DELETED] could produce and deliver the stated quantity of kettlebells. In addition, two domestic manufacturers, [DELETED] and [DELETED] could produce and deliver the solicited measuring tapes; four domestic manufacturers, [DELETED] and [DELETED] could produce and deliver the solicited bumper plates; and one domestic manufacturer, [DELETED] could produce and deliver the solicited sleds. See Contracting Officer Statement/ Agency Legal Memorandum at 25.

On this record, under the applicable standards for making a set-aside determination, we find no basis to conclude that the agency's judgment regarding the decision to set aside the acquisition for small business concerns was unreasonable.

⁶ The agency reports that it requested information regarding production and delivery capacity for 40,000 sets in addition to 18,304 sets to determine the feasibility of making one award for a minimum of 36,608 sets and a maximum of 50,000 sets in the event two eligible proposals for a minimum of 18,304 sets were not received. Contracting Officer Statement/Agency Legal Memorandum at 11 n.6.

Other Issues

Sourcelinq also contends that the pricing evaluation worksheet is defective because the packaging/crating requirement, CLIN 12, is not listed as an end item product. According to the protester, the “crate is reusable and made from heat-treated wood” and will be used repeatedly to store and transport the ACFT equipment sets. Protest at 14. As such, the protester argues, the crate should be evaluated to determine if it qualifies as a domestic, foreign exempt, or foreign non-exempt product for purposes of applying the Buy American Act and the nonmanufacturer rule. Id.

In response, the agency asserts that the protester’s allegation is factually wrong. The agency explains, and the record reflects, that amendment No. 10 deleted in its entirety, section D.1.4, the packaging requirement in the original RFP that required the shipping crate to be reusable and made from heat-treated wood. See RFP amend. 10, Packaging Instructions at 11. As amended, the agency notes that the RFP simply includes the standard packaging instructions typically included in any solicitation for supplies. Contracting Officer Statement/Agency Legal Memorandum at 39. Since the protester’s challenges in this regard are based on a factually erroneous understanding of the solicitation, they do not provide a basis on which to sustain the protest.

The protest is denied.

Thomas H. Armstrong
General Counsel